THOMPSONS SOLICITORS

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Personal Injury Law Review

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HSE consults

The Health and Safety Commission has launched two consultations. The first is a proposal to amend the current Work at Height Regulations 2005 to include those who are paid to lead or train climbing and caving activities in the adventure activity sector.

To download a copy of the consultation (which closes on 31 October), go to: www.hse.gov.uk/press/2006/c06020.htm

The second is a proposal to introduce new and revised Workplace Exposure Limits. To download a copy of the consultation paper (which closes on 27 September), go to: www.hse.gov.uk/press/2006/c06016.htm.

Thompsons publishes reponses to Government consultations at: www.thompsons.law.uk/ltext/briefings-and-responses.htm

Corporate manslaughter Bill published

After much prevarication, the Government finally published the Corporate Manslaughter and Corporate Homicide Bill in July. Although the Bill is a step in the right direction, it will not have as much impact as was hoped because of the retention of the "senior manager test".

This is what in law is called a "controlling mind" test. Existing health and safety law says that, to get a conviction of manslaughter, there has to be a causal link between a grossly negligent act (or omission) by a person who is the "controlling mind" of the company and the cause of death.

This requirement has made it virtually impossible to secure convictions. Retaining the test is not going to make it any easier. The other weakness is that fines and remedial orders are the only penalties.

However, the Bill has introduced some changes which are to be welcomed:

- the abolition of Crown immunity
- application of the Bill to the police
- increased cover for agency workers and suppliers of services, particularly relevant to the construction industry
- improvements and clarification of the meaning of duty of care
- improved guidance to juries in considering whether there was a gross breach
- penalties for breach of a remedial order (fines)

Thompsons' interim briefing on the Bill can be read at: www.thompsons.law.co.uk/ltext/briefings-and-responses.htm

Guardian Newspapers in RSI payout

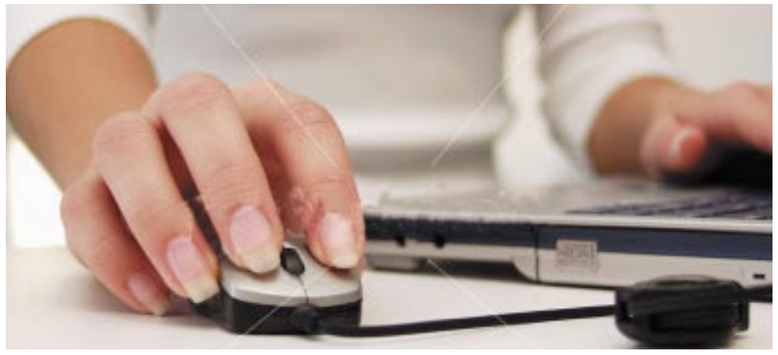
A Guardian Newspapers night editor who was refused access to the company physiotherapist after developing repetitive strain injury has been paid £37, 500 in damages. She was supported in her claim by the NUJ who instructed Thompsons to act on her behalf.

Andrea Osbourne, who had been a casual at the paper for two and a half years, worked almost exclusively using a mouse up to 45 hours a week without a break. No risk assessment was carried out when she started the job in February 2001.

By May 2002 the stiffness and pain was so acute she could not even lift a kettle. Her GP diagnosed RSI, and because of the long NHS waiting lists for physio, advised her to see the company's physio. The Guardian refused because she was a casual worker.

By March 2003, she was unable to work and suffered financial difficulties. Gradually, following nine months of rest and physio, she eventually secured a lower paid job in new media.

Marion Voss, Andrea's solicitor at Thompsons, said: "The Guardian failed in its duty of care to Andrea. This is one of the worst cases Thompsons has seen of a newspaper employer refusing to follow basic health and safety procedures."
Go to: www.thompsons.law.co.uk for more details



Negligence redefined

The Compensation Act was passed by Parliament just before the summer recess.

It is the Act that reverses the Barker asbestos decision by the House of Lords (see pages 4 and 5).

