

PIBA

STATUTORY DUTY

STRICT LIABILITY?

Workplace Regulations

Regulation 5 of the Workplace (Health, Safety and Welfare) Regulations 1992 -

“the workplace and the equipment, devices and systems to which this regulation applies shall be maintained (including cleaned as appropriate) in an efficient state, in efficient working order and in good repair.”

The words/phrases “efficient state” and “efficient working order” are not defined in the Regulations. The Approved Code of Practice states that “efficient” means efficient from the view of health, safety and welfare (not productivity or economy). There are Guidance Notes as well and in turn they refer to separate HSE publications giving advice, British Standards, EU Standards, manufacturers’ information and instructions and trade literature. It is to be wondered whether the standard of maintenance and repair is to be judged by the industry standards rather than the law’s views of the standards to be expected.

The wording has its origins at least 70 years ago. The Factories Act 1937 required that lifts and hoists be “properly maintained” and that was defined as “maintained in an efficient state, in efficient working order and in good repair”. The Mines and Quarries Act 1964 and Shipbuilding Regulations used the same wording.

It is clear that there are 2 requirements, maintenance and repair. A swing door and restraint mechanism might be in good repair in that nothing is worn, but if not properly adjusted not be in efficient working order and may be a source of danger.

Stark v The Post Office [2000] ICR 1013 CA considered the liability imposed by the words used in Regulation 5. The same wording is used in Regulation 5 of the Provision and Use of Work Equipment Regulations 1998, “every employer shall ensure that work equipment is

maintained in an efficient state, in efficient working order and in good repair.” The claimant was riding a Post Office bicycle. The stirrup broke and the claimant was thrown off the bicycle and sustained injury. The defect was caused by metal fatigue or a casting defect not discernable on normal maintenance. It was held that the bicycle was not maintained in an efficient state, in efficient working order and in good repair. It was held to be a strict liability duty. It can be said that at the moment that the stirrup broke it was not in efficient working order, nor in good repair.

If the brakes on Mr Stark’s bicycle had been in good condition (good repair) there could still be a breach if they were not properly adjusted. But there would only be a breach if they were not in efficient working order, and that requires a judgment of their efficiency. Should it be the ability to stop on a sixpence/five new pence, or something different? How long is the piece of string that measures the stopping distance?

Why does the section not use the word “safe”?

Consider the obligation to keep personal protective equipment “in an efficient state, in efficient working order and in good repair. The obligation is imposed by regulation 7(1) of the Personal Protective Equipment Regulations 1992. The claimant Mr Fytche was a lorry driver who collected milk from farms. He was supplied with steel-capped safety boots. There was a hole in one boot and water got in. In extreme cold weather conditions he suffered frostbite. It was held that the obligation was not an absolute concept but had to be construed in relation to what made the equipment “protective equipment”. The boots were provided to protect his toes from the fall of something heavy; they were not meant to be waterproof or to be used in extreme weather conditions. *Fytche v Wincanton Logistics plc* [2004] UKHL 31.

The obligation may be strict, but the standard may be variable. Regulation 7 of the Workplace (Health, Safety and Welfare) Regulations 1992 states -

“the temperature in all workplaces inside buildings shall be reasonable.”

The Approved Code of Practice says that the temperature should provide reasonable comfort without the need for special clothing. A minimum of 16C is referred to for workrooms save where severe physical effort is required. It then acknowledges that there are hot and cold processes; think of cold stores and metal foundries The Code recognises that air movement and relative humidity affect whether the temperature is reasonable. Think of the glass houses at Kew Gardens. The Guidance Notes refer to an HSE publication on thermal comfort.

Regulation 8 of the Workplace (Health, Safety and Welfare) Regulations 1992 states requires “suitable and sufficient lighting”.

The Approved Code of Practice says it should be sufficient to enable people to work, use facilities and move from place to place safely. On the other hand it advises that dazzling lights and annoying glare should be avoided. The Guidance Notes refer to the HSE publication “Lighting at Work.” The standard may vary according to the location and the work that needs to be done.

Consider regulation 9 of the Workplace (Health, Safety and Welfare) Regulations 1992 which states -

“every workplace and the furniture, furnishings and fittings therein shall be kept sufficiently clean.”

The Approved Code of Practice says that the standard of cleanliness will depend on the use to which the workplace is put. It gives the example of an area where workers take their meals compared with the factory floor.

Regulation 10 of the Workplace (Health, Safety and Welfare) Regulations 1992 states -

“every room where persons work shall have sufficient floor area, height and unoccupied space for purposes of health, safety and welfare.”

The Approved Code of Practice says that workrooms should have enough free space to allow people to get to and from workstations and to move within the room with ease. The size of the room, space taken up by furniture and the like and the layout are all factors to be considered. A guideline figure of 11 cubic metres is suggested as a standard, but for instance it does not apply to kiosks or lecture theatres.

