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Report threatens trade union legal services

If adopted, the Jackson Review of Civil Litigation Costs, threatens to undermine the ability of trade unions to offer free legal services to their members

A REPORT ON the costs of legal cases, including those involving workplace accidents, has suggested changes that could rob injured people of up to half their compensation and undermines current arrangements that allow unions to offer extensive free legal services to members.

The winners from the report will be insurance companies and their shareholders who will enjoy extra profits.

Sir Rupert Jackson – one of Britain's top judges – launched his costs review in response to constant insurance company complaints that legal costs were too high and of a growing compensation culture in the UK.

No compensation culture

All the evidence showed that there was (and is) no compensation culture. So the insurance industry turned its attack to the right of injured people to have legal representation and this report is the result of that lobbying.

> To deny injured people legal representation in this way would be a denial of access to justice and equality in arms

If Jackson's recommendations were to be accepted by the current or a future government (and there is heavy pressure from the judges and the insurers to see that done) it would impact on all aspects of union legal services.

The recommendations would mean:

- The end of insurers having to pay for the risk of cases being lost. This will make backing members' compensation claims, particularly where the case is complex and may be difficult to prove, financially risky.
- The money that insurers pay when they lose a claim – a success fee – which is meant to cover the cost of unsuccessful cases, will no longer be paid by them. It is proposed that this would have to be paid out of the compensation. This will seriously undermine the funding of union legal services.
- Fixed costs (the amount of the costs of pursuing a claim that can be recovered from the defendant) in personal injury claims where the likely value of the whole claim is less than £25,000 compensation (that is well over 80 per cent of union cases).

Fixed costs might sound like a legal technicality for lawyers to worry about, but in practice it will encourage non union lawyers to take short cuts and settle early (to avoid running up costs that they cannot get back).

And it will enable employers to work out what an injury to a worker will cost them in total and therefore to calculate whether it is a cost worth paying by, for example, getting more work out of their production lines by cutting health and safety corners.

The Jackson report is not all bad news. One measure aimed at softening the blow of injured people having to pay for success fees and other costs out of their damages is a proposal to increase "general damages" by 10 per cent. But this is nowhere near enough to make up for the possible amount people will have to pay out.

General damages are paid for the injury itself and for pain and suffering. There is no

suggestion that the other part of people's compensation (and often the biggest part) – for things like loss of earnings – should be increased.

More good news

Another piece of "good news" for claimants and trade union legal services, but which is far less welcome when the detail is studied, is the decision not to increase the small claims limit for personal injury claims.

An increase to either £5,000 or £2,500 (both figures were considered by Jackson) from the current £1,000 would have denied most claimants the ability to be legally represented.

This is because the costs incurred by solicitors in investigating and proving claims below the current £1,000 limit cannot be recovered in the small claims court, even though lower value claims can be as hotly contested by defendants as high value ones (and defendant insurers still engage lawyers even in a small claims case because their pockets are so much deeper than a claimant's if they lose).

An increase to £2,500 would have freed employers from paying costs in 50 per cent of union-backed personal injury cases and would have seriously undermined the current model of union legal services.

To deny injured people legal representation in this way would be a denial of access to justice and equality in arms.

Substantial increase?

But not increasing the small claims limit may only be a temporary thing and it could be reviewed again at the end of 2010. The risk is that, if the judge does not consider that the reforms on fixed costs, success fees and other recommendations have been satisfactory by the end of the year, he will recommend an increase and we think that means a substantial increase.

Even if the reforms are considered satisfactory, the limit will still be raised to £1,500 when inflation since 1999 – the last time the small claims limit in personal injury cases was increased – justifies it.

Thompsons will be studying the detail of the Jackson report and discussing with unions how to deal with the most potentially damaging of its recommendations so that unions can continue to provide high quality and free legal services to members.

In the meantime, workplace reps should remember that members with potential compensation claims – for injuries sustained at or away from work – should contact the union's legal service as soon as possible in order to get their claims under way.

Needlestick injuries, trivial or traumatic?

The Court of Appeal has ruled in favour of a UNISON member in a long-running dispute over the seriousness of needlestick injuries. **Oonagh McClure** of Thompsons McClure explains the legal arguments

AS SEAN FRYERS removed a yellow clinical waste bag from a bin at the Royal Victoria Hospital in Belfast, he felt a sharp pain in his leg. The bedside hygiene operative had been pricked by a used needle that had been thrown into the bag.

His leg was bleeding and so the duty nurse squeezed the wound to make it bleed more and then rinsed it repeatedly and dressed it.

