

HEALTH AND SAFETY COMMISSION (HSC)

**PROPOSALS FOR NEW REGULATIONS AMENDING
THE MANAGEMENT OF HEALTH AND SAFETY AT WORK REGULATIONS
1999 AND
THE HEALTH AND SAFETY (CONSULTATION WITH EMPLOYEES)
REGULATIONS 1996**

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS
(APIL06/05)**

MAY 2005

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and prompt compensation for all types of personal injury;
- To improve access to our legal system by all means including education, the exchange of information and enhancement of law reform;
- To alert the public to dangers in society such as harmful products and dangerous drugs;
- To provide a communication network exchanging views formally and informally;
- To promote health and safety.

APIL's executive committee would like to acknowledge the assistance of the Health and Safety Policy Working Group in preparing this response:

Martin Bare	Executive Committee Member, APIL
Cenric Clement-Evans	Co-ordinator of APIL Wales Regional Group
Nigel Tomkins	Member, APIL

Any enquiries in respect of this response should be addressed, in the first instance, to:

Miles Burger
Policy Research Officer
APIL
11 Castle Quay
Nottingham
NG7 1FW

Tel: 0115 958 0585
Fax: 0115 958 0885

E-mail: miles.burger@apil.com

**PROPOSALS TO AMEND THE MANAGEMENT OF HEALTH AND SAFETY
AT WORK REGULATIONS 1999 AND THE HEALTH AND SAFETY
(CONSULTATION WITH EMPLOYEES) REGULATIONS 1996**

Introduction

1. APIL welcomes the opportunity to put forward its comments on the Health and Safety Executive's (HSE) consultative letter on the proposals for new regulations amending the Management of Health and Safety at Work regulations 1999 (MHSWR) and the Health and Safety (Consultation with Employees) Regulations 1996 (HSCER).

2. APIL firmly believes that there should be no exclusion for civil liability¹ – i.e. the right to be sued – for any breach of health and safety regulations, regardless of whether you are employer or employee. In terms of who should be able to sue for such a breach, APIL feels that employees, non-employees and third parties should be able to receive compensation from the 'polluter'. We therefore suggest that all civil liability exclusion clauses be revoked from the MHSWR and the HSCER.

3. In relation to the MHSWR, in the first instance, APIL proposes that the current existing civil liability exclusion relating to non-employees and third parties – Regulation 22 – should be removed. This will involve a reversal of the changes which occurred via the Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003². Secondly, with reference to the current consultation, APIL proposes that the suggested plan to include a new civil liability exclusion for third parties against employees should be abandoned.

¹ There are currently two principal grounds under which a person injured, or made ill, at work can claim compensation under civil law. The first is under common law – i.e. previously decided cases – where the injured person has to demonstrate that the injury incurred was due to the negligence of his employer. The second principal is where an employee can claim compensation if he was injured due to his employer breaching a legal duty as set-out in legislation – for example, if the employer did not provide adequate and appropriate work clothing under the Personal Protective Equipment at Work Regulations 1992 he would be breaching his statutory duty. The majority of the current law enables employees who have been needlessly injured in the workplace to pursue a civil case for compensation on the grounds of breach of statutory duty as well as for negligence. The original MHSWR, however, excluded an employee's right to bring a civil action in respect of the employer breaching its statutory duty.

² SI 2003 / 2457

Proposal: Amend Regulation 22 of MHSWR to exclude the right of third parties to seek damages from employees in breach of their duties under MHSWR

4. APIL feels that there is no reason why the right of third parties to seek damages from employees in breach of their duties under MHSWR should be excluded from the proposed Management of Health and Safety at Work and Health and Safety (Consultation with Employees)(Amendment) Regulations. APIL believes that employees should be held responsible for their health and safety breaches and strongly agrees with the recent view of Lord Justice Tuckey in *Davies v HSE* that “[t]hose persons who enter a regulated field are in the best position to control the harm which may result and they should therefore be responsible for it”³. While both the Trades Union Congress (TUC) and UNISON feel that by allowing third parties the right to seek damages from employees there will be a need for all employees to have personal indemnity insurance cover, in reality this situation is unlikely to occur. Any actions against an employee will, in the vast majority of cases, fall under vicarious liability⁴. The law of vicarious liability is now so well developed that it would be automatic to sue the employer as well as the employee, with the employer in effect providing an indemnity for the employee’s actions. Alternatively, in situations where vicarious liability cannot be established, it would not be financially viable to bring an action against a lone employee who did not have the insurance cover to actually pay for the damages award.

