

# GL Update

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## Work equipment, or not work equipment, that is the question

The House of Lords has recently considered the definition of 'Work Equipment' with the result that the definition provided within the Provision and Use of Work Equipment Regulations 1998 (PUWER) has been widened and restated. This arguably gives greater scope to claimants' solicitors to allege breach of PUWER and will require employers to take a broader view of what is covered by the Regulations.



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### Background

Regulation 2(1) PUWER defines 'Work Equipment' as:

*any machinery, appliance, apparatus, tool or installation for use at work (whether exclusively or not).*

Pursuant to 3(2) the requirements imposed by PUWER 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.*

This definition has been widely applied and objects ranging from lifts<sup>1</sup> to folding tables<sup>2</sup> to vans and roof racks<sup>3</sup> have been held to be 'work equipment'.

Until recently the leading authority in this area - *Hammond v Metropolitan Police Commissioner* [2004] EWCA Civ 830 - suggested that this definition covered what might loosely be considered "tools of the trade" required by an employee to carry out his work. It did not include items provided by others on which an employee was working. So, applying this to

the facts in *Hammond*, the wheel bolt on a van, not owned by the employer, being repaired by the claimant mechanic fell outside the definition of 'work equipment'.

### Current position

The House of Lords has now rejected the view in *Hammond*.

*Spencer-Franks v Kellogg Brown & Root Ltd* [2008] UKHL 46 (NB: a Scottish case) concerned a claim for personal injuries brought by a worker on an oil platform based in the North Sea. He was employed by Kellogg Brown and Root Ltd but was

contracted to work on a platform operated by a third party. In 2003 Mr Spencer-Franks was asked to inspect and repair the closer on the door of the central control room. According to Mr Spencer-Franks the screw in the linkage arm was disengaged in circumstances in which it should not have been and he suffered injury as a result. He brought proceedings in Scotland claiming, inter alia, that that the door closer was 'work equipment'.

The Court of Session held that the door closer was not 'work equipment' and, even if it was, Mr Spencer-Franks was not 'using it' within the meaning of PUWER. The Court of Session accordingly dismissed Mr Spencer-Franks appeal.

The matter was taken to the House of Lords where the appeal was allowed. In delivering the leading judgment Lord Hoffmann noted that:

**“The domestic definition requires one to ascertain the purpose of the apparatus etc. What is it for? If it is for use at work, then it is work equipment”**

Applying this to the issues in Spencer-Franks it was noted that everyone using the control room was using it for the purposes of their work. They used the door to enter or leave the control room. And in doing so, they used the closer. Its purpose was for use at work. Giving the definition its ordinary meaning, the closer was work equipment.

Lord Hoffman queried if PUWER impliedly excluded apparatus which forms part of the premises upon which the work takes place. He suggested that in the case of ordinary work premises on land this might be a good argument. But in the present case - the equipment being attached to an offshore platform - it was not applicable.

Essentially, Lord Hoffmann's reasoning is twofold:

1) You first decide whether some apparatus is work equipment

or not (ie is it machinery, appliance, apparatus, tool or installation for use at work ?) and, if so;

2) You decide whether the regulations apply in respect of it (ie is it provided for use or used by an employee of his at work?)

### Other recent decisions

It is interesting to note that the House of Lords did not refer to the case of *Smith v Northampton County Council* [2008]<sup>4</sup> in their judgment given that this case was decided just five weeks before *Spencer-Franks* was heard.

In *Smith* the claimant was employed by the defendant as a carer. She sustained injury when - whilst pushing a wheelchair at a client's house - she slipped off the edge of a ramp which gave way.

### Effect of the judgment in Spencer-Franks

The effect of the judgment in *Spencer-Franks* is to expand the current law of what constitutes 'work equipment'.

Had Lord Hoffmann's guidance been applied to *Hammond* then the outcome would have been quite different. If the van was "machinery, appliance [or] apparatus" (which Lord Hoffmann thought it was) and 'for use at work' (which Lord Hoffmann also thought it was) then it would have been considered 'work equipment'.

