A fine line between genius and insanity

An update on breach of duty of care at common law in the post-Enterprise Act era

Steve Laing, Advocate
&
Gavin Thornley, Advocate

Compass Chambers

1. Breach of duty of care prior to treatment in medical negligence cases

Darnley v Croydon Health Services NHS Trust 2017 EWCA Civ 151

- Claimant suffered a head injury
- Attended A&E Department - busy night
- Receptionist told him he'd be seen in 4-5 hours (average waiting time for treatment)
- Should have told him that triage nurse would see him within 30 minutes

Darnley v Croydon Health Services NHS Trust 2017 EWCA Civ 151

Left hospital
after
19 minutes
without treatment
and
without telling any
member of staff

Darnley v Croydon Health Services NHS Trust 2017 EWCA Civ 151

- Had he realised that he would be seen by a triage nurse, he would have stayed
- Condition deteriorated at home
- Suffered a left hemiplegia, with long term problems
- Would have been prevented had he received prompt treatment

Darnley v Croydon Health Services NHS Trust 2017 EWCA Civ 151

- Left after 19 minutes
- Clinical guidelines - head injury patient should be assessed by a clinician within 15 minutes of arrival
- Experts accepted that 30 minutes would also be appropriate on busy night
- Court of Appeal held that no breach of duty of care by failure to examine him within 15 or 19 minutes on a busy night in A&E when his presentation on arrival didn't merit priority triage

Darnley v Croydon Health Services NHS Trust 2017 EWCA Civ 151

Advanced a case - breach of duty as failure of A&E receptionist to give accurate information about waiting times

Kent v Griffiths (No 3) 2001 QB 36

- Court of Appeal decision in action against London Ambulance Service
- GP attended asthmatic patient
- Phoned 999 and asked for “immediate” ambulance - 6.5 miles away
- Two further telephone calls
- Ambulance didn’t arrive for 38 minutes
- Patient suffered a respiratory arrest resulting in memory impairment, personality change and a miscarriage

Kent v Griffiths (No 3) 2001 QB 36

- Court of Appeal held that the Ambulance Service could owe a duty of care to an individual member of the public once an emergency phone call providing patient's personal details had been accepted by them
- Different from police force and fire service who serve the general public
- Ambulance service akin to service provided by hospitals to individual patients

Darnley v Croydon Health Services NHS Trust 2017 EWCA Civ 151

- Court of Appeal held (2:1) that no general duty on receptionists to keep patients informed about likely waiting times

- Nor was it fair, just and reasonable to impose a duty not to provide inaccurate information about waiting times

- Even if there was a duty to provide the information, the scope of the duty could not extend to liability for consequences of a patient walking out without telling staff he was about to leave

Darnley v Croydon Health Services NHS Trust 2017 EWCA Civ 151

What about Kent v Griffiths?

- A&E receptionists different from ambulance service telephonists
- Patients waiting for ambulances needed to decide whether to stay where they were or arrange own transport to hospital

Darnley v Croydon Health Services NHS Trust 2017 EWCA Civ 151

- Ambulance service telephonist requires to pass on correct information

- A&E receptionist record details of new arrivals and pass on details to triage nurse

Darnley v Croydon Health Services NHS Trust 2017 EWCA Civ 151

McCombe LJ dissenting

- Patients needed to know that initial assessments would occur sooner than average waiting time for treatment

- If it was accepted that hospital had a duty not to misinform patients, the duty was not removed by interposing non-medical reception staff as first point of contact

Darnley v Croydon Health Services NHS Trust 2017 EWCA Civ 151

UNDER APPEAL!

Permission to appeal to Supreme Court granted August 2017

2. Foreseeable risk of injury - cases involving stairs and/or alcohol

Honeyman v Babcock Design & Technology Limited (11/1/17 ASPIC)

- Surveyor slipped and fell while descending internal staircase on a ship which he'd been surveying

- Handrail on left hand side only

- Claimed that he tried to squeeze past fitters coming in opposite direction, and must have let go of handrail on left

- Argued that failure to provide a second handrail on right hand side caused his injuries as he was unable to maintain "three points of contact"

Honeyman v Babcock Design & Technology Limited (11/1/17 ASPIC)

- Sheriff McGowan held that the law did not require employers to respond to apparent risks rather than real risks

- No evidence of previous accidents

- Evident that stair designed for one way traffic but not dangerous

- A person descending on the right hand side could easily hold onto the handrail on the left hand side