5. In contrast to the TUC’s and UNISON’s worries, APIL considers the consequences of amending Regulation 22 of MHSWR to exclude the right of third parties to seek damages from employees to be of greater danger, and will ultimately mean that employers will get away with health and safety breaches. As admitted by the HSC “cases in which an employer would not be vicariously liable for personal injury caused by an employee’s breach of duty under regulation 14 of MHSWR would be very

³ Paragraph 16 - [2002] EWCA Crim 2949

rare and may never arise". APIL is concerned that the removal of the ability of third parties to sue employees for a breach of their duties – as contained in regulation 14 of MHSWR – will subsequently prevent the employer being vicariously liable for this breach. For example, if an employee injured a member of the public due to his misuse of a piece of equipment, the injured member of the public would not be able to proceed against the company as the employee would not be liable for the breach and thus vicarious liability would not be applicable.

6. APIL believes the HSE's attempt to introduce civil liability exclusions into the MHSWR represents a direct failure to properly implement the original European framework directive⁵ on which the regulations are based. The framework directive makes no mention of any type of exclusion for civil liability, and APIL suggests that the HSE's attempts to introduce such an exclusion means the regulations fail to reflect the intention of the original EU directive.
7. APIL believes by preventing third parties from suing an employee who has breached his duties under the MHSWR⁶, the suggested amendment is actually contrary to other pieces of health and safety legislation. For example, in regulation 5 of the Manual Handling Operations Regulations 1992 it is stated that:

"Each employee while at work shall make full and proper use of any system of work provided for his use by his employer in compliance with regulation 4 (1) (b) (ii) of these Regulations".

"4 (1) (b) (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"

⁴ Vicarious liability is a common law concept under which if an employee doing his job causes injury to someone, the injured person can sue the employer for his employee's wrongdoing.

⁵ 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 (see <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31989L0391:EN:HTML> for a web-based copy of the directive)

⁶ Regulation 14 – Duty of employees

Proposal: Remove the civil liability exclusion in the Health and Safety (Consultation with Employees) Regulations (HSCER) – a breach of the duty by an employer (regulation 5) would confer a right of action in civil proceedings so far as it causes damage.

8. APIL fully supports the removal of the civil liability exclusion within the HSCER as it will help prompt employers and employees, faced with such claims, to raise their health and safety performance. It also aligns the HSCER with other comparable health and safety legislation, by allowing civil liability against anyone who breaches the HSCER regulations.

Other proposed amendments to the MHSWR

9. APIL has previously commented on the proposed amendments to the MHSWR which were suggested by the HSE in March 2002⁷ and introduced via the Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003. We believe that there should no exclusion for civil liability for any breach of health and safety regulations and feel it is worth re-iterating our objections concerning the retention of the civil liability exclusion for non-employees. As with the current consultation's suggested amendment, the retention of the civil liability exclusion within the MHSWR for non-employees represents a failure to properly implement the original European framework directive⁸ in a number of ways. Firstly, as already detailed, the framework directive makes no mention of any type of exclusion for civil liability. Therefore exclusion of civil liability of any kind could be said to be outside the intention of the original EU directive.

10. Secondly, the framework directive is explicit in its terms with the object of it stated as being *“to introduce measures to encourage improvements in*

⁷ See Appendix A: Health and Safety Executive (HSE) consultation – Proposals to amend the Management of Health and Safety at Work Regulations 1999 and the Fire Precautions (Workplace) Regulations 1997 (March 2002). A copy of APIL's response can also be found at: <http://www.apil.com/pdf/ConsultationDocuments/54.pdf>

⁸ 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 (see <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31989L0391:EN:HTML> for a web-based copy of the directive).

*the safety and health of workers at work*⁹. In contrast, the MHSWR makes no mention of ‘worker’, and instead permits civil liability for people who have an ‘employer–employee’ relationship only. APIL contends that the use of the term ‘worker’ signifies a more expansive concept than ‘employee’ and will include anyone who may not have a contractual relationship with the employer, but is still involved in working under the direction of the employer. For example, in the construction industry, many workers are defined as sub-contractors for tax reasons. Yet although these ‘subbies’ are not employees, they still work under the employer’s direction and control. The fact that the owner may provide the materials and tools necessary for the work, and also dictate the work to be done, indicates that the necessary master and servant relationship still exists. With the expansion of workplaces where a single site may have multiple employers and employees present, APIL believes that it is essential for people to be protected from injury and illness via the removal of civil liability exclusion for non-employees within the MHSWR.

