THOMPSONS SOLICITORS

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Personal Injury Law Review

www.thompsons.law.co.uk

Controlling asbestos

The Control of Asbestos Regulations 2006 came into force on 13 November 2006. The revised regulations strengthen overall worker protection by reducing exposure limits and introducing mandatory training for work with asbestos.

They also simplify the regulatory regime and implement revisions to the EU Asbestos Worker Protection Directive.

The revised regulations introduce the following changes:

- single control limit of 0.1 fibres/cm3 of air for work with all types of asbestos
- specific mandatory training requirements for anyone liable to be exposed to asbestos
- requirement to analyse the concentration of asbestos in the air with measurements in accordance with the 1997 World Health Organisation recommended method
- practical guidelines for the determination of "sporadic and low intensity exposure" as required by the EU Directive
- replace three existing sets of Asbestos Regulations.

Most work with asbestos will still need to be undertaken by a licensed contractor but any decision on whether particular work is licensable will now be determined by the risk.

To download the full text of the regulations, go to: www.opsi.gov.uk/si/si200627.htm

Prosecution service prosecuted

The High Court has ordered the Crown Prosecution Service to review its decision not to bring corporate manslaughter charges against the employer of a teenager killed in his first week at work.

The Judge ruled that the CPS must reconsider the evidence in the death of 17-year-old Daniel Dennis who fell through a skylight while working for roofing company North Eastern Roofing in April 2003.

The decision, following a Judicial Review brought by the GMB and Thompsons Solicitors, is only the second time in legal history that the CPS has been brought to court in a workplace death case. It exposes the lack of specialism and proactivity in the CPS's approach to corporate manslaughter.

The Court concluded that the way the CPS interpreted the evidence and its apparent lack of understanding of health and safety law, should be looked at again. The Judge said it is "...seriously arguable that a different decision might be made once account is taken of these matters".

The employer was aware that Daniel had had no prior safety training, but sent him up scaffolding to access timber on the roof of a B&Q store in Cwmbran, Gwent during a re-cladding project. He was not wearing a harness and the skylight area was not fenced off.

The inquest jury took less than 10 minutes to reach its unlawful killing verdict, although the CPS had told the Dennis family that gross negligence manslaughter charges could not be brought.

Representing the Dennis family, Mick Antoniw, an expert in corporate manslaughter and health and safety law at Thompsons said: "This is a landmark ruling and we now expect the CPS to review and overhaul the way they consider the evidence in cases involving workplace deaths. This case also exposes the desperate need for the new corporate manslaughter laws currently before Parliament." (See page 11)

If you or anyone you know has been involved in a workplace accident, go to www.thompsons.law.co.uk for more information.

Slipping when gritting

It's that time of year when there's a lot of snow and ice on roads and pavements. What happens when employees slip, fall and hurt themselves at work?

Regulation 12 of the Management of Health and Safety at Work Regulations requires employers to ensure that the "surface of every traffic route in the workplace" is suitable for the purpose for which it is used and their surfaces are not slippery or have no substance on them that exposes employees to risk of slipping.

So if an employee slips on snow or ice, falls and hurts themselves as a result of a failure by the employer to grit, then they may have a compensation claim. But what about the employee who slips and injures themself while doing the gritting?

In **Ann Farrant -v- Essex County Council**, the claimant successfully sued her employer for negligence when she slipped on the ice she was gritting.

Mrs Farrant, a UNISON member, came to Thompsons after she fractured her wrist when she slipped on the ice she was gritting in a playground as part of her duties as a school caretaker.

Thompsons took proceedings against Essex County Council whose solicitors fought the case to court. Thompsons said that Essex CC should have carried out a risk assessment and provided Mrs Farrant with proper safety equipment under the Personal Protective Equipment Regulations. Indeed, the council had expected her to carry out her own risk assessment and she wore her own boots and Marigold gloves to do the job.

The Judge found in favour of Mrs Farrant. He said that, although it was a "common sense" task, the whole point of risk assessments was to train an employee in how to do the job safely and to provide them with safe equipment.

In this case, Mrs Farrant should have been trained to allow the ice to melt before she walked on it and should have been given proper non-slip boots.

Essex CC argued that, even if they were at fault, Mrs Farrant should take some of the blame for the accident for not paying attention to the area she had salted.

The Judge said she was clearly treading carefully on the salt and that she was in no way responsible for her accident (see page 4 for more details about contributory negligence).

