



**GUILDHALL PERSONAL INJURIES SEMINAR FOR INSURERS AND INSURANCE  
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**EMPLOYERS' LIABILITY  
Work equipment, construction sites and employee fault - Answers  
Workshop in the Dining Room**

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One sunny day Sir Alan and his apprentice Yasmina go to work on the Big Brother house (owned by Channel 4) where they are required to do some decorating. Sir Alan says to Yasmina "don't use equipment for anything other than its intended use". Yasmina sets off to paint the ceiling of the diary room. Unfortunately, she can't reach the ceiling so stands on a wobbly ornate technicolour chair just placed there earlier by the furnishings contractor. Also, without telling Sir Alan she decides to paint the room using her latest secret invention, the Paint Grenade. Unfortunately, when the grenade goes off the chair tips over and Yasmina falls, breaking her neck. With her dying gasp Yasmina admits that she knew there were step ladders in Sir Alan's van.

Raspe, Winge and Moane, solicitors, have despatched a letter of claim to you stating that Sir Alan is liable for Yasmina's death. You must decide how to defend the claim.

Suggested answers (in brief):

The chair

1. Is it an item of "work equipment"?

*Under reg 2 of the Provision and Use of Work Equipment Regulations 1998 ("PUWER") work equipment means "any machinery, appliance, apparatus, tool or installation for use at work (whether exclusively or not)".*

*In order for an item to be "for use at work" it needs to perform a useful, practical function in relation to the undertaking in which it is provided: Spencer-Franks v Kellogg v Brown and Root Ltd [2008] UKHL 46 per Lord Rodger and Lord Mance. Whether something is work equipment depends upon what is its purpose, what it is for: Spencer-Franks, per Lord Hoffman. If equipment is for use at work then it is work equipment even when it is not in fact being used.*



*There are two types of equipment: (i) equipment for use at work (ii) equipment not for use at work. In respect to (i) it is then necessary to decide if the Regulations apply (by reg 3). “You first decide whether some apparatus is work equipment or not and then you decide whether the regulations apply to it”, Spencer-Franks, per Lord Hoffman.*

*Smith v Northamptonshire County Council [2009] UKHL 27 did not disturb Spencer-Franks, however observations in the minority speeches included Lord Hope’s view that the words “for use at work” exclude “items that are for storage only or for decoration” and Baroness Hale’s view that the use must “... be known about and authorised by the employer...”.*

*In Couzens v T McGee & Co Ltd (now McGee Group Ltd) [2009] EWCA Civ 95 Smith LJ suggested that that there was a clear indication that Lord Rodger in Spencer-Franks “thought that when showing that an item was work equipment, it would not be enough for an appellant to show that he was using it; he would have to show that his employer permitted its use”. She held “if an item of equipment which has not been supplied by the employer is being used at work, it will not be work equipment for the purposes of the 1998 regulations unless the employer expressly or impliedly permitted its use or must be deemed to have permitted its use”.*

*It does not appear that Sir Alan gave permission for the chair to be used.*

2. Was it “provided for use at work”?

*By reg 3 (2) of PUWER the requirements imposed by the Regulations on an employer in respect of work equipment shall apply to such equipment “provided for use or used by an employee of his at work”.*

*Sir Alan did not provide the chair.*

3. Was it “used at work”?

*Yes on the literal meaning of the words, but not for the purpose of the Regulations on the basis of Smith v Northamptonshire County Council [2009] UKHL 27. Regulation 3 (2) involves an analysis of the question of control. Control over the use of the equipment is not enough: control over the equipment must be demonstrated. Per Lord Mance: “some specific nexus is required between the equipment and the employer’s undertaking, before the employer comes under the strict responsibilities imposed by the regulations.”*



*The test: “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.”*

4. Was it “suitable”?

*It was probably not suitable for the purpose for which it was used.*

*Reg 4 of PUWER sets out requirements in respect to suitability. Suitable is defined in reg 4 (4). “Suitable ...means suitable in any respect which it is reasonably foreseeable will affect the health or safety of any person”*

*The precise circumstances need not be foreseen and the carelessness of those who use and interact with the equipment should be considered, Robb v Salamis (M& I Ltd) [2006] UKHL 56.*

*N.B. Questions that remain open (according to the House of Lords in Robb) are: the degree of foresight, definition of risk, whether it is for the Claimant to plead and prove foreseeability or for the Defendant to plead and prove the absence of foreseeability.*

5. Was it “maintained in an efficient state, in efficient working order and in good repair”?

*Reg 5 of PUWER imposes an absolute obligation to maintain work equipment in an efficient state, in efficient working order and in good repair (see Stark v The Post Office [2000] PIQR P105).*

*A wobbly chair has not been maintained as required by the regulation.*

The Grenade

6. Is it an item of “work equipment”?

*Not for the purpose of PUWER. There was no permission to use it and therefore it was not for “use at work”.*



7. Was it “provided for use at work”?

No

8. Was it “used at work”?

*Again, yes on a literal meaning, but Sir Alan did not have the control required by Smith for PUWER to apply.*

### Liability

9. Will Sir Alan be liable under the PUWER 1998 for the chair or the grenade?

No.