The Act gives a new definition of negligence to be considered by the courts including a new concept of 'desirable activity', which if a person was engaged in would not lead to a finding of negligence.

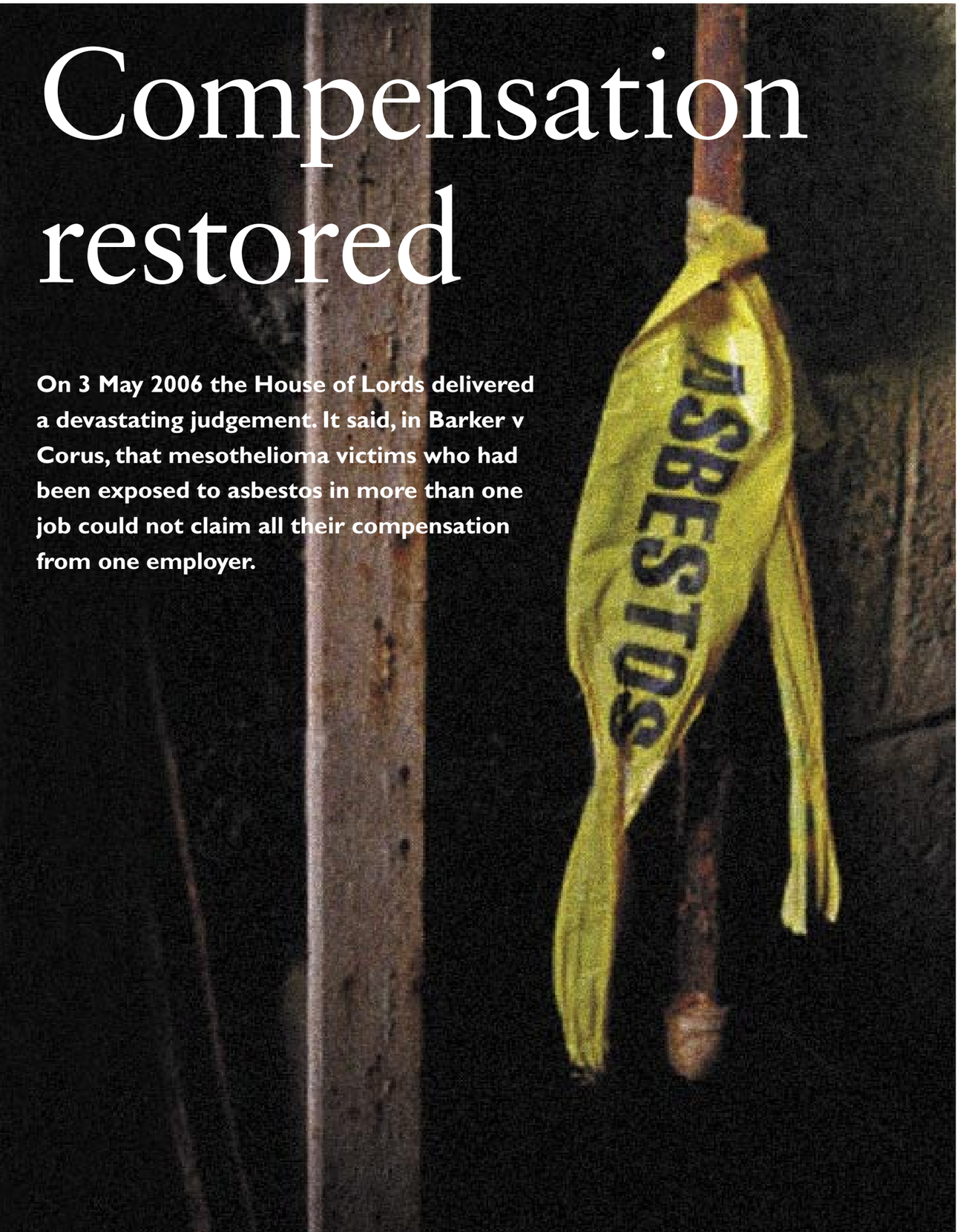
This is despite the view of the Lord Chief Justice that there was no need to do so and that current case law more than adequately defined negligence in a way that did not encourage litigation.