Slipping on leaves

In a case where a meter reader slipped on leaves, the Occupiers Liability Act 1957, which states that occupiers of land owe a duty of care to visitors, and the Workplace Regulations 1992 applied.

In **Bond -v- Derbyshire County Council**, the claimant was visiting an old people's home (owned by the council) to read the meters. He had to go through a fire exit to an outside meter.

It was a windy and wet day and he slipped on leaves in the outside corridor and fell, fracturing his elbow.

Mr Bond, a UNISON member, was referred to Thompsons. Along with the Occupiers Liability Act, we said that the Workplace Regulations 1992 applied because the building was his workplace as, at the time, he was there to do a job.

The Workplace Regs require the employer to ensure, among other things, that workplace floors are safe.

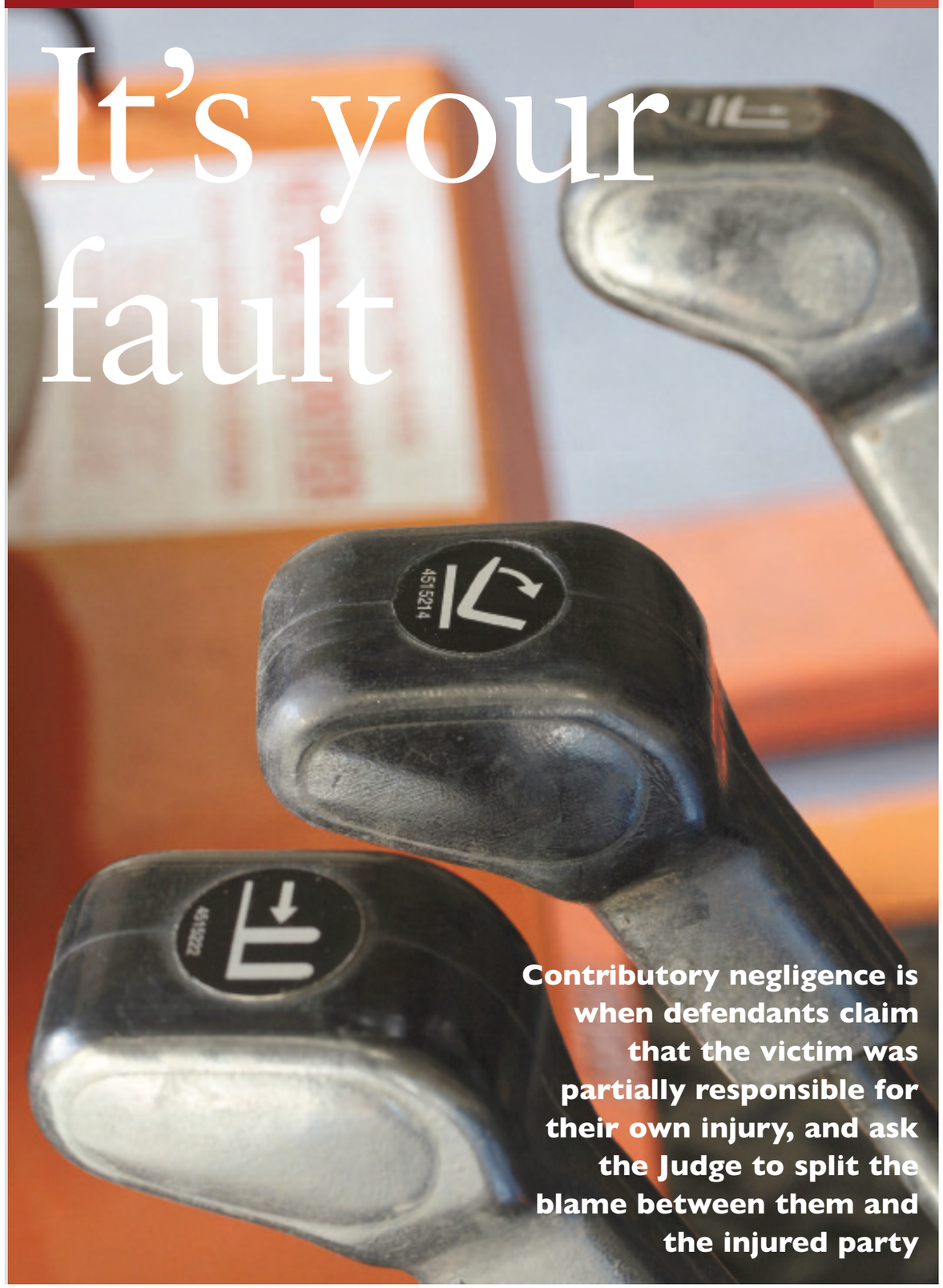
Thompsons successfully argued, under the Occupiers Liability Act, that the defendant should have at least warned Mr Bond that there were likely to be wet leaves outside the door, even if it could not keep the area clear due to the wind.