### Further reading

A full text of the Judgment in Spencer-Franks can be accessed at <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080702/spence-1.htm>

<sup>1</sup> *Reid v PRP Architects* [2006] EWCA Civ 1119

<sup>2</sup> *MacKie v Dundee County Council* 2001 Rep LR 62

<sup>3</sup> *Wright v Romford Blinds and Shutters* [2003] EWHC 1165

<sup>4</sup> [2008] EWCA Civ 181

# Bereavement damages

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**Since 1 January 2008 the amount paid to those whose loved ones have suffered a fatal accident has risen. However, does this increase truly compensate those affected by bereavement, or does it fall short in a world where everything costs more?**



## **The Fatal Accidents Act 1976**

This Act governs the allocation of damages upon death. It allows for an automatic amount to be paid to individuals having a certain relationship with the deceased. This means that if, at the time of the death, you are either the spouse or civil partner of the deceased, or if you are the parent of an unmarried deceased, under 18, then you are entitled to “bereavement damages”.

## **What is the amount?**

S1A (5) of the Act makes provision for the Lord Chancellor to set and adjust the figure at any given time. The amount rose from £7,500 to £10,000 in April 2002, and from 1 January 2008 it rose a further 18% to £11,800 for deaths occurring on or after this date. The latest rise has been made in order to keep in line with changes to the Retail Price Index that have incurred since the last rise in Bereavement Damages in April 2002.

However, although the increase is generally welcomed, it is felt that more could be done to compensate people affected by bereavement. In Scotland, for example, those suffering a bereavement can claim up to £30,000 - more than twice the amount now in force in England and Wales. The Government has however indicated that they will consider the figure on a regular basis.

## **What happens if you cannot qualify for bereavement damages?**

S1(1) of the Act does give a right to claim for damages where a loved one suffers death by a wrongful act, neglect or default. These individuals must, however, prove the damages that they have suffered as a result of the death in order to quantify the amount they may receive. As such it is a more laborious task than a s1A claim.

Those that can claim under s1(1) include a wife or husband or former wife or husband, a civil partner or former civil partner of the deceased, any person who was living with the deceased immediately before the date of death, or had been living with the deceased for at least two years before that date as a wife or husband or civil partner. Parents, children, siblings, uncles or aunts of the deceased can also bring such a claim as can any person (not being a child of the deceased) who was treated as a child of the family. A claim under s1(3) is usually brought by the executor or administrator of the deceased, though it may also be brought by all or any of the persons seeking the amount.

## **What if more than one person is entitled to the bereavement payment?**

This question might arise where, for example, a deceased child has two parents. Can both parents claim an individual £11,800 each under the Act or

must they divide a single payment between themselves? The answer is the latter. The statutory amount is one paid as a single lump sum and is divided between those entitled to it. Furthermore, there is a distinction between legitimate and illegitimate children in s1A(2)(b) which states that whilst both parents of a legitimate child may claim for damages, only the mother of an illegitimate child may claim. This distinction, however, is understandable in seeking to avoid fraudulent claims.

All in all, whilst being a strictly regulated procedure the ability for spouses, civil partners or parents to claim a guaranteed amount upon the loss of a loved one must be seen as a positive thing. Whether the latest increase in the amount claimable is adequate or not, however, is open for debate.

# Update

## EL trigger litigation

Six test cases - collectively referred to as the "Employers Liability Trigger Litigation" - have been selected to determine which event will 'trigger' liability in different mesothelioma claims.

This litigation follows the 2006 Court of Appeal decision in *Bolton Metropolitan Borough Council v (1) Municipal Mutual Insurance Limited (2) Commercial Union Assurance Company Limited* [2006] EWCA Civ 50 which held that a public liability policy which provided cover in relation to 'injuries occurring during the period of insurance' would only respond to an asbestos-related disease at the time the disease began and not at the time of exposure. Following this decision insurers have sought to deny liability for certain mesothelioma claims.

The ruling will have a significant financial impact on Insurers. The trial of the test cases has now ended and judgment is expected in November 2008.

## Reforms to personal injury litigation

Despite widespread publicity about the proposed reforms to personal injury litigation it has now been confirmed that many of the changes will not take place.

The aim of the proposed reforms was to both reduce the costs for lower value personal injury claims and to make the handling of cases more efficient. Proposed reforms included increasing the fast track limited, introducing a streamlined claims process and fixing recoverable costs.

After a considerable delay the Government has now provided a response to the proposals. The outcome can be summarised as follows:

- i) Small claims limit to remain at £1,000 for injury claims and £5,000 for others
- ii) Fast track limit to be increased from £15,000 to £25,000
- iii) Streamlined claims process limited to motor claims under £10,000
- iv) Fixed recoverable costs to apply to motor claims under £10,000 only.

