Employer liability threat eased after appeal court victory

The threat to companies and organisations of being sued by staff injured when using equipment not even provided or maintained by their employer has eased after a local authority's legal victory.

Shoosmiths acted in a recent case where, on appeal, the decision was made in favour of its client Northamptonshire County Council and is crucial for all employers sending staff to premises where they might use equipment owned or supplied by third parties.

A driver employed by the county council injured an ankle as she pushed a wheelchair-bound patient down a wooden ramp at the patient's home. The edge of the ramp – which had not been installed by the county council – crumbled, causing the driver to slip.

She sued her employer, claiming inadequate work equipment under the Provision and Use of Work Equipment Regulations 1998 (PUWER), and won, the Judge ruling that the ramp was 'work equipment', and that it was inadequately maintained.

Northamptonshire County Council went to the Court of Appeal, which held that the ramp was not work equipment for the purposes of PUWER, and took into account a number of factors:

- the ramp had been installed by others, not the county council
- the county council had neither the ability nor the right to maintain it
- it was used mostly by people not employed by the county council
- it was, to an extent, permanent
- the ramp was part of the patient's home

The appeal decision suggests that if an employer does not have at least the right to maintain the equipment without the consent of the third party that supplied it, then claimants will find it difficult to establish strict liability.

If the appeal had failed, employers could have been liable for injuries to their staff caused by equipment neither supplied nor maintained by them.

How they would be expected to know about or to have any control over the condition or suitability of a third party's equipment is unknown, and may have meant employers being responsible for equipment in private homes.

The Claimant has now been granted leave to appeal to the House of Lords. The House of Lords may refer the matter to the European Court of Justice. Shoosmiths continue to advise Northamptonshire County Council.

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Over using Act might put lives at risk, not save them

A recent Health and Safety Lawyers Event saw an interesting debate emerge on the use of section 3 Health and Safety at Work Act 1974 (HSWA) in conjunction with work undertaken by the emergency services.

The debate centred around the successful prosecution of the Metropolitan Police following the shooting of John Charles De Menezes.

As explained by the CPS, which took the decision to prosecute, the public had been exposed to a risk in the failure of the Metropolitan Police to stop Mr De Menezes boarding public transport in the wake of failed suicide bombings when he had emerged from a property under surveillance. The Metropolitan Police had failed to apprehend Mr De Menezes despite instructions that all persons emerging from the property should be stopped.

It was questioned whether HSWA legislation was designed for such a use, and whether, in the fall out from this prosecution, emergency services would have to consider the risk to themselves and the public before doing their job.

The Panel discussed whether the Police should continue to award medals for bravery where the actions of individuals could be considered to have put the individual and other members of the public at risk. Could people be commended for taking risks that could potentially be prosecuted?

The majority view expressed from the floor suggested that HSWA legislation was now being taken too far. The collective opinion being that the reason this Act was used was because Mr De Menezes had been killed, and there was no other suitable method of bringing the police to account that would placate the media and public.

Originally, the HSWA was established as a tool to predominately help protect employees in dangerous workplaces from rogue employers who deliberately took risks with employees' safety.

Arguably, section 3 was designed to offer protection to those visiting a workplace who were not employees. Whether the workplace was deemed to include the scenes of emergencies or general public spaces might be stretching the original intention too far. Instead of widening the use of such legislation perhaps the legislature should be prompted to consider alternative legislation designed to cover such scenarios.

It was argued that in using the HSWA as a general prosecution tool when no other areas of legislation adequately cover the 'offence' would devalue the HSWA. Public perception will be drawn dangerously toward the view that this is 'health and safety gone mad'.

Much progress has been made in workplace health and safety since the advent of the Act, and it would be a shame were it to be undermined by an over-developed use that may put more lives at risk than it saves.

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BRIEFING

Driving at Work

Driving is the most dangerous work activity that most people undertake.

An average 20 people are killed and 250 seriously injured every week in crashes involving someone who was driving, riding or otherwise using the road for work purposes. Up to a third of road accidents involve someone who was driving at work.

Health and safety law applies equally to on-the-road work activities, and the risks should be managed within an effective health and safety system.

Indeed, the Health and Safety at Work Act 1974 states that employers must ensure, so far as reasonably practicable, the health and safety of their employees while at work, and this extends to driving at work.

Moreover, under the Management of Health and safety at Work Regulations 1999, employers should assess risks to health and safety of employees at work and to other people who may be affected by their work activities. Again, this responsibility does not stop at the workplace, and should extend to assessing road related risks.