The Judge agreed that the council should have foreseen that leaves would blow into the area and that a verbal warning should have been given, or the area checked before allowing Mr Bond to go through the door.

Derbyshire CC then argued that the Workplace Regulations did not apply as Mr Bond was not at his own workplace.

The Judge ruled that Regulation 2 of the regs applied to a working visitor to the premises and therefore that the council was in breach for the same reasons as above. The Judge found in Mr Bond's favour and decided that he was in no way responsible for his accident.

It's your fault



Contributory negligence is when defendants claim that the victim was partially responsible for their own injury, and ask the Judge to split the blame between them and the injured party

It is an argument that defendants are increasingly putting forward to avoid paying full compensation. But this is often based on a misunderstanding of the law, which says that courts should be reluctant to find blame against an employee for a momentary lapse of attention if the main cause of the accident was a breach by the employer.

In a recent case that Thompsons pursued on behalf of an Amicus member, the employee was injured when the fork lift truck he was driving collided with another vehicle that had been wrongly left in a passage, forcing him to drive into a wall.

Although the member's injury claim was only for around £3,500, the employer at first counter-claimed for £15,000 for the cost of the repairs to the wall, increasing this to £18,000 when court proceedings were issued. After pressure from the union, the employer dropped the claim of contributory negligence.

This is just one example of how employers (and their insurers) use contributory negligence arguments to delay and deny personal injury claims.

But the case law is clear. In **John Summers & Sons -v- Frost (1955)** it was held that where an accident was just the type that legislation was designed to avoid, and where the workman was injured as a result of a momentary lapse of concentration (and not disobedience or reckless disregard), then no contributory negligence would be found.

And in **Ryan -v- Manbre Sugars Ltd (1970)** the Court of Appeal was unanimous that pure inadvertence was not negligence and excusable inadvertence was not something that Mr Ryan should be blamed for.

Lord Justice Keene said in **Cooper -v- Carillion plc (2003)** that an employee can have a legitimate expectation that their employer has complied with their duties. If not, employees should not share the blame equally with them.

> Irrespective of how much an employee is to blame for the accident, workers cannot be found to have contributed 100 per cent to their own misfortune

An approach that the Court of Appeal confirmed recently in **Sylwester Dziennik -v- CTO Gesellschaft Fur Container-transport MBH and Co (2006)**. It decided that an electrical engineer had not been at fault and partly to blame for his injuries when he was badly burned while trying to replace a defective thermosensor.

Although the High Court found that the vessel did not operate in "as tight a fashion" as it should have done in relation to safety, it said Mr Dziennik was 60 per cent to blame for not following instructions he had been shown during an informal discussion in the smoking room with the chief engineer.

However, the Court of Appeal disagreed. It said it was not clear how the Judge had come to his conclusions, given the "real doubt" as to whether Mr Dziennik had been shown how the job "should" be done as opposed to just how it "could" be done.

Nor was it clear that Mr Dziennik had been negligent when he failed to follow the informal procedure. This was only one way to do the job out of a possible three.

In **Smith -v- S Notaro Ltd and Grafton Group plc (t/a Plumbase) (2006)** the Court of Appeal held that employers must comply with their legal obligations, even if the employee was mostly to blame for the accident. The court said that the employer should have trained Mr Smith in the risks of using unsafe walkways, even though these were "largely a matter of common sense".

And irrespective of how much an employee is to blame for the accident, the Court of Appeal has said in **Anderson -v- Newham College of Further Education (2002)** that workers cannot be found to have contributed 100 per cent to their own misfortune.

But if employees have contributed, then they must pay the price. In **Badger -v- Ministry of Defence (2005)**, the High Court said that although asbestos was partly to blame for his death, Mr Badger had contributed by continuing to smoke, despite being aware of the dangers.

So it is clear that, although employers often try to put all the blame on their employees, the courts will not always agree. Whatever the circumstances of the accident, it's best to get expert advice from Thompsons.

