



The Compensation Superhighway Traffic Warning - Civil Engineering

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Road map

- Compensation route planner
- Major junctions - stress
- The superhighway road lanes and jams
 - reactive case law
 - absent regulatory framework
 - vicarious liability curiosities
- Heavy traffic alert
- Shortcuts
- New destinations

Compensation route planner

Milestones

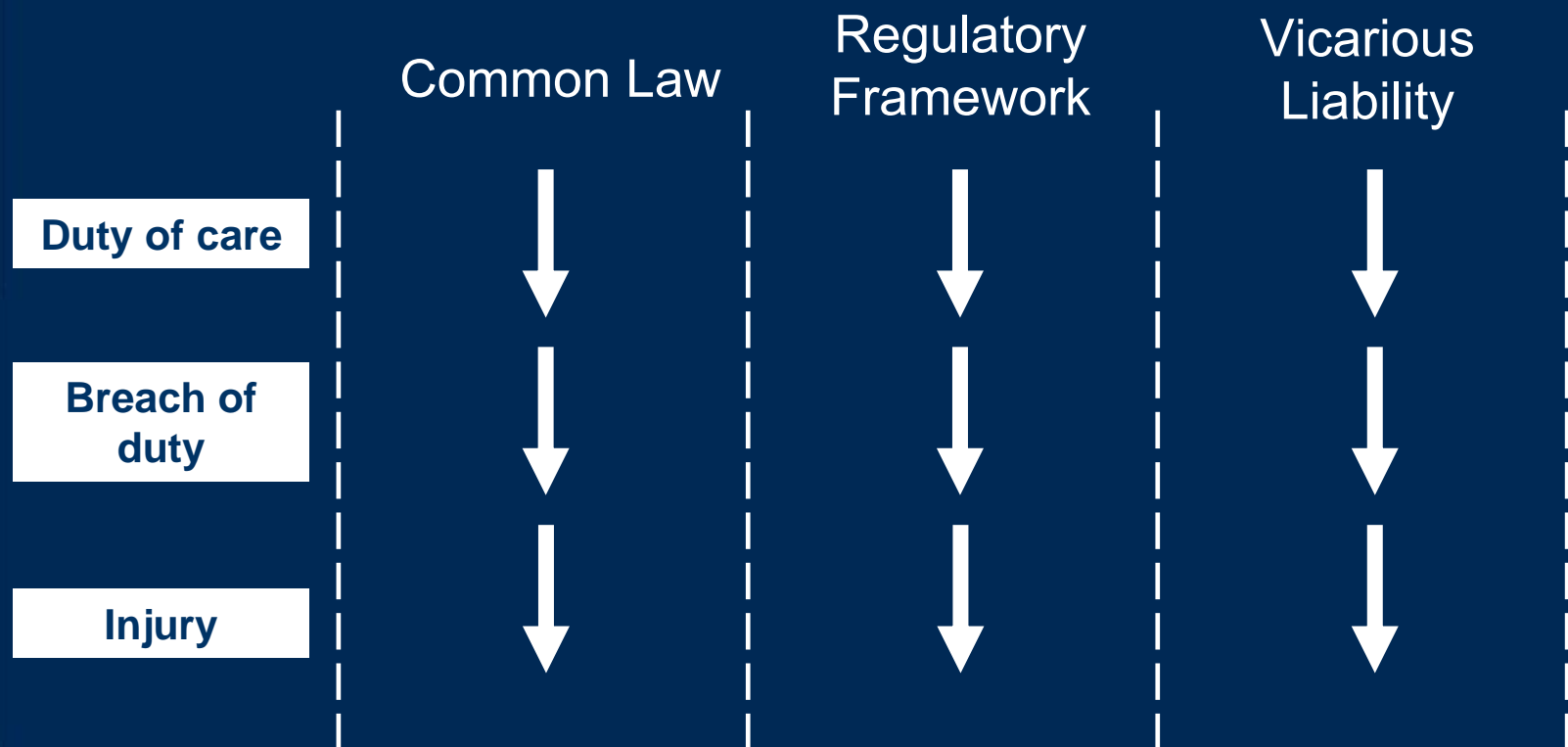
- ↓ Duty of care
- ↓ Breach of duty “causing”
- ↓ Damage and injury
- ↓ No other defence - limitation

