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Personal injury: Making a connection

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*Smith has forced the courts to re-evaluate the concept of control, says **Brent McDonald***

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In Brief

· *Smith v Northamptonshire County Council* : the House of Lords has acted to limit the scope of the Provision and Use of Work Equipment Regulations 1998, emphasising the need for claimants to establish a sufficient connection between their employer's business and the equipment which leads to the injury.

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In *Smith v Northamptonshire County Council* [2009] UKHL 27, ALL ER [2009] All ER (D) 170 (May) Mrs Smith was a carer and driver working for the defendant. On the day of her accident, as she had done for eight years previously, she attended at a private house to convey the occupant, who was a wheelchair user, into the minibus. To do so she had to wheel the claimant down a wooden ramp which had been installed at the client's home by the NHS.

Although the council had carried out an inspection of the ramp (which, it was agreed, would not have revealed a defect) and asked Mrs Smith to visually inspect the ramp before using it, they had no right to call for its removal, to repair it or otherwise exercise control over it.

Due to rotting which could not be seen, the edge of the ramp gave way as the claimant crossed it, causing the claimant to fall and suffer injury. The claimant alleged a breach of reg 5(1) of the Provision and Use of Work Equipment Regulations 1998 (PUWER) (SI 1998/2306) which following *Stark v Post Office* [2000] PIQR P105 imposes strict liability for failure to maintain work equipment.

It was conceded by the defendant that the ramp was work equipment, following the House of Lords' decision *Spencer-Franks v Kellog, Brown & Root* [2008] UKHL 46. However, the House of Lords then had to go on to determine whether the claimant had shown that the ramp was in the class of equipment to which the regulations applied. In respect of employers, this extends to equipment "provided for use or used by an employee of his at work" per reg 3(2).

It was unanimously agreed by their lordships that reg 3(2) had to be interpreted purposively, rather than simply applying the plain words. PUWER, it will be remembered, was enacted to implement Work Directive 89/655/EEC, itself made pursuant to the Framework Directive 89/391/EEC.

Lord Mance (Lords Carswell and Neuberger concurring) referred to Lord Hoffmann's view expressed in *Spencer-Franks* (ibid) that no major extension of the Directive had been intended in enacting PUWER. In Lord Mance's view: "the issue arising under reg 3(2)...is whether the equipment was work equipment in relation to the particular employer's undertaking" so that the critical enquiry was "whether the equipment was work equipment in relation to the particular employer's undertaking".

Testing times

Lord Mance said the court should look for a sufficient nexus, the test for which is "whether the work equipment has been provided or used in circumstances in which it was as between the employer and employee incorporated into and adopted as part of the employer's business or other undertaking, whether as a result of being provided by the employer for use in it or as a result of being provided by anyone else and being used by the employee in it with the employer's consent and endorsement".

Lord Mance agreed with Lord Neuberger's characterisation of this test as focusing more on the control which the employer has over the equipment itself, as opposed to concentrating on the control which the employer has over the employee's use of the equipment.

Failure

In the majority's judgment, that meant the claim failed. The ramp was neither incorporated into nor adopted as part of the council's undertaking, nor was it under their control. It was not owned, provided or possessed by the council, and they had no right or responsibility to repair it.

In Lord Mance's view to hold the council liable would erroneously mean that every place which an employee had to visit while at work would be covered by an all-embracing protection which would render superfluous duties under the Occupiers' Liability Acts or ordinary common law duties of care. In his words: "Courts should be careful not to impose on employers responsibilities which go far beyond those at which the Directive and Regulations can in my opinion have been intended to impose. The judge's (over) generous interpretation of the concept of control would, if accepted, add both unjustified stringency and undesirable uncertainty into this area."

It is perhaps significant in the light of this that both Lords Mance and Carswell reserved their opinion on whether *PRP Architects v Reid* [2007] ICR 78 correctly applied PUWER 1998 to a communal lift situated within a building where an employer had an office. It is now approximately 20 years after PUWER's parent Directive was enacted. Despite the repeated attention of the appellate courts, it is a brave adviser who can say for certain when and where in a workplace PUWER will apply, and when and where it will not.