- Absence of handrail on right hand side was not a negligent omission

AB v Pro-Nation Limited 2016 EWHC 1022 (QB)

- Man leaving defendant's bar with group of friends after "6 or 7 drinks"
- 19th century building but staircase leading to street built in 2010
- No handrail on left hand side when descending
- Also argued that the design of the handrail on the right hand side didn't comply with Building Regulations or British Standards
- Court held that handrails should be spaced away from the wall and rigidly supported in a way to avoid impeding finger grip

AB v Pro-Nation Limited
2016 EWHC 1022 (QB)

- Handrail fell well below standard of reasonable provision for a staircase built in 2010

- Particularly so in context of use of premises for consumption of alcohol, due to obvious increased risk of falling when users had been drinking

- Had there been an adequate handrail, claimant would have been able to steady himself

- No more than momentary inattention leading him to stumble on the stairs - so no contributory negligence

Brown v Abercorn Estates
2017 NIQB 5

- Claimant at birthday party at Belle Isle Castle, Northern Ireland owned by defendant

- Castle hired out for functions

- Claimant had had a “few drinks”

- Lost balance in dining room and dislodged antique ceramic jardiniere from stand, causing it to fall and break

- She fell on broken pieces, sustaining serious injuries to legs

- Her husband had apologised and offered to pay for damage

Brown v Abercorn Estates 2017 NIQB 5

- Court held that there was no foreseeable danger in a dining room accommodating 30 guests, many of whom had been drinking, of vase becoming detached from its stand

- No failure by defendant in not securing vase to its stand or weighting it down with suitable material or removing it

Burton v Butlins Skyline Ltd (6/12/16 Reigate County Court)

- Bar in Butlins holiday park in Bognor Regis
- Customer carrying tray of drinks
- Refused entry to VIP lounge by member of staff
- Walked away and bumped into claimant, dropping tray of drinks
- Head-butted claimant, then attacked him with glass wine bottle
- Breach of duty of care to serve glass bottles of wine?

Burton v Butlins Skyline Ltd (6/12/16 Reigate County Court)

Defendant had “no glassware” policy due to risks of injuries when slips and trips

But policy only covered drinking glasses, bottles of beers and alcopops (sold “thousands” of them in a single night but only 10-15 bottles of wine)

Claimant argued policy should have extended to glass wine bottles

Burton v Butlins Skyline Ltd (6/12/16 Reigate County Court)

- Court held that too far-reaching to say breached duty of care by not banning wine bottles
- Precautions taken due to volumes of glasses and bottles of beer used
- Also, no breach of duty by VIP lounge staff member
- Customer didn't present an immediate risk that he would carry out a violent act
- Not enough that speaking in an aggressive way and was drunk

3. Vicarious liability for assaults

Scope of vicarious liability? Dependant on answers to two questions

Cox v Ministry of Justice 2016 UKSC 10 per Lord Reed

1. What sort of relationship has to exist between an individual and a defendant before the defendant can be made vicariously liable in tort for the conduct of that individual?

2. In what manner does the conduct of that individual have to be related to that relationship in order for vicarious liability to be imposed on that defendant?

Armes v Nottinghamshire CC 2017 UKSC 60

Vicarious liability of local authorities for foster carers

Armes v Nottinghamshire CC 2017 UKSC 60

- Majority (4:1) held that local authority was vicariously liable:-
  - foster parents were not an independent business but was activity carried on for benefit of local authority;
  - local authority had created a relationship of authority and trust (foster parents/children) where children vulnerable as local authority could not exercise close control;
  - local authority exercised powers of approval, inspection, supervision and removal;
  - most foster parents had insufficient means to meet substantial award of damages, but local authority could

Armes v Nottinghamshire CC 2017 UKSC 60

Lord Hughes dissented on vicarious liability:-

- Spectrum of services provided by local authority children's services

- if vicarious liability applied to ordinary foster carers, would also apply to placements with "connected persons" including family and friends, if parents in difficulty

- would inhibit laudable practice of such placements

Lister v Hesley Hall Ltd
2001 1AC 215

Lord Clyde's "guidance":-

1. a broad approach should be adopted; the context of the act complained of should be looked at and not just the act itself

2. time and place will always be relevant but may not be conclusive

3. the fact that the employment provides the opportunity for the act to occur at a particular time and place is not necessarily enough