10. Will he otherwise be liable?

*PUWER will also apply to the step ladder as to which the duties under reg 8 Information and Instructions and reg 9 Training apply.*

*The common law duties which include providing safe plant and equipment of course apply. It appears from Yasmina’s dying gasp that suitable, safe equipment i.e. a step ladder was available.*

*We do not know whether Yasmina had been trained to use the step ladder. We do not know whether Sir Alan had carried out a risk assessment, and whether there was a prescribed system of work.*

*It appears that Sir Alan could have been in breach of the Work at Height Regulations 2005. The Claimant was working in a place where she could fall a distance liable to cause personal injuries. Under reg 4 the work has to be (a) properly planned; (b) appropriately supervised and (c) carried out in a manner which is so far as is reasonably practicable safe and the planning has to include selection of work equipment under reg 7.*

*The Construction Design and Management Regulations 2007 apply as re-decorating is construction work under reg 2 (1). The duty under section 26 “Safe places of work” applies generally albeit the Work at Height Regulations are more specific to the facts.*



*Consider Mason v Satelcom [2008] EWCA Civ 494 and Ammah v Kuehne Nagel Logistics [2009] EWCA Civ 11.*

*Causation - Significance of the grenade causing the accident and not the wobbly chair?*

11. What about his warning?

*The general instruction not to use equipment other than for its intended use is insufficient: Ammah v Kuehne Nagel Logistics [2009] EWCA Civ 11. However, in that case the overall effect of the Defendant's evidence was that an adequate warning or instruction was given in respect to not standing on a box to access shelves. Further evidence will be needed.*

12. Would the date of the accident make any difference to any of this?

*Construction (Health, Safety and Welfare) Regulations 1996 were revoked and replaced by CON DAM with effect from 6 April 2007.*

*Work at Height Regulations 2005 came into force on 6 April 2005 and had already revoked and replaced regulation 6 (1) of the Construction (Health, Safety and Welfare) Regulations 1996, which provided: "Suitable and sufficient steps shall be taken to prevent so far as is reasonably practicable, any person falling".*

13. What lines of investigation should you be pursuing?

*Documents as a starting point:*

- *Risk assessment*
- *System of work/Method Statement*
- *Training records for Yasmina and details of the content of the training*
- *Contractual documentation with client and other contractors*

*Interview Sir Alan and obtain a statement*

*Photographs of the chair and room.*

*Expert evidence re causation – did wobbly chair make any difference?*



## Defences

### 14. Can he blame others?

*PUWER reg. 3(3). The existence and extent of a non-employer's duty relates to the extent of his control. 3 different methods of control: (i) work equipment; (ii) a person at work who supervises or manages the use of work equipment; (iii) the way in which work equipment is used at work.*

*Consider facts of control and purpose for which he has it. (see Mason). Did the furnishings contractor have control of the use of the chair (reg.4)? It appears not. Did it have control of the maintenance of the chair (reg 5)? We don't know.*

*Work at Height Regulations apply in respect to a non-employer only in relation to work by a person under his control, to the extent of his control.*

*CONDAM apply in respect to other contractors that have requisite control (reg. 25 and the duties under reg. 26-44). See McCook v Lobo [2002] EWCA Civ 1760 in respect to the previous regulations. Control is a question of fact. Control was "control over the work of construction" and not the site.*

*We need further information to determine whether the furnishings contractor had any control. Could there be other contractors who had control?*

*Channel 4 is probably "the client" and therefore has duties under CONDAM, but there is a broad restriction on civil liability (see reg. 45).*

*Occupiers' Liability Act 1957? See for instance Intruder Detection & Surveillance Fire & Security Ltd v Fulton [2008] EWCA Civ 1009.*

### 15. Can he say Yasmina is wholly to blame?

*On the basis of Boyle v Kodak [1969] 1 WLR 661 a Defendant employer can not exonerate itself for liability for breach of statutory duty unless it was wholly brought about by the Claimant employee (i.e. the employee's fault was co-extensive) and the Defendant had done all it reasonably could to guard against it. If it was wholly brought about by the Claimant employee, the issue of contributory negligence does not arise as there is no liability. If it was not*



*wholly brought about by the Claimant there must be fault on the part of the employer from the mere fact of breach of duty and there must be an apportionment to the employer of some blame.*

16. If not, what will be the extent of her contributory negligence?

*Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 (“the 1945 Act”) provides, so far as relevant, as follows:*

*“Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage: ... ”*

*“Just and equitable” having regard to:*

*Causative potency*

*Blameworthiness*

*(see Davies v Swan Motor Co (Swansea) Ltd [1949] 2 KB 291)*

*Consider breach of statutory duty as well as negligence e.g. s. 14(2) of the Work at Height Regulations.*

*There would appear to be at least a high degree of contributory negligence.*