

# talking liabilities

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A FARADAY NEWSLETTER COVERING EL/PL ISSUES

## FARADAY™

### CONTENTS

#### LEGISLATION

- Compensation Bill 01

#### CORPORATE MANSLAUGHTER

- First Reading 02

#### EL/PL

- Suicide or Accident? 02
- Promoting Safe Events 02
- Occupiers' Liability 02
- Periodical Payments 02
- Vicarious Liability 03
- Product Liability 03

#### HEALTH AND SAFETY

- Dangers of Cement 03
- Fatal Injuries "Falling" 03
- Risk Assessments 03

#### INSURANCE

- After the Event Insurance:  
Staged Premiums 03

- QUANTUM LEAPS 04

## LEGISLATION

### Compensation Bill

*The Compensation Bill received Royal Assent on 25 July 2006. Part One now contains provisions on mesothelioma which establish joint and several liability in cases where a person has contracted mesothelioma as a result of being negligently exposed to asbestos.*

The bill would restore the law to a pre-**Barker v Corus** state: victims of mesothelioma will be able to receive full compensation from any responsible person who will in turn be able to claim back contribution from other responsible persons.

Part One also contains provisions on the law of negligence and breach of statutory duty generally. It permits the courts to consider the wider social value of a particular activity in the context of which the damage occurred when determining whether particular steps are required to meet a standard of care. This will help

prevent normal activities from being prevented due to a fear of litigation. Part Two sets out a framework for the regulation of claims management services. The Secretary of State will initially be the regulator supported by a trading standards unit to monitor compliance and deal with applications for authorisation. Service providers will be required to give clear advice on claim validity, funding options and provide a complaints process. Failure to obtain authorisation will be punishable by up to two years' imprisonment. Further information is at <http://www.dca.gov.uk/legist/compensation.htm>

## COMPETITION

### Win a Bottle of Champagne!

*Simply answer the question below:*

What date was the first edition of the *talking liabilities* newsletter published?

Was it: a April 2006    b December 2005    c January 1896

Please email your answers to [competition@faraday.com](mailto:competition@faraday.com) giving your name and address by 31 December 2006. "Faraday Reinsurance Co. Limited will process participant data in accordance with the relevant Data Protection Legislation".

## CORPORATE MANSLAUGHTER

### First Reading

#### Corporate Manslaughter and Corporate Homicide Bill (Bill No.220)

The *Corporate Manslaughter Bill* received its first reading in the House of Commons on 20 July 2006. A second reading is scheduled for 10 October 2006.

The bill provides that for a company to be convicted of manslaughter a "directing mind" of the organisation must first be found guilty of the common law offence of manslaughter by gross negligence. Under the new offence, an organisation that breaches its duty to take reasonable care for a person's safety will be liable if the activities or the organisation have been managed or organised by senior managers in a manner which amounts to a gross breach of this duty and causes the person's death.

The government indicated in its response to the Home Affairs and Work and Pensions Committees report on the bill that it would seek an alternative to the "senior management failure" test for the new offence. This part of the bill is still under review.



## EL/PL

### Suicide or Accident?

In the last edition of *Talking Liabilities* we looked at the Court of Appeal decision in **Eileen Corr (Administratrix of the Estate of Thomas Corr, Deceased) v IBC Vehicles Limited**, 31 March 2006, which held that suicide will be compensable as psychological harm flowing from foreseeable physical harm where the original physical harm caused depression affecting the judgment and volition of the deceased. In **Kiani (as personal Representative of Abdul Kiani, Deceased) v Land Rover Limited** [2006] EWCA Civ 880, the Court of Appeal held that in an appropriate case it is open to a court which has discounted suicide to treat death as accidental on the balance of probabilities, particularly where the employer has breached a duty to guard against the injury concerned. A cleaner at a Land Rover plant was found dead, although relatively uninjured in the sub-floor coolant tank. Land Rover unsuccessfully argued he should be held to have committed suicide, as he had complained of insomnia and family difficulties a week earlier, had given a highly valued ring to a colleague that day, and it was virtually impossible to fall through the tank hatch without sustaining some injury. From the evidence, the trial judge was justified in finding suicide "less than probable" and holding the death to be an accident caused by the employer's negligence.

### Promoting Safe Events

The Home Office has issued practical safety advice to organisers of public events such as carnivals, charity and small scale sporting events:  
<http://police.homeoffice.gov.uk/news-and-publications/publication/operational-policing/safety-guide.pdf>.

### Occupiers' Liability

The Court of Appeal in **Michael Moon v Paul James Garrett & Ors**, [2006] EWCA Civ 1121 held that it was reasonably foreseeable that a man delivering concrete blocks to the edge of a track, a few feet from a 2m deep excavation, might slip, notwithstanding that the manner of the falling of the blocks that triggered the incident leading to the injury was hard to foresee. The dangerousness of the pit raised the obligation to take care to prevent even unusual accidents which could result in serious injury. The court also noted (but did not decide) that the *Construction (Health, Safety and Welfare) Regulations 1996* would apply to a DIY builder employed to collect and deliver blocks to a building site by virtue of the definition of a "person at work". It is thus not surprising that an occupier is liable to an unskilled labourer who is carrying out extensive building works in a similar manner to a professional builder.

### Periodical Payments

In **Tarlochan Singh Flora v Wakom (Heathrow) Limited**, [2006] EWCA Civ 1103 the Court of Appeal held that the court's power under s.2(9) *Damages Act 1996* to depart from the default position under s.2(8) of adjusting periodical payments orders by reference to the retail prices index could be exercised if it was appropriate and fair to do so in the circumstances. There is no need for "exceptional" circumstances. The claimant, a 58 year old man who was injured at work, alleged in his Statement of Claim that a wage-related index such as the Average Earnings Index would be a more suitable mechanism for adjusting sums payable to him under a periodical payments order. The defendants

## EL/PL - continued

unsuccessfully argued that s.2(9) may only be triggered in exceptional circumstances. The court noted that the defendant's suggested interpretation ran counter to the intention of the legislator.

