Safety obligations: common law liability
17 June 2011, Rachel Barnes

It is often assumed that statutory obligations in relation to safety are more onerous than the common law duty of care. However, a recent Supreme Court judgment suggests that statutory duties, properly interpreted, equate much more to the common law duty than may have been thought.

The case of Baker vs Quantum Clothing Group concerned the potential liability of a number of different employers in the knitting industry for hearing loss suffered by employees prior to 1 January 1990. Such liability was alleged to have arisen both under common law and under section 29 (1) of the Factories Act 1961.

The common law standard is that of the conduct of the reasonable and prudent employer. In particular, an employer is entitled to follow a recognised and general practice where one exists, unless it is clearly bad or has been rendered out of date by developing knowledge.

As regards protection against noise, a code of practice dated 1972 had said that employees should not be exposed to noise that exceeded 90 decibels averaged over a period of eight hours. However, it also said that some people could be affected by noise levels below that level.

During the eighties, there was a growing body of opinion that this maximum limit was too high and on 1 January 1990 new regulations came into effect requiring employers to provide ear protectors to employees who could be exposed to noise levels above 85.

The judge at first instance held that, up to 1 January 1990, the duty on employers on both bases was to treat 90 as the maximum limit, above which protection should have been supplied. Two of the employers concerned had, in the view of the judge, acquired special knowledge of the growing awareness that this maximum was too high, and they were held to have been under a duty to treat 85 as the maximum limit from the beginning of 1985. However, as regards the average employer, those claimants in their employment who had suffered hearing loss before 1 January 1990 resulting from noise levels between 85 and 90 could not recover damages.

The Court of Appeal agreed with the judge’s interpretation of the common law duty. However, they took a very different view of the statutory duty under section 29 of the Factories Act.

This states that every workplace “shall, so far as is reasonably practicable, be made and kept safe for any person working there”, which was held to include keeping people safe from excessive noise. Similar wording is used for safety obligations in other statutes (for example, the Health and Safety at Work Act, sections 2 and 3).

The Court of Appeal held that liability under this section was more stringent than common law liability and that a place's safety is “an objective test without reference to reasonable foresight”. In short, safety is an absolute.

The Court of Appeal concluded that statutory liability to employees who were exposed to levels of noise below 90 became effective from January 1978. This was on the basis of a paper published in 1976, which provided a method for making an assessment of the quantum of risk arising from noise below 90. Because of this paper, in the view of the Court of Appeal, from January 1978 it was reasonably practicable for employers to take the necessary measures.
The Supreme Court, by a majority of three to two, rejected this approach. The reasoning of the court focused on the meaning of safe: “Whether a place is safe involves a judgment … objectively assessed … but by reference to the knowledge and standards of the time. There is no such thing as an unchanging concept of safety … foreseeability must play a part in determining whether a place is or was safe … The onus is on the employee to show that the workplace was unsafe in this basic sense.”

Thus the majority of the Supreme Court agreed with the first judge that the standard of safety under section 29 of the Factories Act did not add to the common law standard.

On the face of it, the approach of the Supreme Court would apply to similarly worded obligations concerning safety in other statutes. There have been two competing approaches towards the interpretation of statutory obligations concerning safety: what may be called the common law approach, which was followed by the first judge and the Supreme Court, and the more strict approach which was favoured by the Court of Appeal. It is the former approach that has now been endorsed at the highest level.

This article was published under the headline: “We’re all ears”

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