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Corporate manslaughter law victory

The Corporate Manslaughter and Corporate Homicide Act became law in July 2007 after a difficult passage through Parliament.

The Act, which comes into effect in April 2008, should make it easier to prosecute organisations which cause the deaths of workers. However, it will still be necessary to show that the failure in health and safety which caused the death was down to decisions made at a senior management level.

For a time it looked as though the government would fail to get the new law onto the statute books after members of the House of Lords voted for an amendment on crown immunity exemptions relating to deaths in police custody.

It was never intended that the law would cover deaths in custody. But ministers conceded to the pressure from opposition members of the Lords in order that the Act would not be lost.

The family of 17-year-old Daniel Dennis from South Wales, who died in his first week at work in April 2003 when he fell through a skylight after being sent onto a roof with no prior safety training, had written to every member of the Lords asking them not to risk the Act for the sake of deaths in custody, no matter how important the issue.

Daniel's father Peter said: "We hope that as a result of this new law employers will understand that they are not above the law and that other tragic accidents will be prevented."

Mick Antoniw, a partner at Thompsons Solicitors who represents the Dennis family said: "After a ten year battle at long last the families of the victims of corporate manslaughter, and the trade unions, have succeeded in achieving a law which will play a key part in improving health and safety and reducing deaths at work. The next part of the campaign is for legal duties to be imposed on directors of companies with responsibility for health and safety."

Deadly statistics

- The number of workers killed last year at work was 241, an 11 per cent increase on the previous year, according to the Health and Safety Executive (HSE).
- Although there is an overall long-term downward trend in the number of worker fatalities, the rate of decrease has slowed over the last 15 years and there has been very little change in the overall rate over the last five years.
- Of the main industrial sectors, agriculture and construction have the highest rates of fatal injury. These two sectors account for 46 per cent of fatal injuries to workers.
- Falling from a height continues to be the most common type of accident, accounting for 19 per cent of fatal injuries to workers in 2006/07. Over the last decade there has been a steady and significant reduction in fatal injuries due to this type of accident. Being struck by a moving or falling object, and being struck by a moving vehicle, are the next most common fatal accidents.

To download the statistics, go to: www.hse.gov.uk/statistics/fatals.htm

Stressed out

The Court of Appeal has made it harder for claimants to succeed in stress cases. It decided in Deadman -v- Bristol City Council that an employee with 30 years' service who developed depression after an allegation of sexual harassment was made against him, could not succeed.

Although the Court accepted that his employer had handled the investigation into the allegation badly, it said that:

- The obligation in the employer's policy requiring them to handle complaints of harassment "sensitively" was not contractual.
- They could not have reasonably foreseen that Mr Deadman would suffer "this particular kind of harm" as a result of convening a panel of two, rather than three, as he was "of robust good health" and had an excellent attendance record.
- The council could not have known that an investigation might have been damaging to his health, given Mr Deadman's demeanour and behaviour leading up to it and had not therefore been negligent to tell him of its decision "by leaving a bald letter on his desk". The content of the letter, not the way in which it was delivered, was more important.

PI claims reform

The Summer 2007 issue of PILR reported that the government was consulting on reforming the personal injury claims process.

To view Thompsons' response to the consultation go to: www.thompsons.law.co.uk/ltext/dload/response-case-track-limits-and-claims-process.pdf

Calls for increase in compensation for victims of asbestos cancer

Thompsons Solicitors has called on the government to increase the amount of compensation for bereavement to the families of asbestos cancer victims in England and Wales.

The firm is demanding equality for families affected by asbestos in its response to a Ministry of Justice (MoJ) consultation on the **Law on Damages**.

The consultation is aimed at improving the system for dealing with claims for compensation for personal injuries and death.

The firm calls for the government to retain the current practice, which requires negligent employers and their insurers to pay compensation for bereavement. But Thompsons is calling for the fixed bereavement award of £10,000 in England and Wales to be increased in line with payments made in Scotland.

Thompsons launched its Justice for Asbestos Families campaign earlier this year highlighting an inequality in the way compensation for bereavement is awarded to families who have lost a loved one to mesothelioma, a cancer of the lining of the lung caused by asbestos.

In England and Wales the level of compensation is set at £10,000 by law and is only payable to the spouse but over the border in Scotland payments up to £30,000 have been made to bereaved widows.

