STONE FEDERATION GREAT BRITAIN

ADVICE

General Advice to Members

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1. Introduction

1.1. There are a number of ways slip-related liability can arise:

1.1.1. in contract;

1.1.2. in tort (negligence).

1.2. The purpose of this advice is to consider how slip-related liability arises in contract and in tort (negligence) and how (or if) this liability can be avoided, or at least managed.

1.3. It is not possible to provide a completely effective barrier against all slip –related liabilities. There are steps that can be taken to reduce the likelihood of slip-related liability arising, or reducing the liability if it does arise.

1.4. Some of the methods of preventing or reducing slip-related liability are examined below.

2. Liability in contract

2.1. There are essentially two ways of protecting against slip-related liability that might arise from a contract.

2.2. The first way of protecting against a slip-related liability is to expressly exclude or limit that liability within the terms of the contract itself.

2.3. This has to be done before or at the time the contract is concluded. It is subject to some important rules and these are considered below. Generally, it is not possible to exclude or limit liability in a contract after the contract has been entered into, unless the other party to the contract agrees.

2.4. The second way of protecting against a slip-related claim is to warn of the slip risk or the suitability of the goods in a slip-risk area, and to advise on maintenance, use and aftercare so that risk is managed and reduced.

2.5. Ideally such warnings / advice should be provided at the time the contract is concluded, or at the time the specification is provided. A copy of the advice about maintenance, use and aftercare should also be provided for the end user.

3. Some Basic Contract Rules

3.1. A contract can come into existence, even if the parties do not sign a document. It can arise from a verbal agreement or a course of dealings.

3.2. Documents given by one party to another after the contract is formed are not usually part of the contract (unless the contract has referred to them, or the parties otherwise agree).

3.3. If the supplier wishes to rely upon a contract term or a product warning to protect against liability for a slip-related claim, the customer / client / contractor must have reasonable notice of the existence of that term or the content of the warning or the advice before entering into the contract.

3.4. The more onerous and unusual the contract term or the warning or advice, the more notice the customer must be given of its existence. It may not be enough to hand over a contract with terms and conditions to the customer / client/ contractor. Instructions about the safe use of the goods, warnings about the slip risks of the goods given or exclusion or limitation clauses may have to be written in bold, underlined OR EVEN WRITTEN IN CAPITAL LETTERS. That way the supplier will be able to argue that he or she gave sufficient notice.

4. Sale of Goods Contracts

4.1. Sale of Goods contracts involve the transfer of title to goods. They are regulated by the Sale of Goods Act 1979. Contracts of sale have implied terms about the quality of the goods, and these terms will apply unless the circumstances show to the contrary.

Satisfactory Quality

4.2. It is an implied term of any contract for the sale of goods sold in the course of business that the goods are of satisfactory quality[1]. Satisfactory quality is connected to slip-related liability, if the goods supplied are not of satisfactory quality, because they are not safe, for example, then the buyer may be able to reject the goods.

4.3. There will be no breach of this implied term about satisfactory quality in relation to matters drawn to the buyer's attention before the contract of sale is concluded[2].

4.4. Goods are of "satisfactory quality" if they meet the standard a reasonable person would regard as satisfactory, taking into account the description of the goods, the price and other relevant circumstances[3].

4.5. Aspects of quality that are particularly relevant to slip-related liability include (a) the fitness for the purpose for which goods of this kind are commonly supplied and (b) their safety[4].

4.6. The risk of liability for breach of the "satisfactory quality" rules can be reduced by the seller providing adequate and clear instructions about the safe use of the goods and adequate and clear warnings about the slip risks of the goods at or before the point of sale.

Fitness for Purpose

[1] Sale of Goods Act 1979 section 14(2)
[2] Sale of Goods Act 1979 section 14(2C)(a)
[3] Sale of Goods Act 1979 section 14(2A)
[4] Sale of Goods Act 1979 section 14(2B)(a) and (d)

4.7. It is an implied term of any contract for the sale of goods sold in the course of business that the goods will be fit for any purpose which the buyer expressly or by implication makes known to the seller, whether or not that purpose is one for which such goods are commonly supplied[5].

