Cases in point

In the latest of his articles for students of the NEBOSH National Diploma, Lawrence Bamber takes a first look at some classic legal cases

NEBOSH'S GUIDE to its Diploma in Occupational Health and Safety Practice, element A9 — Civil law — says that the overall aims on completion of this element are that the student will understand:

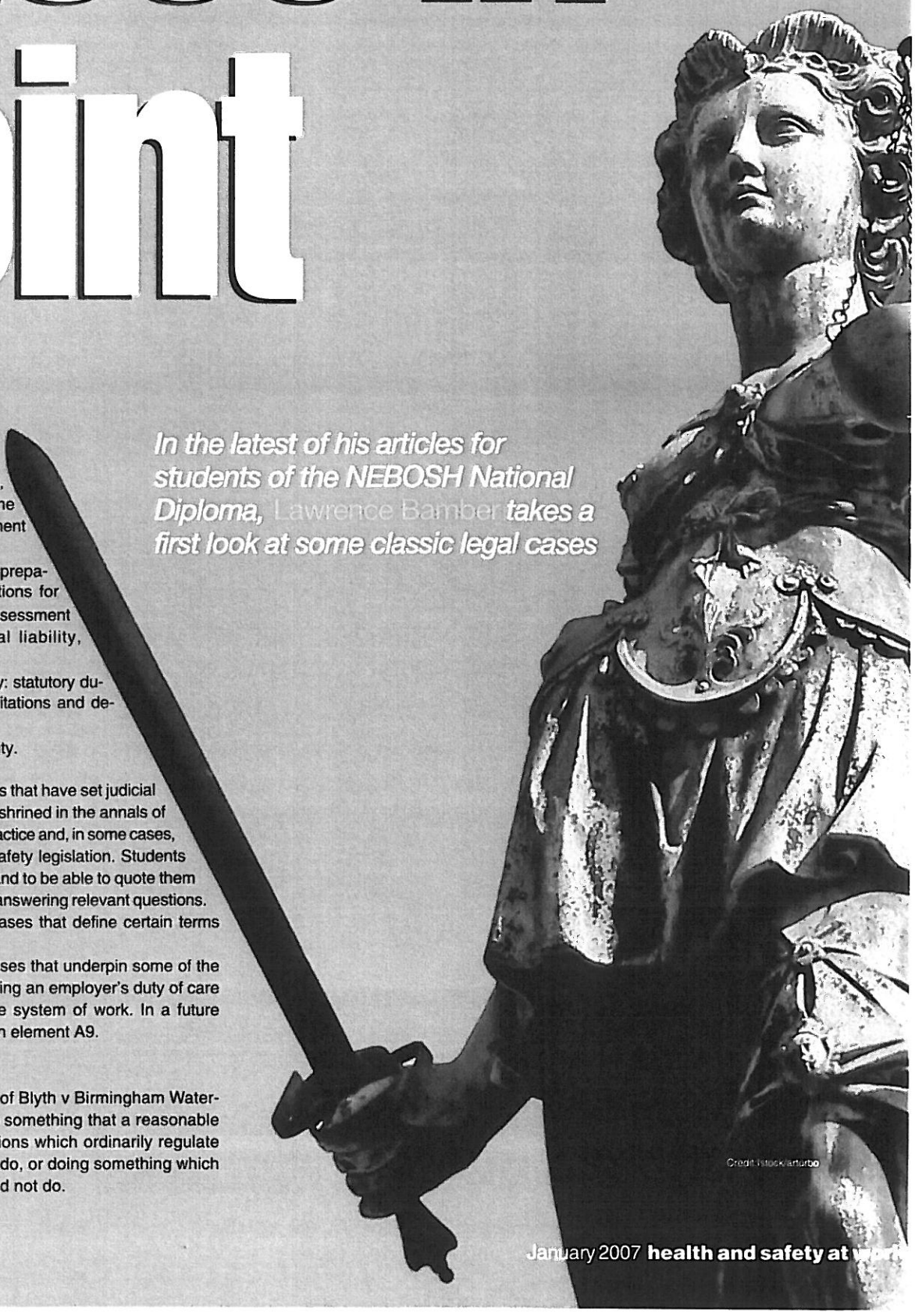
- the tort of negligence: remedies, preparation and limitations of civil actions for damages, factors affecting the assessment of damages, joint and several liability, possible defences
- the tort of breach of statutory duty: statutory duties giving rise to civil action, limitations and defences
- vicarious, strict and no-fault liability.

The element content lists 33 civil cases that have set judicial precedent over the years, become enshrined in the annals of good occupational safety and health practice and, in some cases, influenced occupational health and safety legislation. Students will need to be aware of these cases and to be able to quote them and the key judicial precedents when answering relevant questions. There are also some other classic cases that define certain terms and principles.

In this article we look at those cases that underpin some of the basic health and safety duties, including an employer's duty of care and responsibility for creating a safe system of work. In a future article we will return to the case law in element A9.

Negligence

Negligence was defined in the case of Blyth v Birmingham Waterworks (1858) as: the omission to do something that a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.