Compliance with traffic law requirements, such as having a valid MOT certificate and insurance policy, may not be enough to satisfy an enforcement officer that you have done all that is reasonably practicable to comply with health and safety legislation.

Additional benefits to companies of having effective driving policies include exercising better control over costs, such as wear and tear, fuel and insurance premiums, fewer days off work due to injury, and fewer vehicles unavailable due to repair.

If employees use their own vehicles for work purposes, employers must at the very least ensure that the employee holds a valid driving licence and that their car is insured for business use, is roadworthy and has a valid MOT certificate. They should seek assurances that the car is serviced regularly, that the employees are capable of carrying out basic maintenance checks (oil, water, tyre pressure), and that the car is suitable for the purpose and expected mileage. It is also advisable for employees to be a member of a roadside recovery organisation. If an employee claims mileage allowance for a journey it usually follows that they are "at work"

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Managing work-related road safety

Work-related road safety should form an integral part of your health and safety systems. The police are now routinely investigating the scene of fatal road accidents as to whether there could have been any work related issues that may have contributed to or caused the tragedy. As with any safety system, there should be commitment from the top level to drive the safety culture and an understanding from all employees that they know what is expected of them.

Here are some tips for employers to help promote safer driving at work:

- All road risks should be assessed so that control measures can be put in place. Consult employees on road related risks and ensure that your policy concurs with risk assessment findings. Risk assessments should be reviewed and updated to include any change in circumstances.
- Use of mobile phones: employees should not use mobile phones whilst driving. Although legal, the use of hands-free mobile telephones should be as minimal as possible. Employers should not engage in lengthy phone calls with employees whilst they are driving, as it causes mental distraction.
- Employees should be advised not to eat, drink or smoke at the wheel, and the policy should prohibit these actions.
- Employees should drive carefully and at the appropriate speed, whether or not they are running late for an important meeting. Employers should not give employees unrealistic schedules, forcing employees to drive at excessive speeds and unable to take sufficient breaks.
- If drivers have an accident or near miss, they should take the details of other vehicles and drivers involved, and details of any witnesses. Employers should encourage all staff to report accidents without the fear of disciplinary action being taken against them. Employee co-operation assists the employer to monitor the system effectively.
- Employers should assess drivers and their driving tasks, remembering that there are a number of factors that can affect driver competence, including age, gender, driving skills and attitudes. Do this especially following an accident or illness, and ensure there is adequate health surveillance in place.
- Employers could provide training and refresher schemes, encourage advanced driver tests and promote e-learning on driving.

Are you confident that all employees are carrying out basic maintenance checks and are not using their phone whilst driving? Do you have the systems in place to check that your policy is working?

By having an effective driving at work policy in place, employers will create safer working conditions for their employees and other road users. Moreover, such a policy will help promote compliance with health and safety legislation and prove useful should an employer find themselves in the unfortunate position of facing a prosecution for a road-related accident.

If you require assistance drafting a Driving at Work policy, or would like advice on your current policy, then please contact the Regulatory Unit.

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Further concern for landlords after spate of boiler explosions

A new Safety Alert concerning solid fuel back boilers has been issued by the Health & Safety Executive after a spate of explosions, one of which led to a fatality.

It is aimed at homeowners, tenants, landlords and heating professionals following five incidents in the last five years in which solid fuel back boilers have exploded.

The risk arises when a fire is lit in front of a disused boiler that has been left at the back of the fireplace, causing the boiler to heat up and explode.

The Alert helps homeowners identify whether the risk exists in their property, and that if they are unsure, they should contact their landlord where applicable.

This Alert is another consideration for landlords, and follows a recent one issued after the death of a 10-month-old baby who suffered 85% burns when a water cistern split above her cot in a tenanted property.

Landlords should heed the advice in these Safety Alerts, and ensure they have the systems in place to check for these risks, and ensure that adequate control measures are taken.

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Corporate Manslaughter Act brings new product liability warning

It is still not widely appreciated that the new offence of Corporate Manslaughter also applies to faulty company products.

A defective product that causes death can leave a company open to prosecution under the act in addition to any breaches of the General Product Safety Regulations or Food Safety Legislation.

As well as all corporations, the Act, which was introduced by the Corporate Manslaughter and Culpable Homicide Act 2007 and came into force on 6 April this year, applies to unincorporated bodies including charities, partnerships and the public sector.

