

Hampstead Ponds from an old postcard: Hardy winter swimmers brave it out before the courts.

HARDY HAMPSTEAD SWIMMERS SCORE VICTORY OVER NANNY STATE

Liability to prosecution by Health and Safety Executive

Should the members of Hampstead Heath Winter Swimming Club be allowed to swim in the pond on the Heath on a self-regulated basis? *Oliver Millington* reports on the recent "triumphant victory for common sense" in [Hampstead Heath Winter Swimming Club](#) and [Marc Sandford Hutchinson v Corporation of London Health & Safety Executive \(Interested Party\)](#).

Newspaper headlines railing against the nanny state are common currency these days. The legislature and the judiciary are often criticised for creating a killjoy legal framework that discourages schools from taking their pupils on adventurous outings, obliges local councils to chop down trees so as not to expose children to the temptation of climbing them, and prevents tourists from feeding the pigeons in Trafalgar Square, to give but a few examples.

To these critics the decision of Mr Justice Stanley Burnton in [Hampstead Heath Swimming Club & Hutchinson v Corporation of London & Health & Safety Executive](#) [2005] EWHC 713 (Admin) was a triumphant victory for common sense, personal freedom and self-regulation. The Court held that the decision of the Corporation of London refusing to allow self-regulated swimming in a pond on the basis that it would be liable to prosecution under section 3 of the Health and Safety at Work etc. Act 1974 was based on a legal error.

In this Issue

Autumn 2005

Civil Partnership 3

Vicarious Liability For Harassment 5

Personal Injury 8
Unreasonable behaviour in recovering more than Fixed Costs.

Failure to comply with Health and Safety Regulations as fundamental breach of contract: a new headache for employers?

The Adoption and Children Act 2002 11

August in Chambers...Quiet? Not Quiet!!

Family Case Law Review 12
Freeing for adoption.

The Paisley Gastropod 14
Would the famous snail case run today?
Legal history from *Donoghue v Stevenson*.

Work at Height Regulations 2005 16
A head for heights is now a legal requirement.

If an adult swimmer with knowledge of the risks of swimming chooses to swim unsupervised, in a pond that had no hidden dangers, the risks he would incur would be the result of his own decision to swim and the Corporation would not be liable to conviction under section 3.

The facts

The Claimants, a swimming club and the club's secretary, sought judicial review of a decision of the Defendant Corporation of London to refuse to allow club members to swim in a pond situated on Hampstead Heath on a self-regulated basis. Some of the club members had wished to swim in

...Continued from page 1

the pond when it was unattended by lifeguards and not open to the public. The swimmers were aware that swimming in an unattended pond exposed them to some risks, which they were willing to accept. The Corporation rejected the club's proposals for early morning self-regulated swimming in the pond as it considered that it would be liable to prosecution by the Health and Safety Executive under section 3 of the Act if it allowed such proposals.

"The swimmers were aware that swimming in an unattended pond exposed them to some risks, which they were willing to accept".

The issue was whether the Corporation's decision was based on an erroneous view of the law, and accordingly the case turned on the interpretation of section 3 of the Act.

The parties' positions

Section 3 of the Act is as follows:

"3 (1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.

(3) In such cases as may be prescribed, it shall be the duty of every employer and every self-employed person, in the prescribed circumstances and in the prescribed manner, to give to persons (not being his employees) who may be affected by the way in which he conducts his undertaking the prescribed information about such aspects of the way in which he conducts his undertaking as might affect their health or safety."

The claimants argued inter alia that:

- a) Section 3 was a penal provision and should be construed restrictively and construed so as to respect "the individualist values of the common law";
- b) Section 3 applied to activities carried out by the Corporation and did not apply to risks created by the Corporation's premises and the grant of access to the pond to self-regulated swimmers would not constitute the conduct of the Corporation's undertaking;
- c) Any risks created by members of the club

would be the result of their deciding to do so and their exposure to such risks would not have been caused by the conduct of the Corporation's undertaking;

- d) In determining whether an employer had established the reasonably practicable defence in respect of section 3, the value of the activity it had permitted must be taken into account and not solely the cost or physical difficulty of eliminating the inherent risk in the activity.

On behalf of the defendant Corporation the following arguments were put forward:

- a) A restrictive interpretation of section 3 was inappropriate. A purposive interpretation was appropriate.
- b) Section 3 was not limited to activities, but applied equally to risks created by an employer's premises.
- c) The risks inherent in unsupervised swimming would be created by the Corporation's grant of access. The Corporation would therefore be liable for the creation of those risks under section 3.
- d) The only matters to be taken into account in determining whether an employer had established the reasonably practicable test were the costs and physical difficulty of a relevant precaution.

The Court's Decision

In giving his judgment, Mr Justice Stanley Burnton considered the principles applicable to the interpretation of the Act; the leading House of Lords case of Tomlinson v Congleton Borough Council (2003) UKHL 47, (2004) 1 AC 46; the conduct of the employer's undertaking; whether the swimmers would be exposed to risks to their health and safety by the conduct of the Corporation's undertaking; and whether the social value of swimming was a relevant factor in determining what was reasonably practicable.

Learned Judge's conclusions

The general proposition that a penal statute such as the 1974 Act should receive a restrictive interpretation required no authority. However other principles of interpretation also applied. The purpose of the statute was, among other things, to secure and to protect the safety of employees and others. It was for that purpose that functions beyond the prosecution of offences created by the Act were conferred on the Health and Safety Executive. That purpose required the court to avoid an over-restrictive interpretation if it would be inconsistent with that purpose. The requirement that section 3 should be interpreted in its context also pointed against an automatic narrow interpretation. However the Act should receive a construction that respected "the individualist values of the common law" (Tomlinson v Congleton BC applied).

Section 3 was not limited to the activities of employers as shown by the preamble of the Act and section 1(1)(b). The preamble was no more than a guide to Parliament's intention and section 1 was in effect enlarging upon the preamble. In addition the distinction between dangers arising from the static condition of premises and activities carried out on them was of dubious validity. The Corporation was correct to consider that its regulation of admission to ponds constituted the conduct of an undertaking within the meaning of section 3.

A physical cause would be irrelevant where the law was concerned not

...Continued from page 2

with causation but with responsibility. The requirements in section 3 that the exposure to risk should be by the conduct of the employer's undertaking was subject to the same considerations as those referred to in Tomlinson. If an adult swimmer with knowledge of the risks of swimming chooses to swim unsupervised, in a pond which had no hidden dangers, the risks he would incur would be the result of his decision and not of the permission given to him to swim. It followed that those risks would not be the result of the conduct of the Corporation's undertaking and the Corporation would not be liable to conviction under section 3. That conclusion was consonant with the application of the Act to risks arising both from the Corporation's activities and the "risks attributable to ... the condition of premises" used for the purposes of the Corporation's undertaking.