Other family members in Scotland can also receive compensation of between £10,000 to £15,000 each.

Thompsons' campaign has already been supported in parliament by a number of MPs.

In its response to the consultation paper Thompsons said that companies that have negligently caused a death must be made to "apologise" adequately and that the amount currently paid to bereaved relatives is out of date and is insulting to families.

The firm added that the level of bereavement damages is too low and the definition of relatives who can claim is far too narrow and should be opened up to include other family members.

Head of asbestos policy at Thompsons Solicitors, Ian McFall said: "This consultation gives the government another opportunity to look again at compensation for bereavement.

"We believe strongly that there is a powerful case for a change in the law to bring compensation for bereavement into line with the amounts currently paid in Scotland."

To view Thompsons' response to the MoJ's Law on Damages consultation go to **www.thompsons.law.co.uk/ltext/dload/law-on-damages-consultation.pdf**

A smoking gun

A look at the new smoking regulations

On 1 July 2007, the Smoke-free (Exemptions & Vehicles) Regulations came into effect in England, making enclosed public spaces and workplaces smoke-free.

Tony Lawton, a personal injury partner with Thompsons, provides an overview of the main provisions of the new law.

Passive smoking

Even before the introduction of the legislation, employers already had a duty of care under the common law to protect their staff so far as is reasonable.

Some employees had used this obligation to bring claims against their employers arguing that they were exposing them to danger, despite being aware of the risks of passive smoking. Many of these, particularly in the food, drinks and entertainment industry, habitually exposed their staff to the dangers of cigarette smoke on a large scale.

Thompsons successfully pursued a number of claims on this basis for union members who were able to prove that they had suffered respiratory illnesses as a result of being exposed to smoke at work. As the dangers of passive smoking have been known for several years, it is just about impossible for a reasonable employer to argue that they were unaware of the dangers.

We have only succeeded, however, where we were able to show that the employer could – and should – have taken steps to significantly reduce the dangers from cigarette smoke. Success is always subject to proving the difficult issue that the illness was caused by smoking at work, whether based on negligence or a breach of the new regulations.

Main provisions of the new regulations

The new regulations go further than the common law and, for the first time, impose a statutory duty on employers. As a result, if they breach the legislation, they may not only face a criminal prosecution but also a civil claim for compensation alleging that they were in breach of their statutory duty. That is in addition to allegations of negligence in common law.

The strength of the new legislation is that, subject to certain exemptions (see below), employers are under a strict liability to abide by them. That just means that the employer is automatically to blame if the employee can show a breach of the law.

The regulations state that premises must be smoke-free if they are enclosed or substantially enclosed and:

- are open to the public
- used as a place of work by more than one person
- a place where members of the public might attend for the purpose of receiving goods or services from people working there

"Work", in this context, includes voluntary work.

Exemptions in the law

Despite the legislation, many workers will continue to be exposed lawfully to cigarette smoke in the course of their work. This is because of the exemptions set out in the regulations.

These allow hotels and boarding houses to have specified bedrooms that are not smoke-free. And designated bedrooms and smoking rooms for adults in care homes, hospices and prisons may also still not be smoke-free. Likewise, designated rooms for adults in accommodation in mental health units.

Those working in the tobacco industry will still not have any statutory protection against cigarette smoke in some places. For example, specialist tobacconists are exempt, as are designated smoking rooms in research and testing facilities where the research relates to the emissions from tobacco or other smoking products. Designated rooms in an offshore installation are also exempted.

The most interesting exemption is that of "performers". The legislation says that anyone participating as a performer in a performance is not to be prevented from smoking if "the artistic integrity of a performance makes it appropriate for them to smoke".

A "performance" is defined as including for example "the performance of a play, or a performance given in connection with the making of a film or television programme". Non-smoking performers on stage or on set and backstage staff may therefore continue to have concerns if they are exposed to cigarette smoke without statutory protection. It will be interesting to see how the courts interpret this exemption.

> Those exposed to cigarette smoke at work should be aware of some of the difficulties involved in pursuing claims for smoking

Exemption, not absolution

Despite the exemptions, employers cannot simply absolve themselves of any responsibility for the health of their employees from inhaling cigarette smoke, just because a part of the workplace falls outside the smoke-free protection. Although the employer will not be open to prosecution where the part of the workplace is exempt, they still may have a common law liability for negligence if they have not taken reasonable steps to protect their staff.