4.8. This obligation only applies to goods sold in the course of business where the buyer has relied upon the skill or judgment of the seller, or where it was not reasonable for the buyer to rely upon the skill or judgment of the seller.

4.9. Fitness for purpose is connected to slip-related liability, if the goods supplied are not fit for purpose, because they are not safe, for example, then the buyer may be able to reject the goods.

4.10. If the buyer relies exclusively on his own skill and judgment in buying the goods, there will be no claim against the seller on the basis that the goods are not fit for purpose. This may occur, for example, where the buyer is an expert in the field and the seller a novice, or where the buyer is expressly warned by the seller, or advised, that the goods are not, or are not likely to be, fit for purpose, but the buyer nevertheless goes ahead with the purchase.

4.11. If it is not reasonable for the buyer to rely upon the skill or judgment of the seller, there will be no claim against the seller if the goods are not fit for purpose.

4.12. The risk of slip-related liability for breach of the "fitness for purpose" rule can be reduced by the seller providing adequate and clear instructions about the

[5] Sale of Goods Act 1979 section 14(3)

safe use of the goods and adequate and clear warnings about the slip risks of the goods at or before the point of sale.

5. Contracts for the supply of goods and services

5.1. Contracts for the supply of goods and services involve both the transfer of title in goods and the supply of a service (i.e fitting tiles). They are regulated by the Supply of Goods and Services Act 1982.

5.2. Where goods are supplied and installed into property as a fixture, then the contract will generally be classified as one for the supply of goods and services, rather than a contract of sale.

5.3. Goods sold as part of a contract for the supply of goods and services are required to be of satisfactory quality[6].

5.4. Goods are of satisfactory quality "if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances".[7]

5.5. The supplier must use reasonable skill and care in providing the services under the contract for the supply of goods and services[8].

5.6. There is no fitness for purpose obligation implied into a contract for the supply of goods and services by the 1982 Act[9]. Whether a supplier has taken on a fitness for purpose obligation depends on the facts, for example, the degree to which the

[6] Supply of Goods and Services 1982 section 4(2)
[7] Supply of Goods and Services 1982 section 4(2A)
[8] Supply of Goods and Services Act 1982 section 13.
[9] Supply of Goods and Services Act

supplier has been involved in the specification of the goods for the installation in question.

5.7. The risk of liability for breach of the "satisfactory quality" rule can be reduced by the seller providing adequate and clear instructions about the safe use of the goods and adequate and clear warnings about the slip risks of the goods at or before the point of sale.

6. Disclaimers

6.1. Contracts for sale or contracts for the supply of goods and services sometimes contain clauses which try to limit liability, or exclude liability altogether.

6.2. Not all disclaimers (limitation or exclusion clauses) work. Their effectiveness depends upon whether the customer is a consumer, whether the contract is on the supplier's standard terms and whether the law allows such a disclaimer at all.

6.3. The less risk the supplier is prepared to take, the clearer the disclaimer has to be.

6.4. The courts take a very strict approach to contract terms which try to exclude liability for negligence.

6.4.1. clauses seeking to exclude or limit liability for personal injury caused by negligence are void[10];

6.4.2. clauses seeking to exclude or limit liability for damage to property caused by negligence are subject to a test of reasonableness[11].

[10] Unfair Contract Terms Act 1977 section 2(1)

6.5. Clauses seeking to exclude or limit liability for breach of contract (other than those terms implied by the Sale of Goods Act, as to which, see below) are, if included in a set of standard terms and conditions, or in a contract in the course of business where the customer is a consumer, subject to a test of reasonableness.[12] If they are not reasonable, the clauses will not be enforced.

6.6. The implied terms about satisfactory quality and fitness for purpose under the Sale of Goods Act 1979 cannot be excluded in a contract with a consumer[13], in fact, it is a criminal offence to attempt to do this.

6.7. The implied terms about satisfactory quality and fitness for purpose (referred to above) can be excluded against a non-consumer, subject to a test of reasonableness[14].

6.8. Contracts sometimes try to define duties and obligations to avoid liability from arising. Clauses which seek to permit the supplier to render "a substantially different" performance from that which was "reasonably expected of him" or even no performance at all, are outlawed.[15]

6.9. The more serious the breach of contract, the less likely the courts will be to believe that the parties agreed to exclude liability.

