International SOS Foundation

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Sending workers abroad: a Perspective on the Employer's Duty of Care in Health, Safety & Security Matters

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Introduction

In the current marketplace, global travel is becoming the norm, with more employers than ever before sending their employees abroad. The graduates who form part of the millennial generation are keen to work outside their home country[i], suggesting that there will be even more demand from employees for international postings going forward. However, the risks involved in posting employees abroad are also on the rise.

Recent world events have shown the increased risks associated with global travel: from aviation disasters to an increased risk of terrorist activity, from natural disasters to pandemics such as the Ebola outbreak in West Africa in 2013 and the MERS outbreak in South Korea earlier this year, there is an inherent risk involved in sending employees to work in other jurisdictions. Every 15 seconds, a worker dies from a work-related accident or disease and, in economic terms, the International Labour Organization has estimated that 4% of the world's annual GDP is lost as a consequence of occupational accidents and diseases[ii].

Of course, not all of these accidents take place while employees are working abroad, but if employers are going to build a borderless workforce against this backdrop, it is critical that they are aware of the duty they owe to protect their employees from harm, both in the UK and abroad.

All employers in England and Wales owe a duty of care to their employees. However, not all employers realise that this duty of care continues to exist – oftentimes to a heightened extent – when their employees are sent to work in other jurisdictions.

In a benchmarking survey carried out by International SOS, more than 600 global companies were surveyed. Although 95% of these of these companies said that they sent their employees to high-risk locations to work, approximately one third of the respondent organisations stated that they did not know whether they had legal requirements or owed a duty of care towards the employees that they were sending abroad[iii].

This note is intended to provide an overview of the duty of care owed to employees who are deployed from England or Wales to work in another jurisdiction, either on a short-term basis (e.g. a business trip) or as part of a longer-term arrangement, such as an international assignment or secondment. This note covers the position under the laws of England and Wales (in force at the time of writing) only, and does not address the legal rights of British nationals (or nationals of any other country) who are employed by local employers in countries other than England and Wales.

The duty of care and its origins

Under the Health and Safety at Work Act 1974, employers owe a statutory duty to ensure the health, safety and welfare of every employee[iv].

There is also a term of mutual trust and confidence implied in every employment relationship. As a result of this term, employers have a duty to provide their employees with, among other things, a working environment that is suitable for the performance of their duties.

Additionally, employers have a common law duty to take reasonable care for their employees. This duty has arisen through the UK case law system and it is this common law duty of care that is perhaps most frequently cited by employees when things go wrong when they are working abroad.

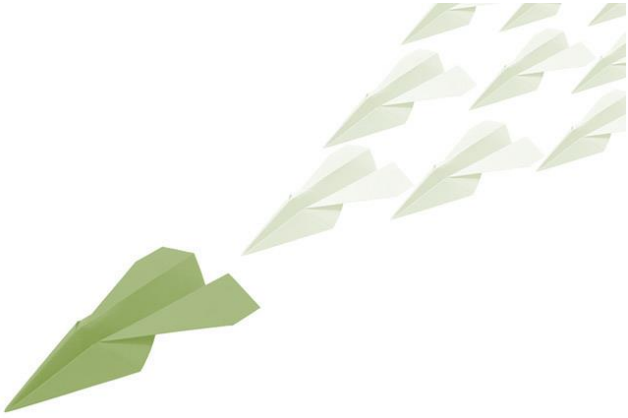
The common law duty of care has recently formed the basis of two high-profile cases brought in the UK courts against the employers of two British men who were fatally injured while working abroad. We will focus on the common law duty of care in this note.

The fundamental principles of the common law duty of care

A duty of care can arise in various circumstances, including between an employer and employee, provided that the following elements are present:

- a *proximate relationship between the parties*;
- *foreseeability*; and
- *causation*.

In an employment relationship, it is generally accepted that the first element – a proximate relationship between the parties – is present. As such, in the case of a dispute, a court would usually be looking at whether the injury, disease or death of the employee was foreseeable and whether there was a causal link between the employer's actions (or lack thereof) and the damage or injury sustained by the employee.



Foreseeability

A foreseeable risk is a risk that a reasonable person should be able to identify. Foreseeability is assessed by reference to all of the circumstances of the case, so what is reasonably foreseeable in one case may not be foreseeable in another.

For example, there would be a foreseeable risk involved in standing next to a tall metallic object in an open space during a lightning storm. Add an umbrella to the equation, and the foreseeability of the risk increases. However, there may be no foreseeable risk in standing in exactly the same position with multiple umbrellas on a bright, sunny day.

