The Issue of Employers' Liability and Legislation in the U.K. and the U.S.

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Today, employers' liability is a recognized subject of concern to all organizations-no matter what size, field, or earning capacity.

The Act states that every employer carrying on any business in Great Britain shall insure, and maintain insurance, under one or more approved policies with an authorized insurer or insurers against liability for bodily injury or disease sustained by his employees and arising out of and in the course of their employment in Great Britain in that business, but except in so far as regulations otherwise provide not including injury or disease suffered or contracted outside Great Britain.

Historic case

Historically, employers' liability can be dated back to 1937 with the case of Priestly v Fowler** whose Judgement was:

The mere relation of the master and servant can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of his judgement, information and belief.

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** Priestly [1937] 3 Fowler M & W1

Until then it was accepted that each workman should look after his safety and if he entered dangerous employment he accepted the risks. However, toward the mid-19th century it was recognized that in some cases special protection was required and minimum standards of safety have been introduced in mines and factories.

At the beginning of the 20h century, circumstances changed rapidly and extensively. A scheme of national insurance was introduced which provided compensation for various accidents of life, including industrial injuries and disease.

An employer's liability at law for accidents to his employees arises under either common law or a statute.

Under the principles of tort/delict, the employers owe a duty of care and are liable for negligence[1]. It is a duty of the employer, acting personally or through his servants or agents to take reasonable care for the safety of his workers and other employees in the course of their employment.

This general duty extends in particular to the safety of workplace, including premises or plant of a third party[2], plant and machinery, and method and conduct of work.

Employers fail in their duty to provide ***safe plant and premises***[3] not only when there is a total failure[4], but also if they fail to make sufficient provision[5] or provide defective and/or dangerous equipment[6]. In respect of tools and machinery liability may arise from failure to both remedy known[7] or discover unknown defects[8].

The main principles of ***methods and conduct of work*** are outlined in the case of Wilson v English. It is a liability of the employer for injuries caused by negligence of a fellow servant[9] (including practical jokes[10]), lack of appropriate training[11] or instructions[12], or failure to ensure workers use protective clothing[13].

Statutory duty giving rise to liability developed simultaneously and began with factory laws and gradually (with the development of the economy) extended to other fields and activities[14]. Under the Employers Liability Act 1880 an employee could succeed in an action for damages against his employer if he could prove that the bodily injury arose from the defect in the ways, works, machinery or plant or from the negligence of a superior or manager whose order the employee was obliged to obey. It was, however, defeated on grounds of *volenti non fit injuria*[15] (assumption of risk, i.e. if the employee took the employment he

ought to have agreed to the risks which emanate from the nature of the work).

Then Workmen's Compensation Act 1897, provoked by the Smith case, applied only to the more hazardous occupations. The legislation provided that compensation should be payable automatically by the employer to an employee in respect of an injury arising out of and in the course of his employment and resulting in his incapacity to work. A new Act was passed in 1906 which extended the provision to all wage earners within certain limits. After a series of amendments the law was consolidated in the Workmen's Compensation Act 1925. In its final form, the scheme provides compensation for industrial diseases and accidents.

Finally, the Employer's Liability (Compulsory Insurance) Act 1969 introduced compulsory insurance of employer's liability for damages payable to his employees. The Offshore Installations (Application of the Employer's Liability (Compulsory Insurance) Act 1969) Regulations 1975 extend to all offshore workers the provisions of the ELCI Act 1969. Every employer of an individual working on, or in connection with, an offshore installation in the UK sector of the Continental shelf is required to obtain insurance cover against claims for personal injury to employees. The requirement applies to foreign employers and employees, as well as UK employers and UK nationals. It is useful to look at how other countries with similar jurisdiction deal with the matter of employer's liability.

The legal system of the USA, is based on the precedent principle. Similar to English law, the US common law of industrial accidents dates back to 1837 and states that the employee should prove negligence before he can collect damages. The employer could block lawsuits using the doctrines of contributory negligence[16], fellow-servant (where the injured worker ***could not*** claim) and assumption-of-risk (Volenti non fit injuria).

With the introduction of the employer's liability laws between 1885 and 1910, the legal position of the injured workers improved significantly although the liability imposed on employers was not strict and the employee had to prove negligence on the part of the employer.

