

**PRESENTATION TO LIABILITY SIG
CILA
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Employers Liability Update

SLIDE 1

Good morning Ladies and Gentlemen. My talk this morning will centre on work equipment and recent decisions before the Courts, including that august body, the House of Lords and essentially where we are now in relation to interpretation of the Provision & Use of Work Equipment Regulations 1998.

It will be recognised that the class of persons attracting duties under the 1998 Regulations is wider than those previously under the original 1992 Regulations. In addition to the employer of a worker who uses, or is provided with work equipment, and to a self-employed person, who uses work equipment at work, duties are now also placed upon “any person” who, in the course of a business, trade or other undertaking has control to any extent of the equipment of those who use it or of the way it is used.

As an aside, it is worth highlighting that the duties under the 1998 Regulations exceed the minimum requirements of the Equipment Directive.

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Whilst the starting point for this presentation must be the House of Lords’ decision in *Spencer Franks v. Kellogg Brown & Root Ltd & Others*, a quick run through of the position with regard to defective equipment is useful and the now infamous and commonly pleaded Court of Appeal decision in *Stark v. The Post Office (2000)* is necessary. This case established that an employer is strictly liable to an employee injured by defective work equipment irrespective of whether the defect was discoverable and regular maintenance had been carried out. Attention inevitably turned to the wording of the Regulations, in particular, “provided for use or used by an

employee” at work and in *Hammond v. Commissioner Police of the Metropolis & Others (Court of Appeal 2004)* it was held that where a mechanic was repairing a van, the vehicle was equipment for its driver, but it was not work equipment in relation to the Claimant mechanic since it had not been “provided for use or used by” the mechanic at work. Specific comment was made that the Regulations do not extend to equipment being worked upon as distinct from the equipment being used by an employee to undertake this work.

There is another Court of Appeal Decision – *Smith v. Northamptonshire County Council (2008)* - which is relevant and more of that later, but in that case installations within third party premises were said to be only work equipment where the employer had some right of control over its maintenance.

So, back to *Spencer Franks v. Kellogg Brown & Root Ltd & Others*.

SLIDE 3

The Claimant was employed as a Technician by the First Defendant who were contracted to supply workers to an oil rig operated by the Second Defendants. When injured, the Claimant was repairing a door closer in a control room on the oil rig being operated by the Second Defendants. The Claimant released a screw to assess tension and unexpectedly the screw disengaged, the closer arm was released and struck the Claimant in the face.

This was a Scottish case and the Inner House of the Court of Session dismissed the claims against both Defendants. It followed the authority of *Hammond* in that the door closer was not work equipment, and that the Claimant had not been using it within the meaning of the Regulations.

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The case was referred to the House of Lords where it was overturned. It was overruled unanimously. The House of Lords said that there should be no distinction as to what is work equipment based solely on the identity of the person using it. The door closer was “work equipment” to those employees in the

control room and, therefore, it followed that it must be “work equipment” of the Claimant whilst he was repairing it notwithstanding, that it was not being used for its intended purpose. In reaching their decision, because of other offshore regulations, the oil rig, and its component parts, was deemed an installation as opposed to workplace.

There is no doubt that the goalposts have been widened. However, as the slide suggests is there any relief to Defendant Employer’s Liability Insurers?

SLIDE 5

Spencer Franks has clarified that equipment being repaired is covered by the Provision & Use of Work Equipment Regulations, even where that equipment is not being used for its intended purpose.

Nonetheless, an important distinction to be drawn from the *Spencer Franks* case, and which can be a point still to be raised by Defendant Insurers, I believe, is that the House of Lords were not called upon to consider whether an employer should be liable for equipment supplied by a third party and, importantly, where the employer does not have any control over it. The Co-Defendants had reached agreement not to test this point.

In determining the issues in *Spencer Franks*, reference was made to an example raised in *Hammond* namely whether a garage proprietor could be liable to an employee mechanic for a defect in a customer’s car. This was questioned by the House of Lords. Reference was made to the European Directive underlying the Regulations, namely work equipment made available to employees “in the same undertaking.” *Hammond* did involve parties within the same undertaking – Metropolitan Police. Nonetheless, the wording of Regulation 3 (2) under the 1998 Provision & Use of Work Equipment Regulations is particularly wide and refers equally to work equipment “used by” an employee at work. The comments were made by Lord Hoffman, one of the panel making up the House of Lords determining *Spencer Franks*, and none of his peers contradicted his comments.

No doubt an opportunity for further litigation, as indeed will be the equipment vis-à-vis workplace issue.