7. Claims in tort

[11] Unfair Contract Terms Act 1977 section 2(2)
[12] Unfair Contract Terms Act 1977 section 3
[13] Unfair Contract Terms Act 1977 sections 6 and 7
[14] Unfair Contract Terms Act 1977 section 3(2)
[15] Unfair Contract Terms Act 1977 section 3(2)(b)(i) and (ii)

7.1. If someone is injured by a product supplied in a situation for which it was not really suitable, or where there is a moderate to high slip risk, the supplier may be held liable for that injury.

7.2. In order to establish a slip-related claim against the supplier, the injured person has to show that the supplier owed them a duty of care and that the duty was breached.

7.3. The duty of care can arise even if there is no contract between the supplier and the injured person.

7.4. The duty of care was defined by the House of Lords in ***Donoghue v Stevenson*** [1932] AC 562. Damages for negligence may be recovered where the negligence causes personal injury, based on the "neighbour" principle: "*The rule that you are to love your neighbour becomes in law: you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply…*" The hidden danger is the slip risk, the "neighbours" are those who are foreseeably the end user of the installed product, so that if there is an accident, the person who has created the danger will be responsible for the consequences.

7.5. A breach of a duty of care arises when a person does an act which no reasonable prudent man would do. Providing a product in circumstances where that are known or are likely to be a high or moderate slip risk may be taken by some courts as a breach of the duty of care, leading to liability for any ensuing injury.

7.6. If the supplier had provided a clear warning and advice about the goods, either given to the end user directly, or to the customer / client / contractor with a

requirement that a copy be handed over to the end user, then this may reduce the chance of slip-related liability arising. Note that claims in negligence are fact sensitive, and each case will be considered on its merits.

7.7. If the supplier had provided a clear warning and advice about the goods, given to the end user directly, or to the customer / client / contractor at the point of sale, with a requirement that a copy be handed over to the end user, but the injured person has failed to follow that warning or advice, that failure might (depending on the circumstances) entitle the supplier to reduce its liability by claiming contributory negligence on the part of the injured person.

8. Wording

8.1. The following should be taken into account when negotiating contracts of sale and contracts for the supply of goods and services:

8.1.1. Warnings about the product:

8.1.1.1. Warnings, such as restrictions on use, advice about suitability, advice about use, maintenance and after care should, wherever possible, be given in writing to the customer / client / contractor before the contract is entered into or, if that is not possible (because the specification has not been provided, or is changed) before the instruction to supply the product is carried out.

8.1.1.2. The warning should be in writing where possible (or recorded later in writing) and should contain sufficient adequate and clear instructions about relevant restrictions on the use of or suitability of the goods to be

supplied and provide advice about the safe use maintenance and after care of the goods in clear and simple language.

8.1.1.3. The warning and advice given should be in line with relevant guidance, standards and publications. Possible sources of advice are: the Slip Resistance Testing, Assessment and Guidance published by Stone Federation Great Britain; "Good Practice In The Selection of Construction Materials" March 2011 edition published by the British Council of Offices; applicable British Standards; or, good industry / standard practice.

8.1.1.4. The warning should include a clear explanation of the slip risks and, if possible, the slip risk rating for the product.

8.1.1.5. If the customer / client / contractor insists upon the supply and installation of goods in breach of any warning and / or advice given by the supplier, this fact should be recorded, at the time, in writing. The written record should be signed and dated, and contain details of the nature of the warning / advice given, to whom it was given, how it was given (e-mail, telephone, at a meeting) when it was given, and should also record the response from the customer / client / contractor.

8.1.1.6. If the supplier wants to limit or exclude his liability (where this is permitted by law), this has to be negotiated and agreed as part of the contract, at or before the time the contract is entered into. Any exclusion or limitation of liability clause should be drafted carefully to suit the particular transaction.

8.1.2. The only way to avoid slip-related liability altogether is not to supply goods with a slip risk. The provision of warnings and advice may prevent slip-risk liability from arising, or help to reduce the effects of that liability, whether in contract or for negligence. In a contract situation, exclusion clauses and limitation clauses may be effective, but there is no guarantee that such clauses will be upheld in court.