There was sufficient ministerial reassurance in the House of Commons and the House of Lords that employees such as a fire fighter or an ambulance worker (by definition involved in a desirable activity) will not be caught by the concept. Time will tell what the courts make of this.

The regulation of claims management companies in the second part of the Act, a welcome move, was originally sufficiently wide to catch union legal schemes.

But the government has agreed to exempt unions by regulation. There is to be a protocol drawn up, which is still in discussion, about the way in which union legal schemes operate so that their distinct nature is recognised and effective exemption follows.

Compensation restored



On 3 May 2006 the House of Lords delivered a devastating judgement. It said, in Barker v Corus, that mesothelioma victims who had been exposed to asbestos in more than one job could not claim all their compensation from one employer.

Compensation Act

This affected their right to claim compensation for the asbestos related cancer, mesothelioma, and meant that they had to figure out the extent to which each employer had contributed to the risk of the disease over the time they had been exposed.

To get their full entitlement the claimant had to find and sue every culpable former employer, some of whom had disappeared without trace and were never insured.

Not a realistic option for someone in good health, never mind someone dying of mesothelioma. The net result was that the two widows, in this case, Mrs Barker and Mrs Murray, stood to lose tens of thousands of pounds in compensation, as did many other sufferers and their families. Not surprisingly, the judgement provoked a public outcry.

Unfair decision

Ian McFall, Head of Asbestos Litigation for Thompsons who acted for Mrs Murray on behalf of her husband's trade union the GMB, said: "The court has, on a legal technicality which will make no sense to most people, deprived our client of full compensation for the death of her husband. The real winner here is the insurance industry which stands to save billions of pounds. We will be urging trade unions and asbestos victim support groups to press for legislation to counteract this gross injustice."

As a result of the campaign that ensued in which Thompsons played a crucial role (involving trade unions, support groups, lawyers and Labour MPs), the Government agreed to amend the Compensation Bill which was going through Parliament. Essentially, it accepted that the decision by the House of Lords was unjust and that mesothelioma sufferers and their families should receive the compensation they deserved.

Compensation act

The "Mesothelioma damages" amendment, as it is known, is now part of the Compensation Act 2006. Section 3(1) says that if a "responsible person" acts negligently (or in breach of the law), as a result of which someone else is exposed to asbestos and develops mesothelioma, then the "responsible person" is liable for all the damage caused, even if the victim had also been exposed to asbestos by someone else.

> The Government accepted that the decision by The House of Lords was unjust.

And it gets better. Section 16 of the Act says that section 3 "shall be treated as having always had effect". In other words, it has to be interpreted as though it has always been the law, meaning that the two widows involved in Barker v Corus, will now receive the compensation to which they were entitled.

For Mrs Murray that means she will receive the full sum she was originally awarded in 2003 after her husband contracted the fatal illness through exposure to asbestos during his time as a welder in various shipyards in the North East.

He died in 1999, but one of his employers, British Shipbuilders (Hydrodynamics) Ltd, argued it should only pay a portion of the compensation because it had only contributed towards 42% of Mr Murray's asbestos exposure. That argument has finally been buried by the provisions of the Compensation Act.

The Compensation Act is actually the product of the Government's concern about compensation culture. Despite accepting the overwhelming evidence that there was no compensation culture the Government swallowed the insurance company line that there was a genuine fear of being sued and as a result they needed to do something about it.
The first clause of the act seeks to redefine the concept of negligence (see news story page 2).

The second part of the act seeks to regulate the claims management companies. If enforced effectively, it should stop the worst excesses by unscrupulous operators.