Vaickuviene v J Sainsbury plc 2013 CSIH 67

- Romasov (Lithuanian)
- employed as shelfstacker in supermarket in Aberdeen

- McCulloch (co-worker)
- frequently worked on same shift as Romasov and made racist comments about him;
- Member of BNP

Vaickuviene v J Sainsbury plc 2013 CSIH 67

- One night shift, McCulloch took "aggressive exception" to Romasov being at same staff table as him during a break
- Subsequently, argument with punches thrown in toilets
- Later , McCulloch attacked Romasov in supermarket aisle with knife
- Knife taken from shelf in kitchenware section of supermarket
- Inflicted fatal stab wounds

Vaickuviene v J Sainsbury plc 2013 CSIH 67

Action by relatives of Romasov

Inner House held:-

- Not just and reasonable for all employers to become vicariously liable for all acts of harassment solely on the basis of engagement

- Employer may be vicariously liable for harassment where an employee in a dominant role (eg supervisory role) harasses an inferior worker in an attempt to enhance productivity or enforce discipline

Vaickuviene v J Sainsbury plc 2013 CSIH 67

Inner House held:-

- Mere bringing together of persons as employees not sufficient to impose vicarious liability

- Neither Defenders' retail business in general or their engagement of persons to stack shelves in particular carried any special or additional risk that persons so engaged (such as the deceased) would either be harassed or otherwise come to harm as a result of deliberate and violent actings of co-employees

- Defender not vicariously liable

Somerville v Harsco Infrastructure Ltd 2015 SCEDIN 71

- Yard Manager (Nelson) had "a light-hearted exchange" with forklift driver (Bazela) about going to shop for rolls for morning break

- Manager responded to some comments - "I will teach you to speak to your manager like that"

Somerville v Harsco Infrastructure Ltd
2015 SCEDIN 71

- Picked up a claw hammer lying on ground within the yard
- Threw it towards forklift driver
- Pursuer 30 feet away checking scaffolding boards, not involved in exchange
- Pursuer 13 feet from forklift driver
- Hammer hit Pursuer on head

Somerville v Harsco Infrastructure Ltd
2015 SCEDIN 71

Court held:-

- Manager did not intend to throw hammer at Pursuer nor attract his attention

- Throwing hammer was frolic and unconnected with what he was employed to do

- Unconnected with duty to instruct an employee about work of Defenders

Somerville v Harsco Infrastructure Ltd
2015 SCEDIN 71

Court held (upheld on appeal) :-

- Not done as manager of the yard or its employees, despite saying "I will teach you to speak to your manager like that"

- Consistent with assault on a fellow employee in course of a prank

- Employer not vicariously liable

Mohamud v Wm Morrison Supermarkets plc 2016 UKSC 11

- Claimant stopped at petrol station and asked employee (Khan) at sales kiosk if he could print off documents from a USB stick
- Khan refused in an offensive manner
- Used racist, abusive and violent language and ordered claimant to leave

Mohamud v Wm Morrison Supermarkets plc 2016 UKSC 11

- Employee followed claimant to car and subjected him to a serious violent and unprovoked physical attack

- Ignored instructions of supervisor who tried to stop him attacking claimant

Mohamud v Wm Morrison Supermarkets plc 2016 UKSC 11

"Close connection" - two matters to consider:-

1. Broadly, what functions had been entrusted by employer to employee?

and

2. whether there was sufficient connection between employee's wrongful conduct and the position in which he was employed

Did the assault fall "within the field of activities" assigned to employee?

Mohamud v Wm Morrison Supermarkets plc 2016 UKSC 11

- Not personal between them
- Seamless episode between response to initial inquiry of claimant and following onto forecourt
- Order to keep away from employer's premises which reinforced with violence
- Gross abuse of his position but sufficient connection with employer's business
- Employer vicariously liable

Bellman v Northampton Recruitment Ltd 2016 EWHC 3104 (QB)

- Claimant was sales manager
- Longstanding friend of company director
- Christmas party in golf club, then "spontaneously" onto a hotel for more drinks
- Director responsible for overseeing smooth running of party
- In the hotel at 3am, argument about higher wages of new employee
- Director hit claimant twice, knocking him to floor causing severe brain injury

Bellman v Northampton Recruitment Ltd 2016 EWHC 3104 (QB)

- Employer not vicariously liable

- Temporal and "substantive difference" between party at golf club and spontaneous drinks at hotel

- Expectation/obligation to participate in party had ended by time reached hotel

- Director was not always on duty, solely because he was in the company of other employees regardless of circumstances.