In 1908 the Federal government passed various workers compensation laws and by 1920 all but 6 states followed. Liability became strict, as in Britain, i.e. fault was not an issue and the employer was held absolutely liable for the occupational injuries of diseases suffered by his employee.

The objectives of the workers compensation laws were the provision of broad coverage for injuries and diseases and sufficient medical care and rehabilitation services. They were designed to protect employees against loss of income, creating safety programmes and reducing litigation costs.

In the US, the individual states have separate and independent laws. In Alexander & Alexander's 1996 Risk Management Survey, 82 per cent of the respondents stated they would not favour federal workers compensation system to replace the fifty different state-run programmes[17].

Almost all states have laws requiring compulsory cover. New Jersey, South Carolina, and Texas have elective laws which give the right to the employer to reject the compensation law. In such a case, the injured worker need only establish the employer's negligence to collect damages.

The employers have the choice to either self-insure, or effect a workers compensation policy, or obtain a cover from a competitive state fund or monopoly.

Many companies believe that purchasing a workers compensation policy is the safest method of managing their employer's liability risk, but those who prefer self-insurance are able to avoid the administration costs associated with this form of contract.

The two most commonly used programmes for worker's compensation cost control are medical care management and intensive return-to-work programmes[18].

Finally, insurance may be purchased from a state fund. In January 1992, six states[19] have monopoly state funds, while 18[20] have competitive state funds[21].

Recent trends

Two main questions arise: "Does the employee's condition amount to injury in the eyes of the law?" and "Is the employer liable for those injuries?"

Over the past few decades many medical conditions were recognised as injuries; before 1964, nervous shock was not recognised as an injury as it did not have a physical aspect that could be seen and easily recognised.

In Britain the process of changing legislation or extending liability is much slower than in the U.S. On the other side of the Atlantic, changes occur in terms of weeks. The U..S. legal system is expanding as is the legal liability of an employer.

The two main potential sources of liability in Britain are RSI and occupational stress-both recognised in the States in the 1980s. In comparison, the U.S. legislation is expanding the liability further to include sexual harassment, an area virtually unexplored in Britain.

Britain has struggled to recognise RSI and make employers liable for the RSI of their employees for some time and every case rests on its own facts. The difficulty with such cases is that many of the conditions have no visible signs and there is a possibility to be caused from other than repetitive movements.

In the recent case of Pickford v ICI[22] it was stated that the employer might be held liable if a psychogenic cause for the injury was not established. The case concerned the rare RDA4 injury but still the decision gives hopes to other claimants.

The court was of the opinion that if the plaintiff is suffering from a prescribed disease the only issue is causation. Further more, if the injury is a documented condition, the employer cannot rely on the defence of lack of foreseeability even if they identify the condition in the first instance.

Often inherent risks in the nature of work could be used as a defence[23] which would render giving warning unnecessary and not compulsory. In such cases the plaintiff should establish negligence of the employer and a failure to provide safe system of work. The case is a major drawback and similar cases are likely to be withdrawn.

The Statutory instruments dealing with the matter are the European Health and Safety Directives. The Management of Health and Safety at Work Regulations require that the employer must identify hazards and assess risks at the workplace and draw an action plan according to the findings.

The Display Screen Equipment Regulations relate specifically to work with VDUs which are named by the Safety Representative as one of the causes of RSI. The employers have a legal obligation to carry out risk assessment of the workplace and to consult the Safety Representatives.

Occupational Stress

There is a wide-spread anticipation that in the next few years occupational stress will manifest itself as the next wave of claims against the employers in the U.K.

A recent survey by HSE held: "stress is a major contributor to work-related illness and sickness absence". According to the HSE "a reaction people have

to excessive pressures or.... demands... they worry they cannot cope". Other factors contributing are the nature of job, work organization, overwork, degree of control environment and organization at work, as well as some physical conditions such as noise, abnormal temperature, light, etc. All are under the control of the employer, hence the legal liability.

There is no specific legislation providing for stress at work. The HSWA 1974, S.2 (1), and the Management of Health and Safety at Work Regulation S.3 apply to prevention of stress. The case law is still developing. The most recent major cases in this field are Walker v Northumberland County Council (1995) and Johnstone v Bloomsbury Health Authority (1991). While the former is awaiting an appeal hearing, the latter was settled out of court before trial.