Going dutch


Tom Jones

The Association of British Insurers wrote recently to members of Parliament calling for a "new independent body" to make the compensation system for mesothelioma victims "both fairer and faster". Tom Jones, Head of Policy for Thompsons, looks at their proposals.

The proposal

The ABI wants a scheme to assess and pay claims, and make payments where it is not possible to sue an employer or insurer. It has cited the scheme that exists in the Netherlands as a possible model.

It would, they say, provide certainty for claimants, faster payments, and end the obscene legal challenges by the insurers and employers, as happened in Fairchild v Glenhaven and Barker v Corus (pages 4-5).

Why though would insurers agree to a scheme that does not provide them with substantial savings? While they might save on the costs of court fees and disbursements, any scheme would still require lawyers to represent the interests of the claimant and work out such things as dependency schedules, to conduct what can be complicated special damages claims, loss of earnings and services claims (ie gardening, DIY).

Dutch model

The clue lies in the Dutch scheme, which is generally considered to be cheap and quick, but very limited in its application.

There are actually three systems for paying damages to asbestos victims in the Netherlands: the court system based on employers' liability law (protracted and regularly challenged by insurers and employers); the Dutch Institute of Asbestos Victims (IAS) scheme; and the public compensation scheme (TAS).

The IAS scheme was set up in 2000 to reduce the "legal agony" for sufferers and to get quick results for mesothelioma victims - no more than nine months for compensation, with the aim of sufferers receiving it while they are still alive.

It is only for mesothelioma victims whose exposure occurred within a 30-year period. And they have to put in their claim themselves, although it can be passed on to dependants after their death.

The IAS has representatives of victims – unions and support groups – employers' federations, public employers' federations and the Dutch Federation of Insurers on its supervisory and advisory boards. The Government also provides financial back-up. IAS uses a closely associated specialist company to mediate claims. Legal professionals deal with issues of liability, medical evidence, employment history and so forth. There are strict procedures for time limits, standardised rates and appeals (about one in three applications were turned down in the first year, but the rate of rejections is declining). If all the qualifying conditions for mediation under the scheme are met, then the applicant is entitled to a financial settlement based on standardised, index-linked rates.

In 2006, these include a standard amount of €47,429 (£32,363.30) in compensation for immaterial damage, €2,636 (£1,798.60) for material damage and €2,636 to cover the expenses incurred by the claimant or their dependant. The scheme also provides an advance payment of €16,476 (£11,139.12).

The system is quicker than the Dutch legal route and pays about the same as the courts. But it has not reduced "the legal agony" as the investigations that the IAS has to carry out are still complex.

Where there is no traceable employer, the TAS system applies. It pays the same amount as the IAS's advance payment, and is a safety net only, a gesture by the government to acknowledge the suffering of individual victims who cannot claim from their employer. It also pays out to spouses and children who develop mesothelioma from overalls exposure.

A possible UK scheme

It is clear that the Dutch model is extremely limited in its application, not least because it is for mesothelioma sufferers only, and because of the rigidity of its payments.

Basing a UK scheme on the Dutch model would not do away with the complexity of establishing liability. It would however speed claims up because of the short time limits it imposes. This however could be done under the existing protocol. Many asbestos cases are concluded within months and the Barker amendment to the Compensation Act (see page 4-5) ensures speed as a priority.

Any asbestos compensation scheme must also allow a widow with a valid dependency claim but who is not named as an executor to claim through the scheme. As should other next of kin if there is no widow.

The amounts set for general and special damages should be reviewed yearly to take account of inflation. Any scheme must provide for equivalent levels of compensation to civil damages linked to an annual inflation update. A scheme must not be a smokescreen for the insurance industry to evade or shift any of their current liabilities.

Mesothelioma sufferers and others who are very ill do not currently have to endure a medical examination in order to make a claim, as experienced medico-legal doctors can prepare a report based on paperwork only. In the Netherlands it is usually necessary to have a medical examination. Will the insurance industry accept the inclusion of all five asbestos conditions, including lung cancer and pleural plaques? Given the Rothwell pleural plaques test cases to be decided by the House of Lords, and the regularity with which insurers resist lung cancer claims, presumably not. In the Netherlands it has not so far been possible to extend the scheme beyond mesothelioma sufferers.