- Merely raising a work-related topic at a social event does not change interraction between colleagues into something in course of employment

Bellman v Northampton Recruitment Ltd 2016 EWHC 3104 (QB)

UNDER APPEAL!

Permission to appeal granted November 2017
(Hearing fixed 18/4/18)

4. Secondary victims in “immediate aftermath” of accident

Young v MacVean
2015 CSIH 70

- Mother of a deceased pedestrian passed the scene of an accident
- Viewed the badly damaged vehicle but had no reason to connect it to her son
- Went to the gym where there was talk about the accident
- Missed calls from her daughter on her mobile telephone
- No sign of her son
- Hysterical and preoccupied about the accident
- Police came in and informed her victim was her son

Young v MacVean
2015 CSIH 70

- Suffered from PTSD

- The nervous shock/psychiatric harm requires to be caused by the shocked person being immediately and directly confronted (through sight or sound of it) by the primary victim's death or injury

- Inner House held that it could not be said that the Pursuer had suffered nervous shock as a result of viewing the aftermath of the event in which her son was killed

- When viewed wrecked vehicle, no reason to connect it to her son

- Not a 'secondary victim'

Clowes v Embrace Group Ltd (14/11/16 Nottingham County Court)

- 74yo resident fell down steps in care home, sustaining severe head injuries
- Taken to hospital but died 3 days later
- Claim by two relatives who attended hospital two hours after accident
- Horrified on seeing their relative - unconscious; on trolley; blood on face

Clowes v Embrace Group Ltd (14/11/16 Nottingham County Court)

- Adjustment Disorder (daughter) and exacerbation of Anxiety Disorder (granddaughter)

- Secondary victims?

Court held:-

- Not come anywhere near to being within the immediate aftermath.

- Entire event, which started at the care home when the deceased was permitted to wander and fall down the steps, had run its course long before they saw him in hospital.

- It did not extend to the deceased's admission to hospital and certainly not to any time at which the claimants saw him following his initial assessment and treatment

Morgan v Somerset Partnership NHS Foundation Trust (29/2/17 Bristol County Court)

- Claimant's husband locked himself in garage and attempted suicide by cutting his wrists
- Attended to by NHS staff who decided he didn't need admitted to hospital
- 6 days later he attempted the same again
- Wife found him in garage and he was taken to hospital
- NHS Trust admitted liability in relation to husband for negligent treatment at time of first suicide attempt
- Wife claimed to have suffered an Adjustment Disorder

Morgan v Somerset Partnership NHS Foundation Trust (29/2/17 Bristol County Court)

- Was she a 'Secondary victim'?
- Court held that negligent act occurred 6 days prior to second suicide attempt
- Some damage as far as primary victim was concerned was occasioned to him on that day - was a failure to treat his depression
- Wife did not have required degree of proximity in terms of time and space between the negligent treatment of her husband and damage suffered by her