The lack of case law and specific statutory regulations create a grey area. In a stress-related case the court may take into account the following:

- is there an identifiable injury?
- was there a psychiatric history?
- when were the first symptoms experienced?
- were employees undertaking similar work affected?
- Was the employer aware that the work and/or conditions were stressful.?

Lawyers may experience difficulties with cases of industrial asthma as it is difficult to distinguish between condition caused by the failure of the employer to provide safe work environment, and one resulting purely from age factors.

The main concerns in the UK are RSI, occupational stress and industrial asthma; the US are ahead in attempting to come to terms with those issues such as sexual harassment.

Although there is a particular trend for the last few years, it remains a major issue leading to fear of significant damages awarded against the employer.

"Quid Pro Quo"

Over the last ten years, a series of decisions by the Supreme Court recognised sexual harassment[24]. and later the Equal Employment Opportunity Commission enforced regulations which defined two distinct types of harassment. "Quid pro quo" is harassment where a submission to sexual advances is a premise for a beneficial condition of employment. Most of the claims arising are where the employee claims that an adverse job situation is a result of the employee's rejection of

sexual advances.

The second form of harassment is defined by case law and the interpretative regulations of EEOC. It is the not so obvious and may result from a "hostile work environment", i.e. an environment which materially alters the conditions of employment[25]. There is no clear definition of "hostile work environment'. However, repeated conduct is required and a 'stray comment' is not sufficient to cause an action. Nevertheless it should be borne in mind that it is a question of a degree of conduct acceptability, and if a comment or a conduct is severe, this may justify a claim.

The main difficulty is the absence of a comprehensive list of offences or even characteristics of offences against which the employers can try to guard themselves. Each case depends entirely on how the party subjected to a comment or action from the opposite sex takes the comment or action.

The U.S. Equal Opportunity Commission created a further category of harassment-when the action or comment is not specifically directed to a person but is ill-received by **bystanders** and as such creates a 'hostile environment'.

The legal standards have moved from the "reasonable man" to that of "reasonable woman" even 'reasonable victim'[26] thus allowing the standard of behavior used to be set by the subjective opinion of the alleged victim.

The lack of a sound base or standard in such cases imposes the threat of employers being devastated by considerable damages being awarded against them. In the recent case Weeks v Baker & McKenzie, the jury returned a verdict of $7,000,000 against the law firm. Although the damages can be reduced or set aside by the trial judge or on appeal, it is yet an example of the financial risks employers face in cases of sexual harassment.

A further complication is that the employer may be held liable for a harassing action or comment regardless of whether he knew about it or not[27]. It could be said that this "Should Have Known" Standard is very wide and makes the division line between prompt and negligible behaviour of employer, almost invisible. The employer must act quickly and ensure that there is a system of reporting of incidents[28].

Insurance Cover

Meanwhile, U.S. insurers were efficient in offering to protect employers from sexual harassment claims. Many insurers are entering the market and it is believed that in the next few

years this form of cover will become standard.

Loss patterns assist in identification of risk characteristics-number of employees, nature of operations, industry, location, state, financial conditions, and the quality of the employer's manual and procedures.

A typical cover provides protection against lawsuits alleging discrimination, harassment or wrongful termination plus the auxiliary common law such as defamation and invasion of privacy.

The U.S. practice may seem difficult and unnecessarily complex compared to the more uniform legislation in the U.K. However, there are advantages and disadvantages in both systems.

They unite around the necessity of compensation provisions for employees suffering occupational injuries or diseases though both systems differ in their opinion on the means of creating the provisions.

The U.S. system now provides greater benefits whilst in the U.K. the employers' liability insurance, being compulsory, is the only means available. However the changing legal system in the U.S. provides greater rights to the employees and imposes greater burdens on the organizations. Eventual changes in the law may take some time.