Mr Fryers was referred to the occupational health unit where he was given the first of a series of three hepatitis B jabs, was advised to avoid unprotected sex with his partner and told to contact the department if he felt he needed further advice or counselling.

The hospital was unable to trace the needle to any particular patient or to rule out the possibility that Mr Fryers had been infected with hepatitis or HIV. As a result, he became very distressed and anxious and developed a psychiatric disorder.

> The contract included responsibility for the employer to safeguard the safety of their employee in the workplace

Liability denied

Although the Royal Victoria had a clear and strict policy on the disposal of used needles in allocated sharps boxes, as well as a policy on what to do in the event of someone coming into contact with a contaminated needle, it denied liability for Mr Fryers' injury.

Thompsons McClure, instructed by UNISON, was therefore forced to issue court proceedings against the hospital.

This should have been a straightforward needlestick claim. The NHS Trust was clearly negligent in failing to dispose of the needle safely and properly. It had therefore exposed Mr Fryers to a foreseeable risk of injury and was in breach of its statutory duty under Section 2 of the Occupier's Liability Act(NI) 1957 and Regulation 9 (iii) of the Workplace (Health Safety and Welfare Regulations) 1992.

In its defence, the trust used the decision in **Rothwell and Others** – the pleural plaques test cases – in which the House of Lords upheld a Court of Appeal ruling that pleural plaques were symptomless and therefore not compensatable.

The Law Lords also confirmed that a psychiatric condition developed by a pleural plaques sufferer because they were worried about developing an asbestos related disease in the future could not in itself create a compensatable injury and neither could the risk of the sufferer actually developing such a condition be added to the other factors to effectively add up to or complete an injury that was compensatable.

And so the defendants in Mr Fryers' claim said the needlestick injury was so trivial that it was not compensatable and the anxiety brought about by his fear of contracting an illness in the future and the risk of that happening did not amount to a compensatable injury.

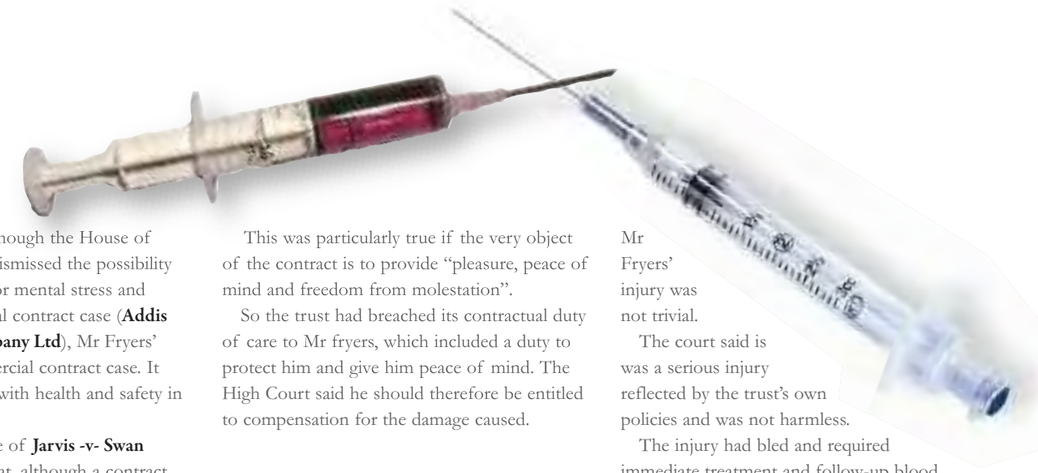
But Mr Fryers had sustained an injury that could be seen and felt and which was bleeding and was made to bleed further. He required immediate medical attention and a course of treatment.

There would be serious consequences if the needle was contaminated with a blood borne virus. However, the County Court judge was persuaded by the trust's argument and dismissed the case. Mr Fryers appealed to the High Court and although he was successful and compensation was agreed at £3,000, the issue of whether a needlestick injury should itself be compensatable remained.

Breach of contract

This is because, before the appeal and with the pleural plaques test cases in mind, Mr Fryers' claim had been amended to include a breach of contract. Put simply, the contract between employer and employee, written or implied, included responsibility for the employer to safeguard the safety of their employee in the workplace.

The High Court agreed with the lower court that the trust was not negligent in relation to Mr Fryers' injury, but did find that it was in breach of the contract of employment. The judge accepted that there was an implied term that the employer would safeguard the safety of its employees.