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I believe it true to say, therefore, that control does in fact remain a live issue. This brings us back to the *Smith & Northamptonshire County Council* case heard before the Court of Appeal. The Decision in *Smith* was published five weeks prior to the House of Lords' ruling in *Spencer Franks* and it is pertinent that the *Smith* case was not referred to by the Lords. This may be explained by the fact that *Smith* is being appealed to the House of Lords. In *Smith* the Claimant was injured on a ramp at a private residence. The Court of Appeal stressed that installations within premises could only be work equipment where the employer had some right or control over their maintenance. This Decision in *Smith* would appear to sit, to an extent, comfortably with *Spencer Franks* in that the Claimant's employer could be said to have some degree of control over maintenance. Nonetheless, the question of control remains relevant and, where an employer has no right of maintenance over installations on third party premises, then it should be possible to maintain arguments that they are not liable for their defects under the Provision & Use of Work Equipment Regulations 1998. This issue, as I have said, was not tested in *Spencer Franks* because of the agreement reached between the Co-Defendants.

Watch this space as the House of Lords may again revisit the particular point of use/control in the Appeal now before them in *Smith & Northamptonshire County Council*.

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Moving on, a case before the Court of Appeal in February 2009 involving *Couzens & McGee & Co. Ltd*.

This was a motor accident where the Claimant, an HGV driver, overturned his vehicle when leaving the M1. There was no debate over how the accident occurred; the Claimant was driving too fast. In his defence, the Claimant maintained that he had been unable to apply the brake because his right trouser leg had become

caught on a piece of angle iron he used as a makeshift tool. He kept this tool in the side pocket of his driver's door. The Claimant alleged that his employer had failed to provide a suitable place in which he could safely keep his tool. His claim was dismissed at first instance. He appealed. The Appeal was based on an interpretation of the Provision & Use of Work Equipment Regulations 1998.

This was a case where the tool had been supplied by the Claimant employee and not his employer. Such equipment will only become work equipment for the purposes of the Regulations if it can be demonstrated that the employer expressly or impliedly permitted its use or must be deemed to have permitted its use. Deemed permission can be established where an employer ought to have realised an item was being used but apparently did nothing to stop it.

There was no evidence to show that the employer had permitted the use of the angle iron and the Appeal was dismissed.

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I now move away from the current crop of work equipment cases and pass onto a case heard before the Court of Appeal in November 2008 involving a turkey plucker. The case is *Hull v. Sanderson*. The Claimant became ill with campylobacter enteritis shortly after commencing employment with the Defendant. She alleged breach of duty in failing to protect her from the risks of infection inherent in handling dead poultry. The Defendant Employer was held liable at first instance for failing to provide suitable gloves, instruct the Claimant to change them frequently and warn her of the risks of exposure and precautions to be taken. However, causation was questionable and the Recorder held that he could not say that on the balance of probabilities the Claimant had become infected as a result of breach of duty. Subsequently, both Counsel presented written submissions and the Recorder revised his judgement in favour of the Claimant on the basis that her case fell within the *Fairchild Principle* where it was held sufficient to show that an employer's breach of duty had materially increased the risk of injury.

On Appeal, whilst reserving their position on the “but for” basis, the Court of Appeal held that the Recorder had failed to make findings of fact which would have enabled him to decide on the *Fairchild* exception.

No request had been made to remit the case to the Recorder for him to make the necessary findings of fact, and the Appeal was allowed and Ms Hull’s claim failed.

This is encouraging news for Defendants and Insurers alike the Court of Appeal stipulating that the *Fairchild* decision should be used in all but a very limited class of cases.

We should not become too complacent, however, because, as commented, there was opportunity for the claim to have succeeded had the appropriate request to the Recorder been made. The issue of causation could not be reopened in the particular circumstances.

We may, therefore, be hearing more of our friends the turkey pluckers and the like.

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The positive news continues with a case involving an apprentice carpenter who failed to secure damages following an incident on a building site, *Duncan v. Acrabuild Ltd (2008)*. The Claimant apprentice was being supervised by a more experienced joiner. The task of noggin-out in a room had been completed, the task involving the fixing of timber strips to roof rafters. The joiner was called away and the Claimant apprentice was left to undertake the same task in a bedroom. He set up a platform from which to work. He gave evidence that he climbed into the roof space by pulling himself between the rafters and, after completing some work he swung back down onto the platform but bumped his head on the rafter he was holding. He then lost his balance and fell onto the floor and struck his head. Breaches of the Construction (Health, Safety & Welfare) Regulations 1996 and Work at Height Regulations 2005 were advanced together with a failure to adopt the risk assessments and safety policy previously drafted. The Queens Bench Division threw out the Claimant’s action. They maintained that the job was a simple one. It had not been

