# A PRACTICAL GUIDE TO:

# AN EMPLOYER'S DUTY TO EMPLOYEES WORKING ABROAD

A Practical Guide from the 2TG Employment Group

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## Introduction

With the onward march of globalisation, it is increasingly the case that an employer based in England will require its employees to travel and work abroad. It is especially common in potentially high-risk sectors such as energy, natural resources and security. An employee suffering an accident abroad in the course of his employment is likely to wish to pursue proceedings in England. The intention of this short guide is to describe the scope of an English employer's duty to employees when working abroad, and to focus on some of the key issues which arise in this field.

Readers should note from the outset that it is assumed for the purposes of this guide that the English courts have jurisdiction and that English law applies to the dispute. This will almost always be the case in respect of an accident suffered by an employee of an English defendant company working abroad, although specialist advice should be sought on questions relating to jurisdiction and choice of law.[1]

### The Scope of the Duty of Care

At common law, employers owe a personal, non-delegable duty of care to their employees to take reasonable care for their safety at work. This encompasses a duty to provide a safe place of work, to select competent fellow workers and supervisors, to provide safe equipment and materials, and to provide and maintain a safe system of work. The duty applies notwithstanding the fact that the employee is working abroad.

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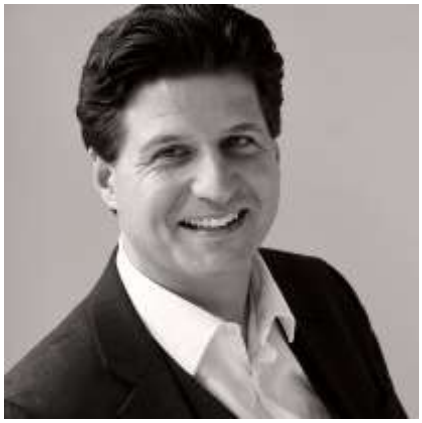

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[1] Readers may wish to consult other publications of the 2tg Travel Group in respect of jurisdiction and choice of law issues.

It is "non-delegable" in the sense that an employer will remain personally liable for its performance and cannot escape liability if it was delegated and not properly performed. It will be no excuse for an employer to say, therefore, that it could not in practical terms take care of an employee because (s)he was based far away, e.g. in Africa, but that it asked someone else to do so and they negligently failed: the employer's duty of care for an employee will remain notwithstanding that there may be thousands of miles between them.

The effect of compliance with the duty should be that employees are not subjected to unnecessary risk.[2] The concept of "unnecessary risk" was defined in *Harris v Brights Asphalt Contractors Ltd* [1953] 1 WLR 341 as:

> "Any risk that the employer can reasonably foresee and which he can guard against by any measures, the convenience and expense of which are not entirely disproportionate to the risk involved."

This is a useful touchstone when considering what might be expected of an employer in relation to an employee working abroad: what might be expected in relation to the safety of its offices in London is likely to be found to be very different from what might be expected in relation to the working environment of a single employee based temporarily in a remote location. Convenience and expense are material factors which may reasonably be taken into consideration, especially where the risks of harm are perceived to be low.

**The 6-Pack Regulations**

The "6-Pack Regulations",[3] which contain many of the statutory health and safety duties owed by an employer to an employee, generally do not apply to workplaces outside the UK, save for specified offshore areas and activities.

With the near-total[4] removal of direct civil liability for breach of health and safety regulations by section 69 of the Enterprise & Regulatory Reform Act 2013 in relation to accidents occurring on or after 1 October 2013, the territorial limitations of the 6-Pack Regulations carry less significance than previously. Workers injured in England and abroad alike must bring their claims in negligence.

The regulations themselves continue to hold significance, however, as evidence of what a reasonable employer would have done in the circumstances pursuant to its common law duty of care. In *Kennedy v Cordia (Services) LLP*,[5] for example, Lord Reed and Lord Hodge (with whom the other members agreed) said, 'the expansion of the statutory duties imposed on employers in the field of health and safety has given rise to a body of knowledge and experience in this field, which ... creates the context in which the court has to assess an employer's performance of its common law duty of care'.