So concerned employees should:

- Make sure their employers are aware of their concerns. Put them in writing, or ensure they are recorded in minutes of safety meetings.
- Explore ways with their employer to reduce or contain the smoking, or find ways of providing better means of extraction.
- Make sure that their employer knows that, although they may not be in breach of the legislation, that does not absolve them from their civil responsibility as they still have a duty of care.

Still not easy to sue

A word of caution. Those exposed to cigarette smoke at work should be aware of some of the difficulties involved in pursuing claims for smoking, whether based on breach of the regulations or negligence.

While Thompsons may be able to show that there had been a breach or that the employer was negligent, we still need to prove that they caused the illness in order to succeed. That is not always easy.

People are exposed to cigarette smoke in many places, not just at work. Proving that it was the smoke at their workplace that either caused the illness or materially contributed to it can be difficult, and would be a matter for expert evidence. That requires a medical expert who is prepared to stand up in court and say that, on a balance of probabilities, the illness was caused by the cigarette smoke at work. They then have to resist cross-examination by the employer who may well have an expert medical witness who disputes the claim.

While the legislation will make is easier to prove that an employer is liable, it will not make it easier to prove that the illness is work-related.

A final thought

However, it should be remembered that the main purpose of the legislation is not to make it easier for employees to litigate against their employers, but to provide an effective preventive measure, which will remove the risks of passive smoking at work. This should then reduce the risk of illness to a large section of the workforce. Progress indeed.

Hitting the mark

An overview of the law relating to violence at work

A recent survey showed that more than a third of nurses working alone in the community had been assaulted or harassed. But they are not the only ones. Local government employees, train drivers and conductors, fire fighters, ambulance personnel and other workers all face risks.

Judith Gledhill, a personal injury partner with Thompsons, provides an overview of the legal duties of employers whose staff face violence at work on a daily basis

Basic obligations

All employers have a duty to look after the health and safety of their employees, to provide a safe place of work and to ensure that their systems of work are safe. The Management of Health and Safety at Work Regulations also require employers to carry out a "suitable and sufficient" assessment of any risks to the health and safety of their employees, and to identify any measures they should take to comply with their health and safety obligations.

Risk of violence

But what should employers do if, having done a risk assessment, they discover there is a risk of violence to their workers? The aim of the regulations is prevention rather than cure, so employers should try to avoid the risk completely in the first place.

If that is simply not realistic, they should make alterations to the working environment. For instance, by introducing panic buttons and/or CCTV cameras. Perspex screens protecting employees from members of the public might also be appropriate in some circumstances. Or the employer may decide that their employees should not work alone. If so, they should implement policies to that effect and increase staffing levels.

Patterson -v- Tees and NE Yorkshire NHS Trust

In the case of **Patterson -v- Tees & North East Yorkshire NHS Trust**, Mr Patterson (a senior psychiatric nurse) was assaulted by a patient with a history of violence. The patient had absconded from hospital and a press release was issued warning the public to take care. The patient saw the broadcast, returned to hospital and assaulted a senior male nurse on the ward.

On starting work, Mr Patterson was made aware of events earlier that day, but was not told that the patient had made verbally abusive comments about him. The patient then attacked Mr Patterson and injured him.

> The police said premises with lone women workers were more vulnerable to attack

The trust argued that they were not liable because the assault could not have been prevented, given the safeguards they had put in place to protect staff. The trial Judge disagreed, saying that the trust had been negligent and in breach of its legal obligations as it had failed to warn Mr Patterson about the verbal abuse. The Judge also found that the trust had failed in its duty to continually risk assess patients on an event-by-event basis.

The employers asked for leave to appeal, but the Court of Appeal refused saying that the trial Judge was entitled to conclude that the evidence of the patient's behaviour prior to the assault was enough to find fault. Specifically, the court said that if Mr Patterson had been made aware of the verbal abuse, he might well have taken steps to avoid any dealings with the patient.

Smith -v- Welsh Ambulance Service NHS Trust

Employers also have to ensure that they have a strategy in place to address workplace violence, and that all employees are properly trained in how to apply it.