11. APIL also believes that the current MHSWR fails to meet the terms of the Temporary Workers Directive¹⁰. The Directive applies, in terms of article 1(2), to *“temporary employment relationships between a temporary employment business which is the employer and the worker, where the latter is assigned to work for and under the control of an undertaking and/or establishment making use of his services”*. In such cases, article 2(3) of the Temporary Workers Directive provides that the Framework Directive¹¹, and all the individual Directives based on it, should apply in full to workers who have an employment relationship as defined by article 1 of the Temporary Workers Directive.

12. In addition to failing to properly implement the originating framework directive, APIL considers the exclusion of civil liability for non-employees within the MHSWR to be inconsistent and contrary to other current health

⁹ Section 1: General Provisions, Article 1 (1)

¹⁰ Council Directive 91/383/EEC - enacted on 25 June 1991 (see <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31991L0383:EN:HTML> for a web-based copy of the directive).

¹¹ Council Directive 89/391/EEC

and safety legislation. Civil proceedings can already be brought for breach of most ‘targeted regulations’¹² in relation to both employees and non-employees alike. For example, within regulation 3 (1) of the Control of Substances Hazardous to Health Regulations 1999¹³ (COSHH) the employer is under a duty in respect of “*any other person, whether at work or not, who may be affected by the work carried on by the employer*”. In fact APIL contends that the exclusion of non-employees within MHSWR is actually inconsistent with itself. Under regulation 3 an employer has obligations in respect of non-employees and risk-assessment:

*“(1) Every employer shall make a suitable and sufficient assessment of:
(b) the risks to the health and safety of persons not in his employment”.*

13. It is vital, APIL believes, that the MHSWR contains the appropriate protections for workers and the public alike due to its importance in governing health and safety in the workplace. The MHSWR represents one of the ‘six pack’ of European Directives which form the basis of duties on employers in terms of protecting health and safety of their employees. The use of risk assessments required under the MHSWR underpins a large proportion of occupational health and safety. APIL feels it would be inconsistent – and unfair – for an employer to escape civil liability if a non-employee were injured simply because the breach occurred under the MHSWR. In contrast if the breach occurred under the COSHH regulations it would not matter if the injured party was an employee or non-employee, the employer would still be liable.

14. The piecemeal amending of the MHSWR, APIL feels, adds further complications to health and safety regulations which many commentators – particularly in relation to small and medium sized enterprises (SMEs) – suggest are already placing a restrictive burden on businesses. In order for SMEs to embrace health and safety regulation it is essential to make

¹² Regulations relating to specific industries and/or types of activity, for example the Work at Heights regulations.

¹³ SI 1999 / 437

health and safety regulations as simple and straight forward as possible. The continued amending of the MHSWR has led to there now being three statutory instruments relating to a single set of regulations. In order to return to a simple structure, APIL proposes that regulation 22 – exclusion of civil liability – should be abolished completely. This will allow non-employees to proceed against both employers and employees, and make health and safety a priority for all businesses.

15. APIL suggests that allowing non-employees – including workers and members of the public – to make civil liability claims against employers will help underpin efforts to raise the profile of occupational health and safety. It will also help in achieving the Government's objectives in its 'Revitalising Health and Safety' programme. According to recent HSE statistics, the number of reported fatal injuries to members of the public was 131 in 2003/04¹⁴. This is an extremely high figure, especially when considered in conjunction with the six per cent increase in the number of non-fatal injuries to members of the public in 2003/04 compared with 2002/03¹⁵. This indicates that there is ample scope for improvement of non-employee work-related safety. The revocation of the current exclusion of civil liability for non-employees within the MHSWR will go a significant way towards reinforcing the rights of claimants and further promoting health and safety at work.

16. APIL believes that the removal of the civil liability exclusion within the MHSWR will allow employers to be held accountable for health and safety breaches through the threat of litigation. The Health and Safety Commission (HSC) openly accepts that with 3.7 million businesses in the UK, but only 1,500 health and safety officers, it "*cannot investigate every company*"¹⁶. With the imposition of civil liability for employers, it is hoped

¹⁴ In fact in 2003/04, of the 371 fatal injuries to members of the public, 240 (65%) were due to acts of suicide or trespass on railway systems. If these are removed from the overall number of deaths, 131 members of the public were fatally injured in 2003/04.

¹⁵ The number of non-fatal injuries to members of the public increased by 6% in 2003/04, to 13,575 from 12,793. (Source: Health and Safety Statistics Highlights 2003/04 – see <http://www.hse.gov.uk/statistics/overall/hssh0304.pdf> for a copy of the report)

¹⁶ Daily Telegraph – 'Don't be scared of us, says health and safety men' (24/02/2005) See <http://www.telegraph.co.uk/money/main.ihtml?xml=/money/2005/03/24/cnhas24.xml> for a copy of the article.

that the potential for litigation against them will mean that they take greater steps to improve health and safety measures in their business.

