QBE European Operations

Technical claims brief

Monthly update | July 2013

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News

The Enterprise and Regulatory Reform Act – an end to the red tape of Health and Safety?

The Enterprise and Regulatory Reform Act followed a review of health and safety legislation commissioned by the Government. The report set out the following broad recommendations:

- Reduce the legal requirements on business which do not lead to improvements in health and safety
- Remove pressures on business to go beyond what the law requires, enabling them to reclaim ownership of the management of health and safety.

The report's author, Professor Lofstedt, suggested that regulatory provisions which impose strict liability should be reviewed and either qualified with 'reasonably practicable' (where strict liability was not absolutely necessary) or amended to prevent civil liability for a breach of those regulations. However, the Act goes much further than However, the Act goes much further than this and has the practical effect of preventing claimants from seeking compensation based on **any** breach of regulatory duty.

The Act received Royal ascent on 25 April 2013 and although a commencement date is still awaited, it is expected that the relevant section 69 will come into force on 1 October 2013. The aim of the section is doubtless to:

- Help business by limiting the right to claim for compensation to where it can be proved an employer has acted negligently
- If a claim is made, provide the employer with the opportunity to defend themselves on the basis of having taken reasonable steps to reduce the risk of an accident
- Provide reassurance to businesses that they can focus on managing health and safety risks in a sensible and proportionate way.

However, there are question marks over whether the measure as adopted will have the desired effect.

The changes should make some claims which currently have to be settled on the basis of a breach of regulation more defensible. Claims which currently have to be settled because the regulations impose strict liability are clearly ones that will be impacted by this change in the future, as in that sort of situation the strictness of the obligation will not be relevant to the extent of the duty in negligence. However, in only a relatively small proportion of claims does liability currently attach on this strict basis, which would not otherwise have attached for other reasons in any event. And once the Act is in force, employers will still have to be able to demonstrate that they provided employees with a safe place of work, a safe system of work, and that they were not vicariously liable through the actions of another employee.

The real danger is that, without breach of regulatory duty to rely on, claimants will be forced to seek to re-establish the same level of duty of care on the part of the employer through claims in negligence. Those claims will prove slow and costly to resolve and quite possibly leave the defendant in the same liability position as before but now faced with a much larger costs bill.

> *It is only once the Bill has come into force and a sufficient period of time has then elapsed that statistical evidence can be gathered regarding the number of personal injury claims brought by employees against their employers and their success rates. It may then be possible to ascertain whether the Government has achieved its aim of reducing the regulatory burden on business and bringing 'common sense' into health and safety matters or whether it has simply created a field day for lawyers who will be happy to fight through the courts to establish new tests of liability in areas that had been considered settled for the last 20 years.*

Liability

Reasonable foreseeability and the need to look before you leap – Hide v Steeplechase Co (Cheltenham) Ltd

During a competitive horse race at Cheltenham, Mr Hide, who was an experienced and professional jockey, sustained his injuries when jumping over the first hurdle at a racecourse. Having cleared the hurdle, the horse stumbled and fell, which caused Mr Hide to fall, hit the ground and move at speed into a post on the rail running around the outside of the track. He claimed under regulation 4 (suitability of work equipment) of the Provision and Use of Work Equipment Regulations 1998. He alleged that the hurdle was placed too close to the perimeter rail, which was too unyielding and/or insufficiently padded.

At first instance, the judge dismissed the claim on the basis that both the hurdle and the guardrail were suitable equipment. He decided that the way in which Mr Hide was injured was very unusual and that the defendant had complied with the requirements laid down by the British Horseracing Authority, and that the defendant could have done no more to have prevented his injury.

Mr Hide appealed and the issue for determination was whether the judge was correct to import the concept of 'reasonable foreseeability' into regulation 4.

Regulation 4 (4) says that 'suitable' meant 'suitable in any respect which it is reasonably foreseeable that will affect the health or safety of any person'. The correct interpretation meant it was for a defendant to prove (reversing the usual burden of proof) that the accident was attributable to occurrences due to unforeseeable circumstances beyond its control or occurrences due to exceptional events, the consequences of which were unavoidable despite the exercise of all due care.

The fact that an injury occurred in an unexpected way would not excuse a defendant, unless it could show further that the circumstances were 'unforeseeable' or 'exceptional'. It followed that the judge at first instance was incorrect to import into regulation 4 the classic common law phrase of reasonable foreseeability, and then to dismiss the claim on the basis that the way in which Mr Hide was injured was very unusual and that the defendant had abided by all requirements of the British Horseracing Authority.

As the judge had said, an accident of Mr Hide's kind, while not likely, was possible and in that sense foreseeable. The defendant could not show that the accident was due to unforeseeable circumstances beyond its control or to exceptional events, the consequences of which were unavoidable and the claimant's appeal was successful.