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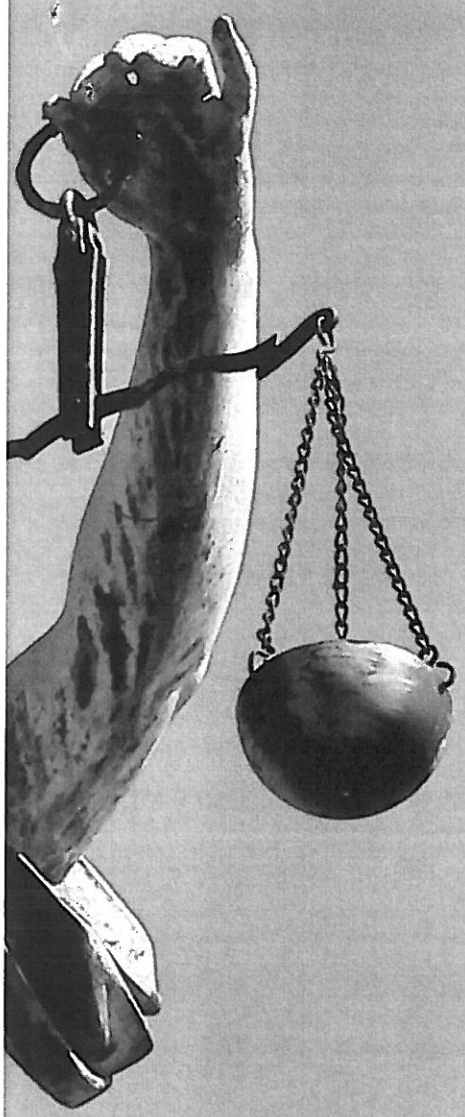

In this case the judge found that the water company had failed in its duty of care to its customer (Blyth) by laying a water pipe too near the surface of the ground which, as a result, had become frozen in winter, thus cutting off supply.

Hence a broad definition of negligence is careless conduct which causes injury or damage to another person — whether that person is an employee, contractor, visitor or member of the public. There are three connected elements needed to establish — on the balance of probabilities — that negligence has taken place:

- that there is a duty of care owed by one party to another
- that there has been a breach of that duty
- that the breach of duty has resulted in damage (injury or disease).

Snail in beer

The decision in Donogue v Stevenson (1932) defines the duty of care as follows: you must take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure your neighbour. The judge went on to define neighbours as: "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts and omissions which are called into question."

This famous case, usually referred to as the "snail in the ginger beer bottle" case, arose when the claimant (Ms Donogue) was ill after drinking from a bottle of ginger beer which contained a decomposing snail. As the bottle was opaque and she had no reason to suspect that it contained anything other than ginger beer, she successfully sued the manufacturer who was held to owe a duty of care to anyone consuming the product.

Hence, a duty of care is owed by anyone considered to be a neighbour. In an employment situation, this includes anyone likely to come into contact with work activities: employees, contractors, visitors and passers-by.

Thus in the UK, we do not owe a duty of care to the Mayor of Hong Kong unless that person comes into contact with UK work activities by being in the country or purchasing a product exported from the UK.

Standard of care owed

This is linked to the statutory phrase "so far as is reasonably practicable" but in fact pre-dates it.

The magnitude of the risk of damage (injury or disease) and the gravity of the consequences of an accident must be weighed against the cost and difficulty of avoiding the risk.

In Paris v Stepney Borough Council (1951), for example, the House of Lords held that eye protection (goggles) should be have been provided for a one-eyed man working where there was a high risk of metal fragments hitting his one good eye, possibly causing blindness, though the risk of this happening to a man with two good eyes could be ignored. Hence the provision of goggles to Mr Paris was held to be reasonable.

In Latimer v AEC Ltd (1953), Lord Justice Denning stated that it is a matter of balancing the risk against the measures necessary to eliminate it.

Res ipsa loquitur

This Latin phrase translates as "the thing speaks for itself". Normally the burden of proof that the defendant has been negligent and has broken the common law of duty of care rests with the plaintiff/claimant. But in some cases, the facts that the plaintiff establishes are such that the thing speaks for itself; hence it is obvious to the court that negligence has taken place — *res ipsa loquitur.*

The principle was established in the case of Scott v London and St Katherine Docks Co (1865). In this case, the defendants dropped a bag of sugar onto Mr Scott, causing him injury, and the court was satisfied on this factual event. The judgment found that the defendant had been negligent by stating the principle as follows: "There must be reasonable evidence of negligence, but where the thing is shown to be under the management of the defendant or his servants [that is, vicarious liability], and the accident is such as, in the ordinary course of things, does not happen, if those who have the management of the machinery use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

Duty to employees

The humanitarian argument for good health and safety management is firmly based on the notion that it is the duty of any person to ensure the general health and wellbeing of others who may be affected by that person's acts and omissions — that is, the common law duty of care, as outlined above.

This places an onus on employers to provide a safe and healthy working environment for their employees and, indeed, for anyone else who comes into contact with their work activities. Employers must take reasonable care not to subject their employees — or others — to unnecessary risk.

The case which highlighted this employer/employee duty was Wilsons and Clyde Coal Co Ltd v English (1938), where Lord Wright said: "The whole course of authority consistently recognises a duty which rests on the employer, and which is personal to the employer, to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm or a company, and whether or not the employer takes any share in the conduct of the operations."

This case also established the elements of what this duty means in practice. The House of Lords held that the employer must provide:

- proper and safe plant and equipment
- safe systems of work, with adequate supervision and instruction
- safe premises, including safe access and egress
- safe and competent employees.

This is supported by Lord McLaren in Bett v Dalmey Oil Co (1905), when he judged that the obligation placed on employers is threefold: the provision of competent staff, adequate material and a proper system, and effective supervision. These duties were later enshrined in Section 2 of the Health and Safety at Work Act 1974.

Safe systems of work

In Wilsons and Clyde Coal v English (see above) Lord Wright held that it was the personal duty of the employer to see to the safety of the system of work, and that liability cannot be escaped by delegating performance of that duty to someone else.