The 6-Pack Regulations arise out of various European Directives and some interesting questions therefore remain, pending reassessment in the post-Brexit landscape. In relation to an accident occurring outside the UK in an EU member state, one argument is that the *Marleasing*[6] and *Bleuse*[7] principles should apply and the English court should disapply the territorial limits and interpret the Regulations so as to enable a claimant to rely on the provisions and standards contained in the relevant underlying Directive. Certainly it is arguable that a claimant should not be allowed to fall between two stools: if similar provisions are in force in England and the Member State where the accident occurred consequent to the same Directive, it would be somewhat peculiar if a claimant were unable to rely on the standards contained in the Directive as a result of the claim being brought in English law. Moreover, at least some provisions of the Directives are likely to be directly effective against emanations of the State and so to be capable of being directly relied upon in a claim brought against a public

[2] *Smith v Baker* [1891] AC 325

[3] The Management of Health and Safety at Work Regulations 1999, the Provision and Use of Work Equipment Regulations 1998, the Manual Handling Operations Regulations 1992, the Workplace (Health, Safety and Welfare) Regulations 1992, the Personal Protective Equipment at Work Regulations 1992 and the Health and Safety (Display Screen Equipment) Regulations 1992

[4] See the Health & Safety at Work etc Act 1974 (Civil Liability) (Exceptions) Regulations 2013 in relation to the case of pregnant workers and new mothers

[5] [2016] 1 WLR 597

[6] *Marleasing SA v LA Commercial Internacional de Alimentacion SA*, C-106/89 [1990] ECR I-4136 ECJ

[7] *Bleuse v MBT Transport Ltd* [2008] IRLR 264: where English law is the proper law of the contract, an English court properly exercising jurisdiction must seek to give effect to directly effective rights derived from an EU Directive by construing the relevant English statute, if possible, in a way which is compatible with the rights conferred.

employer, regardless of whether the accident occurred before or after 1 October 2013.

**The Standard of Care**

The standard of care expected of an employer is always determined by requirements of reasonableness. These include keeping reasonably abreast of current knowledge of dangers arising within its trade. An employer's specialist knowledge of the risks and safety precautions relevant to its particular business will be taken into account when assessing whether it acted reasonably.

This is particularly relevant in the context of employees working abroad. An NGO based in England which sends its employees to undertake development work in a fragile economy overseas ought to be aware of the political situation in such a country and any security risks to which its employees might be exposed whilst working there, even if it has scant day-to-day control over them. It will be expected to take such precautions as are reasonable bearing in mind its knowledge of those risks. Similarly, an energy company based in England which sends an employee to work in a mine overseas will be deemed to have knowledge of the physical risks posed generally by such work and, for instance, of the type of protective equipment which should be worn, even if it has little control over the mine itself.

A further significant consideration when assessing the standard of care owed by an employer to an employee sent overseas is the magnitude of the risk. The more likely the risk is to eventuate, and the more serious the harm that may occur, the more is expected by way of precautions. Thus, where there is a risk to life, great expense and trouble to prevent an accident from occurring is always justified,[8] and if such measures are simply too expensive or difficult to adopt, a court is likely to find an employee should not be directed to perform the task in hand.

Unusually in an employer's liability context, section 1 of the Compensation Act 2006, regarding the potential deterrent effect of liability upon desirable activities, may have some relevance when determining the standard of the duty of care owed by an employer to an employee working abroad. In *Hopps v Mott Macdonald Ltd & ors,*[9] the claimant was a civilian consultant electrical engineer sent to work in Basra on projects designed to restore Iraq's shattered post-war infrastructure. He was injured when an improvised explosive device (IED) exploded next to the escorted Land Rover in which he was travelling. It was alleged on his behalf that the risk of IEDs necessitated, in particular, the use of armoured vehicles. Christopher Clarke J rejected that argument holding, on the facts, that at the material time the exercise of reasonable care did not require the procurement and use of a particular armed vehicle for civilian contractors who, compared with Army personnel for whom such vehicles had been provided, were not priority targets. In reaching this conclusion, he accepted that section 1 of the Compensation Act 2006 was a relevant factor for him to consider and held:

> "It seems to me that in determining whether particular steps (eg confinement to the airport until armoured vehicles were available for transport) should have been taken I am entitled to have regard to whether such steps would prevent the desirable activity of reconstruction of a shattered infrastructure after a war in territory occupied by HM forces, particularly when failure to expedite that work would carry with it risks to the safety of coalition forces and civilian contractors in Iraq as a whole."