> *At first glance this seems like a tough decision on the defendants and their position was summed-up by the original trial judge who had referred to the 'remorseless march' of health and safety legislation and 'health and safety gone mad'. That said, the appeal judges identified that the padding on the guardrail could have been thicker or the hurdle could have been placed at a greater distance from the rail – both relatively straightforward and non-cost prohibitive options. The decision provides valuable guidance to stadium and track owners and to sports governing bodies about the stringent requirements upon them when considering, selecting and placing barriers around their sporting event.*

Legislation

A good walk spoiled? - Phee v Gordon & Ors

The golfers amongst you may remember the 2011 case of Anthony Phee v James Gordon and Niddry Castle Golf Club.

By way of background, Mr Phee was playing a round of golf at Niddry Castle Golf Club in Winchburgh, West Lothian when he was hit in the eye by a ball struck by a golfer teeing off on a separate hole. Mr Phee lost the sight in his eye and brought a court action against Mr Gordon (the golfer who struck the tee shot) and the golf club. After hearing evidence from all of the parties involved, the Court of Session in Edinburgh found in Mr Phee's favour and awarded him damages of £400,000. The Court held that Mr Gordon was 70% responsible for the injury due to his negligence in taking his tee shot when people were walking close to the tee, whilst the golf club was 30% responsible for failing to erect appropriate signs to safeguard golfers' safety.

Both Mr Gordon and Niddry Castle Golf Club appealed the decision to the Inner House of the Court of Session and the appeal was decided on 14 March 2013. Whilst the Inner House agreed that Mr Gordon and the golf club were responsible for Mr Phee's injury, it decided that the golf club should bear 80% of the responsibility, with Mr Gordon bearing the remaining 20%.

On appeal the Court considered: the layout of the golf course, the accident locus, the club safety practices, rules of the club and the absence of any warning signs. The club's failure to warn by signage was a significant failure and it followed that the club must bear the greater share of liability.

> *This was an unfortunate accident, but one which serves to underline the common law duty owed by occupiers, but also by individuals. So what lessons can be learned? Clubs should carry-out formal risk assessments on their courses. If a risk exists, putting preventative measures in place is absolutely necessary. For players, there will always be a risk of danger. To avoid injury, one should always look around to make sure there is no one nearby to be hit by the ball.*
>
> *From a purely self-preservation perspective, if someone shouts 'Fore', it is advisable to duck down, cover your head and not look up!*

Procedure – Fatal Accident Claims

Who qualifies as a dependant? – Laurie Swift v Secretary of State for Justice

The Claimant had been living with her partner, Mr Winters, for about six months (and was pregnant with their child) when he was fatally injured at work as a result of the admitted negligence of a third party. The child, who was born after Mr Winters' death, was able to make a claim for loss of dependency under s.1(3)(e) of the Fatal Accident Acts 1976. However, the Claimant was not entitled to make a claim under the same Act since she did not meet the two-year cohabitation requirement under s.1(3)(b)(ii) of the FAA. Section 1(3)(b) of the FAA provides that a 'dependant' is any person who:

1. Was living with the deceased in the same household immediately before the date of the death; and
2. Had been living with the deceased in the same household for at least two years before that date; and
3. Was living during the whole of that period as the husband or wife or civil partner of the deceased.

The Claimant argued that the section was incompatible with her rights under the European Convention on Human Rights 1950 and unjustifiably discriminated against persons who had been cohabiting as husband and wife for less than two years. The case was dismissed in the High Court, so the Claimant appealed.

The Court of Appeal dismissed the Claimant's appeal and held the section was a proportionate means of achieving a legitimate aim – to confer a right of action on dependants of victims of fatal wrongdoing to recover damages in respect of their loss of dependency, whilst confining that right to those who had relationships of some degree of permanence and dependence. Parliament was entitled to take the view that there could not be a presumption in the case of short-term cohabitees, unlike in the case of married couples or parents and their children,that the relationship was or was likely to be one of permanence and constancy. It was entitled to decide that it was therefore necessary to have a mechanism for identifying those cases in which the relationship between cohabitants was sufficiently permanent to justify protection under the Act.

> *This decision provides clarity by maintaining the status-quo relating to dependency claims. The Court sent out a clear message that the two-year threshold is a proportionate and reasonable test. The bright-line distinction inevitably means some Claimants will fall on the wrong side of the line, but it produces certainty and prevents the need for intrusive enquiries into the nature and quality of a Claimant's relationship to the deceased.*

Completed 25 June 2013 – written by QBE EO Claims. Copy judgments and/or source material for the above available from Jonathan Coatman (contact no: 0113 2906713, e-mail: jonathan.coatman@uk.qbe.com).

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