In the case of **Smith -v- Welsh Ambulance Service NHS Trust** (see PILR June 2007) the trial Judge accepted that members of the emergency services would sometimes face risky situations. If that was the case, he said it was essential for control room staff to do a risk assessment and then make an "intelligent decision" about whether to send in a lone worker or not.

In this particular case, the Judge found that the control room staff should have advised Mr Smith to wait until the police arrived. They had not been trained to do this, however, and could not therefore give guidance on how to deal with such a potentially dangerous situation. Nor did they know how to quickly do a risk assessment. That meant that paramedics

and other ambulance personnel were left to make difficult decisions alone.

Other staff facing violence

Although cases involving violence to health care workers are on the increase, other workers are also at risk from violent assaults by members of the public. Take the case of **Collins -v- First Quench Retailing Ltd**. Miss Collins was the manager of an off licence store owned by First Quench. She was alone in the shop in June 1998 when masked men burst in and put a knife to her throat. She was pushed into a cellar and made to open the shop safe. Understandably, she suffered a severe psychological reaction to the assault.

Miss Collins brought a claim, alleging that her employers had failed to provide her with adequate protection, given that the shop had a history of serious incidents. Since 1977 there had been 13 reported crimes including four armed robberies. In 1997, another employee had resigned after being threatened by a violent customer.

Not only that, but she had already asked her employers to provide better security in the form of screens and to ensure there were two members of staff in the shop at all times. Her employer did nothing, however. There was then another armed robbery on 31 May 1998, but her employers still took no action.

First Quench argued that the shop was not located in a high-risk area and that the number of incidents were not significantly higher than in other local shops. They had fitted the off licence with panic buttons and a CCTV camera, and had rostered two staff to work evening shifts. These measures, the employer said, were enough to protect staff from violent customers and robberies.

The police gave evidence at the trial, saying that premises with lone women workers were more vulnerable to attack than those with at least two members of staff.

The Judge found in favour of Miss Collins, saying that lone workers were generally easier to attack than two or more employees. Having more than one person in the shop did not just act as a deterrent to robbers, but to all forms of physical or even verbal attack.

He therefore decided that having two employees in the shop at all times was a step that would have materially reduced the risk of an attack and that the employers could reasonably have implemented the change. As a result, First Quench was found to be in breach of the duty to take reasonable care to ensure the safety of its employees.

Employer obligations

With violent assaults on working people becoming more commonplace, it is vital that employers comply with their legal obligations and undertake detailed risk assessments. Once a risk is identified, employers must implement systems to reduce the risk to the lowest level possible.

Staff go to work to do their job, not to face abuse and violence. If employers pay lip service to their legal duties, they run the risk of their employees being injured, having to take time off work to recover and in some cases not being able to return to work at all. Costly legal proceedings may then follow with the employer or their insurer being ordered to pay significant sums by way of compensation. In many instances, this could be avoided if the employer had just done what they were supposed to do.

Handy Hints

A review of the law on manual handling

The Manual Handling Regulations may never make it onto the bestseller list, but they should be compulsory reading for all health and safety reps.

According to the Health and Safety Executive (HSE), more than a third of all musculoskeletal disorders (MSDs) that last more than three days are caused by someone handling an item at work wrongly.

Work-related MSDs affect one million people in the UK, and overall they are the most common form of ill-health disorders at work throughout Europe. Problems include back pain, work-related neck and upper limb disorders, including repetitive strain injuries, and lower limb disorders.

So it's little wonder that this year's European Safety and Health At Work week (22 to 26 October) called "Lighten the Load" is dedicated to MSDs.

The aim of the campaign is to support employers, workers, safety representatives and other stakeholders in understanding their rights and obligations and, where possible, preventing MSDs.

Manual handling regulations

The 1992 regulations (amended in 2002) define manual handling as "any transporting, or supporting of a load (including lifting, putting down, pushing, pulling, carrying or moving thereof) by hand or by bodily force".

The scope of the regulations makes clear that manual handling injuries can occur wherever people are at work, and not just in obvious risk areas such as hospitals, factories or on building sites. They can happen in banks, offices, shops and even at home.