He also said that, although the House of Lords had previously dismissed the possibility of claiming damages for mental stress and anguish in a commercial contract case (**Addis -v- Gramophone Company Ltd**), Mr Fryers' claim was not a commercial contract case. It was a contract created with health and safety in mind.

The court in the case of **Jarvis -v- Swan Tours** took the view that, although a contract breaker is not in general liable for distress, frustration, anxiety or aggravation caused by the breach, this rule is not absolute.

Comment

In reaching their decision, the Court of Appeal judges stressed that context was everything.

Had the needle been sterile and outside the hospital environment, then it may well have been right to regard the injury as trivial.

A prick from a clean needle in a shop or a sewing needle in a domestic situation is unlikely to be anything other than trivial.

But this was a used needle in a hospital. For this reason the 1996 case of *Page -v- Smith* would have applied even if it had been found by the court that there was no physical injury.

The Trusts' failure in Mr Fryers' case to dispose of the needle appropriately created a foreseeable risk of injury and it was irrelevant whether that injury was physical or psychiatric.

However, given the High Court's finding of a breach of contract, it would seem sensible to include a breach of contract in all work-related compensation claims.

This was particularly true if the very object of the contract is to provide "pleasure, peace of mind and freedom from molestation".

So the trust had breached its contractual duty of care to Mr fryers, which included a duty to protect him and give him peace of mind. The High Court said he should therefore be entitled to compensation for the damage caused.

Appeal Court

Not surprisingly both parties sought leave to appeal to the Court of Appeal (CA) in Belfast. It was important to establish that the judge was right to dismiss Mr Fryers' claim that his employer was negligent and whether it was right that the employer was in breach of contract.

The CA confirmed the principle that, before a person could establish a viable claim for personal injury, they must establish that the injury was more than trivial. But it decided that Mr Fryers' injury was not trivial.

The court said is was a serious injury reflected by the trust's own policies and was not harmless.

The injury had bled and required immediate treatment and follow-up blood tests and assessments, and so Mr Fryers had suffered a physical injury and was entitled to damages.

The **Rothwell** decision was not relevant to this case and, if the physical injury was foreseeable, then damages for the resulting psychological condition – which everyone agreed had developed as a result of the original injury – should also follow.

As a result it was unnecessary for the CA to deal with the breach of contract point.

Photo: John Harris/reportdigital.co.uk

Directors on the hook

Directors make most of the day-to-day health and safety decisions but, if something goes wrong, they are rarely held liable. This strange legal quirk is something that a Private Members Bill from MP Frank Doran aims to change, writes **Godric Jolliffe**

Frank Doran addresses the House of Commons

WHILE COMPANY directors can be prosecuted for health and safety offences under Section 37 of the Health and Safety at Work etc. Act (HSWA), this is mainly if they fail to ensure that their organisation complies with health and safety law.

It is therefore a "negative" obligation. It is also a piece of legislation that is rarely used, with just a handful of directors prosecuted each year.

Even more unusual is the court's power to order disqualification of directors following health and safety offences under the Company Directors Disqualification Act 1986.

When Frank Doran, MP for Aberdeen North, presented his Health and Safety (Company Director Liability) Bill 2009-10 to the House of Commons in January he pointed out: "There is no obligation on any company director to take action to inform themselves of any offences being committed by the company or to take steps to prevent offences being committed."

Employers, on the other hand, do have "positive" health and safety duties. Most obviously this is through Sections 2 and 3 of HSWA which provide the foundation for UK health and safety legislation.

S.2 requires employers to "ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees". There is a similar obligation towards non-employees contained in S.3.

New law

Mr Doran proposes changing the law so that there is "a positive duty on all company directors to take all reasonable steps to ensure health and safety in all aspects of the company's activities". The most obvious way of doing this would be to amend the HSWA, possibly by adding an extra section to s.37.

This would, Mr Doran told the Commons, effectively put directors in the same position as other employers and "remove a glaring anomaly in our health and safety laws".

TUC support

This is an approach that the TUC supports. The wording of Mr Doran's proposal mirrors the TUC's preferred option in a recent briefing document. This was a proposal suggested to the Health and Safety Commission (then in charge of the Health and Safety Executive (HSE)) in 2006.

The TUC goes further, however, and says that there should be an Approved Code of Practice as well – based on existing voluntary guidance – which makes clear what is expected of directors, though they would not be bound to follow it.

However, they would have to prove to a court that they had taken alternative steps to those set out to prove that they had complied with the legislation.