Routes

- ▶ Common law duties
- ▶ Regulatory and statutory
- ▶ Vicarious liability

Contract

The superhighway



The superhighway

Common Law



Regulatory Framework



Vicarious Liability



Major junctions - Stress

Developmental	To 1995	Nervous shock and customary phlegm
Post Walker	1995-1999	Overwork – one breakdown rule
Pre Hatton	1999-2002	Discomfort and distress – first instance free for all
Reactive	2002-2005	Respond to specified indicators and occurrences
Proactive	2005+	Standards, outreach, check, reveal, respond, systems, assessment, responsible for health

Jams - reactive common law

Case law time lag – exposure, claim, hearing

Walker v Northumberland County Council (1995)

Hatton v Sutherland (Baker Refractories v Bishop) - CA 2002

Barber v Somerset County Council - HL 2004 - Framework

Hartman v South Essex... CA January 2005

Harding v The Pub Estate Company - CA May 2005

Employers response or reaction to frank stressors in the workplace

- a) reports “ that it is making me ill”
- b) of conspicuous notorious workplace practices

Quality of response

Would a better response have made a difference?

Helpline myths

Jams – absent regulatory framework

- *The Management of Health and Safety at Work Regulations 1992, 1999*
- Six, seven, eight packs
- Criminal sanctions
- Civil application ?
- Focussed on risk sector
 - VDU
 - Manual handling
 - Chemicals
- **Psychosocial risks - missing in action**
- Risk assessment

Jams - vicarious liability curiosities

- Common employment defence - another era
- Conduct and activity
- Injury - “arising out of and in the course of” - employment
- Frolics and practical jokes
- Functional overlap with employers’ direct duties
- Harassment and bullying - in context
- Course of employment?

The superhighway – pre engineering

Common Law



Regulatory Framework



Vicarious Liability





Heavy traffic alert - civil engineering in progress

- Better routes to redress?
- The trinity
 - Regulatory framework - **October 2003**
 - Common law standards - **November 2004**
 - Vicarious liability - **March 2005 +**

An actionable regulatory framework

- The Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003
- “Management Regs - 1999” R22 - effective October 2003
- Actionable civil claims...
 - Failure to risk assess
 - Failure of Health and Safety arrangements
 - Failure in Health surveillance
 - Failure in Health and Safety assistance
 - Failure to provide information
 - Failure in training

The superhighway

Common Law



Regulatory Framework



Vicarious Liability





Common law – New standards & duties

- **Risk Management** - The reservoir of misery
 - HSE Standards - published November 2004
- Demands
- Control
- Support
- Relationships
- Role
- Change
- Outreach/investigation - employees indicate: affirmation
- Policies

Outreach

- Identify all stressors
- Conduct risk assessments to eliminate
- Consult with employee representatives
- **Use “indicator tools” & run focus groups**
- Training
- Confidential counselling
- Provide resources to implement
 - The French question dilemma - employers response?
 - New standards/new duties - causation tests
 - Redundant case law?

Liability and management pitfalls

Inaction - employers embarrassed by the standards

Action - Adequate at outset and in response, case management

Response - to the complainant, what sort of complaint or illness?

Action - Organisational upheaval

Actionable - “Management” regulations

Burden of proof - caused, material contribution or increased risk?

Causation - still an issue, “would better have made a difference?”

Intensive or fact rich - management time, demanding, expense

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Vicarious Liability



Vicarious liability – new responsibilities

Bullying and harassment

- *Fennelly v Connex South Eastern - CA (2000)*
- *Lister v Hesley Hall - HL (2001)*
 - Close connection tests / modes of doing jobs
 - Managers / supervisors

The Protection from Harassment Act 1997

- *Majrowski v Guy's and St Thomas's NHS Trust - CA March 2005*
- Parliamentary intentions v drafting
 - Harassment definitions ?
 - Personal liability becomes Employer's liability
 - Appeal pending

The superhighway – operating at full capacity

Common Law



Regulatory Framework



Vicarious Liability





Shortcuts

- Tribunals, contracts and discrimination
- Julia Messervy-Whiting and Alan Rennie, Everatt & Co

New destinations

Shift in balance of advantage away from the employer

- More claims - how many?
- More payers - how many?
- More to pay - how much?

Approaches:

- Awareness of the issues, scale, complexity and impact
- Employer's resources and willingness to plan and act
- Skills to carry the action through effectively

Support from QBE to Manage the Risk

- Health and safety accent - embrace change
- Good practice is good civil sense



Points of View?



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