foreseeable that the Claimant would have to enter the roof space whilst performing it and, even if he had to, a scaffold and ladders had been provided to enable him to do so safely. There was no evidence that the Defendant had failed to take into account its safety policy and risk assessments. The risk that the apprentice carpenter had taken when deciding to climb into the rafters in the way that he had, was one that had been entirely obvious to him and there had not been a need to draw it to his attention. There was no negligence on the part of the Defendant employer. Further, in determining that there was no breach of the Construction (Health, Safety & Welfare) Regulations 1996, the Claimant's place of work had been the bedroom and the platform from which he had been carrying the work of noggin-out. Both places and the means of access to and egress from them had been safe because they had provided no foreseeable risk of injury to persons behaving in a reasonably foreseeable manner. The roof space above the rafters had not been a place of work for the Claimant but even if it had, there had been suitable and sufficient safe access to it. If, and insofar as the roof space had been an unsafe place of work, that unsafe environment had not caused the accident. Accordingly, the Court held that there had been no breach of Regulation 5 of the 1996 Regulations.

With regard to the Work at Height Regulations, then the work of noggin-out had been appropriately planned and appropriately supervised. The work had not required the Claimant to have someone supervising him at all times. It had not been part of his job to climb into the roof space and the Defendant employer had not been required to instruct the Claimant that he was not to do so, or that if he did so, that he should use a scaffold or a ladder. The Court said that the Claimant had interrupted his work in order to enter the roof space. The accident had, therefore, not been caused in the manner in which the Claimant had been carrying out his work. His actions had been beyond the extent of his employer's control within the meaning of the 2005 Regulations. Comment was also made that there was not anything that the employer could have reasonably practicably done to prevent the Claimant from doing what he had done. Equally, the provision of information or training would not have prevented the accident.

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To conclude the positive news, I refer to the case of *Paterson v. Surrey Police Authority*, a claim for damages for stress-related symptoms. The Claimant had been employed since 1979 and since 1985 had been the Estate Manager of the Authority's headquarters. Approximately 9 years later, in September 2004, he suffered a nervous breakdown and did not return to work. It was alleged that his symptoms developed as a result of having to work long hours in order to perform his duties and, in particular, of having to be on call out of hours. There was also an allegation that the Defendant Police Authority should have provided the Claimant with accommodation away from the site for use on the occasions when he was not on call.

The Court held that it was not reasonably foreseeable that the Claimant would suffer injury to his health as a result of stress to which he was subjected at work. The Claimant had never submitted a self certification form detailing stress and in a conversation between his wife and his manager, on which the Claimant relied, the Claimant's wife did not tell his manager that the Claimant was suffering symptoms as a result of stress. The only possible indication the Defendant Police Authority had, was in a report prepared in 1991 which the Court held was too remote from a point of time aspect, being 13 years prior to the alleged development of stress-related symptoms.

The evidence adduced did not charge the Authority with knowledge of a foreseeable risk from the number of hours the Claimant was working. In any event, the operative cause of his breakdown was the Claimant's perception of his treatment by his employer in respect of his wish to be provided with accommodation away from site. The Authority had no duty to provide such accommodation.

This decision further reinforces the principles set out by the Court of Appeal in *Hatton v. Sutherland (2002)* and, in particular, that injury to health must be reasonably foreseeable. In the case of *Paterson & Surrey Police Authority* there was a total lack of evidence of foreseeability hence the Claimant could not succeed in his stress claim.

In summary, whilst *Spencer Franks* has ostensibly added to an employer's potential woes, and, indeed, we have yet to see what the House of Lords decides in the *Smith & Northamptonshire County Council Appeal* also, whilst it may be argued that the application of the Regulations is becoming stricter, there do remain avenues open for legal debate, principally on the question of control. Further, as *Duncan v. Acrabuild Ltd* confirms, there still remains an ability to avoid a claim where the risks are identified and communicated to a Claimant and, whilst not mentioned in the slides, there is a recent Court of Appeal Decision, 22 January 2009, involving *Ammah v. Kuehne Nagal Logistics Ltd* where the risk associated with standing on a box to reach a high shelf had been identified by the employer. In addition, adequate instruction and warning had been given such that the Claimant employee who stood on a box and suffered an accident had taken a risk for which only he, and not his employer, was to blame.

I don't believe that the tide is changing, but, clearly, there still remain opportunities to present a good and successful defence in cases where the Insured's evidence is sufficiently strong and defeat a Claimant employee.

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