

# Employers' Liability and the Enterprise and Regulatory Reform Act 2013

**Justin Valentine, St John's Chambers, Bristol**

Published October 2014

---

Section 69 of the Enterprise and Regulatory Reform Act 2013 amends section 47 of the Health and Safety at Work Act 1974 ("the Act") so that for accidents that occur on or after 1<sup>st</sup> October 2013 there is no civil liability for breach of health and safety regulations made under the Act. The amended section 47(2) of the Act now provides:

*Breach of a duty imposed by a statutory instrument containing (whether alone or with other provision) health and safety regulations shall not be actionable except to the extent that regulations under this section so provide*

The regulations themselves remain in force and in many cases attract criminal sanction. This is odd as although an employer could be prosecuted for a breach of the regulations an employee could not rely on that prosecution as determinative of his civil claim.

Under the old regime, in order for an employee to succeed against his employer negligence needed not be proved. This arose primarily as an evidential rather than a policy issue. The aim of the law as it was, was not primarily to result in

windfalls for employees (although it arguably sometimes did) but to shift the onus of proving that everything had been done to protect an employee onto the employer to see that the workplace was safe.

For example, in relation to defective equipment, an employer was strictly liable to the employee since Regulation (1) of the Provision and Use of Work Equipment Regulations 1998 provides:

*Every employer shall ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair.*

An employee will know nothing of the history or maintenance of a machine and will be unable to investigate why an accident occurred save retrospectively through the rickety means of civil litigation. The employee does not have direct access to inspection/maintenance regimes, to the creation of risk assessments, to evidence concerning previous failures of a machine, to management concerns about the operation of particular machinery or to undocumented conversations about an accident.

### **After the Act**

The burden shifts to the employee to prove negligence. Regulations which incorporate a defence of "*reasonable practicability*" (which many do) will now require the Claimant to prove that the failure to take the steps required by regulation resulted in injury. For example, Regulation 4(1)(b) of the Manual Handling Operations Regulations 1992 ("the Regulations") provides:

#### ***Duties of employers***

*4.-(1) Each employer shall-*

*(a) so far as is reasonably practicable, avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured; or*

*(b) where it is not reasonably practicable to avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured-*

*(i) make a suitable and sufficient assessment of all such manual handling operations to be undertaken by them, having regard to the factors which are specified in column 1 of Schedule 1 to these Regulations and considering the questions which are specified in the corresponding entry in column 2 of that Schedule,*

*(ii) take appropriate steps to reduce the risk of injury to those employees arising out of their undertaking any such manual handling operations to the lowest level reasonably practicable, and*

*(iii) take appropriate steps to provide any of those employees who are undertaking any such manual handling operations with general indications and, where it is reasonably practicable to do so, precise information on-*

*(aa) the weight of each load, and*

*(bb) the heaviest side of any load whose centre of gravity is not positioned centrally.*

Once a claimant had established that a task involved a risk to injury then the burden of proof switched to the employer to show, pursuant to Regulation 4(1)(b)(i) and 4(1)(b)(ii) of the Regulations, that a suitable and sufficient assessment of the risks had been undertaken and that appropriate steps to reduce the risk of injury to the lowest level reasonably practicable had been taken. The employer, from 1<sup>st</sup> October 2013, is now under no such duty. Rather, the duty will be upon the employee to demonstrate, as best he can, what steps could or should have been taken. That may imply expert evidence. As noted, the intent of civil liability arising from breach of the regulations was evidential not to provide windfalls.

Workplace claims will be harder to win as an employee must demonstrate that an employer's standard of care fell below that of a reasonable and prudent employer. However, that test is not fixed. As noted in *Stokes v Guest Keen & Nettlefold (Bolt & Nuts) Ltd* [1968] 1 WLR 1776:

*From these authorities I deduce the principles, that the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; **where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it;** and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probably effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent. [emphasis added]*

This statement of the test implies that the Courts should have regard to the regulations when considering the employer's actions. Whilst defending the amendment of the Act in the House of Lords on 22<sup>nd</sup> April 2013, Minister Viscount Younger stated:

*We acknowledge that this reform will involve changes in the way that health and safety-related claims for compensation are brought and run before the courts. However, to be clear and to avoid any misunderstanding that may have arisen, this measure does not undermine core health and safety standards. The Government are committed to maintaining and building on the UK's strong health and safety record. **The codified framework of requirements, responsibilities and duties placed on employers to protect their employees from harm are unchanged, and will remain relevant as evidence of the standards expected of employers in future civil claims for negligence** [emphasis added].*

When construing statutes the Court may have regard to ministerial statements; *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3. This provides significant support to the assertion that the common law should take up much of the slack.

Consider, by way of analogy, Regulation 3(1) of The Management of Health and Safety at Work Regulations 1999 which states:

*(1) Every employer shall make a suitable and sufficient assessment of—*

*(a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and*

*(b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,*

*for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions*

Section 22 of those Regulations initially excluded civil liability for breach of Regulation 3 but the Regulations were amended in 2003 to enable employees to claim damages from their employer in a civil action following concerns raised by the European Commission.