Mr Justice Stanley Burnton reiterated "the importance of protecting individual freedom of action and of avoiding imposing "a grey and dull safety regime on everyone".

The meaning of the words "so far as was reasonably practicable" was authoritatively considered by the House of Lords in Mailer v Austin Rover Group Plc 3 WLR 520 (considered). The decision in Tomlinson could not be held to have affected that decision. Since permission by the Corporation to adult able swimmers to swim in the pond did not create a relevant risk, the question of reasonable precaution did not arise. In the circumstances the Corporation's decision was based on a legal error as the Corporation's grant to the club of permission to swim unsupervised in the pond would not of itself render it liable to prosecution under s3.

Conclusions

In revisiting and restating the principles as set out in Tomlinson, Mr Justice Stanley Burnton reiterated the importance of protecting individual freedom of action and of avoiding imposing "a grey and dull safety regime on everyone". Following Hampstead Heath Winter Swimming Club, if an adult swimmer with knowledge of the risks of swimming chooses to swim unsupervised, the risks he incurs are the result of his decision and not of the permission given to him to swim. Accordingly, those risks are not the result of the conduct by the employer of his undertaking, and the employer is not liable to be convicted of an offence under section 3 of the Act.

Oliver Millington completed his pupillage with 9 Gough Square. He was taken on as a tenant in April 2005 and undertakes a variety of work including criminal, family, personal injury, employment, L&T and all aspects of common law work.



Civil Partnership

A radical change to society is due to take place this winter. *Oliver Jones* outlines the Civil Partnership Act 2004 that comes into force on 5th December 2005 and will enable a new legal status to be created – that of a "civil partner".

Although the fanfare of publicity for civil partnerships trumpeted it as the creation of gay marriage, this is not entirely true. Civil Partnership does share many similar restrictions on who can enter it with marriage:

- (i) They are not allowed to be within the prohibited degrees of relationship (siblings; parent and child; uncle and nephew; aunt and niece; grandparent and grandchild; adoptive parent and adoptive child etc);
- (ii) They cannot already be married or in a civil partnership that has not been legally ended;
- (iii) They must be over 16 years old (similar regional variations apply in relation to obtaining parental consent for those aged under 18 years old).

There are some obvious differences too. In particular the couple must be of the same sex. One of the fundamentals of marriage is omitted entirely from civil partnership: there is no requirement that the couple should be in a romantic or sexual relationship together. Although a loving relationship is commonly perceived as the cornerstone of marriage, the law puts the sexual element of the relationship at its heart: (i) there is an expectation that marriage should be consummated and (ii) adultery is a ground for proving irretrievable breakdown of the marriage. Civil partnership does not include these elements. Perhaps surprisingly, there is nothing that restricts civil partnership to homosexual couples. Indeed any friends of the same sex who are unmarried and unrelated could enter into a civil partnership.

How does it compare to marriage?

The government's objective was to "create a

...Continued from page 3

parallel but different legal relationship that mirrors as fully as possible the rights and responsibilities enjoyed by those who marry". The benefits of a civil partnership are very similar to the benefits of marriage and they touch on many different aspects of life:

- **Inheritance:** in the absence of a will a surviving partner will have the same inheritance rights as a spouse. Partners will gain tenancy succession rights.
- **Tax:** civil partners will be treated the same as married couples for tax purposes, including inheritance tax.
- **Pensions:** civil partners will be able to access survivor pensions in public service schemes and contracted-out pensions schemes from 1988. Further details can be obtained from the Pension Service – www.thepensionerservice.gov.uk
- **Children:** civil partners will have responsibility for maintaining any children of the family & will be entitled to apply for parental responsibility or residence of the children of the family.
- **Maintenance:** they will have a duty to provide reasonable maintenance for each other and any children of the family.
Protection from domestic violence.
- **Next-of-kin rights:** partners will be given the same rights for visiting sick partners in hospital.
- **Testifying:** the exemption from testifying against a spouse will be extended to civil partners. Similarly a civil partner cannot be prosecuted for conspiring with his or her partner.
- **Benefits:** civil partners will be treated jointly for income-related benefits.
- **Fatal accidents compensation:** civil partners will be treated like spouses.
- **Recognition for immigration and nationality purposes:** People subject to immigration control will have to give notice at a Register Office designated for that purpose and will have to produce either:
 - (i) An entry clearance (usually a visa) granted to form a civil partnership;
 - (ii) A Home Office certificate of approval, or
 - (iii) Indefinite leave to remain in the UK.
 Registrars are required to report any civil partnerships to the Immigration Service if they have suspicions that they are being entered into as a means of circumventing immigration control.
- **Names:** civil partners will be able to take their partner's surname or hyphenate their names. A civil partnership certificate along with proof of

identity will enable a person to change their name on their passport and driving licence.

On dissolution of a partnership, the rights and responsibilities will include fair arrangements for property division, residence arrangements and appropriate contact in the same way as for divorcing couples.



How can a civil partnership be registered?

There has to be advance notice of 15 clear days before a civil partnership can be formed – although registrars will have powers to reduce the notice period if there are “compelling reasons because of the exceptional circumstances of the case” – presumably this could be used to allow seriously ill people to enter into partnership. Apart from a handful of exceptional cases, the first civil partnerships will start to be created on 21st December 2005.

Registration has to be done through a registry office (www.gro.gov.uk). Formal notice of intention to form a civil partnership will have to be given 15 days in advance (during which time eligibility will be checked). The names and occupations of couples will be published but unlike marriage their addresses will not be published – no doubt to minimise the risk of harassment of homosexual couples. After the notice period, the civil partnership is formed by the couple when they sign a document in the presence of two witnesses and the registrar. This can take place in any registry office or premises licensed for a civil marriage but not in any religious premises. There are special provisions for registering when this would not be possible (i.e. when a partner is ill, in hospital or in prison). There is no requirement for any ceremony. The Act prohibits any religious service from taking place during the registration process. However, couples will be able to arrange a ceremony in addition to the registration procedure if they want to.

What if it all goes wrong?

The “divorce” procedure for civil partnerships is called “dissolution” and will be a court-based process. Like divorce, it will not be possible to apply for a dissolution within the first year of civil partnership. The partner applying for dissolution will have to show that there has been an irretrievable breakdown in the relationship. In order to prove this, one or more of the following facts will have to be proved:

...Continued from page 4

- Unreasonable behaviour, such that the applicant cannot reasonably be expected to live with their civil partner;
Separation for two years, where the other civil partner consents to a dissolution order being made;
Separation for five years; where the other civil partner does not consent to a dissolution order being made;
That the other civil partner has deserted the applicant for a period of two years prior to the application.
- The courts will have other orders available to bring a civil partnership to an end in certain circumstances:

“nullity order” annuls a void or voidable civil partnership;
“presumption of death order” dissolves a civil partnership on the basis that one partner is presumed dead;
“separation order” which provides for the separation of civil partners.