The TUC says: "This new duty would be the biggest driver yet in changing boardroom attitudes towards health and safety."

Resistance

Like turkeys and Christmas, directors are unlikely to welcome any change to the current law. New laws would be unnecessary and may be counter productive says the Engineering Employers Federation (EEF) – the manufacturer's organisation.

This conclusion is based on an EEF survey, which the organisation says shows that company boards are taking a more hands-on approach and spending more time on health and safety.

There is a "sea change in director involvement – active leadership is now very definitely the norm, not the exception" commented the EEF's head of health and safety policy Steve Pointer.

> "... more encouragement is needed to persuade employers to take health and safety much more seriously"

Union reps might beg to differ. A report by UCATT in 2007 said that only 44 per cent of organisations have a health and safety director at board level.

Directors are likely to prefer that the existing voluntary guidance for directors on health and safety remains the status quo. In 2007, the Institute of Directors and the HSE issued *Leading health and safety at work*. This sets out the following essential principles:

- strong and active leadership from the top (including visible, active commitment from the board)
- worker involvement (including engaging the workforce in the promotion and achievement of safe and healthy conditions) and
- assessment and review (including identifying and managing health and safety risks).

But, says Mr Doran: "The voluntary approach is not working, so more encouragement is needed to persuade employers to take health and safety much more seriously."

Last year, a major report into safety in the construction industry, commissioned by the Department for Work and Pensions, called for positive health and safety duties for directors. *One Death is too Many* said these duties should "ensure good health and safety management through a framework of planning, delivering, monitoring and reviewing".

Pressure for reform

Last July, the government said it would respond to the report's recommendations "later in the year". The Work and Pensions Select Committee also called for a legal duty on directors to be introduced as soon as possible in the same month.

The Health and Safety (Company Director Liability) Bill is due a second reading on 23 April 2010. However, Private Members Bills rarely become law unless the government supports them (and there is very little parliamentary time left before the next general election).

The government did pledge to change the law in this area ten years ago in its *Revitalising Health and Safety* strategy. Supporting this Bill would be a quick way of delivering on that commitment.

References

Frank Doran's speech can be found in Hansard: www.publications.parliament.uk/pa/cm200910/cmhansrd/cm100119/debtext/100119-0005.htm#column_166

Health & Safety at Work, etc. Act 1974 and Companies Directors Disqualification Act 1986 can be obtained from www.opsi.gov.uk/legislation/about_legislation

TUC Briefing *Directors Duties – proposals for new legislation* is available at www.tuc.org.uk/ h_and_s/tuc-17355-f0.cfm

'Leading health and safety at work' is available at www.hse.gov.uk/leadership

The perils of the stairwell

Ben McBride looks at the law around the most common of accidents: staircase falls

ONE OF THE most common causes of fatality, along with road accidents, is falling on domestic staircases.

While, to a large extent, this high rate reflects the numbers of the mainly elderly, infirm and very young having such fatal falls in non-workplace situations, staircases do present a hazard in the workplace.

Falls from height have been a priority programme for the Health and Safety Executive (HSE). Analysis of the RIDDOR statistics between 1996/7 and 2001/2 showed stairs to be the most common agent in low fall accidents (below two metres) and although the 2001/2 statistics showed the number of stair incidents had decreased, there were 500 such falls, making stairs the second most common cause of falls from height, after ladders (*Falls on Stairways – Literature Review HSL/2005/10*).

Staircases at work should be treated as a potential hazard and risk assessed accordingly. They can be dangerous and the law recognises the obligation to make them safe.

The most common place for workplace stairway falls is the service industries, in particular in catering.

Any situation that carries the risk of a fall from height is covered by the Work at Height Regulations. They state that, if the staircase has an open side, it must be securely fenced off.

Regulation 12 (5) of the Workplace Regulations 1992 says suitable and sufficient handrails (and even guards where appropriate) should be provided for all staircases that are traffic routes unless a handrail would block the traffic route.

The HSE explains that "a secure and substantial handrail should be provided and maintained on at least one side of every staircase" (except where they would block access as in a theatre aisle).

If the staircase is busy or unusually wide or has narrow treads or is likely to be subject to spillages, then there should be handrails on both sides or even one extra rail in the middle on a very wide stairway, according to the Code of Practice that accompanies the Regulations.

> "A secure and substantial handrail should be provided and maintained on at least one side of every staircase"

While it might not be obvious what difference a handrail can make, given that people tend not use them, a 1998 study by Maki, *Efficacy of handrails in preventing stairway falls: A new experimental approach,* showed that virtually everyone can right themselves by grabbing a rail when falling.