Compensation

Mesothelioma claims in the spotlight

The current system for compensating mesothelioma victims is inherently unfair, with the outcome subject to a number of vagaries, including whether the victim was exposed to asbestos during the course of their employment or whether their exposure was from the contaminated clothing of a relative says Thompsons' national head of asbestos litigation Ian McFall

Ian McFall

The Department of Work and Pensions recently consulted with unions, law firms and others on how the system of handling mesolthelioma claims could be improved. Thompsons' national head of asbestos litigation **Ian McFall** examines the system and what needs to be done.

How mesothelioma sufferers get compensation

A mesothelioma sufferer can get compensation in one or more of the following ways:

- DWP benefits [including Industrial Injuries Disablement Benefit (IIDB), Disability Living Allowance (DLA) for Care (DLAC) and/or Mobility (DLAM) and Constant Attendance Allowance (CAA)]
- Payments under the Pneumoconiosis Workers Compensation Act 1979 (PWCA)
- A civil claim for damages against one or more of the companies responsible for exposing them to asbestos negligently and/or in breach of a statutory duty.

But not all victims get compensation and some may end up with none at all.

To be eligible for DWP benefits or a payment under the PWCA the asbestos exposure has to have occurred during the course of the applicant's employment.

Anyone who contracts mesothelioma from para-occupational exposure – such as the wives, children or even grandchildren from a worker's overalls – is automatically excluded.

Civil compensation

The outcome of a civil claim for damages is just as unpredictable. It will depend on whether the company responsible for the asbestos exposure still exists, whether it has assets to meet the claim or whether the insurers on risk at the time of exposure can be traced.

Thompsons estimate that between 10 and 20 per cent of mesothelioma claims fail because the company no longer exists and insurers cannot be traced.

The court system

The mesothelioma fast track procedure in the Royal Courts of Justice (RCJ) delivers an effective system which results in an almost immediate judgment in the claimant's favour where it is clear the defendant was in breach of duty. The claimant also receives interim payments of over £40,000 within weeks of starting proceedings and what is called a disposal hearing in a few months, which resolves any outstanding issues about assessing damages.

The vast majority of mesothelioma cases pursued in the RCJ fast track procedure settle without the need for a disposal hearing. With an average case lasting just a few months, most mesothelioma cases can be brought to a conclusion within a claimant's lifetime.

Not surprisingly, there are increasing demands on the RCJ mesothelioma fast track procedure. The system is becoming overloaded and needs more resources to enable more cases to be dealt with more quickly. Claimants would also benefit from having the system rolled out to regional courts.

A fund of last resort

Since the introduction in 1972 of the Employers Liability (Compulsory Insurance) Act 1969 employers have had to hold liability insurance in respect of employees' bodily injury and disease. Yet insurers in many mesothelioma claims often cannot be traced. This is in no small part due to the insurance industry failing to keep adequate records.

An "insurance fund of last resort" would provide for payment of compensation in cases where the employer is insolvent and the insurer cannot be traced. Payments should be funded by a compulsory levy on the insurance industry.

Make insurers refund PWCA payments

Payments made under the PWCA to claimants who subsequently succeed in recovering damages are deducted from the total compensation due from the defendant company or their insurers. These are not refunded to the state, and are effectively a windfall for the wrongdoer or their insurer.

The compensator – the insurer – should be responsible for refunding PWCA payments to the State in the same way that it currently has to refund relevant DWP benefits to the Compensation Recovery Unit (CRU).

This would stop insurers receiving a windfall collateral benefit and would be an income stream to the state equivalent to the CRU recoveries.

Increase PWCA payments

Payments under the PWCA to claimants who submit an application during their lifetime currently range from £10,180 (for a person aged 77 and over) to a payment of £65,531 (for someone aged 37 and under).

These should be re-calibrated so that the minimum and maximum payments coincide with the bracket for an award of general damages for pain, suffering and loss of amenity in mesothelioma claims as currently set out in the Judicial Studies Board Guidelines. These would work out at £47,850 to £74,300.

Improve eligibility for IIDB

The Industrial Injuries Disablement Benefit (presently limited to people who have contracted the disease as a result of asbestos exposure arising out of or during the course of earned employment), should be relaxed to include para-occupational exposure such as clothing and environmental exposure claims, which could include living near an asbestos factory.