**Application of the Duty of Care**

An employer's duty of care extends to third party premises to which an employee is sent to work, including premises abroad; to travel to and from work in the remote location; and to any work-related activities undertaken there.

**(1) Premises Abroad**

It is well-established that employers who send their employees to work on the premises of a third party still have an overriding duty to take reasonable care not to expose their employees to unnecessary risk. Whilst an employer is not usually responsible for deficiencies in the premises of others where the employee is directed to work, if the employer knows or ought to know, for instance, of a particular danger on the third party's

[8] See, for example, *Henderson v Carron Co* (1889) 16 R 633: dismantling of furnace in a dangerous condition

[9] [2009] EWHC 1881 (QB)

premises, they ought to take reasonable care to safeguard their employees from it.[10]

In *Cook v Square D Ltd* [1992] ICR 262, an employee of a UK company was injured when he tripped on a floor tile in an office of a professional third party to which he was sent to complete electrical engineering work in Saudi Arabia. He brought proceedings against his employer, alleging that it had been negligent in failing to place safety barriers around the hazard, to warn him of it, to cover the tile and to ensure that those based in the office were operating a safe system of work.

The claimant won at first instance but the decision was overturned on appeal. Farquharson LJ held that, in determining the liability of an employer in respect of an accident on a third party's premises:

> "... One has to look at all the circumstances of the case, including the place where the work is to be done, the nature of the building on the site concerned (if there is a building), the experience of the employee who is so despatched to work at such a site, the nature of the work he is required to carry out, the degree of control that the employer can reasonably exercise in the circumstances, and the employer's own knowledge of the defective state of the premises."

He went on to find that the employer had not delegated its duty of care to the claimant but rather it had reasonably satisfied itself that the third party site occupiers were reliable companies and aware of their responsibility for the safety of workers on site. That being the case, "The suggestion that the home-based employers have any responsibility for the daily events of a site in Saudi Arabia has an air of unreality".

While the decision in *Cook* might at first sight appear to set a fairly low bar for employers sending employees to work at third party premises abroad, Farquharson LJ specifically stated "one cannot prescribe any rules in this context" and made it clear that much will depend on the facts of the individual case. He pointed out that circumstances will vary such that it may be, for example, that in cases where a number of employees are called on to work at a site abroad for a considerable period of time, an employer might be required to inspect the site and satisfy itself that the occupiers of it are conscious of their obligations concerning the safety of people working there.

What is clear is that an employer cannot relinquish responsibility for an employee sent to work at a third party's premises abroad and that it must take reasonable steps to satisfy itself that the employee will be safe whilst working there. The extent of the steps which it will be reasonable for the employer to take will depend on the magnitude of the risk the employer can reasonably foresee and the measures that can reasonably and proportionately be taken to guard against that risk. Where a single employee is sent to work in professionally-occupied offices for a short period abroad, it is obvious that the measures which the employer will be expected to take in those circumstances will be far less onerous than where a team of individuals is sent to work on, for example, a construction project in a remote location.

**(2) Travel Abroad**

An employer owes a duty to take reasonable steps not to expose its employees to foreseeable unnecessary risks whilst travelling in the course of their employment, and that duty will extend to travel between the employee's base in England and the remote location abroad.

An employer will need to consider carefully all the travel arrangements which the employee will be required to undertake and to ensure that all aspects of those arrangements which might pose a risk to health and safety have been assessed. For instance, in *Palfrey v Ark Offshore Limited*,[11] damages were awarded to the widow of the defendant's employee who had died of malaria after travelling to West Africa to work on an oil rig. He had been advised by his employer that, because he was to be based offshore, he did not need medical protection for the trip. This was right, but it failed to take into account the risks posed during travel to and from the offshore location. Onshore, there were endemic diseases giving rise to a "high risk of serious illness" and his journey to the offshore oil rig encompassed an overnight stay on an island, where he had contracted malaria. The claim succeeded because the defendant employer had failed to discharge its duty to have an effective policy for the provision of advice as to health

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

[11] 23.02.01 QBD Deputy Judge HHJ Graham Jones - unreported

precautions to be taken by employees sent to work abroad and that it had thereby endangered the employee's safety.

