Fault Lines
Rachel Barnes, October 2006

All employers have duties under health and safety legislation, but those in the construction industry will be aware that there are several regulations that apply specifically to them – for example, the CDM regulations which set out the duties of planning supervisors, designers and contractors. Some are absolute obligations, whilst others are mitigated by 'so far as is reasonably practicable'. How do the courts interpret the two duties?

In 1996, a nurse at an NHS hospital suffered a serious adverse reaction to wearing latex gloves, which led to a claim against the hospital trust. The evidence failed to establish that the employer should have known that this would happen. Nonetheless, the Court of Appeal held that there had been a breach of a statutory regulation:

The regulations state that employees should not be exposed to hazardous substances unless it is not 'reasonably practicable', in which case it should be adequately controlled.

As latex is a hazardous substance, the employer was liable. The fact that this was not reasonably foreseeable at the time was irrelevant. That is the nature of an absolute obligation. Fault, in any moral sense, does not enter into it.

Employers are also responsible for making sure, so far as is reasonably practicable, that employees and non-employees are not exposed to health and safety risks. But what does 'so far as is reasonably practicable' mean in practice? A recent prosecution followed the deaths of two employees who were providing traffic management services. They were moving a mobile lighting tower, but had not lowered it, when it struck an overhead power cable. Their employer argued that it had taken all practicable steps to ensure the safety of the men by way of training and instructions, and could not have foreseen their actions. The Health and Safety Executive argued that the issue of foreseeability was irrelevant to the question of whether or not the employer had breached its duty to take all reasonably practicable measures to ensure the safety of its employees.

The Court of Appeal rejected this argument. It accepted that a defendant could refer to the likelihood of the relevant risk taking place in support of its case. The court held that it might not be reasonably practicable for a person to take a particular measure with a low degree of risk and a high degree of cost.

The question of what is reasonably practicable can therefore involve carrying out a risk assessment, balancing the likelihood of the risk against the cost of taking action to eliminate it. Further, the employees had not taken reasonable measures to ensure their own safety. The HSE argued that their conduct should in effect be treated as the conduct of the organisation of which they were part. It contended that this was the intention of a provision in the regulations that states that an employee's acts or defaults cannot provide a defence to the employer.

The Court of Appeal rejected this too, on the basis that the phrase 'so far as is reasonably practicable' is not a defence, but qualifies the employer’s duty. The court followed an earlier case in which an employee's negligent action may have threatened the safety of third parties. This had not precluded the employer from arguing that it had taken all reasonably practicable measures to ensure that third parties were not exposed to risk.

Watch this space, however, because both these issues may now be considered by the House of Lords.

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