Consider regulation 11 of the Workplace (Health, Safety and Welfare) Regulations 1992 which states -

“every workstation shall be so arranged that it is suitable both for any person at work in the workplace who is likely to work at that workstation and for any work of the undertaking which is likely to be done there.”

The Approved Code of Practice refers to each task being carried out safely and comfortably. Work materials and frequently used equipment or controls should be within easy reach, without undue bending or stretching. The Guidance Notes refer to a handful of HSE publications, including “Reducing Error and Influencing Behaviour.”

Regulation 12(1) of the Workplace (Health, Safety and Welfare) Regulations 1992 which states - “every floor in a workplace shall be of a construction such that the floor or surface of the traffic route is suitable for the purpose for which it is used”.

Regulation 12(2) says that the floor .. “shall not be uneven or slippery so as to expose any person to a risk to his health or safety.”

The Approved Code of Practice says that surfaces of floors and traffic routes which are likely to get wet or to be subject to spillages should be of a type which does not become unduly slippery.

Regulation 12(3) provides

“so far as is reasonably practicable, every floor in a workplace and the surface of every traffic route in a workplace shall be kept free from obstructions and from any article or substance which may cause a person to slip, trip or fall.”

The Approved Code of Practice refers to the provision of effective drainage where a floor is likely to get wet to the extent that the wet can be drained off. So consider laundries, kitchens and car washes.

Consider the total effect. If the floor tile becomes slippery when wet, then according to the Approved Code of Practice, the focus should be on regulations 12(1) and (2) and not on the

less strict 12(3). If a non-slip coating comes off the tiles then that is a breach of regulation 5, a failure “to maintain in an efficient state, in efficient working order and in good repair.”

Provision and Use of Work Equipment Regulations

Regulation 4 of the Provision and Use of Work Equipment Regulations 1998 provides -

“every employer shall ensure that work equipment is so constructed or adapted as to be suitable for the purpose for which it is used or provided.”

Regulation 5 of the Provision and Use of Work Equipment Regulations 1998 provides -

“every employer shall ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair.”

The Guidance Notes put this into good context.

“Some parts of equipment such as guards, ventilation equipment, emergency shutdown systems and pressure relief devices have to be maintained to do their job at all times.”

This rather suggests that with some other work equipment there is a less exacting standard. But if there is a failure and danger is created does that not create the breach in the same way that the unknown fault in the bicycle stirrup rendered the employer liable to Mr Stark?

Regulation 7 requires that the use and maintenance and repair of work equipment is restricted where there is a “specific risk to health or safety”. There is no definition of “specific risk” and the Guidance Notes only give examples, namely platen printing machines and drop forging machines.

It is perhaps easier to recognise whether the instruction or training required by Regulations 8 and 9 is “adequate”.

Regulation 11 is an interesting example of the way that the standards can vary.

“(1) every employer shall ensure that measures are taken in accordance with para (2) which are effective -

- (a) to prevent access to any dangerous part of machinery ...
- (b) to stop the movement of any dangerous part of machinery ... before any person enters a danger zone.

(2) the measures requires by para (1) shall consist of -

- (a) the provision of fixed guards enclosing every dangerous part ... where and to the extent that it is practicable to do so, but where or to the extent that it is not, then
- (b) the provision of other guards or protection devices where and to the extent that it is practicable to do so, but where or to the extent that it is not, then
- (c) the provision of jigs, holders, push sticks or similar protection appliances used in conjunction with the machinery where and to the extent that it is practicable to do so, but where or to the extent that it is not, then
- (d) the provision of information, instruction, training and supervision.

Thus the defining requirement between the different protection regimes is practicability. The Guidance Notes refer to the existence of HSC/HSE publications and current national, European and international standards.

It is worthy of note that in respect of the meaning of “dangerous part” the Guidance Notes refer to judicial decisions, saying that in practice it means that if a piece of work equipment could cause injury if it is being used in a foreseeable way, it can be considered a dangerous part. That has approach has been followed in *Robb v Salamis (M&I) Limited* [2006] UKHL 56

Personal Protective Equipment Regulations 1992

Regulation 4 provides -

“every employer shall ensure that suitable personal protective equipment is provided to his employees who may be exposed to a risk to their health or safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective.”

Thus the first question is whether there is a risk, and the second question is whether the personal protective equipment is suitable. There is no requirement to remove the risk entirely. Indeed the Guidance Notes state that where risks are sufficiently low that they can in effect to be adequately controlled, then PPE need not be provided.

Consider also the manual handling cases where “risk” has been considered.

