Ropewalk Chambers

News Bulletin

Baker v. Quantum Clothing Group Limited & Others [2011] UKSC17

Decision of Supreme Court April 13th 2011

A summary by Dominic Nolan QC, Patrick Limb QC, Simon Beard and Toby Stewart

We give every single case the care and attention it deserves.

The Decision

1. By a majority of 3 to 2 (Lords Mance, Dyson and Saville in the majority, Lords Kerr and Clarke in the minority) the Supreme Court allowed the appeals of Quantum Clothing Limited and others from the Court of Appeal's decision in 2009 (Sedley, Smith and Jacob L.JJ.) allowing Mrs. Baker's appeal. In effect the Supreme Court restored the Judgment of HH Judge Inglis given in 2007. Lord Dyson in particular paid tribute to the Judge's original Judgment.

The effect for claims of noise induced hearing loss

2. An employer without specifically acquired knowledge of risk – in shorthand "the ordinary employer" – is not in breach of either his common law obligation or his statutory duty under s.29(1) of the Factories Act 1961 for permitting unprotected exposure to noise not exceeding 90 dB(A) LEP,d prior to 1st January 1990, when the Noise at Work Regulations 1989 came into force. The majority held as the judge had found that industry generally had properly regarded the 1972 Code of Practice, which set 90 dB(A) LEP,d as the threshold for the use of hearing protection, as the standard to be applied.

3. The position is different for an employer with specific knowledge of risk where exposure is 85 dB(A) LEP,d or higher although the date of such knowledge (and hence the date of any breach) will depend upon the circumstances of each individual case. In this litigation both Meridian and Pretty Polly were held by the Trial Judge to have relevant knowledge at the beginning of 1983. [This approach did not break new ground in principle since it has long been established that specific knowledge of the risk imparts a duty to act: Thompson v. Smiths Shiprepairers [1984] QB 405 and Harris v. BRB [2005] EWCA Civ 900 [2005] ICR 1680. For such an employer the period of two years allowed by the Judge in which to devise and implement a system of hearing protection was restored by the Supreme Court (allowing the appeal against the Court of Appeal's substitution of its own period of 6 to 9 months) with the effect that in failing to provide hearing protection to employees exposed to noise at 85 dB(A) LEP,d or greater Meridian and Pretty Polly were in breach of duty from the beginning of 1985 (as the Judge had held) but not before that date.

The decision in more detail

4. Reference should be made to the material produced for the Ropewalk Chambers Annual Personal Injury Seminar of 11th March 2011 where the issues are set out in some detail. In summary:

(a) The contention that an employer without specialist knowledge providing hearing protection at exposure less than 90dB(A) LEP,d prior to the coming into force of the Noise at Work Regulations 1989

would be “ploughing a lone furrow” (see Thompson) upheld by the Trial Judge but dismissed by the Court of Appeal was restored by the Supreme Court;

(b) The argument that s.29(1) of the Factories Act 1961 did not apply to activity at the premises (as opposed to the physical state of the premises) and did not in any event apply to noise was rejected by all members of the Supreme Court;

(c) However, whilst acknowledging that the question of what was “safe” under Section 29 was a matter requiring objective analysis, the majority of the Supreme Court rejected arguments that the question of “safe” was an absolute standard to be applied retrospectively and without reference to foreseeability. This was especially so in the case of noise where knowledge of and attitudes to the risk constituted by noise at work had changed over the years;

(d) Thus the question of foreseeability of injury was relevant both to the question of what was “safe” and the question of what the limits of reasonable practicability required;

(e) Assessing the question of what was reasonably practicable involved a weighing of the nature and potential effect of a risk against the measures required to meet that risk and there was no necessity for there to be a “gross disproportion” between the former and the latter;(f) Thus exposure to noise not exceeding 90 dB(A) LEP,d
in the 1970s and 1980s was not “unsafe” in accordance with s.29 of the Factories Act but in any event the relevant places of work were as safe as was reasonably practicable.