Appendix A

HEALTH AND SAFETY EXECUTIVE CONSULTATION

PROPOSALS TO AMEND THE MANAGEMENT OF HEALTH AND SAFETY
AT WORK REGULATIONS 1999 AND THE FIRE PRECAUTIONS
(WORKPLACE) REGULATION 1997

MARCH 2002

HEALTH AND SAFETY EXECUTIVE CONSULTATION

**PROPOSALS TO AMEND THE MANAGEMENT OF HEALTH AND SAFETY
AT WORK REGULATIONS 1999 AND THE FIRE PRECAUTIONS
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A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

MARCH 2002

The executive committee would like to acknowledge the assistance of following people for assisting with the preparation of this response:

Colin Ettinger	Executive Committee Member, APIL
Cenric Clement-Evans	Coordinator, Occupational Health Special Interest Group, APIL
James Thompson	Secretary, Occupational Health Special Interest Group, APIL

Any inquiries in respect of this response should be addressed, in the first instance, to:

Richard Fairholme
Research Administrator
APIL
11 Castle Quay
Nottingham
NG7 1FW

Tel: 0115 958 0585
Fax: 0115 958 0885

E-mail: richard@apil.com

CONSULTATIVE PROPOSALS TO AMEND THE MANAGEMENT OF HEALTH AND SAFETY AT WORK REGULATIONS 1999

1. The Association of Personal Injury Lawyers (APIL) was formed in 1990 and represents more than 5250 solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. The aims of the association are:
 - To promote full and prompt compensation for all types of personal injury;
 - To improve access to our legal system by all means including education, the exchange of information and the enhancement of law reform;
 - To alert the public to dangers in society such as harmful products and dangerous drugs;
 - To provide a communication network exchanging views formally and informally.

2. APIL supports fully the removal of the civil liability exclusion in the Management of Health and Safety at Work Regulations (MHSWR) 1999, in respect of employees. We can see no reason, however, why the exclusion should remain in respect of non-employees and we urge the HSC to remove it as soon as possible.

3. APIL agrees with the case for removing the civil liability exclusion, which is detailed on page two of the consultation paper. It is important to have consistency within the MHSWR and with other UK health and safety regulations. The amendments will also underpin efforts to raise the profile of occupational health and safety and will prompt employers to raise their health and safety performance. We support these aims, but we can see absolutely no reason why the case for removing the exclusion does not also apply to non-employees. Civil liability is not excluded in respect of non-employees within the Control of Substances Hazardous to Health 1999 (COSHH), the Workplace (Health and Safety) Regulations 1992 or the Provision and Use of Work Equipment Regulations 1998. The risk assessments required under the MHSWR underpin occupational health and safety. Employers

who have breached these regulations should not be able to escape civil liability where a non-employee has been injured as a result of that breach, just as they would not be able to escape civil liability if a non-employee was injured as a result of a breach of COSHH.

4. This issue is of concern because of the extremely high incidence of injury to the public caused by work activities, which far exceeds the number of employees injured at work. According to recent HSE statistics, the number of reported fatal injuries to members of the public is 447 (2000/2001) and 436 (1999/2000). In comparison, the number of reported fatal injuries to employees and self-employed workers is nearly half that of injuries to the public (220 (1999/2000) and 295 (2000/2001)). There were also 20,693 non-fatal injuries to members of the public caused by work activities in 2000/01. Undoubtedly, there is ample scope for improvement of non-employee work-related safety. Removing the exclusion of civil liability for non-employees under MHSWR would go a significant way towards reinforcing the rights of claimants and further promoting health and safety at work.
5. Under regulation 3 MHSWR, an employer does have obligations in respect of non-employees:

“(1) Every employer shall make a suitable and sufficient assessment of:
... (b) the risks to the health and safety of persons not in his employment”.

By failing to remove the exclusion of liability under the proposed amendments, the HSC is, in our view, failing to grasp the opportunity to raise further the health and safety performance of employers. In addition, European case law establishes that individuals must have an effective remedy where they have suffered as a result of a breach of European law. Enforcement of health and safety law lies to the HSE and the only effective remedy for an injured individual would be a civil claim for compensation to meet the losses and expenses caused by that injury. In conclusion, we believe that the discrimination in respect of non-employees is unfair and unjust and we call on the HSC to remove the exclusion of civil liability in respect of them as soon as possible.