In many cases of para-occupational exposure there is no prospect of pursuing a successful civil claim for damages either because the responsible company no longer exists and there is no available insurance, or the court may not be prepared to find a breach of duty as in the recent Court of Appeal decision in **Maguire -v- Harland and Wolff [2005]**.

There are probably no more than 100 para-occupational exposure mesothelioma cases each year. The cost of providing DWP benefits and a PWCA payment to those claimants who would otherwise have no entitlement to any compensation would be relatively modest.

And it would remedy an injustice that Thompsons finds very hard to explain in any logical way to the wives, children and even grandchildren who have developed mesothelioma because they were exposed to asbestos through no fault of their own.

Damages in Scotland

There is a big difference between the way in which damages for bereavement are assessed in Scotland, as compared to England and Wales. There is no logical explanation for it.

In England and Wales a bereavement award is fixed at £10,000 for deaths occurring on or after 1 April 2002. In mesothelioma cases it is normally payable only to the spouse of the deceased.

In Scotland the equivalent award to a bereaved spouse is currently in the order of £28,000. Other family members such as siblings and children each have their own right to a payment of approximately £10,000.

That means that the compensation for bereavement for a family who can bring a claim in Scotland will differ by tens of thousands of pounds compared to a family in England and Wales.

The Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill will ensure that relatives' claims for damages are not extinguished by a person with mesothelioma settling their own claim whilst still alive. A similar statutory amendment should be introduced in England and Wales.

Alternatively the Civil Procedure Rules should be amended to allow a claimant with mesothelioma to make an application for an interim payment by way of Part 8 proceedings if they choose not to bring the claim to a full and final settlement during their lifetime, therefore preserving the rights of others to pursue a claim of greater value after their death.

Empty shell

For a claim of negligence to succeed against an employer, claimants have to be able to show (among other things) that their employer did (or did not do) something that caused the injury or disease

A soldier who developed a skin cancer, which he said was caused by picking up depleted uranium, failed recently in his claim of negligence. The Judge concluded that, on the balance of probabilities, it was more likely to have been caused by over exposure to the sun.

The soldier asked Thompsons to represent him, which we agreed to do even though it would be a difficult case to pursue.

Basic facts

W served in the Army for 15 years, including spells in Cyprus and Australia as well as an armaments research operation in Kirkcudbright in Scotland, where he worked between 1984 and 1987.

This site contained a number of ranges where armaments, including depleted uranium (DU), were tested. When the DU rounds were fired, some fell on the ground and had to be cleared by teams of soldiers, including W.

When picking up the DU, W said that although he wore a dosemeter, he was not issued with gloves and was not given any instruction or training about working with such a hazardous substance.

He subsequently developed a cancer on the side of his nose which he said was caused by touching his skin with his hand or finger, either of which could have been contaminated by DU. His employer, the MoD, argued that it was caused by exposure to sunlight.

The arguments

W argued that:

1. That because the skin on the side of his nose was particularly thin, it was more easily contaminated than other parts of his body
2. That his particular type of skin cancer was less likely to be caused by exposure to the sun than other types
3. That the side of the nose was less likely to be exposed to ultra violet (UV) rays from the sun than other parts
4. That he had a dark complexion and was therefore less at risk of developing skin cancer from UV exposure
5. That during his time at Kirkcudbright, he suffered from short lived acute inflammatory conditions of the throat and right eyelid which, in his expert's opinion, could be attributed to DU contamination
6. The fact that he was young was relevant

For its part, the MoD pushed the link with exposure to sunlight, arguing that:

1. W worked out of doors for most of his working life in all weathers, including sunlight
2. When he worked outside he wore a beret, which did not provide his face with any protection from the sun; and sun protection was not as common as now
3. When serving in Australia he was stationed in areas where skin cancer was very common
4. The experts agreed that, at the very least, sun exposure played a part in the development of his skin cancer
5. The link between sun and skin cancer was well documented
6. The doctors treating him thought sunlight was the likely cause
7. He suffered from a common cancer.

Conclusion

From the evidence, the Judge ascertained that, during the time he spent at Kirkcudbright, there were very few incidents that gave cause for concern in relation to contamination. In any event, W had worked on a very occasional basis (no more than 15 times) on the range when DU rounds were fired. But a risk still existed (however low) and it was therefore foreseeable that W could be injured. But what caused his injury – was it contamination or exposure to sunlight?