Special Knowledge

5. Meridian and Pretty Polly had been found by the Trial Judge to have specific knowledge of the risk putting them under a duty to take measures to protect hearing at noise exposure in excess of 85 dB(A) LEP,d. The Trial Judge had found that they had such knowledge by the beginning of 1983. Lord Mance would have been content to allow the appeal of Meridian and Pretty Polly against that finding upon the basis that there was no clear demonstration of knowledge sufficient to give rise to a duty to act where the “general employer” was not under such a duty. However, Lords Dyson and Saville were not so persuaded and Lord Mance accepted that view in the decision of the majority.

6. The Supreme Court allowed the appeal of Quantum against the Court of Appeal’s finding that Quantum also had specialist knowledge. Lord Dyson in particular held that the Court of Appeal had had no justification to interfere with the Trial Judge’s decision on that issue.

Reaction Time

7. The Court of Appeal had held that once knowledge of risk was acquired then given that (in the Court of Appeal's view) the relevant employer by then would already have carried out the necessary noise surveys etc., the only period required for implementation of protective measures was 6 to 9 months. The Supreme Court allowed the appeal against the Court of Appeal's substitution of this period of 6 to 9 months for the Judge's view of two years, the Supreme Court referring to other types of case where such a period of 2 years had been allowed for action following knowledge of risk of disease. Again the Supreme Court held that the Court of Appeal had had no right to interfere with the Judge's decision on the evidence.The Minority View

8. Lords Kerr and Clarke would have dismissed the appeals. The essence of their approach was that the 1972 Code of Practice had of itself identified that there would be a risk of injury to some, albeit a minority, from long term exposure to noise at levels lower than 90 dB(A) LEP,d. Their approach was that given that such a warning of risk was never in issue:

(a) Employers were bound to act upon that warning and take necessary measures to eliminate such risk;

(b) That duty arose even though much guidance saw 90 dB(A) LEP,d as the standard to be achieved;

(c) Thus there was a breach of duty at common law in permitting such unprotected exposure at levels below 90 dB(A) LEP,d – note Lord Kerr would on this basis have allowed a cross-appeal by Mrs. Baker (had she instigated
one) and would have held the Appellants in breach from dates before the dates when the Court of Appeal found them to be in breach;

(d) Section 29 of the Factories Act 1961 clearly applied to noise and exposure to noise above 85 dB(A) LEP,d (indeed above 80 dB(A) LEP,d) was "unsafe" and could be seen to be unsafe as soon as there was any risk of injury to anyone;

(e) There could be no defence relying upon the limits of reasonable practicability where there was the unchallenged finding of the Trial Judge that provision of hearing protection would have been straightforward and inexpensive.

The Upshot

9. The upshot is that unless a Claimant can establish that his or her employer had specific knowledge – greater than that of the average employer – of a risk to hearing from exposure to noise above 85 dB(A) LEP,d but below

90 dB(A) LEP,d then there is no claim for noise induced hearing loss from unprotected exposure occurring at those levels before 1st January 1990.

10. For an employer demonstrated to have such knowledge, breach will occur for unprotected exposure at those levels occurring more than two years after the date when the employer is deemed to have acquired that knowledge, but not before.

The "retrospectoscope"

11. It is implicit in all 3 of the majority Judgments – and explicit in the very short concurring Judgment of Lord Saville – that those Judges forming the majority took the view that it would be wrong to impose upon industry retrospectively a tougher standard than had been applied at the time – or thought by anyone to apply.

The implications for the law

12. The implications for industry and employers' liability insurers are clear and was one of the reasons why the case was taken on to the Supreme Court.

13. The implications for the law generally are that:

(a) If a statute is "always speaking" then even if a risk was not, or could not, have been in the mind of legislators, that risk can later, when recognised, come within the ambit of the statute. That was clearly the case with noise
which was not in the mind of the legislators as a workplace risk when what became s.29 was enacted;

(b) s.29 can apply to activity carried out as part of the factory process and is not restricted to the physical condition of the premises;

(c) Although objectively assessed, the issue of "safe" under the Factories Act 1961 is not an absolute concept and foreseeability of injury is relevant;
(d) For the defence of reasonable practicability to be established there must be a disproportion between the risk and the measures necessary to eliminate the risk, but it does not need to be a "gross disproportion";

(e) The reminder that the Court of Appeal is not entitled to interfere with a conclusion which a Trial Judge was entitled to reach on the evidence before him.

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13th April 2011

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