“Real risk” *Hawkes v London Borough of Southwark* (1998)

“no more than a foreseeable possibility” *Anderson v Lothian Hlth Brd* [1996] SCLR 1086

“foreseeable possibility” *Cullen v North Lanarkshire Council* [1998] SC 451

“a real risk ... element of realism required”

Koonjul v Thameslink Healthcare Services [2000] PIQR P123 CA

Control of Substances Hazardous to Health

In *Dugmore v Swansea NHS Trust and Morriston NHS Trust* [2003] ICR 574 CA the claimant nurse became sensitised to latex protein from latex gloves used in the hospitals. The statutory duty was considered.

Regulation 7(1) provided -

“every employer shall ensure that the exposure of his employees to substances hazardous to health is either prevented or, where this is not reasonably practicable, adequately controlled.”

It was held that the duty in reg 7(1) is an absolute one: to ensure that exposure is prevented or controlled. ensure that exposure is either prevented or controlled.

[/uk/legal/search/runRemoteLink.do?service=citation&langcountry=GB&risb=21_T1509800351&A=0.644885561827168&linkInfo=GB%23UK_ACTS%23num%251961_34a%25section%2529%25sect%2529%25&bct=A](http://uk/legal/search/runRemoteLink.do?service=citation&langcountry=GB&risb=21_T1509800351&A=0.644885561827168&linkInfo=GB%23UK_ACTS%23num%251961_34a%25section%2529%25sect%2529%25&bct=A)The defence of reasonable practicability qualifies only the duty of total prevention. Until the claimant became sensitised to latex protein, the substance hazardous to her health was contained in the powdered latex gloves. it would have been a simple matter to replace those gloves with vinyl gloves: this was not rocket science

waiting to be invented. It was for the hospital to prove that it was not reasonably practicable for them to do this.

There is the question of whether the claimant's exposure was adequately controlled. Here, the duty is to ensure that exposure is adequately controlled. 'Adequately' is defined in reg 7 without any reference to reasonableness or the foreseeability of risk: it is a purely practical matter depending upon the nature of the substance and the nature and degree of the exposure and nothing else. It cannot be adequate control to oblige an employee frequently to wear powdered latex gloves when other barriers are available.

“The purpose of the regulations is protective and preventive: they do not rely simply on criminal sanctions or civil liability after the event to induce good practice. They involve positive obligations to seek out the risks and take precautions against them. It is by no means incompatible with their purpose that an employer who fails to discover a risk or rates it so low that he takes no precautions against it should nevertheless be liable to the employee who suffers as a result.”

IS EXPERT EVIDENCE REQUIRED TO UNDERSTAND THE STANDARDS?

For many situations it is to be doubted.

The Guidance Notes to Regulation 4 of the Provision and Use of Work Equipment Regulations 1998 (suitability of work equipment) suggest that most duty holders will be capable of making the risk assessment themselves. But it is acknowledged that in respect of complex hazards or equipment the risk assessment may need to be done in conjunction with the help of external health and safety advisors. In the more straight-forward situations the Judge will be able to make a judgement. In more technical areas the Judge would have little or no experience of the work activity. There will be situations where a lack of knowledge will be a bad thing.

Look for example at the provisions of Regulation 11 (which were considered above) which involve a hierarchy of protection measures, distinguished by the requirement of practicability.

- (a) the provision of fixed guards ... where not practicable, then
- (b) the provision of other guards or protection devices ... where not practicable, then

- (c) the provision of jigs, holders, push sticks or similar protection appliances used in conjunction with the machinery where not practicable, then
- (d) the provision of information, instruction, training and supervision.

Expert evidence could well be required to assist in determining what was practicable at the relevant time.

PUBLIC SERVICE v EMPLOYEE'S PROTECTION

It seems to be a question of balancing the risk of injury against the necessity of the task in hand. Consider the progression revealed in these manual handling cases.

Knott v Newham Healthcare Trust [2002] EWHC 2091(QB), upheld on appeal. The claimant was a hospital nurse. Part of her duties involved moving patients, which was a manual handling task as defined in the Manual Handling Operations Regulations 1992. There was one hoist for use in 2 wards. The hoist was often inoperable. The claimant worked on a high dependency ward. Patients were moved using the “drag lift” which had been criticised for many years as creating a risk of injury. The claimant suffered injury to her back. It was held that there was a causative breach of the Regulations and the claimant recovered substantial damages.