An employer might also need to give consideration to a "back-up plan". In *Durnford v Western Atlas International Inc*[12], the employee of an oil exploration company successfully claimed damages against his employer when he suffered an acute prolapse of an inter-vertebral disc during a journey in Nigeria. The claimant was supposed to have travelled by coach on the 1½-hour trip from the airport to the work location, but the coach broke down 10 minutes into the journey. The claimant and his colleagues waited at the roadside while alternative transport was arranged and ultimately he was transported in a "camper-type minibus" in a cramped position on a folded-down seat with little padding and no armrests or back supports. During that minibus journey he suffered a spinal injury and claimed damages on the basis that the journey posed a foreseeable risk of injury to a person of ordinary physical robustness and there was no evidence of any enquiries being made regarding alternative transport.

The claimant's success at first instance was upheld on appeal. Mance LJ held:

> "As I see it there was nothing wrong with a minibus per se, but the two minibuses provided did not in fact have enough places to offer the claimant any satisfactory form of seating on a substantial journey over not the best of roads. There was no evidence that larger minibuses could not have been provided or that a further minibus or car could not have been provided to ensure that everyone had a proper seat. That, it seems to me, was at the root of the present problem which, as a matter of causation, led to the claimant's injury."

The case has obvious significance for employers with workers abroad. A minibus of the type used in *Durnford* may well not have been unusual for Nigeria; although evidence regarding local standards can be relevant when assessing whether what an employer did or did not do was reasonable in the circumstances, claims brought in England will be assessed by English judges in accordance with English law. Compliance with a local standard will not necessarily be sufficient to prove that what the English employer did was effective to discharge its duty of care to the employee in English law.

**(3) Work-related Activities Abroad**

An employer's duty of care extends to any work-related activities undertaken in the remote location.

The question of whether or not an activity is work-related will often be an issue where an accident occurs abroad. An employee sent on a "work jolly" and injured in the course of a practical team building exercise is likely to be able to satisfy the court that the accident happened in the course of their employment, the general principle being that something reasonably incidental to the work would fall within the scope of employment[13]. Where an accident happens when socialising in the hotel at the end of the day, however, there may be greater scope for an employer to argue that the activity being undertaken at the time was not work-related and that it owed no duty in respect of it. All cases will be fact-sensitive and a careful consideration of the circumstances of the accident will need to be undertaken.

Two cases decided in 2015, *Dusek v Stormharbour Securities LLP*[14] and *Cassley v GMP Securities Europe LLP*,[15] both involved London-based professionals sent to remote overseas locations to look at energy projects who had suffered fatal injuries whilst undertaking risky journeys by air. In each case the court found that the employer's duty of care had been breached and made it clear that it was not sufficient for an employer simply to entrust an employee's safety to local organisers, whilst taking no active steps to satisfy itself of the employee's safety.

Mr Dusek worked for an investment company and was sent by his employer to Peru to consider a proposed hydroelectric complex in which investment was sought. He died when a helicopter, chartered by a Peruvian company, crashed into the Andes during a return visit from the site. Hamblen J found that the scope of the employer's duty extended to the helicopter flight because it was undertaken in the course of Mr Dusek's

[12] [2003] EWCA Civ 306

[13] See *Smith v Stages* [1989] AC 928 and, for a more recent illustration of the principle, *Vaughan v Ministry of Defence* [2015] EWHC 1404 (QB)

[14] [2015] EWHC 37

[15] [2015] EWHC 722 (QB)

employment, and that the defendant owed a duty to take reasonable care not to expose him to unnecessary risk, notwithstanding the fact it had not organised the flight. It was clear that there were obvious potential dangers involved in the trip (the expert evidence was that the terrain was some of the most challenging in the world for helicopters), of which a reasonable and responsible employer would and should have known. The defendant was found to have breached its duty of care in failing to enquire about the safety of the trip or to conduct a risk assessment and causation was made out because, had it done so, the employer would have found out that an alternative quote had been received by the Peruvian company organising the flight, which specifically advised against taking the route in fact taken, and Mr Dusek would not have been required to take the fatal flight.