Photo: Rod Leon
Widows protest outside The House of Lords

And what of claims where there is no defendant, because all employers are untraceable or dissolved without insurance, or for claims for women and children who developed mesothelioma from the asbestos dust from overalls? There seems to be little need for a new, separate system in the UK, given the existence of the Pneumoconiosis Act 1979, but this should be extended to allow claims for women who were exposed in that way.

Fast track

The fact is that prompt payments of civil compensation can be obtained right now by using a specialist mesothelioma Fast Track procedure operated by Master Whitaker in the High Court. This system ensures that where the insurers have no defence, judgment is entered in a matter of weeks, an immediate interim payment is available to claimants, and thereafter the case is progressed quickly and efficiently to a hearing to determine any outstanding issues.

We would suggest that the simple answer (if we all truly believe in the need for speed and fairness) is to ensure that Master Whitaker's management of mesothelioma cases is extended or his procedures adopted in other Court centres.

And the ABI should encourage all its members to respond to asbestos claims without delay, admit liability when it is clear the claim is going to succeed and put forward reasonable proposals for settlement, thus saving court costs and ensuring mesothelioma victims receive their compensation during their lifetime, taking the burden off the court system, and thus providing the "fairer and faster" system the ABI claims to want.

The proposals put forward by the ABI, including the creation of an independent body to administer a scheme, creates more questions than it answers. The insurance industry's newly discovered concern for asbestos victims would be far better invested in making the existing system work.

Going unheard

It is well established in law that, in terms of exposure to noise, the watershed between risk and safety is defined at 90dB(A)leq. In general, therefore, claimants have to show that they have been exposed to that level of noise to establish a breach of their employer's duty of care.

Photo: Nick Blyth

However, as the Court of Appeal said in **Harris v English, Welsh and Scottish Railway Ltd**, a lower level of noise can result in a breach, particularly if the employer knew of the risk and did nothing about it.

Mr Harris was supported by his union, ASLEF, which instructed Thompsons to act on his behalf.

Basic facts

Mr Harris worked as a train driver for English, Welsh and Scottish Railway Ltd for 26 years. During that time, he worked on a number of different – and very noisy – locomotives, which resulted in him suffering permanent hearing loss. At the age of 50, he lost his job after failing a hearing test.

Mr Harris claimed that his employer owed him a duty of care because the sound levels to which he had been exposed over the years exceeded 85dB(A)leq and that he should have been provided with ear plugs.

The employers argued that he had to show an exposure to 90dB(A)leq or above.

Court of Appeal judgement

The Court of Appeal said that just because an employer's liability usually arises at 90dB(A)leq, a lower level of noise may still give rise to a duty of care.

In this case, the Court said that the company was aware from 1973 that exposure above 85dB(A)leq could give rise to a real risk of damage. As early as 1977, the Head of Acoustics recommended issuing personal ear protection for anyone exposed to 85dB(A)leq of noise or above.

Although the company knew that it could reduce exposure to noise through the use of earplugs, it did nothing about it. In fact, the Court said that it "took the view that to do so would be more trouble than it was worth, and that it would be better to run the risk of facing the possibility of future claims."

It was quite clear to the train company, at least by 1980 that it was "knowingly exposing people to a situation which would make them deaf".

Over the next ten years, the company debated the use of ear protectors and the advisability of bringing down noise levels in the cabs to 85dB(A)leq. The Railway Inspectorate also put pressure on them to introduce protectors.

However, although it required employees in the engine room to wear ear protectors, British Rail decided not to allow cab drivers to do so because they would not be able to hear essential sounds like warning and danger signals.

In any event, it said that there was resistance among staff to wearing them. The Court said there was no evidence to support either of these views.