Fleming v Stirling Council [2001] SLT 123, the Regulations applied to an emergency operation carried out on the initiative of employees where an emergency of the type that occurred was foreseeable. In this case the employee had caught a patient who was supervising who had fallen trying to get up from the toilet. [CHECK FULL CASE]

Jack v Royal Berkshire Fire & Rescue Services (Mayors & City of London County Court (District Judge Trent) 22/8/2002). The defendant was not liable for the injuries sustained by a firefighter who tripped and fell down an awkward staircase when carrying out salvage operations following a fire because it had properly assessed the risks identified by the Manual Handling Operations Regulations 1992 and had reduced them to their lowest level. Consideration was given to the task to be undertaken, the urgency of task, the actions that could have been taken to resolve risks, the experience of the firefighter, training, and lack of complaint before undertaking task. There had to be a balance between the risk of injury to the

firefighter and the risk that the fire might re-ignite. The fire-hose could not be removed because there was a risk of the fire re-igniting.

Sussex Ambulance NHS Trust v King [2002] ICR 1413 the ambulance service's duty to its employee was balanced with the duty of care owed to its patients. The claimant employee was required to carry a patient down a narrow twisting staircase which carried with it a foreseeable risk of injury. The task was not an emergency but was urgent. The claimant was injured whilst carrying the patient in a carry-chair down the stairs. The Court of Appeal held that there was no breach of the Manual Handling Regulations 1992, the duty being to reduce risk, not necessarily to eliminate it. It was a question of what was reasonably practicable. The only alternative way to remove the patient from his home would have been by using the fire brigade to take out the window and remove the patient through the window. Whether such a call for help was the appropriate solution depended on the magnitude of the problem, the urgency of the case and the actual or likely response of the patient or his carers and the fire brigade. In common law when determining the reasonableness of the Defendant's conduct the court must balance the risk against the utility of the action. In determining therefore what the Defendant should have done the court must assess the appropriateness of the method to move a person in the circumstances of the case, that what is appropriate is not merely what is theoretically possible and appropriateness must be assessed against the urgency of the case (Hale LJ). The essential premise was therefore that an ambulance person may have to accept a greater degree or risk than one who is employed to move inanimate objects and that what is reasonable in these circumstances has to be evaluated with regard to the social utility of the operation, a public authority's duties to the public and that person in general.

R v East Sussex County Council, the Disability Rights Commission (interested party), ex parte A, B (by their Litigation friend the Official Solicitor) X, Y [2003] EWHC 167 (Admin). X and Y were 2 adult siblings with from profound physical and learning disabilities who lived with their parents. There was a disagreement between the parents and the County Council as to the level of manual handling operations that should be undertaken. The County Council refused to provide care staff to undertake manual handling operations to the extent demanded by their parents. The court's judgement was that the statutory regime aimed to avoid hazardous manual lifting so far as was reasonably practicable and commensurate with

the best interests of the disabled person, his dignity and the promotion of his independence and human rights. However the regime also recognised that the needs of the disabled person could mean that it was not reasonably practicable to avoid a particular risk or to reduce it as much as might otherwise be appropriate. In assessing what was reasonably practicable the relevant factors were: (a) the possible methods of avoiding the risk; (b) the context; (c) the risks to the employee; and (d) the physical, emotional, psychological and social impact upon the disabled person.

The court held that a manual handling risk assessment should include consideration of the impact on the employee and the impact on the disabled person. The employer had to balance the two impact assessments against each other and if it came down in favour of manual handling then the employer had to make appropriate risk assessments and take steps to minimise the risks.

SOME THOUGHTS AND EXAMPLES ON THE 6-PACK REGULATIONS

Management of Health and Safety at Work Regulations 1999

These Regulations came into force on 29th December 1999. Originally, section 22 excluded civil liability for breach of the Regulations. That was changed by amendment and this has now been further amended by the Management of Health & Safety at Work (Amendment) Regulations 2006. These last came into force on 6th April 2006. Section 22 now reads as follows:-

22 - (1) Breach of a duty imposed on an employer by these regulations shall not confer a right of action in any civil proceedings insofar as that duty applies for the protection of a third party.

22-(2) Breach of a duty imposed on an employee by regulation 14 shall not confer a right of action in any civil proceedings insofar as that duty applies for the protection of a third party.

22-(3) In this regulation “third party” in relation to the undertaking means any person who may be affected by that undertaking other than the employer whose undertaking it is and the persons in his employment.

Thus there is limited civil remedy for breach of the Regulations.

Criminal liability for breach of the Regulations under the Health and Safety at Work Regulations remains unaltered.

Risk assessment

3. - (1) Every employer shall make a suitable and sufficient assessment of -

(a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and

(b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,

for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions and by Part II of the Fire Precautions (Workplace) Regulations 1997.

It is always unhelpful to the defendants' case if there was a failure to carry out a risk assessment. But it is not decisive. The court will be looking to see whether if the general risk assessment had been carried out it would have identified the risk and would have determined that the risk was significant to the degree that something needed to be done to reduce or remove the risk. (*Spencer v Boots The Chemist* [2004] EWCA Civ 1691) - pharmacist lifting bottles up onto a shelf.)