SUMMARY

1. At common law, the employer is liable for harm, injury or disease suffered by his employees if those arise in the course of employment. The general duty includes safety of the work place, safety of plant and machinery, safe method of work and safe fellow-workers.
2. Even a partial (as opposed to total) failure to provide any of the above will render the employer liable. There is general trend in the U.K. toward no-fault system.
3. Statutory law for employers liability developed simultaneously and re-enforced the common law. Originally, there were a number of statutes covering different occupations but in the first decade of the 20th century the law was gradually unified for all occupations.
4. By virtue of Employers Liability Compulsory Insurance Act 1969, employers in the U.K. are obliged to effect insurance cover for their potential liability to employees. Consequently, provisions extended to off-shore work and employment of legal aliens working f more than 14 days for a U.K. en loyer.

5. The U.S. legislation developed in a way similar to U.K. Workers compensation laws provide for occupational injuries and diseases and consequent medical care and rehabilitation. They also protect the employee against loss of income.
6. A number of states have elective laws where in the absence of compensation cover, injured employees need only establish negligence on the part of the employer to collect damages.
7. The U.S. employers can choose between self-insurance, workers compensation policy and a cover from a competitive state fund or monopoly.
8. In the U.K. two main sources of potential liability are the RSI and occupational stress. In the RSI field, an employer may be held liable for a documented condition even of experiencing it for a first time.
9. Main acts governing RSI are the European Health and Safety Directive, management of Health and Safety at Work Regulations and Display Screen Equipment Regulations.
10. Employers are becoming increasingly aware of the legal potential of occupational stress claims. There is not yet any specific legislation governing this area of liability.
11. In the U.S. employers face claims over sexual harassment. The matter is complicated by the creation of two-types of harassment-"Quid pro quo" and "hostile environment", and the absence of a checklist of characteristics of harassing conducts.
12. Insurance covers for sexual harassment claims have been created and are expected to become part of the risk management methodology.

CONCLUSION

Although the U.K. and U.S. legal provisions in the field of employer's liability started at the same time and over the years developed in a similar way, they are now taking different paths.

U.K. employers must take into account recent court decisions and the recognition of new sources of liability. Risk managers should be aware of the recent trends and anticipate further changes in relation to claims for repetitive strain injuries and occupational stress.

Changes in the statutory duty of employers will inevitably lead to the need for re-drafting policies and close re-examination of the workplace and all its aspects. This will reflect on the cost of managing liability risks.

Following the example of their American colleagues, British insurers may expand present, or devise special, covers to include claims for RSI and occupational stress. Until then, the employers have to use traditional covers and tighten the control over the work process.

In the combat against RSI, American employers use a wide variety of techniques - the most used being modification of equipment, job tasks and work processes, followed closely by work station and job analysis. Both proved to be very successful.

In Britain, there is a general trend towards the American no- fault system. The developments across the Atlantic indicate future changes in the U.K. legal system. Employers should use the U.S. experience to prepare themselves for handling future liability claims.

APPENDIX ONE
REFERENCE
STATUTES

Factories law:

Health & Morals of Apprentices Act 1802

Factories Act 1844.

Factory and Workshop Act 1878

Factory and Workshop Act 1901

Factories Act 1961

Other:

Employers' Liability (Defective Equipment) Act 1969

Employers' Liability (Compulsory Insurance) Act 1969

Law Reform (Contributory Negligence) Act 1945

Law Reform (Personal Injuries) Act 1948

Mines and Quarries Act 1954

National Insurance (Industrial Injuries) Act 1946

Offices, Shops and Railway Premises Act 1963

Offshore Installation Regulations 1975

Prevention:

Health Safety and Welfare at Work Act 1974

Compensation:

Employers Liability (Compulsory Insurance) Act 1969

Workmen's Compensation Act 1897

Workmen's Compensation Act

1906

Workmen's Compensation (Consolidation) Act 1925

Sexual Harassment (US):

EEOC, Policy Guidelines on Current Issues of Sexual Harassment

APPENDIX TWO
REFERENCE CASE LAW

Barret v Omaha National Bank (8th Circ 1984) 726 F2d 424

Butler (or Black) v Fife Coal Co [1912] AC 149

Clark v Holmes 1862

Crookall v Vickers Armstrong [1955] 2 All ER 12 .