Causation

For causation to be established, there must be a link between the action or inaction of the employer and the harm that the employee suffers. The causation principle is often referred to as the "but for" test. For example, if there was an unmarked hole in a walkway which an employer chose not to cordon off or sign post, and an employee was subsequently injured by falling into the hole, there would likely be a causal link between the employer's failure to sign post the hole and the employee's injury. Applying the "but for" test: but for the employer's failure to make the area safe, the employee would not have fallen into the hole and would not, therefore, have been injured. As such, a causal link would likely be established between the failure on the part of the employer and the employee's injury.

The duty of care

Where a common law duty of care exists, employers must take reasonable precautions to protect their employees from any foreseeable risk of injury, disease or death. From a practical perspective, this means that employers owe a duty to their employees to:

- provide safe systems of work;
- take care in selecting proper and competent fellow workers and supervisors;
- provide proper machinery and materials; and
- provide and maintain a safe system of work[v].

Third party premises

Importantly, these duties don't only exist while an employee is working at his or her usual place of work. It has long been established that employers who send their staff to work at the premises of others cannot relinquish all responsibility for their safety simply because the employee has left their primary place of work[vi]. Rather, employers must continue to safeguard employees who are working offsite, at a third party premises or at remote locations at the employer's request. As such, employers should ensure that the working conditions, systems of work, machinery and materials that their employees may be using while working offsite are satisfactory, especially if the employees are working from locations where the

local safety standards and working practices may not comply with the accepted standards in England and Wales.

Travel

An area that is often overlooked when employees are working abroad is travel, either to or from work on a day-to-day basis or to and from the UK. Generally, when an employee is working from his or her usual place of work, the employer will not have responsibility for the employee's travel to and from work; the employee will be expected to make his or her own travel arrangements. However, where an employee is working abroad, the duty of care may include a duty to ensure the employee's safety while in transit.

In the case of ***Palfrey v Ark Offshore Limited***[vii], an employee contracted a fatal malarial infection when travelling to West Africa to work on an oil rig. Mr Palfrey was informed by his employer that he did not need to be concerned about the risk of malaria in West Africa, as he would be working on an oil rig, offshore, where there was no risk of being bitten by a mosquito. As such, Mr Palfrey took no anti-malarial medication before or during his trip. When Mr Palfrey was bitten by a mosquito during an overnight stay on an island *en route* to the oil rig, he contracted malaria, which proved to be fatal.

In this case, the High Court found that there was a clear failure on the part of Mr Palfrey's employer to take reasonable care to ensure the safety of Mr Palfrey in the course of his employment, which included travel to and from the oil rig.

In another successful case, an employee brought a claim against his employer when he suffered a slipped disc due to an inadequate minibus that was supplied by his employer to transport him to the third party premises where he was working while abroad[viii]. The Court of Appeal found that the employer had caused the employee to travel in conditions that were so extreme that there was a foreseeable risk of any person of an ordinary level of physical robustness succumbing to an injury.

These cases show that, when sending employees abroad, it is not just the place of work that needs to be considered, but also the employee's ability to access the place of work safely.

Recent case examples

The common law duty of care was propelled into the media spotlight earlier this year.

The cases of Cassley v (1) GMP Securities Europe LLP; and (2) Sundance Resources Limited[ix] and Dusek & Ors v Stormharbour Securities LLP[x] were both heard in the High Court within a few weeks of each other.

Both cases involved fatal aviation accidents, resulting in the death of British men who had been working abroad at the time of the accidents. In both cases, the employing entities were found to have breached their duties of care towards their employees.

Dusek & Ors v Stormharbour Securities LLP

The ***Dusek*** case arose as a result of a helicopter crash in the Peruvian Andes, which caused the death of Mr Dusek. The flight in question had been scheduled to take Mr Dusek, who was working for Stormharbour at the time, to visit the site of a hydroelectricity complex that was being built in south-east Peru. However, the helicopter came into difficulties on the way to the site and crashed into a mountain in the Andes mountain range, killing all passengers and crew on board the flight. Mr Dusek's family brought a claim against Stormharbour in the High Court, in which it was alleged that, among other things, Stormharbour had failed in its duty as an employer to provide Mr Dusek with a safe place of work.

When the case was heard, Justice Hamblen found that the incident was essentially an accident waiting to happen.

Hamblen considered that:

- it was clear that the flight was a dangerous, high risk one[xi];
- Stormharbour was fully aware of this risk; its senior management were aware of the fact that the hydroelectricity development site was in a remote location, in an underdeveloped area of the Andes that could not be reached by road[xii]; and
- Stormharbour would also have known that Cusco, which was the departure point of the flight, is at a high altitude, making helicopter travel more dangerous.

In delivering judgment, Justice Hamblen stated that any reasonable and responsible employer would have realised that if their employee was to take a helicopter flight from high altitude, across the Andes mountains, to a particularly undeveloped and inaccessible area, there was a real risk of danger and the proposed flight raised obvious and foreseeable safety risks[xiii].