It concluded that it was quite clear to the train company, at least by 1980 that it was "knowingly exposing people to a situation which would make them deaf".

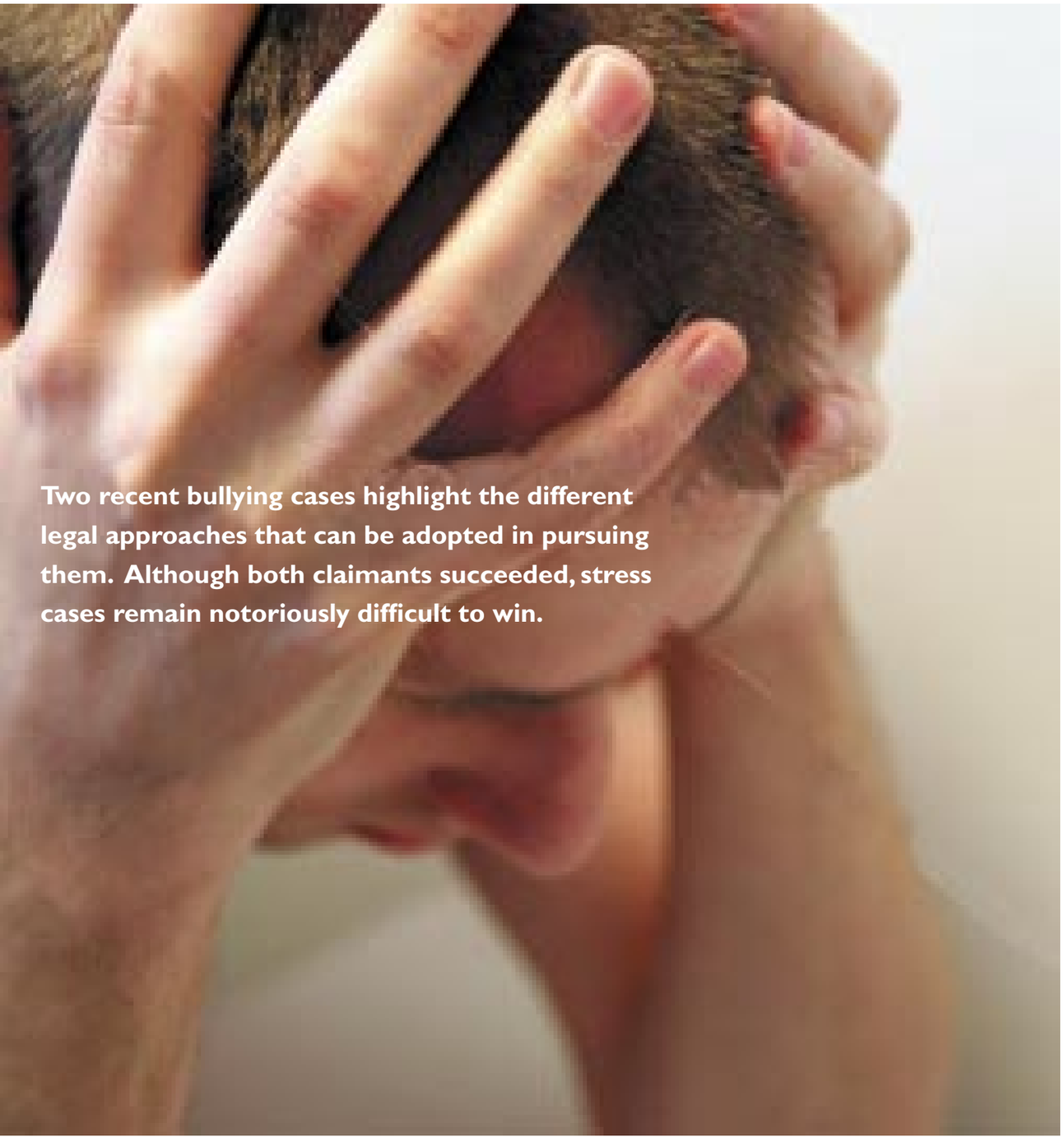
The Court also decided that the company was in breach of section 11 of the Noise at Work Regulations because it had not given Mr Harris any information about the risk of exposure.