However, notwithstanding the inability until 2003 to rely on those Regulations as breach of statutory duty, failure to risk assess was considered relevant in many pre-2003 cases, eg *Sherlock v Chester City Council* [2004] EWCA Civ 210 where, in relation to the risk assessment, the Court of Appeal held at paragraphs 24 and 25:

*24. ... Both experts said that a risk assessment would have identified this [the provision of a run-off table or second man] as a requirement, and that a risk assessment should have been carried out. In the circumstances of this case, I cannot see that the risk assessment needed to have been the formal procedure envisaged by Regulation 3 of the Management of Health and*

*Safety at Work Regulations 1999; but at least there should have been some informal assessment by Mr Ankers or Mr Willmot identifying the need for the run-off table or the presence of the second man.*

*25. Even though the judge was entitled to conclude that the appellant was sufficiently well trained and experienced to have identified the requirement himself, that does not seem to me to be sufficient in itself to meet the common law requirement that the respondents should provide proper equipment and a safe system of work. At the very least the question should have been asked as to what was required so as to ensure that the appellant was alerted to or reminded of the need for either a run-off table or a second man. That was essentially what both experts agreed should have happened. If that had been done, both parties, that is the employer and employee, would have identified what was required and even if the only step taken by Mr Ankers had been to tell the appellant that he should construct a run-off bench himself there is nothing in the evidence to suggest that the appellant would not have followed such an instruction. **The purpose of a risk assessment in a case such as this is to ensure that what may appear to be obvious is in truth obvious, in the sense that both parties have appreciated the risk. I say both parties, because it also provides the opportunity for an employer to ensure that he has taken appropriate steps to protect his employee.** [emphasis added]*

## **A New Approach**

Hitherto, pleadings were of the format:

*Negligently and/or in breach of Regulation ... failing to etc.*

Now, pleadings will be in the format:

*Negligently failing ....*

*The Claimant will refer to Regulation .... as relevant to the standard to be expected of employers in the workplace.*

ie, the breach of the regulation will be relied upon as evidence of common law negligence.

There is likely to be a greater reliance upon expert evidence as to best practice within a particular workplace. An expert may be able to elucidate accepted

practice within an industry or workplace and whether sufficient steps had been taken to ensure the safety of employees. Whether the Court will demonstrate an increased willingness to allow claimants to rely on expert evidence is moot.

More attention must be given to evidence gathering. That requires proper pre-action disclosure. Lists of indicative documents must become more sophisticated. There must be greater attention paid to the type of documents that may be in existence. The employee may be best placed to identify what type of documentation exists.

Disclosure includes electronic documentation. In many cases there is a failure to disclose email correspondence passing between other employees/managers.

Risk assessments as to the steps required within the workplace are likely to be pivotal. The Health and Safety Executive's website provides much useful information. Five steps are recommending when assessing the risk in a workplace. See <http://www.hse.gov.uk/risk/controlling-risks.htm>. The HSE website usefully provides example risk assessments for particular workplaces: <http://www.hse.gov.uk/risk/casestudies/index.htm>.

Examination of health and safety material will have relevance not only to pleadings but also to witness evidence. The Claimant's statement should state what the Defendant should have done to prevent the accident, ie why the Defendant was negligent, why he fell below the standard to be expected of a reasonable and prudent employer. This must be specific. If practice changed after the accident then clearly this is relevant. Evidence about training and

instructions is often important. As noted, the regulations remain highly relevant as indicators of steps that employers should take.

Reliance should also be placed, in appropriate cases, on the Employer's Liability (Defective Equipment) Act 1969 which act imposes vicarious liability for defective equipment on the employer for the negligence of others.

It is to be hoped that the Court will view breach of health and safety regulations as prima facie evidence of negligence. The statement of Viscount Younger indicates that the standards to be expected of employers should not be reduced on a wholesale basis. Were that to happen then there may be breach of European Law. In this regard, there has been debate about whether the Enterprise and Regulatory Reform Act 2013 is consistent with the European Directives from which the Regulations derive. If not, then EU Directives will remain directly actionable against "*emanations of the state*" including local authorities, government departments, police authorities and public health bodies.

However, in *European Communities v United Kingdom* (C-127/05); [2007] All ER (EC) 986, the European Commission sought a declaration from the European Court that, by restricting the duty upon employers to ensure the safety and health of workers in all aspects related to work to a duty to do this only "*so far as is reasonably practicable*", the United Kingdom had failed to fulfil its obligations under Article 5(1) and (4) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work. The Court rejected that contention. The Advocate General's opinion was clear that:



*117. Contrary to the Commission's contention, that provision does not therefore substantiate, either if read in isolation or in conjunction with Article 5(1), the contention that the framework directive was designed to introduce strict liability on the part of the employer.*

*118. Although defined in particularly broad terms, the employer's liability resulting from Article 5(1) and (4) of that directive is in fact liability based on fault, which flows from a failure to discharge the duty to ensure safety devolving on the employer.*

The Government must have been aware of this when removing the provision for strict liability and the ability of an employee to succeed on the basis of breach of statutory duty subject to the employer's defence of reasonable practicability.

The Government brought about this change to, it claimed, rebalance the rights of the employee and the employer and thereby to boost business growth especially within small and medium-sized enterprises ("SMEs"). The amendment was based on recommendations made within the Löfstedt report. However, this report did not recommend the removal of a right of an employee to rely on breach of statutory duty and Professor Löfstedt commented that the Government's approach "*was more far-reaching than I anticipated*".

In any event, it is questionable to what extent the amendment will succeed in its aim since those who regularly undertake workplace civil litigation will know that most claims do arise from poor practices within the workplace not from unavoidable incidents or through the fault of the employee. Such claims can still succeed albeit at greater complexity, both evidential and legal, than hitherto.

JUSTIN VALENTINE - 14 October 2014.