In the first instance the court will make conditional orders which can be made final after at least 6 weeks has passed.

Does it go far enough?

Stephen Cretney, a prominent academic in family law has raised an argument that if civil partnerships can be a chaste relationship, why is it necessary for there to be prohibited degrees of relationship. His argument is that it would be fairer to allow civil partnership to exist without such limitations – imagine two elderly spinsters who share a house, a civil partnership would allow the surviving sister to remain living in the house when otherwise she might have to sell to meet the inheritance tax liability. On a similar vein, he has suggested that civil partnerships do not need to be restricted to same sex couple – why should heterosexual couples not have the option to formalise a “common law marriage”.

Nonetheless, it is clear that the new civil partnerships will provide a far-reaching new legal status for same-sex couples that effectively covers almost every legal aspect that marriage currently provides for.

Oliver Jones’s practice is concentrated on family law work dealing with all areas of public law, private law and ancillary relief matters (including publicly funded work). He acts regularly for local authorities, parents and Guardians in all levels of court.

A sporting challenge to our readers

Emboldened by watching a summer of glorious ashes victories, Giles Mooney issues a challenge to readers. Further emboldened by the celebratory drinking, the sportier (it’s all relative) members of 9 Gough Square feel the need to increase our fixture lists for our football and cricket teams. Anybody interested in arranging a football match should contact Shahram Sharghy at ssharghay@9goughsquare.co.uk and for cricket next year, Giles at gmooney@9goughsquare.co.uk.



Vicarious Liability For Harassment

Majrowski v Guy's and St. Thomas' NHS Trust [2005] EWCA Civ 251 (16 March 2005 Auld LJ, May LJ, Scott Baker LJ)

At common law an employee who wishes to seek damages against his or her employer in respect of stress at work faces formidable hurdles. Dan Lawson reports on the case of Majrowski where the Court of Appeal reached a decision that potentially makes such claims a great deal easier to pursue.

It held that an employer could be vicariously liable under the Protection from Harassment Act 1997 for its employee's breach of the duty not to subject another person to harassment. There was a forceful dissenting judgment from Scott Baker LJ, however, and on 7 July 2005 the defendant was granted leave to appeal to the House of Lords. At this stage one cannot, therefore, be certain how the land will eventually lie. The Court of Appeal's decision, if upheld, would in many ways revolutionise stress at work claims.

FACTS

Williams Majrowski was employed by the Trust as a clinical audit co-ordinator. He alleged that, whilst

...Continued from page 5

working in that post, he was bullied, intimidated and harassed by his departmental manager acting in the course of her employment by the Trust. He instituted proceedings against the Trust under s.3 of the Protection from Harassment Act on the grounds that the manager's conduct amounted to harassment in breach of the Act for which the Trust, as her employers, were vicariously liable.

Section 1 of the Protection from Harassment Act provides that:

"(1) A person must not pursue a course of conduct -

- (a) which amounts to harassment of another; and*
- (b) which he knows or ought to know amounts to harassment of the other.*

(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in the possession of the same information would think that the course of conduct amounted to harassment of the other."

Section 2 makes harassment in breach of s.1 a criminal offence. Section 3 provides a civil remedy for the same conduct and, in doing so, goes further than the common law in providing for damages for anxiety falling short of injury to health.

An interpretative section provides that:

"(2) References to harassing a person include alarming the person or causing the person distress.

(3) A "course of conduct" must involve conduct on at least two occasions.

(4) "Conduct" includes speech."

At first instance Mr. Majrowski's claim was struck out on the grounds that the Protection from Harassment Act does not permit the imposition of vicarious liability for breach of its provisions. The appeal raised two issues: first, whether employers may be vicariously liable for a breach of statutory duty imposed only on their employees; and, secondly, whether employers may be civilly vicariously liable under s.3 of the Protection from Harassment Act for harassment in breach of s.1 of the Act committed by one of their employees in the course of his or her employment.

The decision

The majority, Auld LJ and May LJ, held that the County Judge had erred in striking out the claimant's claim on the basis that the Act does not permit vicarious liability for breach of its provisions and that since the alleged harassment was perpetrated by a fellow employee, and not by the employers, the claimant had no reasonable grounds for bringing this claim against the Trust.

It was held that an employer may be held vicariously liable for a breach of statutory duty imposed on an employee but not on the employer. Recent authorities, in particular the judgments of the House of Lords in Lister v Hesley Hall Limited and Dubai Aluminium Co. Limited v Salaam have freed the courts from the traditional test for determining vicarious liability - whether the employee was acting "in the course of his employment" - and have substituted a new test of fairness and justice, turning on the sufficiency of the connection between the breach of duty and the employment.

It was held that the new jurisprudence made it clear that vicarious liability is not confined to common law claims. What matters is the closeness of the connection between the offending conduct of the employee and the nature and circumstances of the employment. Thus it is immaterial whether the conduct in respect of which a claimant seeks to hold an employer to account is a breach of a common law or a statutory duty, and whether it is a criminal offence as well as a civil breach.

In the case of any statutory duty in respect of which a claimant seeks to establish an employer's vicarious liability, the claimant will have to show that the statute in question does not exclude such liability either expressly or on its proper construction, the latter guided, where appropriate, by considerations of policy. On that basis the majority held that employers may be vicariously liable under s.3 of the Protection from Harassment Act for their employees' acts of harassment of third parties, including fellow employees, committed in the course of employment. The Act neither expressly provides for vicarious liability nor expressly excludes it and there is no good policy reason why vicarious liability should not apply to breaches of the Act.

Although the Act was primarily aimed at stalking, not something normally done by a person in circumstances that could involve an employer in vicarious liability, the prohibition in s.1 of "a course of conduct ... which amounts to harassment of another" is capable of wider application than to stalkers. The workplace is the very place where harassment is often encountered and from which its victim is often powerless to escape. It is thus often likely to be a risk incidental to employment.

Employers are expected to be alert to all sorts of discrimination and exploitation by their employees, which may include harassment, and to establish good working practices and procedures to warn and/or guard against such abuse. If for want of good practices or procedures falling short of negligence, or if despite them, the nature of the employer's undertaking is such as to render harassment in breach of the Act a reasonably incidental risk, a court may consider it just and reasonable in the circumstances to hold the employer vicariously liable.

The majority felt that there were three effective safeguards for employers to prevent the "floodgates" opening. First, there was the constraint provided in the Act itself where, in s.1, it prohibits a "course of conduct" amounting to

...Continued from page 6

harassment. As a result it takes more than a single act of an employee in the course of his employment to engage the liability of his employer. Second, to succeed in a claim under s.3, it is necessary for a claimant to establish to an objective standard at least that the course of employment amounts to harassment, usually in the sense of it being likely to alarm or cause the claimant distress. Third, the conduct, looked at in the statutory context making it unlawful, must make it just and reasonable in the circumstances of the case to compensate the claimant by application of the "close connection" and/or "reasonable incidental risk" criteria.