Obligations of employers

The regulations require employers to:

- avoid the need for hazardous manual handling, as far as possible
- assess the risk of injury that cannot be eliminated

- reduce the risk of injury as far as possible.

Obligations of employees

Employees are required to:
- follow appropriate systems of work
- make proper use of equipment that their employer has provided
- co-operate with their employer with regard to health and safety
- inform their employer if they identify hazardous handling activities
- ensure they do not put others at risk.

Risk assessment

But although employers are under a huge onus to try to find ways of avoiding injuries caused by manual handling, the law recognises that this may not always be possible. The regulations therefore require employers to assess the risk and take steps (such as providing training) to reduce the chances of injury to their employees.

So, for instance, employers must take account of:
- the physical suitability of the employee to carry out the operation
- the clothing, footwear or other personal effects they are wearing
- their knowledge and training
- the results of any risk assessments carried out under the Management of Health and Safety at Work Regulations (MHSWR)
- results of any health surveillance undertaken under the MHSWR
- whether the employee is one of a group of employees who are particularly at risk.

If the employer does all that, employees are unlikely to succeed in proving their claim even if they are injured, as the case of **King -v- Sussex Ambulance NHS Trust** shows. Mr King was injured when carrying an elderly patient down steep stairs in a carry chair. The Court of Appeal said that there was nothing else his employer could have done to prevent the risk, other than to ask a third party to intervene which, in this case, was not practical.

Breaches of the regulations

But the same cannot be said of all NHS employers. In **Knott -v- Newham Health Care NHS Trust**, the Court of Appeal said that Ms Knott's injury was caused by repeated heavy lifting. Her employer had breached the regulations by, among other things, failing to provide a hoist or give her proper training. She was awarded over £400,000.

And in **Wells -v- West Hertfordshire HA**, the Court of Appeal found that Ms Wells' employer had failed to carry out the most basic of requirements under the regulations – to do a risk assessment.

Alternative ways of doing the job

If the employer has done a risk assessment and identified a risk, they may then have to find another way of doing the job. Take the case of Mr Millward, a warehouse worker who injured his back lifting a 17kg roll of plastic pallet wrap from a pallet onto a machine on the shop floor. The employer's defence was that they had done a risk assessment and provided adequate training.

The court held that trussing chickens was not a manual handling operation

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At trial, Mr Millward proved to the Judge that his employer had not thought about whether there was a way to avoid lifting the rolls at all. The Judge accepted that the roll was heavy and that the employer had not mentioned this approach in their defence. He therefore found for Mr Millward.

Likewise, the case of the railway supervisor who had to lift two cylinders and a trolley weighing about 150 kg by hand from track level to the platform. When doing so, he strained his back.

His employer said that, as he was a supervisor, his responsibility was to make a dynamic assessment of the risk and choose a safe method of work. They said they could not always provide lifting equipment when working nights on this sort of job.

The supervisor argued that the need to lift could have been eliminated altogether by using a road/rail vehicle, and pointed out that his last manual handling training had been 10 years before. The Judge found that, if there were better methods of doing the task, it was for the employer to provide training in those methods.

Not all activities covered

It makes sense, however, that not all activities fall within the regulations. In a recent Scottish case – **Hughes -v- Grampian Country Food Group Limited** – the Court of Session held that a process worker trussing chicken carcasses was not performing a manual handling operation.

Having watched a video of the work process, which mainly consisted of employees working on carcasses on a work bench, or picking them up briefly to apply the trussing string before putting them back down, the Judge concluded that, while manipulation was being performed, there was no transporting or supporting of a load.

A Judge also found against an administrative assistant in the case of **Curr -v- Crown Prosecution Service**. As she walked along the road from her office to the local court, carrying bulky legal files, she slipped on a patch of ice and injured her knee. She said that the reason she fell was because the files were bulky and cumbersome and she found it difficult to balance them in the icy conditions. The Judge, however, said that it was an accident and that the bags had nothing to do with her fall.

Time out

An explanation of time limits in litigation

There are certain legal basics that trade union representatives and full-time officers should know about. One of them is the time limits for bringing court proceedings for different types of personal injuries.

Tony Lawton, a personal injury partner with Thompsons, explains what they are and why they are important.

Why are there time limits?

