

Strictly Speaking
Rachel Barnes, May 2008

I am constantly warning professional consultants against undertaking strict and absolute duties and no-fault liability. There is perhaps a tendency to use these terms interchangeably but they do not mean quite the same thing.

In a recent Court of Appeal case concerning the Provision and Use of Work Equipment Regulations, the court said that a strict obligation was one where non-compliance with the obligation cannot be excused on the ground that it was not practicable or reasonably practicable to comply with it. This is not the same as absolute or no-fault liability, which imposes liability for something that could not have been avoided, even by the exercise of all possible care.

Thus, a term requiring a consultant to perform services in accordance with a particular timetable would be a strict obligation, whereas a term requiring a particular outcome (for example, that a design be fit for a particular purpose) could well impose absolute liability.

More complex, however, are terms containing more value-laden requirements; for example, to provide services or achieve outcomes that are adequate, effective or efficient. Such an obligation, if it is strict, may have the effect of imposing absolute liability; however, if this is not the case, what is the practical effect of the obligation being strict?

The specific regulation considered by the Court of Appeal begins as follows: *'Every employer shall ensure that all persons who use work equipment have received adequate training for purposes of health and safety ...'*

This is obviously intended to be a strict obligation, but what exactly is it saying? What does 'adequate' mean? On behalf of the claimant, who had suffered strain injury caused by her method of working, it was argued that this regulation imposes absolute, no-fault liability. She had not received the sort of training that would have avoided her injury, so the training was inadequate.

The court rejected this argument, mainly on the basis that no-fault liability is rare in English law and requires clear words of imposition. However, the court also said it was wrong to interpret the meaning of adequacy by reference to risks foreseen by the employer, which is the common law approach. The strict terms of the regulation require a higher standard than that. The court said the employer was required to carry out a full assessment of the risks that the work may involve and in respect of which training may be required, seeking expert advice if necessary. In other words, it had to go out and discover the risks.

This equates to another statutory duty that is strict but not absolute – the duty to fence dangerous machinery. The employer is not liable for an injury caused by failure to fence if it was not reasonably foreseeable that the machinery (or the relevant part of it) was in fact dangerous. This is a point that is nearly always determined by expert evidence.

The distinction made by the Court of Appeal between the strict liability of the regulation in question and common law liability may not be entirely convincing. After all, common law liability is based on reasonable foreseeability, which involves what ought to be foreseen, not just what is actually foreseen; and the common law standard may well require expert advice. Conversely, the strict standard that, according to the Court of Appeal, would normally require the obtaining of expert evidence must still acknowledge that there has to be a reason for an employer in any situation to appreciate the need for expert advice appropriate to that situation, otherwise the employer cannot know what sort of expert advice to seek. In this case, the employer, so the court held, must have been aware of the risk of strain injury, and so should have taken advice from an ergonomist. So the employer must then have been aware of a particular risk before this duty to consult an expert arose. Would the practical effect of the common law duty in such a situation be any different?

It seems that the difference may simply be one of degree, and that what the court is saying about the active nature of the strict duty means simply that it requires the use of, in the words quoted earlier, all possible care. This is to be contrasted with the common law standard of reasonable care. In the context of professional services, it would be contrasted with the standard of reasonable skill and care that normally applies to the performance of such services; and it should also be distinguished from absolute or no-fault liability, where liability may be imposed even though all possible care has been exercised.

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