In *The Home Office v Lowles* [2004] EWCA Civ 985 the claimant usually entered the premises through the main gate, but used a side entrance if the main entrance was blocked, the defendants could not avoid liability by producing a risk assessment which determined that there was no risk. The Court of Appeal held that the judge was right to consider that the presence of a step masked by a door created a significant hazard.

In *Sherlock v Chester City Council* [2004] EWCA Civ 201 it was held that a risk assessment would have identified the need to make the claimant aware and to remind him of the availability of equipment which would have made the use of the circular saw safer. What was needed was a system to identify a proper work practice. The claimant was found to be 60% contributory negligent, but the Court of Appeal was satisfied that the employers negligence and breach of statutory duty were a cause of the accident.

Principles of prevention to be applied

4. Where an employer implements any preventive and protective measures he shall do so on the basis of the principles specified in Schedule 1 to these Regulations. (a) avoiding risks;

(b) evaluating the risks which cannot be avoided;

(c) combatting the risks at source;

(d) adapting the work to the individual, especially as regards the design of workplaces, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate and to reducing their effect on health;

(e) adapting to technical progress;

(f) replacing the dangerous by the non-dangerous or the less dangerous;

(g) developing a coherent overall prevention policy which covers technology, organisation of work, working conditions, social relationships and the influence of factors relating to the working environment;

(h) giving collective protective measures priority over individual protective measures;
and

(i) giving appropriate instructions to employees.

Protection of young persons

19. - (1) Every employer shall ensure that young persons employed by him are protected at work from any risks to their health or safety which are a consequence of their lack of experience, or absence of awareness of existing or potential risks or the fact that young persons have not yet fully matured.

(2) Subject to paragraph (3), no employer shall employ a young person for work -

(a) which is beyond his physical or psychological capacity;

(b) involving harmful exposure to agents which are toxic or carcinogenic, cause heritable genetic damage or harm to the unborn child or which in any other way chronically affect human health;

(c) involving harmful exposure to radiation;

(d) involving the risk of accidents which it may reasonably be assumed cannot be recognised or avoided by young persons owing to their insufficient attention to safety or lack of experience or training; or

(e) in which there is a risk to health from - (i) extreme cold or heat; (ii) noise; or (iii) vibration,

and in determining whether work will involve harm or risks for the purposes of this paragraph, regard shall be had to the results of the assessment.

Workplace (Health, Safety and Welfare) Regulations 1992

Maintenance of workplace, and of equipment, devices and systems

5. - (1) The workplace and the equipment, devices and systems to which this regulation applies shall be maintained (including cleaned as appropriate) in an efficient state, in efficient working order and in good repair.

Strict liability - *Stark v Post Office* - post office bicycle - brake stirrup broke.

However, the regulation does not impose an obligation to install equipment. It was concerned with maintenance of equipment that had already been installed (*Coates v Jaguar Cars Ltd* unreported 2004 CA)

In *Fychte v Wincanton Logistics plc* [2004] UKHL 31 in respect of a similar duty under the Personal Protective Equipment Regulations 1992 it was held that the words "in efficient state, in efficient working order and in good repair" in the Personal Protective Equipment at Work

Regulations 1992 reg.7(1) was not an absolute concept but had to be construed in relation to what made the equipment protective equipment. An employer did not have a duty to do repairs and maintenance that had nothing to do with its protective function. The claimant was employed by as a lorry driver collecting milk from farms. In extreme weather conditions, water had leaked through a hole in his boots and reached his little toe, causing mild frostbite. The claimant had been provided with steel-capped safety boots. They were provided to protect his toes in case something heavy fell on them, but were not meant to be waterproof or to be used outside in extreme weather conditions.

Do the Workplace Regulations apply to visitors?

Regulation 5(1) of the Workplace Regulations provides:

- “(I) The workplace and the equipment, devices and systems to which this regulation applies shall be maintained (including cleaned as appropriate) in an efficient state, in efficient working order and in good repair.
- (ii) Where appropriate, the equipment, devices and systems to which this regulation applies shall be subject to a suitable system of maintenance
- (iii) The equipment, devices and systems to which this regulation applies are
 - (a) equipment and devices a fault in which is liable to result in a failure to comply with any of these regulations;

The Work Equipment Regulations do extend to a defective lift situated in the common parts of a building, thus enabling the claimant to succeed in her claim against her employers; see *PRP Architects v Precious Reid* [2006] EWCA Civ 1119. The Court of Appeal held that “work equipment” was to be given a broad interpretation. The Court was also satisfied that the claimant was using the lift “at work” within the meaning of the regulations even though she was going home at the end of the day.

The claimant in *PRP Architects* also pleaded the Workplace regulations. The judge at trial, having found for her on the Work Equipment Regulations declined to decide the Workplace Regulations point. The Court of Appeal (whilst acknowledging that they had not heard full

argument) decided that the employer had insufficient control of the lift to bring them within the ambit of the Workplace Regulations.