For an organisation to be guilty of an offence, it will need to be shown that it was the way in which its activities were organised and managed by senior management that caused the death, and that by acting in such a way the organisation was guilty of a gross breach of a relevant duty of care.

"Senior Management" can mean those actually managing an activity as well as those holding a formal title. In some organisations, that run 24/7, the actual managing, at night for example, might not be carried out by those traditionally thought of as "senior management".

There is no maximum fine for this offence, and there are three sanctions available to a Court passing sentence:

Firstly, an unlimited fine for an offence of Corporate Manslaughter imposed in the Crown Court. The Sentencing Advisory Panel has suggested that the fine imposed for the new offence should be based upon annual turnover which they see as the most appropriate measure for determining an organisations' ability to pay a fine. The penalty would not be related to the ability to pay. It therefore suggests that for a prosecution following a fatality committed by a first time offender pleading not guilty, the starting point for sentencing should be:

- 5% of the offender's average annual turnover during the three-year period prior to sentencing. This is to be a starting point. The Court will then take into account any aggravating or mitigating features, and by doing so will arrive at a fine which will normally range between 2.5% to 10% of the average annual turnover.
- For any offences under the Health and Safety at Work Act, 2.5% of the average annual turnover will be the starting point, and the fine would normally fall within a range of 1% to 7.5% of the average annual turnover.

Secondly, a new sanction of a Publicity Order is available to the Court to impose alongside a fine. The Panel's view is that a Publicity Order should be imposed on every offender convicted of Corporate Manslaughter, requiring it to publicise the fact of its conviction, the particulars of the offence, the amount it was fined and the terms of any Remedial Order. How and where this publicity is given is a matter for the Court, but the guidance suggests an announcement in trade press, writing to all shareholders, customers and suppliers as a minimum. In practice announcements in national press, radio and TV are likely.

Thirdly, the final sanction is a Remedial Order, though this is only likely to be imposed after consultation with the relevant regulatory body, for example the Health and Safety Executive. The Order would specify the things to be corrected which constituted the failing, along with the time and steps for compliance. There would be an unlimited fine for failure to comply with such an Order. However, such Orders are likely to be very rare, as most organisations will have put their house in order long before being sentenced, as to have done so is likely to be a mitigating factor.

There is a further substantial financial penalty in the form of legal costs. Prosecution costs are payable by the defendant in addition to fines, and in fatal cases often exceed £100k. Defence costs are usually similarly high, and not always covered by insurance.

A senior management failing leading to a death and a successful prosecution under the new legislation could cost an organisation a considerable and potentially damaging fine, plus a damaged reputation and brand due to attendant publicity.

Management must understand the implications of the new legislation and the real threat it poses to the very existence of their organisation. The Court of Appeal has stated that it will not reduce substantial fines simply because companies may be put out of business by the financial burden. It believes companies committing serious offences do not necessarily deserve to remain in business.

A combination of financial penalty and negative publicity could be a blow from which even very large companies never recover.

