

## Asbestos

### **Rice v Secretary of State for Industry High Court EWHC 1257 2006.**

In this case it was found that an agency could be found to owe a duty of care towards its registered agency workers. The circumstances were unusual; this particular agency was highly regulated.

The case was brought on behalf of the estate of Edward Rice who died with an asbestos-related disease and who worked as a dock worker between 1955 and 1967. During this time his labour assignments and payments were made by the National Dock Labour Board (NDLB). Assignments were made to registered employers, day by day.

At issue was whether or not the NDLB owed a duty of care to take reasonable steps to protect the health and safety of registered dock workers. In evidence it emerged that up to 1967 the registered employers were often very unsophisticated, having neither equipment, premises nor control over working conditions. Many had no record of personnel.

NDLB was charged by statute with provision of training, welfare and medical facilities and with forming a view as to whether or not such provision was adequate, whatever the source. It was an offence to allow work on the docks without registering with NDLB. Anyone refusing an assignment would be punished by a period of exclusion from the scheme.

The NDLB liabilities were taken over by Secretary of State for Industry in 1989.

So who was the employer?

In **Powell v Docks and Inland Waterways Executive** (1949) 83 Lloyd's List LR 107 the Court of Appeal held that the employee was not in the employ to the agency once allocation to an employer had been made. The argument that carried most weight was whether or not the agency had control over the mode of work after allocation. In order to find that there was a duty of care, the judge in this case would have to examine whether or not NDLB had or should have had an interest in the training and welfare systems provided.

It seems clear from the law and practice at the time that the NDLB had an obligation to find out whether or not conditions of work and training were satisfactory, to find out what cargoes were to be handled, to ensure that the labourer was suited to the work required and to enforce discipline on workers who refused a given allocation.

If, as the judge held, these were sufficient to imply a duty of care was owed by NDLB then should NDLB have know of the (or any) risks of exposure to asbestos? From the judgement:

*"It follows that at all material times the defendants [NDLB] either knew or ought to have known that exposure to heavy concentrations of asbestos dust could cause asbestosis, and, by 1947 that it was also highly probable that it could also cause lung cancer".*

And

*"[NDLB] knew that the claimants were coming into contact with asbestos powder, which had not been properly packed"*

The judge noted that having a remedy against the registered employer could not by itself preclude a remedy against the NDLB. He added, on several occasions throughout the judgement, that the extent of the duty of care owed was not being considered in this case, only whether or not there was a duty. There were strong inferences that the limited option for NDLB to change the actual mode of work would limit the extent of the duty of care in practice.

#### Comment

The NDLB did owe a duty of care up to 1967 and could have taken some practical and effective steps in that regard. Their ability to act to protect the employee was limited. In our view, under most circumstances NDLB would expect to make some contribution towards a damages award. Other parties would be the registered employer and the ship owner, both of whom would have considerably greater control over exposure to risks. Sadly, circumstances are such that finding out who was the employer or ship owner in question would probably be impossible. NDLB is easy to find.

The problem for NDLB arises when there is a prospect of compensating on a joint and several basis. In this case a small but proximal breach of duty could lead to there being 100% liability for damages. NDLB have stated their intention to appeal.

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