Regulation 2 of the Workplace Regulations, “workplace” includes:

“(b) any room, lobby, corridor, staircase, road or other place used as a means of access to or egress from that place of work or where facilities are provided for use in connection with the place of work other than a public road”.

Thus the car park and footpaths to an office building would be included.

But there is another requirement, that of control. Regulation 4(1) of the Workplace Regulations provides, insofar as is material:

“Every employer shall ensure that every workplace, modification, extension or conversion which is under his control and where any of his employees works complies with any requirement of these Regulations ...”

It can be seen that in the context of that case it was a rather different and difficult point. The common staircase and lift was not controlled by her employer. She did not work there, although she did use work equipment there (the lift). Thus the argument against her employer on the Workplace Regulations looks very weak.

The claim was also pleaded against the landlord and the lift maintenance company, but those claims were not pursued at trial. Let us concentrate on a claim against the landlord.

It can be seen that the landlord cannot be within the definition of Regulation 4(1) of the Regulations provides, insofar as this claimant was concerned because she was not his employee. However, by virtue of Regulation 4(2), the obligations apply to every person who has

“to any extent, control of a workplace, modification, extension or conversion”.

This is qualified by Regulation 4(3)

“Any reference in this regulation to a person having control of any workplace (etc) is a reference to a person having control of the workplace ...in connection with the carrying on by him of a trade, business or other undertaking (whether for profit or not).”

This is sometimes referred to as the butler and nanny exemption.

In the context of the landlord the question is whether the area is a “workplace”. Can liability depend on whether the landlord employs a receptionist in the lobby? It may do.

The same consideration will apply to other premises. It is to be noted that the Guidance Notes to the Regulations say that it is intended to protect the health and safety of everyone in the workplace. Thus the shop assistant is covered. So is the contract cleaner. And using the same reasoning, the Regulations would also apply to protect the shop customer.

Condition of floors and traffic routes

12. - (1) Every floor in a workplace and the surface of every traffic route in a workplace shall be of a construction such that the floor or surface of the traffic route is suitable for the purpose for which it is used.

(2) Without prejudice to the generality of paragraph (1), the requirements in that paragraph shall include requirements that -

- (a) the floor, or surface of the traffic route, shall have no hole or slope, or be uneven or slippery so as, in each case, to expose any person to a risk to his health or safety; and
- (b) every such floor shall have effective means of drainage where necessary.

(3) So far as is reasonably practicable, every floor in a workplace and the surface of every traffic route in a workplace shall be kept free from obstructions and from any article or substance which may cause a person to slip, trip or fall.

It was held that there had been a breach of regulation 12(3) where a box had been left on the classroom floor and not tidied away. The box was used during the day to store the children's lunch boxes. The system in place at the school was that once the children had collected their lunch boxes and left, the box was to be stowed away. It was reasonably practicable to do so, and was what was normally done. On the day in question the box was not stowed away. Thus the floor of the traffic route had not been kept free of an article that might cause a person to fall. It did not help the Defendants on primary liability that the box was large and bright blue, although it was relevant to contributory negligence, which was found to be 50%. *Burgess v Plymouth City Council* [2005] EWCA Civ 1659.

Similarly, it was held that where it was reasonably practicable to keep the floor free of the obstruction created by a library kick stool there had been a breach of duty (*Robinson v Midland Bank plc* (2000)).

But contrast those 2 decisions with the decision in *Pratt v Internet Refractories Ltd* (2000). On the evidence before the court, the recorder was fully entitled to hold that the claimant's injury was not caused by the defendant's breach of duty under the Workplace (Health, Safety and Welfare) Regulations 1992, but was caused by the claimant's own inattention and negligence in failing to notice the readily visible piece of wood which he tripped over causing injury to his back.

In *Bassie v Merseyside Fire & Civil Defence Authority* [2005] EWCA Civ 1474 it was held that a film of invisible dust was a breach of regulation 12(3) and that since it was reasonably practicable to keep the floor free of dust by damp mopping, there had been a causative breach of statutory duty. It was not relevant to the issue of breach as to whether it was known that

the dust was present on the floor, nor whether its presence was reasonably foreseeable. Knowledge was relevant to the issue of reasonable practicability. The Defendants knew that dust was brought into the room which was used for physical training for the firefighters. Mopping was to be carried out on the day after the accident, but in the circumstances it was reasonable to mop before having physical training in that room.

How then to reconcile that with the decision in *Lewis v Avidan Ltd* [2005] EWCA Civ 670? There the claimant care assistant slipped on a patch of water which had come from a concealed pipe that had burst shortly before the accident. It was held that there had been no breach of regulation 12(3). The answer is that the Judge had found that in the time scale it had not been reasonably practicable to have acted differently to deal with the flood.