The dissenting judgment

Given the pending appeal to the House of Lords it is appropriate to consider briefly the dissenting judgment of Scott Baker LJ. He held that the Protection from Harassment Act was not intended to impose civil liability on an employer for acts of harassment perpetrated by an employee, thus giving the victim the opportunity to recover damages from the employer as well as or instead of the employee. He thought the Act was aimed at unconscionable behaviour essentially by one individual to another. The statutory duty is personal in nature and not one in relation to which, in the event that the prohibited conduct happens to occur in the workplace, the employer is to be treated as standing in the shoes of an employee perpetrator. The fact that the perpetrator of harassment may be doing so within or from the workplace is entirely incidental to the primary purpose of the legislation which is to stop harassment and provide the machinery for doing so, rather than to award compensation in those cases which would not otherwise be covered by the common law.

Scott Baker LJ felt that the common law of negligence provided claimants with an adequate framework for claiming damages against employers for injury caused by stress at work in the nature of harassment. There are appropriate control mechanisms so that the balance is held between the social interest in furnishing an innocent victim with recourse against a financially responsible defendant on the one hand and the desire not to place an undue burden on employers on the other. Vicarious liability for breach of the Protection from Harassment Act by an employee would be a considerable extension of the employer's liability at common law. In particular, there is a lower threshold for damages under s.3 of the Act. Any anxiety caused by harassment qualifies for an award of damages. This is in sharp distinction to stress at work claims where the threshold for an award is identifiable psychiatric injury, which has to be foreseeable injury following a breach of duty on the part of the employer.

Comment

It remains to be seen which of these opposing approaches the House of Lords will favour. Whatever the correct position as a matter of law, one is bound to view with a certain amount of scepticism the suggestion that this decision, if upheld, will not create something of a "floodgate" problem. As Scott Baker LJ pointed out, stress at work claims will be presented as claims for breach of statutory duty under the Act and it will not be possible to strike out claims, because every case in which it is alleged the perpetrator of harassment was acting in the course of his employment will have to be examined on its facts for the court to decide whether, in all the circumstances, it will be just and reasonable to impose vicarious liability on the employer.

Mr. Majrowski's complaints of his manager were that she was excessively critical of, and strict about, his time-keeping and his work; that she isolated him by refusing to talk to him and treated him differently and unfavourably compared to other staff; that she was rude to him in front of other staff; that she imposed unrealistic targets for his performance. The task of determining objectively when such conduct passes from reasonable managerial vigour in promoting efficiency within the workplace to harassment is bound to be finely balanced.

Dan Lawson has a broadly based civil practice with extensive experience of all areas of personal injury law, especially cases involving industrial accidents and occupational disease. He also does large amounts of contract and property work, with particular emphasis upon building disputes and business and residential landlord & tenant. Employment work forms a significant part of his business disputes practice and he has acted in a number of discrimination cases.

Clinical & Legal Update Seminar At The Law Society, London

15th November 2005

Clinical

- Clinical Negligence in Breast Cancer
- Reproductive Surgery & IVF in Practice
- Problems of Diagnosis in General Practice
- Problems in Childbirth
- Medical Negligence in Plastic Surgery

Legal

- Periodic Payments
- Mediation Update
- Expert Witnesses
- CFA's
- Care Claims

Cost £145.00 +VAT per delegate inc lunch
(book two places and get a third free)

For details please see our seminars page at www.9goughsquare.co.uk, or telephone 020 7832 0500.

Personal Injury - Unreasonable behaviour in recovering more than Fixed Costs.

The fixed costs regime applicable to small claims track cases is well-established by Part 27 of the CPR. It is only in circumstances of 'unreasonable behaviour', as set out in Part 27 rule 14(2)(d), that anything more than fixed costs will be awarded, reports *Louise Jones*.

At the inception of the Civil Procedure Rules in 1998 it was initially unclear how 'unreasonable behaviour' would be interpreted. It remained to be seen how the making of offers to settle would affect the award of costs in the small claims track, given that the formal rules of Part 36 do not apply.

A decision of DJ Stuart-Brown in Bristol County Court, *Clohessy v Homes* June [2004] 6 CL 47, has provided an interesting gloss on Part 27.14. In a straightforward road traffic case, the Defendant had made an offer to settle of 75/25 on liability in favour of the Claimant. The Claimant rejected that offer and went on to fight the case, whereupon the Claimant's case was dismissed at trial and no liability was apportioned to the Defendant.

"Claimant had failed to make a clear and objective assessment of its own case"

The Judge found that the Claimant had failed to make a clear and objective assessment of its own case, and accordingly, found that the Claimant had behaved unreasonably for costs purposes on two bases:

Continued on page 10....

Failure to comply with Health and Safety Regulations as fundamental breach of contract: a new headache for employers?

Suzanne Bunning v. G T Bunning & Sons Ltd [2005] EWCA Civ 983 (27 July 2005 Brooke LJ (V-P), Latham LJ, Maurice Kay LJ)

In allowing permission to appeal in the case of *Bunning v. Bunning* the Court of Appeal considered the possibility that a failure to comply with the requirements of the Management of Health and Safety at Work Regulations 1999 ('the Regulations') might be a breach of contract sufficient to enable the employee to resign and claim constructive dismissal. Employers and their legal advisers held their breath. Was this the quiet opening up of a floodgate through which would flow countless legitimate constructive dismissal claims founded on employers' failure to comply with the numerous Health and Safety Regulations in existence? *Esther Pounder* finds out.

FACTS

Ms Bunning was employed as a welder/fitter by the family business. On 30 September 2001 Ms Bunning informed her father, one of the directors, that she was pregnant and that she felt that it was no longer safe for her to continue working in the workshop.

By so doing Regulation 16 of the Regulations, requiring completion of a risk assessment to consider the risks posed to new and expectant mothers, was brought into operation (see below). The Employment Tribunal at first instance found that the risk assessment completed by the company was defective. In reliance upon this assessment the company told Ms Bunning that she should return to work as normal. Ms Bunning returned to work in the workshop.

Dad, I'm pregnant! It's not safe for me to carry on working in the workshop.

However, on 2 November 2001 the company offered her an alternative job in the stores. The offer followed a second risk assessment which the Employment Tribunal also concluded was defective. Ms Bunning began working in the stores but miscarried shortly thereafter. Following this unhappy event Ms Bunning wrote a letter to her employers complaining about her treatment, particularly the initial requirement that she remain working in the workshop. In her letter she requested a meeting with her employers and a response to her letter by 3 December. A letter dated 4 December was sent to Ms Bunning by her employers declining the suggestion of a meeting. That letter crossed with Ms Bunning's letter of resignation dated 5 December. In her letter Ms Bunning described the treatment she had received at the hands of the company over the preceding weeks as necessitating her decision to leave. As she put it: "I cannot work any longer in any environment...where the trust and confidence has entirely broken down as a consequence of the company's actions and attitudes".