But inevitably, where there is a sensible law aimed at protecting workers, employers will disregard it and lawyers will still get into battles over the language rather than the spirit of the law.

When is a staircase not a staircase?

The key battleground has become the word "staircase". When is a staircase just a set of steps and so does not benefit from the safety standards required by these Regulations?

For a staircase to be a staircase you might think it must have a minimum number of steps. But the courts have failed to make a definition, even though they have said that a few steps do not necessarily make a staircase.

In the case of **Jaguar Cars -v- Coates (2004)** the Court of Appeal (CA) said there was no legal requirement for a handrail on four steps, even though the stairs were outside.

Mr Coates tripped on the third step of four at Jaguar's Coventry factory which led from the outside of a building to the car park. There was a chain link fence on one side but the other side, by a grass bank, was open. Mr Coates fell onto the bank, breaking his arm.

Although there was nothing intrinsically wrong with the steps, which were in good condition, solidly constructed and of generous depth, the lower courts said that Jaguar was negligent for its failure to provide a handrail.

Although Jaguar did then install a handrail, the firm did not think it was necessary and appealed the finding of negligence. The CA found in favour of Jaguar. It said that the failure to provide a handrail was not negligent.

The steps were of generous dimensions and, because there were only four, could not pose any real risk so long as those using them exercised the degree of care to be expected.

It was also found that Jaguar was not in breach of Regulation 5 (1) of the Workplace Regulations relating to the duty to maintain work equipment because, as the equipment – a handrail – was not provided, the regulations on maintenance and repair did not apply.

Nosings

A solitary step in a workplace is the most common cause of a trip caused by steps or stairs and it should be well lit and prominently marked by a contrasting colour.

Visibility of stair edges and lighting is a key part of the Regulations. They add that it should be ensured "that edges of steps have clearly visible nosings" – the commonly seen yellow strips on the edge of stairs are to comply with this guidance.

The nosings should be non–slip and should be regularly inspected to ensure they do not wear smooth over time. Carpets too can wear smooth through excessive use and should be regularly inspected.

An employer in the care services has a duty in common law to heed a carer's complaints if a domestic carpet is frayed or dangerous.

There is much literature on www.hse.gov.uk about such risks and the slipping assessment tools (SAT), including measurements for non-slip surfaces.

As ever, safety representatives at work have a right to make inspections and representations if they feel the workplace falls short of legal obligations.

Bakery fall ends career

A BFAWU member slipped coming down a stairway back into the mixing area, fracturing his elbow.

The injured man said he would normally have used both handrails of the stairs but a truck had been left at the top and he was obliged to remove his left hand.

The elbow was pinned but physiotherapy failed to relieve the pain or restore full movement. Even after manipulation under anaesthetic and further surgery, the man had limited shoulder movement and a weakened grip in his right hand.

He also developed a frozen shoulder and problems with the main nerves in his forearm.

The prognosis was that his reduced arm function was unlikely to improve and so it would be difficult for him to get another job.

Although the bakery admitted that it was negligent in allowing the accident to happen, it argued about whether the fall directly caused the man's symptoms and it was some time before a substantial compensation settlement was reached.

Dangers of low level vibration

A low level vibration case, which should have been a straightforward claim for compensation, was so hard fought by the defendant that they appeared to be treating it as a test case. **Judith Gledhill**, head of personal injury at Thompsons, explains

Glynn Coward worked for Wakefield MDC as a garage mechanic. He started to notice tingling in his fingers when he was riding his scooter in 2001. A year later he had developed pins and needles in all four fingers of both hands and was waking at night due to the discomfort. His fingers turned white in the cold and warming them up could be very painful.

His GP prescribed a course of physiotherapy and painkillers, but did not advise that the symptoms could be work-related.

Mr Coward had been employed in the Wakefield Metropolitan District Council Transport Service Unit as a garage mechanic since 1991, working mainly on HGVs and vans as part of a team of five. He used many different hand-held vibratory tools including impact wrenches and air guns to remove wheel nuts, air saws for cutting bolts and steel as well as using grinders, drills and sanders.

Although the tools changed constantly according to the job he had to do, he used these tools on and off throughout the day. For example, when carrying out a brake service on an HGV he would have to loosen all the wheel nuts using a one-inch impact wrench.

