

Employer's liability: back to basics

Introduction

- 2-part series
- Webinar 1: overview of basic principles and commonly-encountered issues
- Webinar 2: Covid-19 pandemic and employer's liability.

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Questions to be answered:

- What are the causes of action now available to employees?
- Who can bring a claim against an employer?
- What are the four central tenets of the employer's duty?
- When and how can Regulations still assist an employee?
- When and why might an employee be found to have been contributorily negligent?
- What defences are potentially available to the employer?

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What are the causes of action now available to employees?

- Liability may arise in:
 - negligence (i.e. reasonable care)
 - Occupiers' Liability Act 1957
- Enterprise and Regulatory Reform Act 2013 s.69
- Since 1st October 2013 breach of duty imposed by "health and safety regulations" do not confer a cause of action

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When and how can Regulations still assist an employee?

- The “six pack” can still assist in demonstrating the standard of care required
- But...*Stark v Post-Office*-type strict liability has gone
- Must now be able to prove fault on the part of the employer

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Who can potentially bring a claim against an employer?

- An employee...obviously!
- Secondary exposure - members of the family

Who cannot (usually) bring an employer's liability claim against an employer

- An employer of an independent contractor
- But...consider the circumstances carefully

In practice - look where control lay

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What are the four central tenets of the employer's duty?

- Safe staff
- Safe place of work
- Safe work equipment
- Safe system of work
- Note...the employer's duty is non-delegable, thus performance can be delegated, but liability for non-performance cannot

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What is the standard of care required of the employer?

- Meaning of “reasonable care”
- Meaning of “reasonable practicability”
- Interaction of common law and statutory duties
- Not however absolute

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Factors of general relevance:

- Industry practice
- Knowledge of employer
- Circumstances of individual employee
- Obligation both to instruct on, and to enforce, compliance
- Risk assessment: Complete? Implemented? Up-to-date?
- Was this place of work under the control of another?
- Training?
- Is anything “broken” or in an unintended state?
- Compliance with guidance?
- How long had the situation complained of existed?
- How difficult would it have been to avoid the accident?

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Factors significant in specific circumstances:

- Manual handling
 - What weights were being lifted?
 - Was there significant repetition?
 - Were environmental factors an issue (cramped spaces etc)
- Work equipment
 - Was the equipment properly serviced and maintained?
 - Are records available to show that?
 - Was it being used as intended?
- COSHH
 - Were the specific requirements for use or storage of that chemical being met?
 - Was the PPE used suitable and sufficient in that context?

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Causation

- Do not ignore the need to prove causation...it is not always obvious
- Problematic cases...
 - Stress at work cases
 - Mesothelioma and other occupational exposures

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When and why might an employee be found to have been contributorily negligent?

- “*Human fallibility, aberration or lapse in attention or inadvertence*” is not enough
- What is needed to support such a finding is usually either:
 - Profound or sustained carelessness; or
 - Deliberate decision to run a risk
- Deductions will in practice usually be small - 25%-33%

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Beyond that, what defences are potentially available to the employer?

- General defences in tort still apply -
 - Volenti (not very often applicable)
 - Ex turpi causa (ditto)
- Defendant's breach wholly comprising employee's own wrongdoing
- Best chance - to avoid a finding of breach!

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List of cases

- *Cockerill v CKX* [2018] EWHC 1155 (QB)
- *Edwards v National Coal Board* [1949] 1 K.B. 704
- *Goldscheider v Royal Opera House Covent Garden Foundation* [2019] EWCA Civ 711
- *Kennedy v Cordia (Services) LLP* [2016] UKSC 6; [2016] 1 W.L.R. 597
- *McGowan v W & JR Watson Ltd* [2006] CSIH 62
- *Brumder v Motornet Service and Repairs Ltd* [2013] EWCA Civ 195

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Looking forward...

This webinar will be followed in early June by the second part of this series, in which Ben and Andrew will turn to consider how the current Covid-19 pandemic might give rise to unusual and novel issues in the context of employer's liability and discuss the approach which might be taken to them.

We hope to see you again then!