"They could have fulfilled their duty of care by taking steps involving little time and no cost"

Against this backdrop, and taking into account the inherent level of risk involved with air travel in the Andes, it was found that Stormharbour should have made at least some inquiry into the safety of the trip and carried out some form of risk assessment. However, it did neither. Justice Hamblen found that if Stormharbour had taken either of these steps, which would have involved little time and little cost, Mr Dusek would never have been permitted to board the plane and, if he had not boarded the plane, he would not have died. Breach of duty and causation were therefore both satisfied and the company was unable to defend the claim.

Cassley v (1) GMP Securities Europe LLP; and (2) Sundance Resources Limited

In ***Cassley***, Mr Cassley's employer, GMP, was also found to have breached its duty of care to Mr Cassley

when he was killed in an aeroplane crash in the Republic of Congo. The plane that Mr Cassley was travelling on as part of a site visit to a mine came into difficulties and crashed into the hillside in a remote area of the Congolese jungle. All passengers and crew died in the collision.

When the case was heard, the Honourable Justice Coulson confirmed that, in addition to all of the general duties of care that Mr Cassley would have been covered by in the usual course of his employment, GMP owed Mr Cassley a duty of care in respect of his working at remote third party premises (in this case, the mine) and a duty of care in relation to travel to and from those premises (in this case, the flight).

"…they took no steps at all to satisfy their duty of care…"

When delivering judgment, he concluded that GMP "…took no steps **at all** to satisfy their duty of care…"[xiv] (Justice Coulson's emphasis). GMP's failings in this case, as listed by Justice Coulson, were numerous.

Firstly, GMP was found to have undertaken no enquiries of any sort about the proposed trip and to have taken no steps to satisfy themselves that the trip was safe, something they had agreed to do in their own policies and procedures[xv]. Secondly, GMP failed to ensure that risks would be either avoided or reduced to an acceptable level. Thirdly, they failed to show any leadership or effective action in respect of health and safety. Fourthly, they failed to conduct risk assessments. Fifthly, they failed to subject contractors to selection processes requiring them to prove their safety standards and, ultimately, they failed to put Mr Cassley's health and safety at the top of their list of priorities, something that they should have done in the circumstances[xvi]. On any reading of the judgment, it is clear that Justice Coulson took a very dim view of the lack of steps taken by GMP to discharge their obligations towards Mr Cassley.

"They failed to show any leadership or effective action in respect of health and safety"

However, a critical difference between Mr Cassley's case and Mr Dusek's case was that in ***Cassley***, there was no causal link between the failings of GMP and the fatalities. Justice Coulson found that even if GMP had complied with its duties and undertaken additional enquiries, the accident would still have happened. As such, the claim against GMP was unsuccessful.

This shows the importance of the principle of causation in English law; even if an employer is in breach of its duties, there must be a causal link between the breach and the injury to the employee for a claim to succeed. However, both cases provide an important reminder to employers of the duty of care that is owed to employees.

Lessons learned from Cassley

GMP was heavily criticised in the judgment in ***Cassley*** for effectively taking no steps at all to satisfy its duty of care towards Mr Cassley. Even those businesses who may feel they have adequate procedures in place to safeguard their employees can learn lessons from this case, especially in relation to the following points.

Policies must be implemented effectively

It is not enough to have health and safety policies in place; businesses must take steps to make sure these policies are actively enforced. During the trial, it became apparent that GMP had put policies and standards of conduct into place, but had failed to ensure these were implemented efficiently. This is a lesson to all employers to make sure that managers understand the aims and objectives of the policies that they have in place and take a holistic view when using the policies on a day-to-day basis. It is not enough to carry out a box ticking exercise against a

checklist; real thought must be given as to whether the objectives and requirements of the policies that are in place are being satisfied in practice.

Carry out risk assessments

Employers should carry out risk assessments in order to properly understand the relative health, safety and security risks that will apply to employees while they are abroad. These need to be tailored to the specific circumstances of the business trip or international assignment; adopting a one size fits all approach will not be enough. As part of the risk assessment process, countrywide risks should be taken into account, such as a heightened risk of natural disaster, terrorist activity or disease. Local factors must also be considered, for example, a lack of medical infrastructure, adequate transport or accommodation in the area the employee is staying or a localised risk of crime.

Check that local contractors meet appropriate safety standards

Safety standards can vary dramatically between countries and working practices that would be deemed legally compliant in one country could be considered grossly negligent or illegal in another. Before sending employees abroad, employers should therefore ensure that local safety standards are of the standard required under the laws of England and Wales. This may include ensuring the place of work, working pattern, working practices and the local workers themselves are of a level that satisfies UK standards.

Practical tips for discharging the duty of care

The duty of care is not absolute and all of the circumstances of a case will be investigated in order to determine whether an employer acted reasonably in any given scenario.

This means that it is possible for prudent employers to meet the required duty, if appropriate action is taken. In addition to the steps set out above, the following practical tips may assist in discharging the duty of care.