The first question is why the law has time limits. The first, and most obvious, purpose is to avoid claims being made long after the event, when the person or organisation has no chance of defending themselves properly, usually because witnesses have disappeared or documents have been destroyed.

Having said that, however, it is sometimes difficult to ascertain a rational basis for some of the time limits that exist. For example, employment law has a three-month limit for bringing a claim for breach of contract in an employment tribunal. Yet, the courts have a limit of six years for the same claim.

Limitation Act

In the personal injury field, the law is governed by the Limitation Act 1980. The main time limit is three years from the date of the accident or the date from when the "cause of action" arose.

This means that the claim form has to be issued in the court before the expiry of the three-year period. There is then a further period of up to four months from the date of issue of the claim form in which to serve it on the defendants.

The position in respect of industrial diseases is rather more complex. There is still a three-year limit, but the three year period begins to run from the date when the claimant knew or ought to have known that they had suffered a "significant" injury, and that the injury was caused in general terms by some fault of their employer.

There is a mass of case law trying to interpret what that means, but the bottom line is that, regardless of what medical advice the claimant may have had, the three-year clock begins to tick from the time when they believed that the injury was caused by their work.

So, for instance, a worker exposed to asbestos dust 30 years ago will not have to worry about time until they have been told by a doctor that they have a condition that is likely to have been caused by asbestos dust, and the clock begins from there.

Yet someone who has worked in excessive noise for many years, has noticed some loss of hearing for many years, and has believed for many years that work is the likely cause, is likely to be out of time if more than three years have elapsed since they formed that belief.

Other time limits

But that's not all. There are other situations to which different time limits may apply. For instance, a member may be assaulted at work either by a member of the public or by a work colleague in which case there is the likelihood of a successful claim to the Criminal Injuries Compensation Authority (CICA).

However, the time limit for bringing these claims is two years not three. In the same situation, the injured member assaulted at work will also have a potential claim against the assailant, against whom court proceedings must be commenced within six years.

Members may go abroad on holiday or on business. If they are injured while travelling as a passenger on an aeroplane or a ship, any court proceedings would have to be commenced within two years. If they suffer injury in a foreign country, and the only valid claim is against a defendant in that country, then they would need to find out the time limits in the country where the accident happened. Time limits around the world vary enormously and some of them are a lot shorter than those that apply in the UK.

Do time limits matter?

Most certainly. The limits are applied very strictly, although the courts do have discretion under Section 33 of the Limitation Act to allow a case to proceed even though the three-year period has expired. This discretion is applied sparingly, however, and usually only if the claimant can show that the employer has not been prejudiced by the delay.

It's crucial that trade union reps know the importance of time limits to be able to advise members accordingly

So, it's crucial that trade union reps know the importance of time limits to be able to advise members accordingly. But, over the years, some have unfortunately misinformed members, for example advising them to delay bringing a claim for a long period until after they have operative treatment.

Or in another example, advising a woman with a repetitive strain injury that there were no time limits applying to those sorts of cases. Even after the member had been to the Citizens Advice Bureau and been told there was a three year limit, the union representative told her that "they have got that wrong!"

Union representatives must be aware that, if, as a result of their action (or inaction), a member fails to bring the claim in time and as a result is unable to pursue it, that member will have a potential claim for negligence against the union. This will be the case whether the representative is a full time officer or a workplace representative.

Advising members

Given the different time limits, it is obviously asking a lot of union representatives to know the details of them all. That is why, in reality, all they need to know is that they are important and that the first question they should ask a member is "when did it happen?" It is also crucial that they advise members to obtain legal advice quickly.

And they should also advise members to bring claims quickly. Even if they are still within the time limit, it is much more difficult to pursue a case successfully if there has been a long delay before seeking advice.

Memories fade, witnesses die, cannot be traced or leave the country; documents may be destroyed, relevant equipment changed or sold. It is an uphill struggle trying to piece together the evidence to win a case long after the event. It is far easier to win a case when the evidence is fresh.

So, the message to all union representatives is clear. Be aware of the time limits when advising members, and make sure that they get legal advice quickly. Union reps often have a major part to play in assisting members to win their cases. An awareness of the importance of time limits is therefore crucial to the success of those cases.

PILR aims to give news and views on developments in health and safety issues and law as they affect trade unions and their members.

This publication is not intended as legal advice on particular cases

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