Continued on page 9....

...Continued from page 8

The company accepted Ms Bunning's resignation and her employment came to an end. The Employment Tribunal found that the failure to undertake an adequate assessment was a fundamental breach of contract but that Ms Bunning failed to establish causation as that breach was waived or the contract was affirmed by taking the job in the stores. The same reasoning was adopted by the EAT and Ms Bunning appealed to the Court of Appeal.

THE LAW

By virtue of section 3(1) of the Regulations:

There is imposed upon employers a general obligation to assess the health and safety risks to which their employees are exposed while at work.

Regulation 16(1) goes further and requires:

That employers employing women of childbearing age, in undertaking the risk assessment required by Regulation 3(1), must take into account the particular risks posed to a new or expectant mother or to her baby.



Esther Pounder - Our newest tenant.

Where a woman has given her employer notice of her pregnancy in writing, has given birth within the previous six months or is breastfeeding, the employer must consider whether it is possible to avoid the identified risks by compliance with the relevant statutory provisions. If the answer is no, then the employer must consider the options of either changing the woman's working hours or conditions or, alternatively, suspending her.

THE DECISION OF THE COURT OF APPEAL

Maurice Kay LJ, in a judgment with which Latham LJ and Brooke LJ concurred, set out the test applicable in cases of constructive dismissal. In essence, it must be proved that the employee terminated the employment contract in accordance with the Employment Rights Act 1996 section 95(1)(c). The employee must show:

- that the breach had gone to the root of the contract; and
- that there was a causal link between the employer's breach and the employee's resignation. (see Walker v. Josiah Wedgwood & Sons Ltd [1978] ICR 744 and Harvey on Industrial Relations and Employment Law, Vol 1, [403])

Maurice Kay LJ, applying the above criteria, held that the Employment Tribunal

had reached a permissible conclusion in deciding that the failure to undertake a sufficient risk assessment might constitute fundamental breach. Accordingly the first aspect of the test was satisfied.

As to the second aspect, his Lordship considered, that the Employment Tribunal had been entitled to find that there was not a causal link between any breaches and Ms Bunning's resignation. The conclusions of the Employment Tribunal could not, therefore, be interfered with and the appeal was dismissed.

COMMENT

Wall LJ at the permission stage allowed Ms Bunning's appeal to proceed, at least in part; as he considered that it was arguable that the company's conduct in relation to the above Regulations constituted a fundamental breach. Maurice Kay LJ in his judgment does not address this question in any detail. His Lordship simply states that:

"...the findings of the Tribunal were that (1) there had been a fundamental breach at or about 10-12 October; ...In my judgment this was a permissible approach on the part of the Employment Tribunal. It is well known that the Employment Appeal Tribunal will not interfere with such findings unless they amount to a conclusion which no reasonable tribunal could reach: Pederson v. Camden LBC [1981] ICR 674 CA. I am unable to say that demanding test has been satisfied."

Despite finding that on the facts Ms Bunning could not succeed, the Court of Appeal have potentially opened up a new basis for constructive dismissal claims to be brought by pregnant employees. What their Lordships have not done, however, is provide any guidance as to the limits of the principle that they appear to have readily accepted: that breach of a particular health and safety requirement can be a repudiatory breach of contract going to the root of the duty of trust and confidence between employer and employee. It would seem that Bunning far from providing certainty has opened the way for protracted debate. It remains to be seen whether the same principles will apply to a breach of Regulation 3(1) and thereby potentially affect all employees.

The argument could be taken even further: could it be said that a breach of any of the other numerous Regulations governing employers' duties in the workplace is capable of amounting to a fundamental breach of contract and allow an

Continued on page 10...

...Continued from page 8

- In commencing the action in the first place;
- In rejecting an early offer favourable to the Claimant.

It may be prudent to bear the case of Clohessy in mind in the negotiations surrounding small claims. There is no blanket immunity from the type of costs penalties enshrined in Part 36 in the small claims track. Although Clohessy was dealing with a particularly favourable offer to the party that ultimately rejected it, there is an inherently subjective element in what constitutes 'favourable' in the context of each small claims case. Caution before rejecting any sort of reasonable offer is therefore advisable, even in the small claims track. Moreover, while there is a clear risk of unreasonable costs being awarded where a case should not have been brought by a claimant, the award of unreasonable costs is also a risk where an action should never have been defended.



Louise Jones joined 9 Gough Square as a tenant in October following successful completion of her pupillage. She is able to undertake a variety of work including personal injury, crime, employment, landlord and tenant, family; and all aspects of common law work. Louise was awarded the Harmsworth Scholarship by the Middle Temple. Prior to coming to the bar she worked as a paralegal on a team representing soldiers in the Bloody Sunday Inquiry.

...Continued from page 9

employee to walk off the job and claim constructive dismissal? It can only be hoped that, if such arguments are to be pursued that, at some stage, the Courts take the opportunity to consider the question in the round and avoid the need for breaches of each of the numerous workplace Regulations to be considered in turn.

For the meantime, the prospect of being faced with constructive dismissal claims following Bunning should provide further incentive for employers to pay close regard to the health and safety risks affecting their employees, particularly if they are under any form of disability.

There are, of course, other pre-existing reasons why employers would be well advised to comply with the Regulations. The failure of an employer to provide a risk assessment in respect of a pregnant woman's position already carries the potential risk of an Improvement Notice being served by the HSE. Criminal penalties may follow if there is a failure to comply with the Notice. Also, a recent amendment to the Regulations has meant that employees are now free to bring civil claims against their employers where they are in breach of duties imposed by the Regulations.

Tortious claims are, of course, also possible in the case of damage being occasioned as a result of the employer's failure to provide and act upon an adequate assessment. Discrimination claims may also be founded upon breaches of the Regulations provided that detriment can be established, as was found in Bunning itself.

Esther Pounder joined 9 Gough Square as a tenant in October following successful completion of her pupillage with Chambers. She is able to assist in a range of work including family proceedings in Court, criminal matters in the Crown and Magistrates' Courts, Fast Track trial work and clinical negligence.

Court of Appeal says Stress at Work cases should be mediated

In the psychiatric stress through over-work case of *Vahidi v Fairstead House School Trust Ltd* the Court of Appeal expressed its exasperation with parties who engage in long trials and appeals where the Court of Appeal has already laid down settled principles. In the words of Lord Justice Longmore:

"One shudders to think of the costs of this appeal and of the trial which apparently took as long as 9 days. As the courts have settled many of the principles in stress at work cases, litigants really should mediate cases such as the present"

9 Gough Square offers a team of CEDR accredited Mediators

Andrew Baillie QC

Giles Eyre

Grahame Aldous

Christopher Wilson

See www.9goughsquare.co.uk for more details

The Adoption and Children Act 2002

“When children cannot live with their birth parents, for whatever reason, we all share a responsibility to make sure that they have a chance of a fresh start and an opportunity to enjoy the kind of loving family life which most of us take for granted.”