Mr Harris was awarded a six figure sum, which was one of the highest amounts ever for industrial deafness.

Comment

This sort of attitude is all too common among employers who only adopt better safety measures when they receive a claim. These are, however, often too little, too late and do not help the injured worker.

Stressed out



Two recent bullying cases highlight the different legal approaches that can be adopted in pursuing them. Although both claimants succeeded, stress cases remain notoriously difficult to win.

Majrowski v Guy's & St Thomas' NHS Trust

Mr Majrowski, a clinical audit coordinator, alleged that his departmental manager had harassed him. He said she was excessively critical of him; that she refused to talk to him; that she was rude and abusive to him in front of other staff; and that she set unrealistic targets for his performance. And he alleged that her attitude was fuelled by homophobia.

He said she was excessively critical of him; that she refused to talk to him...

Rather than making a claim for negligence (because of evidential and limitation problems), however, Mr Majroswki claimed that the hospital was vicariously liable for breach of a statutory duty imposed on his manager under the Protection from Harassment Act 1997.

The county court said he could not rely on the Act, but the Court of Appeal disagreed. And the House of Lords has now confirmed that employers can be vicariously liable for a breach of the Act by one of their employees, if it can be shown that they were acting "in the course of their employment".

Green V DB Group Services (UK) Ltd

Helen Green worked as a company secretary assistant for Deutsche Bank from 1997 to 2001. She said that, during that time, she was subjected to psychiatric injury because of the "offensive, abusive, intimidating, denigrating, bullying, humiliating, patronising, infantile and insulting words and behaviour" of several of her colleagues. On 7 November 2000 she was admitted to hospital where she was diagnosed with a major depressive disorder. She returned to work the following March, but suffered a relapse in October. She did not return to work after that and her employment was terminated in September 2003.

She claimed that her employer had been negligent and in breach of contract, as well as in breach of the Protection from Harassment Act. The High Court judge agreed, awarding her £800,000, mainly for loss of future earnings.

Comment

Although the case of Majrowski may provide claimants with another potential avenue to explore in bullying/harassment claims, it will not help in the majority of stress cases. That is because they still have to get over the hurdles of foreseeability laid down by the Court of Appeal in Sutherland v Hatton, and reaffirmed by the House of Lords in Barber v Somerset County Council.

In order to rely on the Protection from Harassment Act, the claimant has to show that the harasser either knew or ought to have known that their conduct amounted to harassment. Although the Act does not define harassment, the legislation makes clear that it is conduct targeted at an individual which is calculated to alarm that person or cause them distress, and which is oppressive and unreasonable.

This turned out to be a hurdle too far in the Court of Appeal case of Banks v Ablex Ltd in which the Court said that Mrs Banks had to show that the conduct (which included an alleged assault) was intentional and that her harasser knew what he was doing.

The Green case also highlights the importance of foreseeability. Like Mr Walker (Walker v Northumberland County Council) and Mr Barber (Barber v Somerset County Council), Ms Green was diagnosed with a depressive illness and subsequently returned to work.

As a consequence of the first breakdown, the court said that she was at a significantly increased risk of a further episode of severe depression. The bullying and harassment to which the first breakdown could be attributed was a material cause of the second breakdown, and the employer should have foreseen that.

PILR aims to give news and views on personal injury law developments as they affect trade unions and their members.

This publication is not intended as legal advice on particular cases

To receive regular copies of PILR
email: info@thompsons.law.co.uk

Contributors to this edition:

Judith Gledhill, Tom Jones, Ian McFall, Jennie Walsh.

Editor: Alison Clarke
Design: Clinic
Print: www.dsigroup.com/talisman