# Health and Safety Executive

# Consultation Paper CD227

# Control of Artificial Optical Radiation at Work Regulations

## A response by the Association of Personal Injury Lawyers

## 5 February 2009

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues. Our members comprise principally practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants. APIL currently has around 4,600 members in the UK and abroad who represent hundreds of thousands of injured people a year.

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

- to promote full and just compensation for all types of personal injury;
- to promote and develop expertise in the practice of personal injury law;
- to promote wider redress for personal injury in the legal system;
- to campaign for improvements in personal injury law;
- to promote safety and alert the public to hazards wherever they arise; and
- to provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:
Muiris Lyons – APIL Vice President;
Karl Tonks – APIL Executive Committee Member;
Mark Turnbull – APIL Executive Committee Member; and
Daniel Easton – Secretary of APIL Special Interest Group for Occupational Health.

Any enquiries in respect of this response should be addressed, in the first instance, to:
Katherine Elliott
Legal Policy Officer
APIL
11 Castle Quay, Nottingham NG7 1FW
Tel: 0115 958 0585; Fax: 0115 958 0885
E-mail: Katherine.elliott@apil.org.uk

**Introduction**

APIL welcomes the opportunity to respond to the HSE's consultation on the Control of Artificial Optical Radiation at Work Regulations.

We are not placed as an organisation to answer or provide comment on each question. Our remit only extends to personal injury cases. We have, therefore, only provided general comments for the question which relate specifically to the draft Regulations.

**Executive Summary**

APIL believes that the health and safety of employees within the workplace should be of the utmost importance to the employer. Throughout this response, APIL makes the following points and suggestions regarding the draft Regulations:

- We consider artificial optical radiation to be a specialist area and that a revised risk assessment should be a compulsory requirement of this Regulation. We therefore believe that the filter, which is present within Regulation 3, should be removed. We would suggest that, as in the case of *Fytche v. Wincanton Logistics plc*[1] , a defence may state that an original risk assessment was carried out under the 1999 Regulations and accounted for risks which were perceived as existing at work rather than all foreseeable risks but that this was sufficient according to these Regulations due to the filter which exists in Regulation 3. We suggest that it should be necessary for a new risk assessment to be carried out in all places of employment where artificial optical radiation is present. Once the Regulation comes into force, a revised risk assessment should become a compulsory requirement of the Statutory Instrument. This will ensure there is no confusion or need to question if there should be a filter.

[1] *Fytche v. Wincanton Logistics plc* [2004] UKHL 31.

- We believe that Regulation 3 provides no strict liability. In order to comply with the EU Directive, and for consistency with the COSHH Regulations, these Regulations will have to have strict liability.

- We suggest that Regulation 4 should include a clause which states that the risk assessment should be carried out by a competent person.

- We consider Regulations 5, 6 and 7 to be inconsistent with the rest of the Regulations.

- We believe that the Regulations should not only refer to adverse health effects to the skin and eyes but to the general health of employees in order to account for dangers within the workplace fully and effectively.

- We suggest that the HSE should be looking to actively enforce these Regulations.

**Questions**

**c) Is the filter in Regulation 3 clear in helping you decide whether or not you will need to do more? [If no, what extra would you like to see?]**

Regulation 3 refers specifically to the risk assessment which the employer is obliged to carry out under the 1999 Regulations. Regulation 3 states that the employer must revise the risk assessment if the employer carries out work which could expose its employees to artificial optical radiation that could create a reasonably foreseeable risk of adverse health affects to the eyes or skin of the employee; and if that employer has not implemented measures to eliminate, or reduce to a minimum, the risk referred to based on the general principles of prevention as set out in the 1999 Regulations[2]. The point that APIL would make at this stage is that artificial optical radiation is a specialist area; and although it was

[2] HSE A consultative document on legislation to implement the Physical Agents (Artificial Optical Radiation) Directive), Page 8 Para. 3.