So said Tony Blair in his foreword to the Adoption White Paper in 2000, commencing what would be a lengthy legislative process to effect the new Adoption and Children Act 2002. That legislative process is now drawing to a close; following the gradual introduction of the new law on a piecemeal basis, the final parts of the Act will come into force on 30 December 2005. Here, *Louise Jones* summarises some of the key provisions that will commence then.

Child’s welfare paramount

- Section 1 firmly establishes that the child’s welfare must be the paramount consideration of the court or adoption agency throughout the child’s life. The factors to be taken into account by the court or adoption agency are the same as in the Welfare Checklist of the Children Act 1989 – at last, the law will proffer a formal alignment between adoption law and the Children Act 1989.
- From 30 December 2005, there will be formally placed upon each Local Authority a duty to continue to maintain an adoption service designed to meet the needs of children who may be adopted, prospective adopters and the adopted parents, natural parents and former guardians of adopted persons – already, the services are to include assessments of members of those groups for their adoption services;
- Rendering the old regime of freeing orders firming to history, the Act sets out a new system of placement for adoption. Agencies will be able to place a child for adoption either if they have the consent of the parent/guardian (section 19) or if they have a Placement Order (section 21);
- Sections 66–76 of the Act provide a statutory exposition of the status of adopted children and the relationship with the adoptive family: “an adopted person is to be treated in law as if born as the child of the adopters or adopter.”
- The remaining parts of the Act dealing with the adoption of foreign children will also come into force on 30 December 2005. These provisions aim to ensure that British nationals follow proper procedures in adopting a child overseas or bring a child into the UK for adoption.

The Act clearly represents an entire, even radical, overhaul of the law on adoption. It is to be hoped that the new regime will enable 2006 to herald the beginnings of a more streamlined and efficient system of adoption that, crucially, has the child’s welfare at its heart.

AUGUST IN CHAMBERS...QUIET? NOT QUITE!!

“See you in four weeks” exclaims Grahame Aldous, as he prepares for the Namibian sunshine. “Next time I see you, West-Ham will be top of the Premiership” commented a rather optimistic Roger Hiorns.

August is upon us and it is a common perception that most Chambers resemble ghost towns during this month. Traditionally, August is a quiet month. The High Court shuts down almost completely for two months at the end of July, with only a handful of Judges sitting from each Division to deal with emergency applications. *Michael Goodridge, our Senior Clerk (Civil)* reports that with the increased jurisdiction of the county courts, matters no longer grind to a halt as they might have done in yesteryear!!

9 Gough Square remains a hive of activity, especially the clerks’ room. We have the usual number of cases to cover, although less barristers to cover them! Many of our solicitors are also away, so we often cover hearings (and often draft documents) that they would ordinarily do themselves; a service we are happy to provide as needs must! It is worth mentioning here that Chambers has a policy of not allowing any of our teams to become too depleted over the summer vacation. We ensure that we have sufficient numbers within the practice groups (with sufficient seniority) to assist our instructing solicitors as and when is necessary.

For those members of Chambers who do work in August, it is a good opportunity for them to catch up with me and other members of the clerk’s room. I have had numerous (and beneficial) practice development meetings this summer, with time to reflect over the past seven months and to consider the often frantic Michaelmas term ahead. If the clerk’s room do have a quieter moment during vacation, it is an ideal time for a late spring clean; countless files housing conditional fee agreements and the like need to be scrutinized to ensure all is as it should be!

Continued on page 13....

...Continued from page 16

Given the overriding purpose of the Regulations to ensure that all work at height is carried out safely, it is no surprise that an obligation is imposed (Regulation 12) to inspect work equipment used in such operations. Where such an item of work equipment has to be installed or assembled then it must be inspected after installation or assembly and before use. A record of the inspection must be kept. All places of work at height must also be checked on each occasion before that place of work is used (Regulation 13).

"Falls from height remain the single biggest cause of workplace deaths" HSE

Finally, all persons working at height are under a duty to use the work equipment or safety devices provided in accordance with the instructions and training they have been given (Regulation 14).

All in all, these Regulations will be the first port of call in any case where someone has fallen off something in the course of their work. Employers will no longer be able to leave it up to the workman to select an appropriate ladder and get on with the job as best he can. A great deal of thought and paperwork will now be required. Is there likely to be widespread compliance with these Regulations? Somehow I doubt it. Keep a copy close at hand.

Roger Hiorns specialises in personal injury, fatal accident and clinical negligence cases. He has a particular interest in occupational disease claims and is noted for his expertise in claims for work related upper limb disorders.

Family Case Law Review

The following case, first published by 9 Gough Square's new tenant, *Dorothea Gartland* in the New Law Journal, addresses the interesting issue of freeing for adoption where parental consent for the freeing application has been withheld. This case attracted a great deal of media attention when the judgment was made in August.

Freeing for adoption

The most recent decision is the High Court judgment in *Essex County Council v X and Y and A and B*. The court took the unusual step of making public its judgment in this case and in also making public an anonymised version of the care proceedings, both of which are to be found at www.hmcourts-service.gov.uk/HMCJudgments.

This case concerned an application by Essex County Council for an order freeing the children A and B for adoption. A was a girl aged a little over 4 years old and B was a boy aged 14 months. The care order upon the basis of care plans for adoption or alternative placement within the wider family had been made in October 2004.

The parents vehemently opposed the adoption and wished to be reunited with their children. At the hearing in the High Court the parents sought an adjournment of the application by Essex for four months together with a discharge of a section 34(4) order enabling the Local Authority to withhold contact. The parents also requested a direction for an assessment by a specialist organization skilled in working with parents who have learning difficulties.

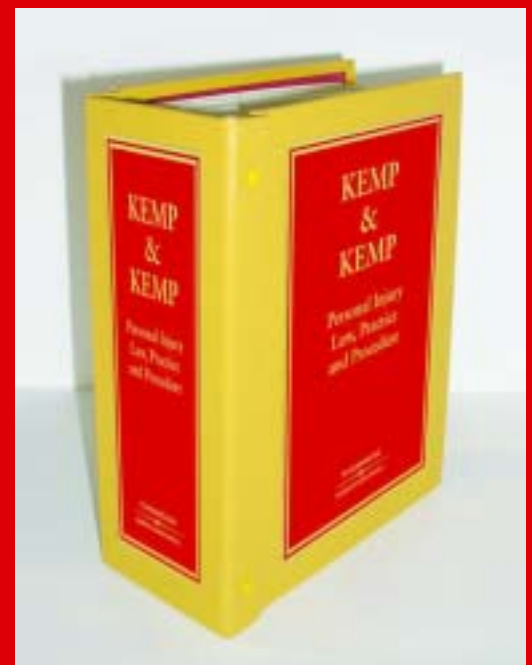
Continued on page 13...