Although W could not remember wearing gloves, the Judge said that it was more likely than not that he was issued with gloves along with a personal dosemeter. He concluded, from the evidence

available, that W would have been aware (if only in general terms) that there was some risk of contamination if he did not wear them and/or if he were to bring the gloves into contact with his skin.

As for exposure to the sun, the Judge concluded that this was a major contributory factor to his cancer. Although W could not ever remember being sunburnt, the judge thought it inconceivable that he would not have been, given that he had spent most of his time in the army outside, and much of it in hot climates during the 1970s and 1980s when there was little awareness of sun protection.

By comparison, the risk of developing skin cancer from DU contamination was no more than a few per cent. Nor was there any evidence to suggest that W had an unusually thin skin which made him particularly susceptible. He concluded, therefore, that UV radiation was "by far the more probable explanation".

Comment

This case was heard at the end of 2006 when depleted uranium was in the news again due to new allegations made by senior US scientist Dr Keith Baverstock of a link between DU and cancer in Iraq. He claimed on the BBC that research showing the link was withheld by the World Health Organisation.

The MOD said in reponse that there was "no scientific or medical evidence" to link depleted uranium use to sickness in Iraq. Thompsons has a long history of pursuing cases such as this where establishment opinion is against us but by doing so we have been able to raise important issues and contribute to a wider debate and campaign.

The Corporate Manslaughter and Homicide Bill received its third reading in the House of Commons in December. Mick Antoniw, a Thompsons partner, explains what this will mean.