Planning

Travel itineraries are helpful in evaluating the likelihood of risks emerging, but in a crisis situation employers will need to be able to pinpoint their employees' location in order to ensure their safety. Full itineraries should be prepared and consideration should be given to tracking and monitoring: in the event of a crisis, employers need to know where their employees actually are, not just where they ought to be.

Tracking needn't be difficult or costly; tracking apps can be helpful in enabling employees to 'check in' or mark themselves as 'safe' during an emergency. In a benchmarking survey carried out by the Forum for Expatriate Management, 45% of the respondent businesses said that they felt the risks associated with business travel could be minimised by moving to a better tracking system. However, over a third of respondents said that they did not systematically track their business travellers[xvii]. It can also be helpful to build vaccination plans or schedules into the travel planning for employees who are travelling to locations where there is a heightened risk of infectious disease.

Testing

Where systems are in place, employers should test these in order to ensure that they remain adequate. Tests should be adopted to fit local requriements. For example, in areas where natural disasters are common, employers may need to carry out earthquake and tsunami evacuation drills, in addition

to the fire drills that are habitually carried out in the UK.

Training

Employers should prepare and educate their employees about the locations they will be working from, and should not assume that they will have knowledge about local conditions or cultural norms.

Where training is provided, signed copies of training records should be retained and training programmes should be refreshed to take account of changes in both the law and the practical realities of working overseas.

Employers may also wish to consider offering their employees first aid training, especially if they may be working in remote locations, away from established medical facilities. If employees will be travelling to high risk locations, additional types of training – such as security briefings and hostile environment awareness training – may need to be considered. Debriefings with employees who have returned from international assignments can also provide a valuable source of information to outgoing employees.

Communications and consultation

Employers should establish systems so that they stay informed of changing risks and can relay such information to their employees while they are working remotely.

Accidents can take place at any time of day, especially when employees are located in different time zones. As such, it may be helpful to provide employees with access to a 24-hour helpline, which may be able to provide support for medical or security questions or facilitate the provision of emergency assistance at a time when an employee's usual points of contact would not be available. It may also be helpful to provide employees with access to travel alerts offered by institutions such as the Foreign Commonwealth Office (FCO), which are constantly updated.

Useful links

The European Agency for Safety & Health at Work: https://osha.europa.eu/en

The Federation of European Risk Managers Association: www.ferma.eu

International SOS Foundation: www.internationalsosfoundation.org

FCO Guidance for businesses operating in high-risk environments: https://www.gov.uk/guidance/operating-in-high-risk-environments-advice-for-business

The Health and Safety Executive: http://www.hse.gov.uk/

BSI: http://www.bsigroup.com/en-GB/industries-and-sectors/health-and-safety/

Footnotes

[i] In a benchmarking study undertaken by PwC, 71% of the graduates who responded to the survey stated that they would like to work internationally, with the positive response rate being as high as 93% in graduates who responded to the survey in Africa (https://www.pwc.com/gx/en/managing-tomorrows-people/future-of-work/pdf/pwc-talent-mobility-2020.pdf). Accessed December 2015.

[ii] http://www.ilo.org/global/topics/safety-and-health-at-work/lang--en/index.htm. Accessed December 2015.

[iii] https://www.internationalsos.com/newsroom/news-releases/duty-of-care-to-employees-is-critical-to-business-stability-reveals-new-global-benchmarking-study-nov-09-2011 Accessed December 2015.

[iv] Section 2 of the Health and Safety at Work Act

[v] ***Wilsons and Clyde Coal Co v English*** [1938] AC 57

[vi] ***Smith v Austin Lifts Ltd*** [1959] 1 WLR 100

[vii] Unreported High Court case

[viii] ***Durnford v Western Atlas International Inc.*** [2003] EWCA Civ 306

[ix] ***Cassley v (1) GMP Securities Europe LLP; and (2) Sundance Resources Limited*** [2015] EWHC 722

[x] ***Dusek & Ors v Stormharbour Securities LLP*** [2015] EWHC 37 (QB)

[xi] At paragraph 144 of the judgment in ***Dusek***

[xii] At paragraph 167 of the judgment in ***Dusek***

[xiii] At paragraph 175 of the judgment in ***Dusek***

[xiv] At paragraph 217 of the judgment in ***Cassley***

[xv] At paragraph 217 of the judgment in ***Cassley***

[xvi] At paragraph 219 of the judgment in ***Cassley***

[xvii] At paragraph 217 of the judgment in ***Cassley*** https://cent.blob.core.windows.net/community/docs/librariesprovider4/report-downloads/policyinpractice_0115.pdf?sfvrsn=2. Accessed December 2015. https://www.gov.uk/guidance/operating-in-high-risk-environments-advice-for-business. Accessed December 2015.

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