Kemp & Kemp: Personal Injury Law, Practice and Procedure

General Editor: Andrew Ritchie



- Gives authoritative guidance on every aspect of PI law, practice and procedure
 - Offers a balanced perspective between claimant and defendant viewpoints
 - Covers all kinds of cases from fatal accidents to industrial accidents, group actions to clinical negligence
 - Written by a team of leading barristers and solicitors under General Editor Andrew Ritchie
 - Focuses on strategies and tactics
 - Excellent value at £175 (or £125 if you are a Kemp & Kemp: The Quantum of Damages subscriber)
- Helps you take on even unfamiliar and complex cases with confidence



Publication date: November 2005 Tel: 020 74491111
www.sweetandmaxwell.thomson.com

...Continued from page 12

Media interest

From May 2005 this case had generated a great deal of media coverage. The judge noted that the core themes of the media's reporting would suggest that the parents had been dealt a cruel injustice; that the Local Authority had without justification built a case against them on the basis of false and misleading evidence; and that the mistakes made by social services had been hidden from public scrutiny by the secrecy surrounding the family justice system.

The judge held it relevant that one prospective adoptive family withdrew from the process of assessment in part because of the media coverage relating to the case.

Medical condition – viability of placement for Adoption

The child B had been diagnosed with possible hydrocephalus and a likelihood of developmental delay. The adoption team position was therefore focusing its efforts on finding a family which would be able to manage children with medical vulnerability, special needs and / or disability.

The parents' submissions in relation to this were to the effect that the medical uncertainty had impacted upon the search for an adoptive family and had made essential a fuller assessment of the parents' family.

The paternal grandparents had been assessed as possible alternative carers for the children but the independent social worker who had conducted the assessment stated that such a placement would be contrary to the children's best interests. The paternal grandparents stated they were dissatisfied with the independent social worker's report but the Judge noted that they had not requested a second opinion or evaluation. The grandfather described the first process of assessment as a trauma which he would not wish to undergo again. A family group conference had taken place but no other relative had put themselves forward for assessment. Further the Judge held that the parents whether together or separately and even when assisted by extraordinarily high levels of outside help and support were incapable of providing for the needs of their children.

Dispensing with parental consent

The parents had withheld their consent inter alia on the grounds that the Local Authority had thus far been unable to identify prospective adopters for the children. The court held that this withholding of consent was unreasonable and granted the application. On the issue as to whether the court might dispense with the agreements of parents to adoption on the ground that they were being unreasonably withheld; the Judge noted that reasonableness was to be evaluated at the date of the hearing and in the light of all the evidence. The Judge went on to note that it might be useful to consider whether having regard to the evidence and the current values of society the advantages of adoption for the welfare of

the child appeared sufficiently strong to justify overriding the views and interests of the objecting parent, while acknowledging the child's welfare was not the paramount consideration.

Dorothea Gartland became a tenant at 9 Gough Square in October 2005 following her successful pupillage with Chambers. She can undertake a variety of work including personal injury, criminal, family, landlord and tenant; and all aspects of common law work. She has a particular interest in family law.



...Continued from page 11

It seems that no sooner have the wigs and gowns been put away for the summer, that familiar faces start to drift back through the door. The relief (or possibly despair?) on Jacob Levy's face always evident when he's been away with the family! So we are one big happy family again and normal practice is resumed; for the next eleven weeks or so we have treble booked barristers to look after, mountains of advices and particulars of claim to bill and liaising non stop with our friends in the Court Service; in short, the whole frantic existence that is a Barristers' Chambers.....Roll on Christmas!!



The Paisley Gastropod

Would the famous snail case run today?

Last year a legal “landmark” met its demise - its value as bricks and mortar was negligible, but its place in history runs at £300 billion a year. This is the estimated amount claimed under the “neighbour principle” known to all lawyers and established in the case of Donoghue v Stevenson 1932 S.C. (H.L.) 31. The recent demolition of Stevenson’s Paisley ginger beer factory has focussed attention on a remarkable piece of legal history. **John Kerr** investigates the human issues leading up to the decision of the House of Lords and asks, despite the plaintiff’s pauper status, “How was it funded?”

No public support would be available now for such a groundbreaking case. Would any lawyer, faced with the prospect of limited damages and high risk, be prepared to run such a case for the important legal precedent it offered in the public interest? Yet it was a determined lady, May Donoghue, who would not take no for an answer after she and a friend visited Frankie Minchella’s “Tally” or Wellmeadow Café” in Paisley on the evening of 26th August 1928. The friend, who was never identified, ordered “pear and ice” for herself and a ginger beer float for May. After Frankie brought the ice cream and poured ginger beer from the brown opaque bottle, supplied by Stevenson’s factory, May spied the snail remains floating from it and claimed they made her ill, such that she needed medical treatment from her doctor 3 days later and at Glasgow Royal Infirmary 3 weeks later. The rest, following her determination and the skills of her maverick lawyer, Walter Leechman, is history.

As an old property it was unremarkable, with The Scotsman reporting it as “a target for firebugs who would ultimately cause the demise of one of the most significant buildings in the world”. Two fires in a few days forced Renfrewshire District Council to demolish the famous Stevenson’s former soft drinks factory in Glen Lane, Paisley urging the paper to claim, “to the world’s compensation lawyers, it is the loss of a shrine”.

May Donoghue’s journey to the House of Lords cannot have been an easy one. Not only did she have to retain counsel who were willing to act without reward, but she had also to gain for herself the status of pauper, for there was no way she could have put up security for costs. The progress of May Donoghue’s petition to be allowed to appear in *forma pauperis* is recorded in the Lords’ Journal. It was supported by an affidavit in which she swore, “I am very poor. I am not worth five pounds in all the world.” Attached was a certificate of poverty signed by the minister and two elders of her church.



Legal history from Donoghue v Stevenson

Mrs. Donoghue's Journey has been mapped in a paper prepared by Martin R. Taylor QC, a retired Canadian judge, practicing as an arbitrator in Vancouver, and a member of the Court of Appeal for the Cayman Islands, from which these excerpts have been taken. His enthusiasm for this famous Scottish case is such that he organised, along with others, a "Pilgrimage to Paisley" in 1990 to celebrate its role in the development of the law of negligence.

In Scotland, they call the law of negligence and liability that this case established, delict. In North America it is called tort and millions of actions now begin with Lord Atkins' ruling.

Had it been her anonymous friend, rather than May Donoghue, who was served with snail-tainted ginger beer, the world would probably have heard nothing of it. The friend could have sued Mr Minchella, and, because there was a contract of sale between them, Mr Minchella would probably have had no defence. But the friend, so the pleadings say, chose instead to order "a pear and ice," and presumably escaped unscathed. Since May Donoghue had no contract with anyone, she would have to prove negligence if she were to recover. The only person she could sue for negligence was David Stevenson.