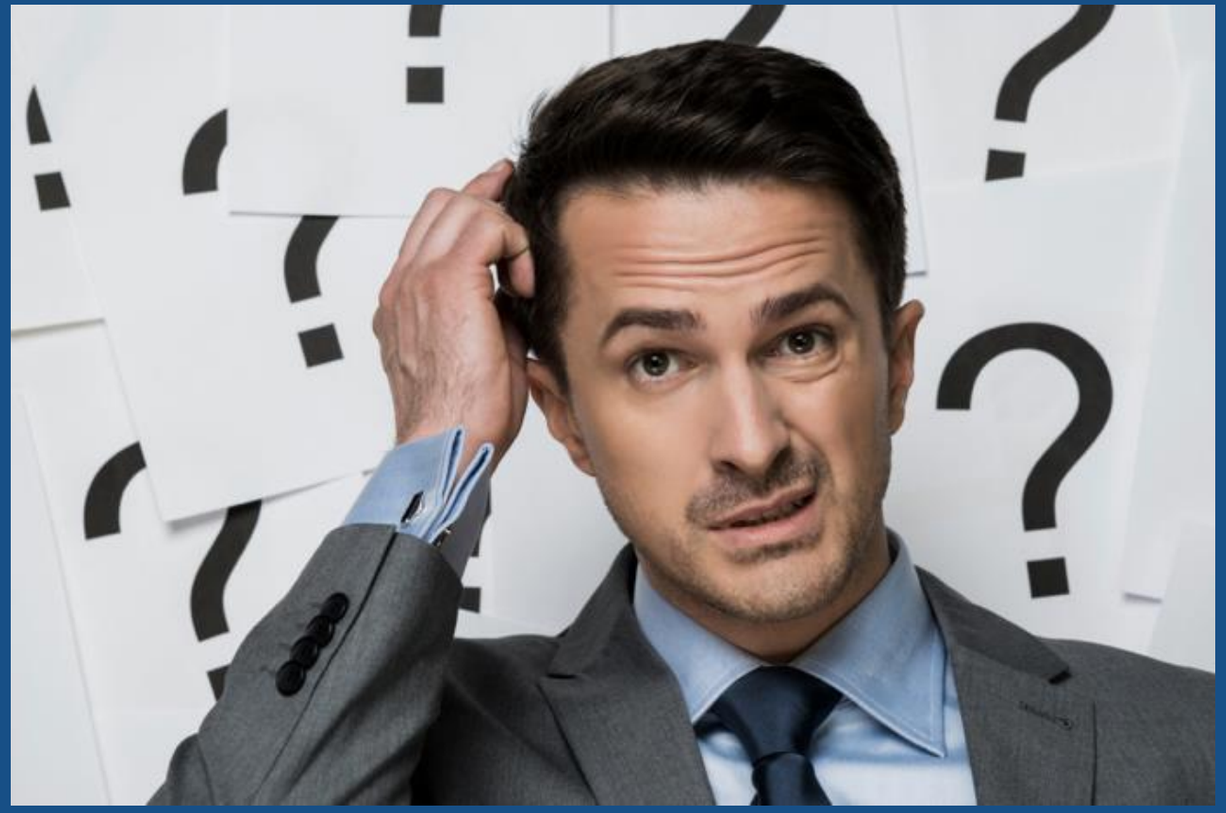
The answer

Bruce Feirstein

US ‘satirist’ and screenwriter

“The distance between insanity and genius is measured only by success”

"So…. how as a lawyer do I succeed in a common law case and show I'm a genius?"



Legal expertise in running your case

The best evidence of the dividing line
between genius and insanity?

The solicitor who instructs Compass

"Brains"

The solicitor who does NOT instruct Compass

"Joker"

Section 69

Enterprise and Regulatory Reform Act 2013

- Common law and negligence stuff

- Failing to do something a reasonable employer would do

- Doing something a reasonable employer would not do


RYANAIR
RYANAIR
RYANAIR

- Duty of the employer is to guard against risks and prevent exposure of the employee to risks which the employer knows of or ought to have known about

- Knowledge – how?

- Risk assessments under Regulation 3 MHSW Regulations 1999

Kennedy v Cordia Services LLP

- 2016 SC (UKSC) 59
- Lord Reed and Lord Hodge joint opinion

- As Smith LJ observed in *Threlfall v Kingston-upon-Hull City Council [2011] ICR 209* , para 35 (quoted by the Lord Ordinary in the present case), in more recent times it has become generally recognised that a reasonably prudent employer will conduct a risk assessment in connection with its operations so that it can take suitable precautions to avoid injury to its employees.

HSE

Health and Safety Executive

Risk assessment

A brief guide to controlling risks in the workplace

This is a web-friendly version of leaflet INDG163(rev4), published 09/11

This leaflet is aimed at employers, managers and others with responsibility for health and safety. It will also be useful to employees and safety representatives.

Introduction

As part of managing the health and safety of your business, you need to control the risks in your workplace. To do this you need to think about what might cause harm to people and decide whether you are taking reasonable steps to prevent that harm.

This is known as risk assessment and it is something you are required by law to carry out. **If you have fewer than five employees you don't have to write anything down.**

A risk assessment is not about creating huge amounts of paperwork, but rather about identifying sensible measures to control the risks in your workplace. You are probably already taking steps to protect your employees, but your risk assessment will help you decide whether you have covered all you need to.

Think about how accidents and ill health could happen and concentrate on real risks – those that are most likely and which will cause the most harm.

- The requirement to carry out such an assessment, whether statutory or not, forms the context in which the employer has to take precautions in the exercise of reasonable care for the safety of its employees.

