



## PI DEFENDANT SEMINAR 2013

### CONTRIBUTORY NEGLIGENCE WORKSHOP PROBLEM 1

#### **Scenario - Supermarket**

One Friday evening, Dale was looking for marmite in his local supermarket, Stack 'em High. The store had recently undergone reconfiguration to improve the customer experience. Dale could not find the marmite. He eventually located "jams and preserves". By now, he was frustrated. The aisles were busy and made busier by the presence of an unattended L-shaped shelf-stacking trolley (one vertical side 40" high and a low bed 48" long, 25" wide, 4" off the floor with wheels at each corner) in the middle of the aisle; customers skirting round it on either side. Dale saw the trolley and almost at the same moment, there, on the top shelf, the marmite. There was one jar left which Dale stepped forwards arm outstretched to pick up when he tripped on the trolley and fell sustaining a scaphoid fracture. The fracture failed to unite and he has been left with chronic pain in his dominant hand.

Dale invites Stack'em High to admit liability in full

#### **Scenario – Employer**

Sue had been a scaffolder for 6 years, but had only been taken on by Pick up Sticks in April 2012. She had never received any formal training beyond a basic qualification in 2006.

July 2012 was a wet month. She particularly disliked putting up scaffolding in the rain. The repairs to the Civil Justice Centre roof had also been booked for the weekend to reduce disturbance. There was no risk or method assessment to work to; it was just another scaffold.

When HHJ Jones heard the cry from her office, she turned and saw Sue falling past her 2<sup>nd</sup> floor window. Upon rushing outside, HHJ Jones saw immediately why Sue had fallen; despite 3 storeys of scaffold there were no ladders anywhere apart from strapped to the scaffolder's truck.

Sue was on the ground, broken, in pain, but alive. Sue was wearing a shirt, jeans and trainers.



### **Notes: Supermarket**

#### **Should the supermarket have had someone by the trolley to warn customers of its presence?**

No, this is absurd. The fact that the trolley was unaccompanied was not a failure for which Stack'em is liable.

#### **The trolley has been used without incident for 5 years by S'em H. Is its design dangerous?**

This is possible. In *Palfrey v WM Morrisons Supermarket Plc* [2012] EWCA Civ 1917, the fact that a trolley had been used for a long period without incident did not make its design safe.

**Why might such a trolley design be dangerous?** A low-lying trolley would not be easily seen by customers whose attention was foreseeably diverted to a higher level.

**What about its positioning in the aisle?** In Palfrey the Defendant was held in breach for not pushing it to one side on the basis that safety demanded that the trolley be placed adjacent to the shelves whilst it was being worked on. It might be questioned though whether in fact positioning in the aisle had any causative significance depending upon the size of the trolley in relation to the width of the aisle.

**What did Dale do wrong?** He tripped over something he had noticed previously was there.

**Is the chain of causation broken?** Do Dale's actions render him the sole effective cause (i.e. was his conduct so wholly unreasonable and/or of such overwhelming impact that it eclipses the D's wrongdoing and constitutes a novus actus interveniens). No, the trolley's design and positioning constitute a reasonably foreseeable cause of injury. There is no last opportunity rule. Supermarkets control the environment.

**Apportionment?** Blameworthiness and causative potency. CA went 80:20 in Dale's favour replacing the previous judge's finding of 50:50. '*The whole point of a tripping hazard is that it presents a danger to one who might not expect to have it in mind as they move into a position of danger. If they could be expected to have it in mind and not have their attention deflected from it, there is likely to be no tripping hazard at all.*'. Per Lord Justice Moses para. 18.

### **Notes: Employer**

**Breach of duty: Pick up Sticks?** Clearly. No risk or method assessment and no training provision and no safety equipment provision.

**Breach of duty: Sue?** Yes, even HHJ Jones saw immediately that building a scaffold without any ladders to ascend or descend is plainly dangerous even to the uninitiated scaffolder. Sue has '*consciously accepted a risk and the precaution is not esoteric nor one which she could not have taken herself.*' *Sharp (by his brother & Litigation Friend John Sharp) v Top Flight Scaffolding Ltd* [2013] EWHC 479 (QB)

**Apportionment?** 60:40 in Pick up Sticks' favour. The obvious nature of the risk trumped significant failings on the employer's part.