Where a roof was not kept in good repair, causing water to leak onto the floor, where the claimant slipped, it was held that there had been breaches of regulation 5(1) and regulation 12(3). *Fox v Michael Serratt & others* 26/1/2005 (Judge Holman).

Provision and Use of Work Equipment Regulations 1998

These 1998 Regulations came into force on 5th December 1998.

Reg 3 (2) The requirements imposed by these Regulations on an employer in respect of work equipment shall apply to such equipment provided for use or used by an employee of his at work.

The Provision and Use of Work Equipment Regulations 1992 do not extend to equipment which an employee was working on but was limited to the equipment which he had been using to undertake his work, the “tools of the trade” (*Hammond v Commissioner of Police* (2004) CA.) At the time of the accident the claimant had been employed by the first defendant as a senior maintenance operator. He was doing some work on a police van. In

order to deal with what he had perceived to have been the problem, he attempted to undo one of the wheel bolts on the front offside wheel with a knuckle bar and socket, when the bolt sheared off, causing him to fall awkwardly.

The Regulations do extend to a defective lift situated in the common parts of a building, **PRP Architects v Precious Reid** [2006] EWCA Civ 1119. The Court of Appeal held that “work equipment” was to be given a broad interpretation. The Court was also satisfied that the claimant was using the lift “at work” within the meaning of the regulations even though she was going home at the end of the day.

It is to be doubted that the lift was in the “workplace” within the meaning of the Workplace (Health, Safety and Welfare) Regulations 1992.

Suitability of work equipment

4. - (1) Every employer shall ensure that work equipment is so constructed or adapted as to be suitable for the purpose for which it is used or provided.

(2) In selecting work equipment, every employer shall have regard to the working conditions and to the risks to the health and safety of persons which exist in the premises or undertaking in which that work equipment is to be used and any additional risk posed by the use of that work equipment.

(3) Every employer shall ensure that work equipment is used only for operations for which, and under conditions for which, it is suitable.

(4) In this regulation "suitable" means suitable in any respect which it is reasonably foreseeable will affect the health or safety of any person.

The measure of risk, perceived disadvantages, and the attitude of the workforce was such that the respondent's failure to fit screens on buses did not amount to negligence. In assessing the suitability of work equipment, the court was required to consider the degree of risk involved.

Yorkshire Traction Co Ltd v Walter Searby [2003] EWCA Civ 1856. The claimant was a bus driver. He was assaulted by a passenger whilst sitting in the driver's seat. He argued that there should have been a screen to separate the driver from the passengers. The defendants did owe a duty of care and its discharge could on occasions involve initiatives independent of the workforce and disagreements with the workforce. However, in the present case, the attitude of the workforce was a substantial factor. Experienced bus drivers in well organised trade unions had objected to the insertion of screens due to health and safety concerns (e.g. reflection of light at night). Some drivers had taken action to have screens removed from buses purchased with screens. In addition, the facts showed that risk of injury to bus drivers from assaults by a passenger was very low.

Work equipment was not to be regarded as unsuitable merely because inadequate control could cause injury (*Griffiths v Vauxhall Motors Ltd*, 2003 CA). The claimant was using an air-powered tool.

But where employees had bunks to sleep in whilst on duty there was a breach of regulation in supplying removable suspended ladders to access the top bunk and the claimant was injured trying to use an incorrectly placed ladder. **Robb v Salamis** [2006] UKHL 56.

Maintenance

5. - (1) Every employer shall ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair.

(2) Every employer shall ensure that where any machinery has a maintenance log, the log is kept up to date.

This is a regulation imposing strict liability; see the well known case of *Stark v Post Office* - post office bicycle - brake stirrup broke. Similarly where a coil spring fractured and

richocheted into the claimant's eye from a hay baling machine; *Ball v Street* [2005] EWCA PIQR P22. Foreseeability is not a necessary ingredient.

In *Ball v Street* the decision in *Fychte v Wincanton Logistics plc* [2004] UKHL 31 was distinguished. In *Ball v Street* the hay baling machine and its owner had been hired by the claimant. At the time of the accident the claimant was working alone, with permission. The Defendants argued that there was no liability because there was no separate agreement for use of the machine without the Defendant, and thus it was a neighbourly loan which fell outside the ambit of the regulations. The Court of Appeal were unimpressed, noting that the defendant was able to charge a hire fee for use of the machine. The handing over of temporary physical control did not remove the duty of maintaining the machine from the defendant.

However, the regulation does not impose an obligation to install equipment. It was concerned with maintenance of equipment that had already been installed (*Coates v Jaguar Cars Ltd* unreported 2004 CA)

Training

9. - (1) Every employer shall ensure that all persons who use work equipment have received adequate training for purposes of health and safety, including training in the methods which may be adopted when using the work equipment, any risks which such use may entail and precautions to be taken.