Hamblen J was careful to point out that the extent of the duty owed by an employer in relation to travel will be fact-sensitive. In many cases, he said, it will be reasonable to entrust performance to reputable travel agents, and a very different approach would be expected of an employer sending an employee on a scheduled flight from London to New York for business purposes by comparison with an employer requiring an employee to take "a chartered internal flight in an undeveloped country on an airline with a notoriously poor safety record and/or on the EU's banned operator list".

The approach taken by Hamblen J was very similar to that of Coulson J in *Cassley*. The deceased in that case was a financier who had been required to take a charter flight from Cameroon to the DRC to visit a mining site. The aircraft crashed because of pilot error. The flight had been organised by a local company without any involvement at all of the deceased's employer. It was found that the defendant had breached its duty of care to the deceased employee because, although it was allowed to rely to a large extent on the charterer, it should have taken steps to satisfy itself that the trip was reasonably safe. Such steps would have included, Coulson J found, investigations with the charterer as to the carrier, the route to be undertaken and whether the carrier had an air operator's certificate and appropriate insurance; and checking the Foreign & Commonwealth Office's website. The case failed on causation because it was found that, even if these measures had been taken, the deceased would have taken the flight which crashed.

**The Future**

*Dusek* and *Cassley* suggest an increasing willingness on the part of the courts to find that the content in practice of duties owed by an employer to those working abroad is not materially different from those owed to employees in the UK, especially where the stakes are high in terms of risk. Whilst all cases in this field will turn on the facts, and an employer will only be required to take measures which are reasonable in the circumstances, employers should be careful that an employee who is out of sight is not also out of mind.

# ABOUT THE AUTHORS

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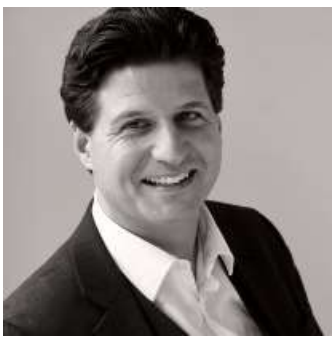
## Helen Wolstenholme

Helen is an experienced personal injury practitioner, known and liked for her calmness under fire, her polished advocacy and her user-friendly approach. She excels when analysing complex issues and provides well-structured and succinct advice which recognises the commercial realities of civil litigation. Helen has particular expertise in the employer's liability sphere, where she is able to draw on her employment law background, and in cases which involve a cross-border element.

Recent examples of Helen's work in the travel and jurisdiction field include:

- Acting, with Benjamin Browne QC and Marie Louise Kinsler of 2TG, in the quantum proceedings which followed the Court of Appeal's decision in *Wall v Mutuelle de Poitiers* [2014] EWCA Civ 138 (the English claimant's damages for catastrophic personal injuries sustained as a result of a road traffic accident were assessed pursuant to the Rome II Regulation in accordance with French law).
- Acting for the claimant, an engineer, who suffered severe injuries to the hands in the course of his employment on a yacht in Italy, as well as associated psychiatric injury.
- Acting for the claimant in clinical negligence proceedings against a Spanish doctor. The claimant suffered severe facial injuries while being treated for anaphylactic shock as a result of an allergic reaction to penicillin.
- Acting for the defendant, an Austrian ski school, in proceedings arising out of a serious injury sustained to an English schoolboy during a school ski trip.

Helen also has significant experience of travel claims brought under the Package Travel Regulations and of proceedings relating to road traffic accidents abroad.



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Niazi is a personal injury and employment practitioner of almost 20 years' standing, described in the Legal 500 as *'A very able barrister, capable of grasping difficult issues and presenting them clearly and with conviction.'* He is a member of the Treasury A panel and has undertaken considerable work in claims with novel or complex employer's liability issues, including:

- The *Kenya Emergency Group Litigation*, in which he was lead junior for the Foreign and Commonwealth Office.
- Litigation arising out of findings made by the Independent Inquiry into Child Sexual Abuse regarding child migration programmes operated during the 1950s and 1960s.
- A fatal accident claim by the family of a maritime security operative engaged by a security agency under a 'consultancy agreement', who contracted malaria whilst at work off the Somali coast.

Niazi was shortlisted for Personal Injury Junior of the Year in the 2019 Chambers Bar Awards.

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