Ellison v Brady (9th Circ 1991) 924 F2D 872

General Cleaning Contractors Ltd v Christmas [1953]2 All ER 1110

Harris v Forklift Sys Inc 510 US, 126 L. Ed 2d 295, 114 S.Ct 267 (1993)

Hudson v Ridge Manufacturing [1957] 2 QB 348, 2 All ER 229

Johnstone v Bloomsbury Health Authority 1991

Jones & Doran v Golden Wander, LRI, Dec 1995

Latimer v AEC Ltd [1953] All ER 449

Lovell v Blundells & Crompton Co. Ltd 1944 KB 502

Machray v Stewarts & Lloyds Ltd [1964] 3 All ER 716

Mason v Williams & Williams & Thomas Turton & Sons 1955 1WLR 549

Meritor Savings Bnak v Vinson 477 US 57 (1986)

McQuilter v Goulandus Brothers Ltd 1951 SLT (Notes) 75

Murphy v Phillips [1876] 35 LT 477

Qualcast v Haynes [1959] 2 All ER 38

Priestly v Fowler [1937] 3 M&W 1

Smith v Baker & Sons 1891 AC 325

Staveley Iron & Chemical Co Ltd v Jones 1956 AC 627

Walker v Northumberland County Council 1995

Wilsons & Clyde Coal Co Ltd v English [1937] 3 All ER 628

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x——— x——— x

What is another word for "thesaurus"?

x——— x———x

When they ship Styrofoam, what do they pack it in?

x——— x———x

If 75% of all accidents happen within 5 miles of home, why not move 10 miles away?

x——— x———x

Why doesn't "onomatopoeia" sound like what it is?

x——— x———x

Why do 'tug' boats push their barges?

x——— x———x

"For one who lives more lives than one
More deaths than one must die."
- Oscar Wide.

x——— x——— x

"The lot of critics is to be remembered by what they failed to understand."
- George Moore.

x——— x——— x

"Home is the place where, When you have to go there, They have to take you in."
- Robert Frost.

x——— x——— x

"Three may keep a secret if two of them are dead."
- Benjamin Franklin.

x——— x——— x

[1] Wilson & Clyde Coal Co., Ltd v English [1937] 3 All ER 628.

[2] McQuilter v Goulandus Brothers Ltd 1951 SLT (Notes) 75.

[3] Latimer v AEC Ltd. [1953] 2 All ER 449.

[4] Lovell v Blundells & Crompton Co.,Ltd 1944 KB 502.

[5] Machray v Stewarts and Lloyds Ltd. [1964] 3 All ER 716.

[6] Mason v Williams & Williams and Thomas Turton & Sons [1955] 1 WLR 549;

[7] Clark v Holmes 1862.

[8] Murphy v Philips [1876] 35 LT 477.

[9] Stavely Iron & Chemical Co.,Ltd v Jones 1956 AC 627.

[10] Hudson v Ridge Manufacturing [1957] 2 QB 348, 2 All ER 229.

[11] Butlter (or Black) v Fife Coal Co. [1912] AC 149.

[12] General Cleaning Contractors Ltd v Christmas [1953] 2 All ER 1110.

[13] Qualcast v Haynes [1959] 2 All ER 12.

[14] See APPENDIX ONE.

[15] Smith v Baker & Sons 1891 AC 325.

[16] In U.K. there are two limitations-agony and dilemma rules.

[17] 1996 U.S. Risk Management Survey, Alexander & Alexander.

[18] 1996 U.S. Risk Management Survey,, Alexander & Alexander.

[19] Nevada, N Dakota, Ohio, Washington, West Virginia, Wyoming.

[20] Arizona, California, Colorado, Hawaii, Idaho, Louisiana, Maine, Maryland, Michi gan, Minnnesota, Montana, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas and Utah.

[21] Principles of Risk Management and Insurance, pp. 506-507.

[22] Court of Appeal, Law Society gazette, 2 August, 1996.

[23] Jones and Doran v Golden Wander, LRI, Dec. 1995.

[24] Meritor Savings Bank v Vinson 477 U.S, 57 (198) Harris v Forklift Sys Inc 510 U.S., 126 L. Ed 2d 295, 114 S. Ct 267 (1993).

[25] EEOC 29 C.F.R. & 1604. 11(A).

[26] Ellison v Brady (9th Cir 1991) 924 F 2 d 872.

[27] EEOC, Policy Guidelines on Current Issues of Sexual Harassment.

[28] Barret v Omaha National Bank (8th Cir 1984) 726 F 2 d 424.