- That is because the whole point of a risk assessment is to identify whether the particular operation gives rise to any risk to safety and, if so, what is the extent of that risk, and what can and should be done to minimise or eradicate the risk.

·The duty to carry out such an assessment is therefore, as Lord Walker of Gestingthorpe said in *Fytche v Wincanton Logistics plc [2004] ICR 975* , para 49, logically anterior to determining what precautions a reasonable employer would have taken in order to fulfil his common law duty of care.

·ie the risk assessment informs what a reasonable should do

- How do you prove what a reasonable employer ought to do?

- No risk assessment available

What could we do about these slip & trip hazards?

HSE

- HSE publications
- http://www.hse.gov.uk/index.htm
- Guidance to employers
- Leaflets for employers
- ACOP

HSE

Health and Safety Executive

Preventing slips and trips at work

A brief guide

Practical steps to prevent slips and trips accidents

·There are many simple ways to control slips and trips risks and prevent accidents in your workplace. Here are a few examples.

· Stop floors becoming contaminated

· Use entrance matting.

· Fix leaks from machinery or buildings.

· Make sure plant and equipment are maintained.

· Design tasks to minimise spillages.

·Plan pedestrian and vehicle routes to avoid contaminated areas

- Use the right cleaning methods
- Make sure that your cleaning method is effective for the type of floor you have.
- Don’t introduce more slip or trip risks while cleaning is being done.
- Leave smooth floors dry after cleaning or exclude pedestrians until the floor is dry.
- Remove spillages promptly.
- Have effective arrangements for both routine cleaning and dealing with spills.
- Use the appropriate detergent mixed at the correct concentration

Consider the flooring and work environment
·Check for loose, damaged and worn flooring and replace as needed
·Floors likely to get wet or have spillages on them should be of a type that does not become unduly slippery
·Make sure lighting is sufficient and that slopes or steps are clearly ible.
· Keep walkways and work areas clear of obstruction

McLeish v Lothian NHS Board [2017] CSOH 71

·Slipped on a wet floor as she entered a room that was being cleaned

·Spoke to the cleaner who said it was ok to come in

·Cleaner holding a mop and her trolley at the door entrance

·No wet floor warning sign not used cleaner's own system of working

- Succeeded under 12(3) of the Workplace Regulations but what if the accident was after October 2013?

- Would the outcome have been different?

Gilchrist v Asda Stores Ltd [2015] CSOH 77

- Hanging clothes up on a high rack
- Standing on a dalek style footstool
- Standing on the footstool when she lost her balance and fell backwards
- Submitted that foreseeable employees could become unbalanced and fall when manual handling above head whilst standing on the footstool

- Lady Stacey – all that has been proved is that she fell when coming down from the dalek
-
- Not because she had to reach above her head on a stool which was of a design which made such a movement dangerous

- Not argued the dalek was unsafe in itself just for this task – absolvitor

- Accepted that employers had to carry out a risk assessment

- Accepted pursuer's submissions about the applicability of the regulations

- Employers had to comply with the regulations – Work at Height and PUWER

- Argument that reasonable employer risk assessment would have highlighted the dangers of falling off and that airport style steps with a handrail should have been used

- Strict liability – is this the end ?
- Reg 5 Work Equipment Regulations 1998

·So what do you do about cases involving work equipment that breaks or malfunctions causing injury?

Employers Liability (Defective Equipment) Act 1969

1.— Extension of employer's liability for defective equipment.

(1) Where after the commencement of this Act—

(a) an employee suffers personal injury in the course of his employment in consequence of a defect in equipment provided by his employer for the purposes of the employer's business; and

(b) the defect is attributable wholly or partly to the fault of a third party (whether identified or not),

the injury shall be deemed to be also attributable to negligence on the part of the employer (whether or not he is liable in respect of the injury apart from this subsection), but without prejudice to the law relating to contributory negligence and to any remedy by way of contribution or in contract or otherwise which is available to the employer in respect of the injury.

- Must be a defect and due to fault of a third party

- Very few cases

- Duty to provide safe plant and equipment

- Has defect been brought to attention of employer or should it have been discovered by methods of inspection and testing

- Courts may set high standards on employers

- What evidence and witnesses to lead at proof

- How do you prove what a reasonable employer ought to have done?

- HSE documents and Regulations

- Can you do that without an expert in health and safety/ person who carries out risk assessments?