It is disappointing - and arguably a missed opportunity - that the proposals have not been extended to employer and public liability claims. This would have been of considerable economic benefit to insurers.

# Round-up

*Benjamin Collett v (1) Gary Smith (2) Middlesbrough Football and Athletics Company (1986) Ltd* [2008] EWHC 1962 (QB)

The claimant was an ex footballer who was injured in a negligent tackle. Liability had been admitted and the matter was before Smith J. The claimant had amassed a great deal of evidence as to his prospects in the game and direct evidence was heard from the Manchester United Manager, Sir Alex Ferguson and the current Manchester United Captain, Gary Neville. The court was impressed with the claimant's evidence as to his future chances of playing professional football at a high level and future loss of earnings were awarded of £3.8m. The court declined to make any award for the possibility that the claimant would have gone on to earn a living post his playing career as a football manager on the grounds that this was too speculative. It was interesting to note that

whilst the court did discount the loss of earnings for contingencies other than mortality they did so by applying a reduction of 15% presumably on the basis the factors suggested by the Ogden tables (disability, education and educational attainment) were not considered applicable on the facts. This is a recent example of the courts being prepared to view each case on its own facts and not being bound to follow the recommendations for contingencies as set out in the 6th edition of the Ogden tables.

*(1) Timothy Perry (2) Catherine Perry v Samuel David Harris (a Minor & Patient suing by his Mother and Litigation Friend Janet Harris)* [2008] EWCA Civ 907

The claimant was a minor who sustained serious injuries whilst

playing on a bouncy castle at a birthday party held by Mr and Mrs Perry for their child. The claimant had not been invited to the party but did have permission from Mrs Perry to play on it. Whilst Mrs Perry's back was turned the claimant was struck on the head by an older child who was performing a somersault.

At first instance the District Judge found for the claimant who held that, inter alia, Mrs Perry's duty of care required her to maintain uninterrupted supervision of the castle. If she had done so she could have stopped the somersault and therefore the accident.

On appeal this decision was reversed. The Court of Appeal concluded that, inter alia, the original trial judge had set too high a standard of care in holding that a bouncy castle required uninterrupted supervision. It was impossible to preclude all risk that children might injure

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themselves and it was impractical to keep children under constant supervision.

This decision appears to be another example of the trend for the courts to apply “common sense” when handing down judgments. It would not have been in the public interest to impose impossibly high duties on parents when supervising their children.

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*Trustees of the Portsmouth Youth Activities Committee (a charity) v Poppleton* [2008] EWCA Civ 646

Mr Poppleton was an inexperienced climber who had engaged in simulated rock climbing without ropes at the Trustees of the Portsmouth Youth Activities Committee’s (TPYAC) indoor climbing room. Rules forbidding jumping were displayed outside the room, however, Mr Poppleton was not referred to them. When Mr Poppleton attempted to leap to an opposite wall he lost his grip and landed on his head on the matting below. He was rendered tetraplegic.

At trial the District Judge concluded that there was nothing wrong with the state of the premises and that the claimant was under no duty to assess Mr Poppleton’s competence or ensure he had the necessary training. However, it was held that the claimant was in breach of its duty of care to him by failing to warn him that thick safety matting did not make a climbing wall safe but might induce or encourage an unfounded belief that it did. Liability was split 75/25 in the defendants favour.

TPYAC appealed against the finding that it was in breach of its duty of care to Mr Poppleton and, in turn, Mr Poppleton cross appealed against the finding for contributory negligence.

The Court of Appeal allowed the appeal and dismissed the cross appeal. It was held that where there was an inherent risk of injury as a result of a voluntarily undertaken activity, the law did not require the occupier of the land that the activity occurred on to prevent an individual from engaging in that activity, or to train or supervise him whilst he did it. It made no difference that that TPYAC had charged Mr Poppleton to use the facilities, nor that the rules which they displayed could have been more prominent.

It is worth noting that the judgment in *Tomlinson v Congleton BC* [2003] continues to be applied. There was again a suggestion that public policy issues were considered when making this judgment. If the law had required training or supervision in the present case then it would have been equally required for a number of commonplace leisure activities which carried with them a degree of obvious risk.

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