When working is bad for you

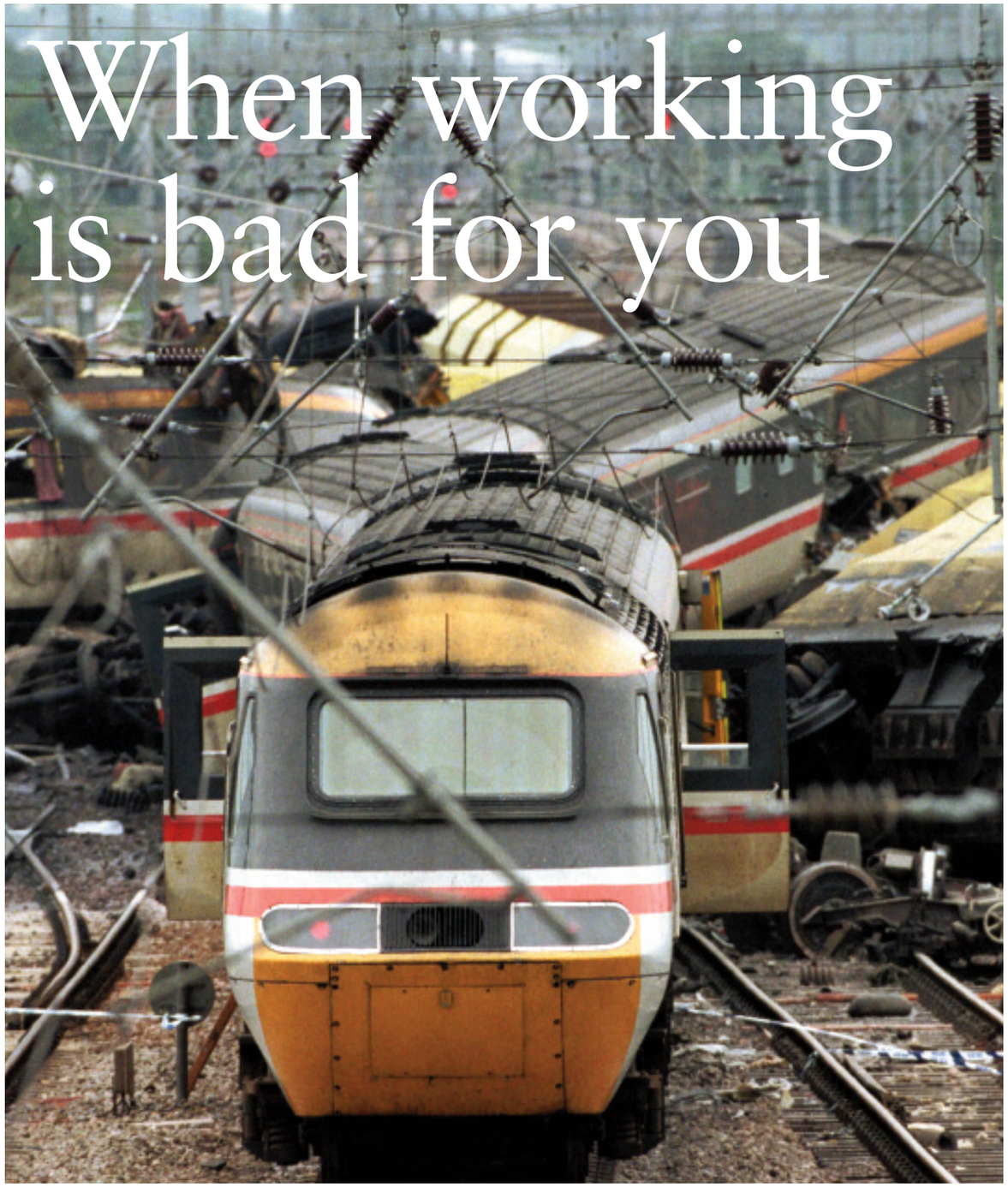


Photo: Duncan Phillips, Report Digital

As we go to print, the House of Lords has voted to extend the Bill to deaths in police custody. This defeat for the government risks losing the Bill over one issue (as important as it is), when the Bill is essentially about holding companies to account for deaths at work. This would be a travesty and a disaster for those families who have lost loved ones in workplace deaths and waited so long for a law to bring some justice.

The UK is finally close to having a law that will make it possible to successfully prosecute employers who kill workers as a result of their gross negligence.

Ten years ago the Labour Party committed itself to such a law, one that would hold employers and corporations to account for public and workplace deaths caused by gross negligence.

Disasters such as Piper Alpha and Zeebrugge, Southall (left) and Hatfield made it tragically clear that the existing law was not working where large corporations are involved.The numbers of workplace deaths each year caused by preventable accidents were unacceptably high, as they still are.

Attempts to charge individual company directors or senior managers of large corporations with what is known in legal terms as gross negligence manslaughter failed disastrously, usually with the charges having to be dropped for lack of evidence linking an individual with the offence.

Controlling mind

Employers and corporations were literally getting away with murder because of the legal requirement to show that an individual senior manager, known as the "controlling mind" had caused the death.

The Corporate Manslaughter Bill creates a new law of " corporate manslaughter " and does not require a "controlling mind" to be identified. The new law is aimed at organisations and not individuals. Its objective is to hold companies and in particular their senior management to account for deaths at work. It is, to a limited extent, the light at the end of the tunnel for the trade unions and victims and public interest groups who have for so long campaigned for such a law.

Mick Antoniw

In terms of punishments, the Bill allows for unlimited fines and the possible use of "remedial orders".

But unlimited fines on their own are largely meaningless. Once a fine is paid the punishment is done. It doesn't deter future offences or instigate a change in culture so that future deaths or injuries are less likely to occur.

Thompsons has worked closely with the trade unions, Labour MPs and ministers to get the Bill amended to include alternatives to fines, including disqualification and imprisonment for company directors who should have a specific legal responsibility for health and safety.

While it is unlikely that the Government will allow the Bill to be changed that dramatically, there is a strong chance that what is being called "corporate probation" will be included as an alternative or addition to fines.

Corporate probation would give the court the power to impose a supervision order on an employer that would compel the company to review its safety procedures and take measures that would result in a reduction in accidents.

The overriding objective of corporate probation is to achieve a positive and long term change to company safety culture.

Further penalties

Depending on the final drafting of the Bill, Courts might also be able to order the company to pay compensation, publicise the offence, notify shareholders, register the offences against the names of directors in the companies' register and to impose whatever order is needed to get the company to change the way it behaves. Failure to comply could lead to further penalties being imposed.

If corporate probation is included in the new law, it will be among the most far reaching and innovative changes to health and safety legislation in the UK.

Despite the Bill there still remains a glaring gap in health and safety legislation. Directors of companies have no specific legal responsibility for a company's health and safety. The Bill exposes this weakness in the law and pressure is building from the trades unions for a new law or amendments to existing health and safety legislation to create specific legal responsibilities and obligations on company directors for a company's safety performance.

Trades unions understand that until company directors are made accountable attempts to change company safety cuture and save lives will be undermined.

In a society where we talk about rights balanced by responsibilities, if companies are to take their health and safety duties seriously, responsibility for a company's safety policy and the implementation of that policy must be taken at boardroom level.

Thompsons is the largest specialised personal injury and employment rights law firm in the UK with an unrivalled network of offices and formidable resources.

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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

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