(2) Every employer shall ensure that any of his employees who supervises or manages the use of work equipment has received adequate training for purposes of health and safety, including training in the methods which may be adopted when using the work equipment, any risks which such use may entail and precautions to be taken.

An employer failed to take reasonable care for the health and safety of an employee who suffered an injury as a result of not being provided with proper training and instruction in the

operation of a vehicle, *Beesley v MP Burke PLC* (2001) The equipment concerned was a specialist heavy goods vehicle; a three ton axle lorry on which a crane was mounted. The crane was used for loading and unloading materials and equipment and was fitted with extending hydraulic stabilising rams to keep the lorry stable. The accident occurred whilst C was trying to raise the ram and was standing on the bottom of a ladder in order to do this. In the process of doing so his right foot, which was dangling off the ladder at the time because the rung was not sufficiently wide to admit two feet, became trapped. C suffered a crushed right toe as a result of the accident and sued D for negligence and/or breach of statutory duty. C claimed that D had failed to give him adequate information about the equipment and therefore were in breach of the Provision and Use of Work Equipment Regulations Reg.8(1) and 9(1)1992.

In *Pennington v Surrey County Council* [2006] EWCA Civ 1493 the claimant firefighter was injured during a rescue whilst using a power ram which was bigger than the one that he was used to. It was not practicable to guard the ram to prevent injury to the claimant's finger, but there had been a failure to provide instruction and training in respect of the use of this larger ram and that failure was causative.

Manual Handling Operations Regulations 1992

The Regulations provide that 'manual handling operations' means any transporting or supporting of a load (including the lifting, putting down, pushing, pulling, carrying or moving thereof) by hand or by bodily force.

Regulation 4 - Duties of employers

- (1) Each employer shall —
 - (a) so far as is reasonably practicable, avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured.

- (b) where it is not reasonably practicable to avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured —
 - (i) make a suitable and sufficient assessment of all such manual handling operations to be undertaken by them, having regard to the factors which are specified in column 1 of Schedule 1 to these Regulations and considering the questions which are specified opposite thereto in column 2 of that Schedule.
 - (ii) take appropriate steps to reduce the risk of injury to those employees arising out of their undertaking any such manual handling operations to the lowest level reasonably practicable.
 - (iii) take appropriate steps to provide any of those employees who are undertaking any such manual handling operations with general indications and, where it is reasonably practicable to do so, precise information on —
 - (aa) the weight of each load, and
 - (bb) the heaviest side of any load whose centre of gravity is not positioned centrally.

The assessment required by the Management of Health and Safety at Work Regulations 1999 (and 1992) should have indicated work activities which entail a risk of injury from manual handling.

In *Koonjul v Thameslink Healthcare Services* [2000] PIQR P123, the Court of Appeal said that an element of realism was needed in assessing whether there was a risk of injury within the meaning of the Manual Handling Operations Regulations 1992. The case involved a domestic care worker in a children's home pulling out a bed to remake it.

Bennetts v Ministry of Defence (2004) CA 16/3/2004. The defendant employer had not breached the Manual Handling Operations Regulations 1992 as there was no real risk that the claimant would injure herself as she had done so carrying out an abnormal procedure. The normal procedure for sorting mail was to push the mail bags onto the mailroom floor and then sort through the post. On one occasion the claimant decided to empty a mail bag by lifting it up and turning it over. In the course of lifting the mail bag snagged and the claimant injured her back. The question of what involved a risk of injury was context-based and in the instant case there was no causal link between the absence of training and B's injury.

Warner v Huntingdon District Council CA 16/5/2002. Where there was no evidence establishing the benefits that lifting training could have achieved, the Claimant's claims in negligence and breach of statutory duty failed. The claimant was employed by the council as a refuse collector in 1986. In 1996 he experienced lower back pain such that he consulted his doctor and subsequently gave up work. He claimed that his back injury was caused by repeated lifting of refuse bags during the course of his employment. The council admitted that the claimant had not received any manual handling training or information about the weight of bags or the risk to his health. The problem for the claimant was not in establishing whether or not there was a breach but in establishing whether any negligence or breach of the Regulations caused the condition from which he suffered. There was no evidence to show that the way in that the claimant approached his work was a method that training could have affected in any way.

In contrast is the decision in **Smith v Notaro Ltd & others** [2006] EWCA Civ 775. The claimant was delivering to a construction site and was carrying radiators on a plank walkway. One of the planks gave way. The claim was brought against the building contractors and the claimant's employer. It was held that the employer was 33% to blame for not providing training on the carrying of heavy objects over uneven surfaces.

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