

Court of Appeals Clarifies Meaning of “Suitable” Work Equipment

In the same week as the Government delivered its report, following a Whitehall-wide review of the operation of health and safety laws, the Court of Appeal, in **Threlfall v Hull City Council [2010] EWCA Civ 1147**, dealt with the practical implications of risk assessments.

The case of Threlfall reveals the potential hazards for employers if they adopt a less than rigorous approach to the risks to which they expose their employees.

This case also demonstrates that Government pronouncements (“Common Sense, Common Safety”) may prove difficult to implement, particularly when so much of the country’s health and safety laws originate from Brussels.

Facts

Mr Threlfall was working as a street scene operative for the council, when on 8 May 2006, he sustained a serious cut to this left hand while clearing debris from a garden of council property. A claim was brought against the Defendant employer, for negligence and breach of statutory duty, in failing to provide the Claimant with suitable protective gloves.

His claim failed, as did his first appeal. The second appeal came before the Court of Appeal on the 6 October 2010, which was heard by Ward, Smith and Jackson LJs. Smith LJ delivered the unanimous judgement.

The Gloves

It was common ground at the appeal that the gloves worn by the Claimant were standard issue for the council’s street scene workers, which were described by the manufacturers as being of simple design, for minimal risks only. They were made partly of cloth and partly of leather, which felt like soft brushed suede. They were not cut resistant. The standard gloves were perfectly appropriate for ordinary gardening jobs.

Those gloves were available for the Court of Appeal to inspect, who also heard that cut resistant gloves were available from the same supplier, which would have been effective to prevent or adequately control the risk of laceration.

Personal Protective Equipment at Work Regulations 1992 (“the Regulations”)

The regulations set out the obligations placed upon an employer (and others) in respect of the provision of protective equipment. The relevant regulations for the appeal were regulations 4 and 6, set out below

Regulation 4

(1) Every employer shall ensure that suitable personal protective equipment is provided to his employees who may be exposed to a risk to their health or safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective.

(3) Without prejudice to the generality of paragraphs (1) personal protective equipment shall not be suitable unless

(a) it is appropriate for the risk or risks involved and the conditions at the place where exposure to the risk may occur;

(b) it takes account of ergonomic requirements and the state of health of the person or persons who may wear it;

(c) it is capable of fitting the wearer correctly, if necessary, after adjustments within the range for which it is designed;

(d) so far as is practicable, it is effective to prevent or adequately control the risk or risks involved without increasing overall risk;

Regulation 6

(1) Before choosing any personal protective equipment which by virtue of regulation 4 he is required to ensure is provided, an employer or self-employed person shall ensure that an assessment is made to determine whether the personal protective equipment he intends will be provided is suitable.

(2) The assessment required by paragraph (1) shall include

(a) an assessment of any risk or risks to health or safety which have not been avoided by other means;

(b) the definition of the characteristics which personal protective equipment must have in order to be effective against the risks referred to in sub-paragraph (a) of this paragraph, taking into account any risks which the equipment itself may create;

(c) comparison of the characteristics of the personal protective equipment available with the characteristics referred to in sub-paragraph (b) of this paragraph.

Pleadings

The case was originally pleaded in negligence and Regulation 4 of the Personal Protective Equipment at Work Regulations 1992. At the trial the Claimant was refused permission to rely on Regulation 6. However, by the time the matter reached the Court of Appeal, it was accepted by the Respondent/Defendant that regulations 4 and 6 should be considered together. The Court of Appeal agreed and for future cases advised Claimants they would be well advised to plead failure to provide suitable personal protective equipment “contrary to regulations 4 and 6”. However, Smith LJ expressed the view that even if that is not done, the court should not ignore regulation 6.

The Claimant’s contention was that there was a risk that he would suffer a laceration while clearing rubbish and the gloves provided could not protect his hands from such cuts. Therefore, they were not suitable. Other gloves which could prevent lacerations were available on the market and this was not disputed. The Council agreed that there was a risk of laceration but submitted it was very low and that the gloves provided were adequate to meet the risk.

The trial judge concluded that as the risk was not high, there was no duty to provide highly protective gloves. The gloves in question had been used for many years without mishap and there had been no complaint about them at health and safety meetings attended by union representatives.

Appeal

At trial and on his first appeal, the Claimant failed both on the application of the Regulations and the fact it remained unclear as to exactly how his finger came to be cut. Smith LJ said it was not all surprising that, when the appellant realised that he had cut his hand, he should have concentrated on his injury rather than looking for what had caused it. In her view, it should have been sufficient that the appellant showed his hand had been cut while he was doing his job of clearing rubbish, to overcome the Defendant's criticism as to how he had come to suffer injury.

Risk Assessment

The employer's risk assessment had dealt only with the general risks of garden clearance. It did not attempt to assess the risks of laceration; nor did it consider what type of gloves should be provided.

The court accepted the Claimant's submission that the risk assessment which the council carried out was manifestly defective when compared with the requirements of regulation 6. Regulation 6 requires an employer to give specific consideration of the risks against which it was intended to provide a form of protective equipment. The risk assessment should have specifically dealt with the risk of laceration and type of protective gloves required in the light of that risk.

The statutory duty to conduct a risk assessment has taken the place of the old common law requirement that an employer had to consider those risks which could be reasonably foreseen. The modern requirement is that the employer should give positive thought for the risks arising from his operations.

In the present case, the employer carried out a general risk assessment of the risks arising from its street scene operatives. The assessment failed to recognise that there was a risk that employees might suffer a laceration of the hand as the result of contact with some sharp object which might well be hidden from view and therefore not avoidable by the taking of ordinary care. If that general risk assessment had been properly carried out, the employer would have recognised that specific risk. It would have also recognised the need to consider the suitability of the protective gloves it

provided for the men. Regulation 4 (3) and regulation 6 would have been there to guide the council.

The Regulations

The opening words of regulation 4 (3) provide that protective equipment will not be suitable unless all the subsequent requirements are met. Although the first of these requirements deals with appropriateness, it appeared to Smith LJ that the most obvious starting point would be to consider the effectiveness of the equipment which appears at sub-paragraph (d). Equipment will not be suitable unless, so far as practicable, it is effective to prevent or adequately control the risk without increasing the overall risk.

Smith LJ unequivocally stated effectiveness is at the heart of suitability. Consequently, logically, the first question under suitability should be, “Does this proposed item of protective equipment prevent or adequately control the identified risk of injury?” If that question cannot be answered affirmatively, the equipment is unsuitable. The objective of effectiveness must be to ensure that, what an adverse event occurs, the protective equipment either prevents any injury at all or so protects the worker that he does not suffer significant injury. Thus the Court of Appeal equates “adequate control of risks” with the prevention of significant injury.

Decision

The Court of Appeal concluded the gloves provided by the employer were unsuitable and their provision amounted to a breach of Regulation 4. The breach was also causative of the appellant’s injury.

Conclusion

This seminal judgement provides clarity on the difficult and important construction of the Personal Protective Equipment at Work Regulations. The decision will bring relief to many claimants who may feel they are inadequately equipped at work while, conversely the judgement will cause extra, but necessary work, for employers, who are reminded they must carry out assessments with specific risks in mind. It would

be interesting to know if Hull City Council employed the maligned health and safety consultant, highlighted in Lord Young's "Common Sense, Common Safety" Report. If Hull City Council had done so, then such a consultant is likely to have applied the rigorous test of eliminating the risk of injury, something the Defendant, in this case, did not do.

If you would like to talk to us about the issues raised by this note, please contact:

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