Screening questionnaire

In summer 2002 he was asked to complete a hand arm vibration screening questionnaire and was sent by his employer's occupational health department for a medical examination. He was not told that he was suffering from a work-related condition and did not receive any advice about restricting his use of vibrating tools or rotating his duties in the work place.

In 2003, after nerve conduction studies arranged by his GP, he was diagnosed with bilateral carpal tunnel syndrome. Shortly after this he was told that he also had vibration white finger and that he would have to have an operation for the carpal tunnel syndrome.

He eventually underwent two operations – one on his right wrist and the second on his left a few months later.

> 10 per cent of those exposed to vibration would be expected to show signs of finger blanching after 16 years exposure at a daily level of 1.4m/s²

It was not however until 2004/2005 that the impact wrenches he had been using were replaced with newer impact wrenches – which gave off reduced levels of vibration – and anti vibration gloves. In addition, his employers decided to introduce a system of job rotation.

Thompsons was instructed by UNISON on behalf of Mr Coward and submitted a claim for compensation for him. Expert engineering evidence was obtained on the likely vibration exposure experienced by him.

The expert instructed by Mr Coward concluded that he would have been exposed to vibration levels of between 1.9m/s² (metres per second per second – a measurement of acceleration) and, on occasions, may have exceeded 2.8m/s².

The expert instructed by the defendant however indicated that, in his opinion, the claimant would not have been regularly exposed to vibration levels over 2.8m/s² averaged over an eight-hour day – A(8).

Vibration levels

Why is the level of 1.0m/s² and 2.8m/s² important? In the UK, the Health and Safety Executive confirmed, in 1994, that an "action level" of 2.8m/s² was the appropriate level for action.

For exposure above this action level, the HSE indicated that an employer should instigate vibration exposure reduction measures, such as rotation of work, investigation of alternative methods of work, replacement of high vibration tasks and health surveillance.

However, in 1987 a British Standard was published which indicated that there was evidence to suggest that exposure to vibration below the level of 2.8m/s² could cause symptoms in a proportion of the population.

But it was stated that this action level should not be regarded as a completely safe level.

Indeed, within the British Standard there was comment that 10 per cent of those exposed to vibration would be expected to show signs of finger blanching after 16 years exposure at a daily level of 1.4m/s² A(8).

In view of this, the expert instructed by Mr Coward confirmed that, even though the exposure to vibration might fall below the old action level of 2.8m/s², the employer still had a duty of care for exposure below that level.

Within the British Standard, the expert noted, symptoms do not usually occur if the daily exposed amount of vibration is below 1m/s² A(8). This is generally known as the "threshold level". It is recognised that, where a worker is exposed to vibration below the old action level of 2.8m/s² but above the threshold level of 1m/s², that the employer should take action.

An engineering report prepared jointly by the engineering expert for the defendant and the expert appointed on behalf of Mr Coward agreed that Mr Coward's average daily vibration exposure would have regularly exceeded 1m/s² A(8) (the threshold level). As such, there was a foreseeable risk that he would develop an injury as a consequence of his use of vibrating tools.

As a result, the engineers agreed that, in view of the fact that Mr Coward was exposed to a foreseeable risk of injury, his employer should have provided him with training and information, including information about the symptoms of hand arm vibration syndrome (including carpal tunnel syndrome and vibration white finger), the need to report those symptoms to the employer, the way the symptoms should be reported and how vibration exposure can be reduced.

The defendants also disputed that Mr Coward's carpal tunnel syndrome had been caused by his use of vibrating tools, despite the fact that the Industrial Injuries Advisory Council confirmed that carpal tunnel syndrome should be regarded as a prescribed industrial disease when it occurs in those who were exposed to hand transmitted vibration.

The defendants indicated that, in view of the relatively potential low level of the vibration exposure, they were treating this case as very much a "test" case. A number of other claims for compensation were stayed pending the outcome of Mr Coward's claim. The case was listed for trial but, only a matter of weeks before it, the defendants offered to settle the case.

Comment

Employers cannot rely on the old action level of 2.8m/s² (now 2.5m/s²) to defend themselves against a claim for compensation.

It is quite clear that, where a worker is exposed to vibration levels in excess of 1m/s², an employer has a duty to advise employees about the potential risks of developing vibration white finger or other symptoms of hand arm vibration syndrome, to report the development of symptoms and to advise them of how to reduce exposure by means of the use of hand tools as opposed to vibrating tools and rotation of tasks as far as possible.

If employers fail to do this and their employees suffer symptoms as a result, then they are likely to face further claims for compensation.

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This publication is not intended as legal advice on particular cases

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