May Donoghue learned all this from a remarkable Glasgow solicitor and city councillor, Mr. Walter Leechman. Leechman issued May Donoghue's writ against Mr. Stevenson. It described the Stevenson plant as a place where "snails and the slimy trails of snails were frequently found," and claimed £500 damages and costs.

Recently in a slick marketing initiative, a manufacturer's ginger beer-naming competition awarded £7,400 in a promotion to celebrate the forthcoming 75th anniversary of the case. This cash prize is today's equivalent of £200, the amount awarded to May Donoghue. Would this be sufficient to encourage private funding of two lawyers and all that is required now to take such a case to the House of Lords?

In due course Stevenson's counsel moved the Court of Session to dismiss the claim, on the ground that it disclosed no cause of action. The motion failed at first before the Lord Ordinary, Lord Moncrieff, but succeeded 3-1 in the Second Division. The majority of the Scottish appeal judges followed a recent decision of their own in two cases brought by plaintiffs who claimed to have found a mouse in a bottle of ginger beer: Mullen v. A.G. Barr & Co.; McGowan v. A.G. Barr & Co. The majority declared that the only difference between those cases and May Donoghue's was the difference between a rodent and a gastropod, and that this, according to the law of Scotland, amounted to no difference at all. The manufacturer of such products,

they held, owed no duty of care to an ultimate consumer unless the consumer had a contract with the manufacturer requiring such care — a most unlikely situation. It was against this decision that Mrs. May McAlister, or Donoghue, sought her relief before "His Majesty the King in his Court of Parliament."

The reports show not only that Leechman's firm had acted for the unsuccessful pursuers in the mouse cases, but also that he caused May Donoghue's writ to be issued less than three weeks after the appeal decision in the mouse cases was handed down. No doubt there was a reason why the mouse cases could not themselves have gone to the House of Lords. If Mr. Leechman had not had May Donoghue's case on the back burner, so to speak, who knows for how long the law might have remained as the Court of Session had declared it. How lucky for May Donoghue — how lucky for us — that she consulted perhaps the only lawyer in the world who would not only have taken her case, but have taken it to the highest court in the land.

The principle established by Atkin defined neighbour:

"as a person so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question".

He also established the principle that everyone has a duty to:

"take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour".

On 17th March 1931, her petition came from committee to the assembled House, consisting of the Lord Chancellor, Lord Sankey, the Duke of Wellington, two bishops, two marquesses, twenty-four earls, sixteen viscounts, and eighty-eight barons, among them Lord Atkin of Aberdovey. In such distinguished company, including many of the greatest names of British history, was May Donoghue declared to be a pauper, with all the privileges attaching to that status before their Lordships' House.

The late Lord Denning recorded an interview on the case in 1995, 4 years before his death. He talks about the underlying Christian principles that inspired Lord Atkin's decision and revealed how a New York case influenced it.

Could lawyers be found to take on a similar ground breaking case today? At 9 Gough Square there are undoubtedly many barristers who would relish the prospect, and work toward a constructive funding approach.

John Kerr joined 9 Gough Square as its Chief Executive in June from the Faculty of Advocates in Edinburgh. Comments on the case to: jkerr@9goughsquare.co.uk

Work at Height Regulations 2005

A head for heights is now a legal requirement

According to the Health and Safety Executive, falls from height remain the single biggest cause of workplace deaths and major injuries in the construction industry. The time is ripe for legislation. Step forwards (and upwards) the Work at Height Regulations 2005, effective from 6th April 2005. This is a comprehensive set of Regulations and a breach is likely to be established in almost all cases where someone has fallen at work. *Roger Hiorns* offers an overview.

The Regulations apply to all "work at height" which is defined (Regulation 2) as being work in any place where, if measures required by the Regulations were not taken, a person could fall a distance liable to cause personal injury. The definition also includes a place at or below ground level, so the Regulations will apply to work next to trenches or, presumably, cliffs.

As might be expected, the Regulations impose duties on employers and also on any person who controls the work of others to the extent of his control (Regulation 3). There are exemptions for ships, dock operations, fish loading processes and pot-holing instructors!

Following the usual form of post-1992 Regulations, there is a hierarchy of measures to be followed. The primary obligation (Regulation 6) is to ensure that work is not carried out at height where it is reasonably practicable to carry out the work otherwise than at height. However, if the work has to be carried out at height then suitable and sufficient measures must be taken to prevent, so far as is reasonably practicable, any person falling a distance liable to cause personal injury. A number of specific obligations fall to be discharged as follows:

- Firstly, the work must be properly planned and supervised (Regulation 4). This will involve a suitable risk assessment which must, specifically, have regard to the weather conditions and whether they are likely to jeopardise the health or safety of the worker. All painting of the Forth Bridge will probably cease forthwith.
- Secondly, the worker who carries out the work at height must be competent to do so (Regulation 5). Persons with vertigo will presumably be expected to stay at ground level.
- Thirdly, suitable and sufficient measures must be taken and suitable work equipment must be selected to prevent a fall liable to cause injury so far as is reasonably practicable (Regulation 6). Where the risk of a fall cannot be eliminated, it must be minimized. Priority is to be given to collective protection measures - such as guard rails - over personal protection measures - such as safety harnesses (Regulation 7).
- Fourthly, the worker must be provided with appropriate training and instruction (Regulation 6).

Having set out those general duties, the Regulations go on to make specific provisions to supplement and enhance those general duties. As a result there are 8 Schedules to the Regulations imposing requirements for ensuring that all working platforms, scaffolding and ladders are strong, stable, large enough and free from all types of risks which could cause or permit a fall. The requirements



"Colleen Graffy (pictured right), 9 Gough Square's door tenant, was recently appointed Deputy Assistant Secretary of State for Public Diplomacy for Europe and Eurasia. She is pictured here with Secretary of State, Condoleezza Rice. Colleen was Associate Professor of Law at Pepperdine University and Academic Director of Pepperdine's London Law Program. She is a Bencher of Middle Temple.

are comprehensive and far too extensive to be set out in this article.

Specific provision is made in respect of work across, near, on or from fragile surfaces. Such work must be avoided if reasonably practicable (Regulation 9). If it is not reasonably practicable to avoid such work then suitable and sufficient platforms, coverings, guard rails or similar means of support or protection must be provided. Specific provision is also made in respect of falling objects. Suitable and sufficient steps must be taken to prevent, so far as is reasonably practicable, the fall of any material or object (Regulation 10).

Continued on page 12....

Editor: John Kerr, Chief Executive
The Chambers of John Foy QC
9 Gough Square
London EC4A 3DG

t 020 7832 0500
f 020 7353 1344
dx LDE 439
clerks@9goughsquare.co.uk
www.9goughsquare.co.uk