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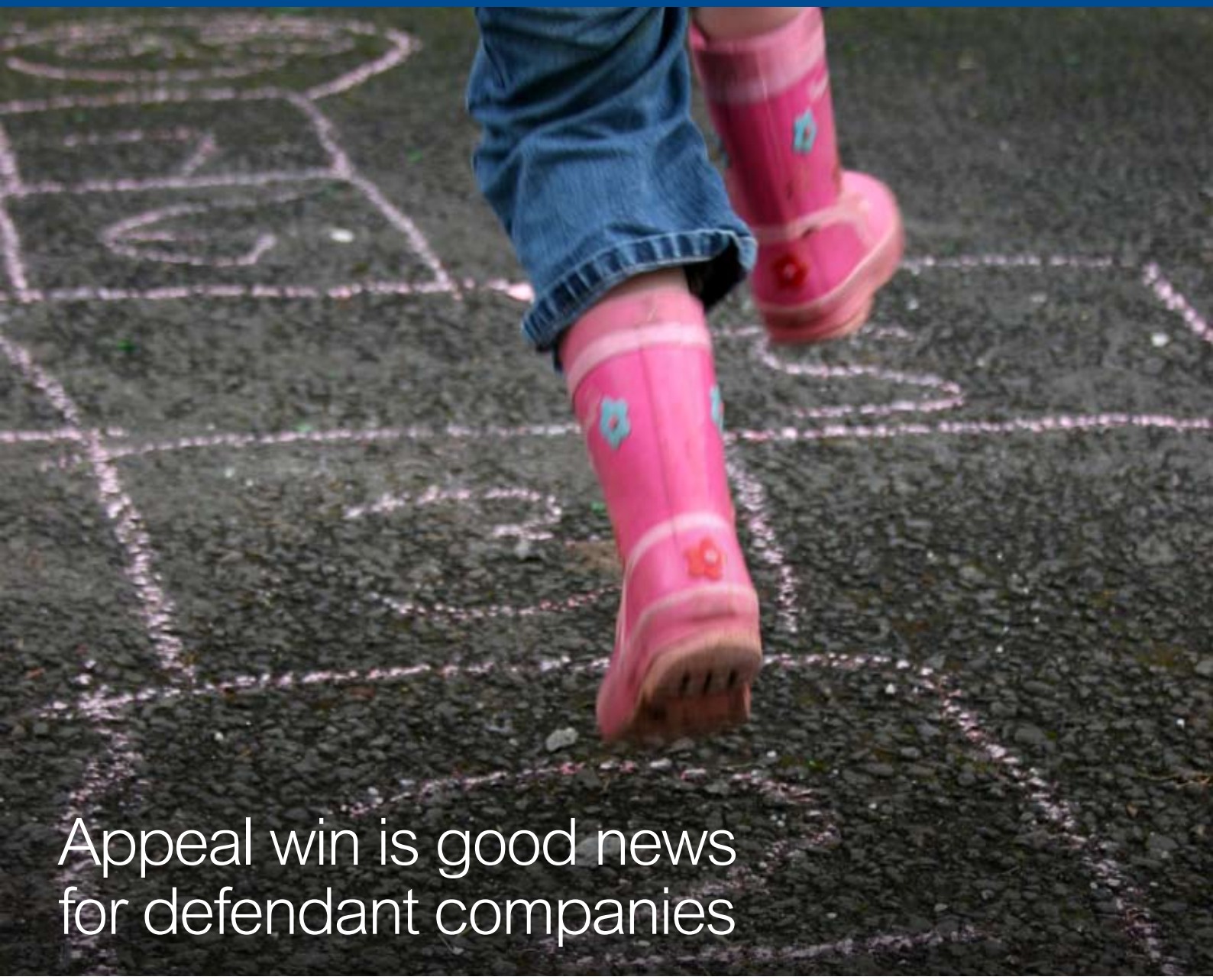

Appeal win is good news for defendant companies

A recent Court of Appeal decision has clarified the position with regard to s.3(1) of the Health and Safety at Work Act 1974 and specifically the concept of 'risk'.

The case involved a three-year-old child who died from MRSA contracted in hospital.

He had been receiving treatment for a head injury suffered after falling down playground steps. At the time of the accident the only teacher supervising the 59 children at play was absent for approximately 30 seconds.

Under s.3(1) of the 1974 Act the employer (the headmaster) has a duty 'to conduct his undertaking in such a way as to ensure so far as is reasonably practicable that persons not in his employment…are not exposed to risks to their health or safety'.

The prosecution only has to establish that there is a risk to health and safety, and that the risk is a real risk as opposed to a fanciful or hypothetical one. Once this risk is established, it falls to the defence to prove that it took all reasonably practicable measures to alleviate the risk.

At the first hearing, the headmaster was convicted after the particulars of the offence were put forward as being that the risk to safety was 'falling on a flight of stairs'.

The Court of Appeal has overturned the decision, confirming that it is for the prosecution to establish that the child had been exposed to a risk caused by the 'conduct of the undertaking', which in this case is the school.

Expert evidence confirmed that there was no fault with the construction of the steps themselves, and no previous accident had occurred elsewhere in the playground, despite the fact that there were numerous places from which a child might choose to jump. No suggestion was put forward by the prosecution that the children should be supervised constantly.

All evidence pointed to the fact that there was no real risk. The prosecution suggested that greater supervision would have reduced the risk of the three-year-old jumping, but it would not have removed the risk. Unless it can be said that this child was exposed to a real risk arising from the conduct of the school, then no question of the reasonable practicability of measures designed to avoid that risk arises.

The Court of Appeal confirmed that where the risk can truly be said to be part of the incidence of everyday life, it is less likely that the injured person could be said to have been exposed to risk by the conduct of the operations in question. The headmaster's appeal was allowed.

This case is good news for defendant companies, as it places a greater burden on the prosecution to establish that a 'real' risk caused by the undertaking existed and not just a fanciful or everyday risk.

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