13 April 2011

PRESS SUMMARY

Baker (Respondent) *v* Quantum Clothing Group Limited (Appellants) and others
Baker (Respondent) *v* Quantum Clothing Group Limited and others (Pretty Polly Limited) (Appellant)
Baker (Respondent) *v* Quantum Clothing Group Limited and others (Meridian Limited) (Appellants)
[2011] UKSC 17
On appeal from the Court of Appeal (Civil Division) [2009] EWCA Civ 499

JUSTICES: Lord Mance, Lord Kerr, Lord Clarke, Lord Dyson, Lord Saville

BACKGROUND TO THE APPEAL

This appeal concerns the liability of employers in the knitting industry of Derbyshire and Nottinghamshire for hearing loss suffered by employees prior to 1 January 1990. The central issue is whether liability existed at common law in negligence and/or under s.29(1) of the Factories Act 1961 towards an employee who suffered noise-induced hearing loss due to exposure to noise levels between 85 and 90dB(A)lepd.

Mrs Baker, the Respondent, worked in a factory in Sutton in Ashfield, Nottinghamshire, from 1971 until 2001. From 1971 to 1989 she was exposed to noise which was found at trial to have been between 85 and 90dB(A)lepd and which had led to her sustaining a degree of noise-induced hearing loss. The measure 'db(A)lepd' indicates exposure at a given sound level over a period of eight hours.

Mrs Baker brought a claim against her employers, for whom liability now rests with Quantum Clothing Group Ltd, one of the Appellants. A number of other individuals brought similar claims against Meridian Ltd, Pretty Polly Ltd and Guy Warwick Ltd, and all the claims were decided together as test cases. Only Mrs Baker was found to have suffered hearing loss due to noise exposure in her employment and the other claims were therefore dismissed. Mrs Baker's claim was dismissed on the different basis that her employers had not committed any breach of common law or statutory duty.

The Court of Appeal allowed an appeal by Mrs Baker and reached conclusions less favourable to all four employers than those arrived at by the judge at first instance. The Court held that liability at common law arose in January 1988 for employers with an average degree of knowledge, which included Guy Warwick. Quantum, Meridian and Pretty Polly were found to have had greater than average knowledge and were liable at common law from late 1983.

S.29(1) of the Factories Act 1961 provides that, '*every place at which any person has at any time to work … shall, so far as is reasonably practicable, be made and kept safe for any person working there*'. The Court held that the section imposes a more stringent liability than at common law and in particular that what was safe was to be judged irrespective of whatever was regarded as an acceptable risk at the time. On this basis the Court held that the date from which liability arose under the section was January 1978.

The present appeal has been brought by Quantum, Meridian and Pretty Polly, with Guy Warwick intervening.

JUDGMENT

The Supreme Court allows the appeal by a majority of 3:2 and restores the judge's decision at first instance. Lord Mance gives the lead judgment. Lord Dyson gives an additional concurring judgment, and Lord Saville agrees with both. Lord Kerr and Lord Clarke give dissenting judgments.

REASONS FOR THE JUDGMENT

The Supreme Court first dealt with common law liability in negligence. The central question was whether a 1972 Code of Practice published by the Department of Employment, which recommended a noise exposure limit of 90dB(A)lepd, constituted an acceptable standard for average employers to adhere to during the 1970s and 1980s. The judge at first instance had found that it did until the terms of a draft European Directive of 1986, which proposed a lower limit, came to be generally known in 1988 via a consultative document. The Court upheld that conclusion of the judge. Examination of the underlying statistical material did not undermine the relevance of the Code as a guide to acceptable practice. It was official and clear guidance which set an appropriate standard upon which a reasonable and prudent employer could legitimately rely in conducting his business until the late 1980s.

The Court also endorsed a further two year period beyond 1988 allowed by the judge for implementing protective measures, thus meaning that the average employer had no common law liability before 1 January 1990. The Court of Appeal had been incorrect to replace that period with a period of six to nine months. On the facts, Quantum and Guy Warwick were in the position of average employers to whom the 1 January 1990 date applied. Courtaulds and Pretty Polly, however, were in a special position. By the beginning of 1983 they had an understanding of the risk that some workers would suffer damage from exposure to between 85 and 90dB(A)lepd, which distinguished their position from that of the average employer. Allowing a further two years to implement protective measures, they were potentially liable at common law from the beginning of 1985.

The Court then dealt with liability under s.29(1) of the 1961 Act. In construing the section, the Court first held that a workplace may be unsafe within the meaning of the section not only due to its physical fabric, but also due to activities carried on in it. The next question was whether the section applies to risks created by noise. The Court held that it did, on the basis that the section could accommodate attitudes to safety that were not held at the time when it was enacted. Thirdly, the Court held that what is "safe" is a relative concept that must be judged having regard to general knowledge and standards at the time of the alleged breach of duty. Finally, the Court held that the qualification, "so far as is reasonably practicable", also allows such general knowledge and standards to be taken into account. Applying that construction, the section did not impose in this respect a more stringent liability than at common law. The employers by complying with the Code of Practice were not in breach of the statutory duty before like dates as those from which they were potentially liable at common law.

Lord Kerr and Lord Clarke dissented. They held that the terms of the Code of Practice and other material available by 1976 were such that employers should have been aware that damage to hearing could occur at levels below 90dB(A)lepd and that certain individuals in the workforce would be particularly vulnerable at those levels. Further, the employers should have been aware that they could have reduced that risk at not inordinate cost by the provision of ear protection. Liability therefore arose at common law from the late 1970s onwards. As to liability under s.29(1), the concept of safety, unlike the qualification of reasonable practicability, does not include an assessment of what was foreseeable at the time. On the facts, the workplaces were not safe and it was reasonably practicable to provide ear protection. The dissenting Justices therefore held that employers were liable under the section from 1978 as held by the Court of Appeal.

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for that decision. The full opinion of the Court is the only authoritative document. Judgments are public documents and are available at:
www.supremecourt.gov.uk/decided-cases/index.html