## Vicarious Liability

The House of Lords in **William Majrowski v Guy's & St Thomas's NHS Trust** [2006] UKHL 34 has held that employers can be held vicariously liable for damages caused by the breach of a statutory obligation by an employee acting in the course of his employment unless the statute indicates otherwise. As a result, an employer can be vicariously liable under s.3 Protection from Harassment Act 1997 for employee conduct amounting to harassment. The court has held in **Daniels v Commissioner of Police for the Metropolis** [2006] EWHC 1622 that "course of conduct" means a minimum of two incidents of harassment by either one or more employees.

## Product liability

The European Commission has recently published its third Report on the Product Liability Directive. It concludes that the Directive is satisfactory in its effect: it offers a common level of protection for consumers and a common basis of liability for producers and strikes an appropriate balance between the interests of the two. Indeed, the Commission concludes that the Directive reflects the "delicate balance between the interests of claimants, manufacturers and their insurers". The Development Risks Defence is seen as crucial to maintaining this balance.

## HEALTH AND SAFETY

### Dangers of Cement

An Essex construction company has been fined £15,000 and ordered to pay £7,000 costs for failing to provide a risk assessment or method statement for the screeding of a concrete floor. A plasterer was asked to lay a cement floor. After kneeling in concrete for 5 hours without protective equipment he discovered that he had suffered serious burns. Chemicals in cement attack nerve-endings first, thus the damage was not felt.

### Fatal Injuries "Falling"

The Health and Safety Commission's annual fatal injury statistics for 2005/2006 show a fall in the number of fatalities to a

record low of 212 (compared to 223 in 2004/2005). The UK construction industry suffered 59 fatalities to 31 March 2006 (compared to 60 to 31 March 2005). Fatalities have fallen from 2001 levels of 5.9 deaths per hundred thousand workers, to 2.95 per hundred thousand.

### Risk Assessments

The Health and Safety Executive has revised its "5 steps to Risk Assessment" leaflet forming part of its sensible risk management campaign. The guidance is designed to encourage business to spend more time taking positive action and less completing paperwork. The guidance can be found at: [www.hse.gov.uk/risk](http://www.hse.gov.uk/risk).

## INSURANCE

### After The Event Insurance: Staged Premiums

The decision in the long awaited appeal on the treatment of after the event insurance premiums when assessing costs was handed down at the end of July 2006. The Court of Appeal in **Jonathan Luke Rogers v Merthyr Tydfil County Borough Council**, [2006] EWCA Civ 1134 concluded that where it was "necessary" to incur a staged ATE premium, it was a proportionate expense. The fact that the ATE premium is large compared with the agreed damages does not necessarily mean it is disproportionate. The consideration of necessity may include the financial risk faced by the insurer. Interestingly, Lady Justice Smith expressed her concern over figures produced by the ATE insurer (DAS) which showed that of the 5% of slip and trip cases which proceed to trial approximately 70% fail. In her view, ATE insurers are in effect allowing claimants to litigate weak cases

without any risk to themselves. Because ATE premiums are currently set on the basis of a high expected failure rate at trial, the premiums are significantly higher than if a more rigorous standard was applied by solicitors and insurers when deciding whether cases should proceed to trial. She noted that the proper use of a three stage premium should require the ATE insurer to take a second, more rigorous, look at the merits of the case before proceeding to trial: *"I have the impression that the insurer does not ask whether the claim should be stopped. It seems to me that if, at the third stage, when much more information should be available than at the time of issue, solicitors and ATE insurers were to make a careful assessment of the prospects of success, and were to stop the weak ones, the proportion of cases which fail at trial would be much reduced. All sensible private clients would insist on such an assessment. I find it hard to believe that Parliament intended that claimants should be in so much better a position than a private litigant."*

## QUANTUM LEAPS

- ▶ The family of a scaffolder who died from mesothelioma has been awarded over £200,000 as he was not offered protective clothing when working next to ladders replacing asbestos.
- ▶ A man who crushed his middle and index fingers removing waste from a machine has won over £4,000 from his employer for breach of Workplace Regulations and the Provision and Use of Work Equipment Regulations.
- ▶ A 75 year old woman attacked by two Alsatian dogs has won £25 from their owners. The dogs knocked her over, breaking her leg.
- ▶ A grandmother who fell down steps due to poorly fitted red carpet at her granddaughter's wedding reception has been awarded £2,758.
- ▶ A butcher who suffered hearing loss due to noise from electric saws at work has won over £5,000. The occupational deafness was suffered over several years working for various employers.
- ▶ A 24 year old woman received £3,618 for pain and suffering caused by a fractured right ankle suffered in a collision with another skater at an ice rink managed by the defendant. The claim was made under the Occupier's Liability Act 1957. [Leanne Cross v Guildford Borough Council, Out of Court Settlement, 6 June 2006]
- ▶ A woman who suffered a serious spinal injury falling down stairs leading to a basement flat which had no hand or guard rail has reportedly received a seven figure out of court settlement. The Court of Appeal had found in her favour but had not decided upon the issue of contributory negligence.
- ▶ A social worker who broke her arm at work when she tripped over a carpet on a staircase has been awarded £30,000 from her council employer. Various members of staff had complained about the staircase.
- ▶ A care worker for an NHS Trust has received £200,000 in damages in a mediated settlement. She suffered a serious injury to her thumb when restraining a patient from attacking another member of staff and was medically retired as a result. The patient had previously assaulted other staff.



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