an area originally covered by the 1999 Regulations, a more specific risk assessment would be more appropriate. Regulation 3 implies that if a risk assessment has already been carried out under the 1999 Regulations then a revised risk assessment is not necessary. APIL would suggest that a compulsory revised risk assessment, specifically looking at artificial optical radiation within the workplace would be more appropriate. According to Regulation 3 of the draft Statutory Instrument in the consultation paper, if a risk assessment was carried out by the employer under the 1999 Regulations there would be no need to carry out a new risk assessment. Should an accident occur, post introduction of these Regulations, in that workplace concerning equipment with artificial optical radiation but which was not accounted for in the original risk assessment, the employer could claim in their defence that a risk assessment was carried out under the 1999 Regulations but that they had not accounted for this particular event in that risk assessment. A scenario similar to this can be seen when looking at the case of *Fytche v. Wincanton Logistics plc* [3]. In this case, the employee (Fytche) brought a claim of negligence against his employer after he suffered mild frostbite. As a consequence of poor weather and bad driving conditions, the lorry Fytche was driving had become stuck on a country road. Fytche decided to dig the lorry out himself unaware of a small hole in his steel toe-capped boots and later suffered mild frostbite in his small toe. His employers, in their defence, stated that steel toe-capped boots had been provided to protect the wearer's toes from anything heavy dropping on them, such as a milk churn, not from wintry weather conditions. In paragraph 9 of Lord Hoffmann's judgment he stated that,

> *"the purpose of personal protective equipment (PPE) is therefore, as a last resort after collective protection or methods of work organisation, to avoid or limit risks. What risks? Those which are* ***perceived as existing at work****."*[4]

Only those risks which appear on the original risk assessment carried out under the 1999 Regulations would be those risks which are perceived as existing at work, whereas there

[3] *Fytche v. Wincanton Logistics plc* [2004] UKHL 31.
[4] *Fytche v. Wincanton Logistics plc* [2004] UKHL 31, Lord Hoffmann, page 3, para. 9.

may be further risks which have not been accounted for that could be picked up in a compulsory revised risk assessment.

APIL would, therefore, suggest that it should be compulsory for a new risk assessment to be carried out in all places of employment where artificial optical radiation is present to avoid the risk of satellite litigation. Once the Regulation comes into force, a revised risk assessment should become a compulsory requirement of the Statutory Instrument. This will ensure there is no confusion or need to question if there should be a filter.

**h) Do you have any specific comments on the Regulations?**

One major concern of APIL's is that the Regulations only refer to artificial light and do not include references to natural light. APIL would suggest at a time where it is necessary to introduce Regulations to comply with European legislation on artificial light and optical radiation, that it is also a practical time to ensure the Regulations are thorough and cover citizens in the EU who are expected to work outdoors in the natural light. Natural light also poses potential hazards to those who work outdoors, particularly within northern Europe.

The HSE has been obliged to draft these Regulations in order to comply with the EU Directive, however, APIL believes that the HSE should take this opportunity to expand this and also include reference to the hazards of radiation within the sunbed industry. APIL feels that the HSE should look at steps to protect the public from artificial optical radiation, as well as those in the workplace. APIL has been campaigning to protect people, particularly those under the age of 18, from the dangers and hazards provided by sunbeds. APIL has proposed banning the use of sunbeds by people under the age of 18. Scotland has already introduced legislation to ban the use of sunbeds by people under the age of 18; and Northern Ireland is currently consulting on this matter too.

**Regulation 3**

As stated in answer to question c), APIL believes that a filter should not be present within Regulation 3 and that it should be compulsory for businesses using artificial optical radiation within the workplace to undertake a new risk assessment. It should also be stated in the Regulations that this risk assessment must be full and effective, so that the employer cannot state that a risk assessment was carried out but that particular events were not taken into account.

APIL thinks that the Regulations would impose a specific duty on the employer to carry out a new risk assessment if there was no reference to the 1999 Regulations within these draft Regulations. This would mean that the risk assessment must be carried out with specifically artificial optical radiation in mind. APIL consider that a risk assessment under the 1999 Regulations is specific not enough for the artificial optical radiation Regulations, and that a separate obligation to carry out a new risk assessment under these Regulations is necessary. The Regulations, as they read, are very technical and there should be a freestanding duty on the employer to carry out a fresh risk assessment specifically referring to artificial optical radiation. APIL also suggests that the initial risk assessment carried out under the 1999 Regulations may not be of an adequate standard. The filter provided in Regulation 3, however, would provide these employers (who may not know its initial risk assessment is of an inadequate standard) with an excuse or "get-out clause" for not carrying out a further risk assessment in accordance with these Regulations. Regulation 3 allows the employer to choose how great their duty is.

Regulation 3 also provides no strict liability. In order to comply with the EU Directive, and provide consistency with the COSHH Regulations, these Regulations will have to have strict liability.

**Regulation 4**

Regulation 4 is specific when referring to how the revised risk assessment should be carried out and lists complicated details that should be considered within the revised risk assessment. This emphasises how highly technical the process may be. However, this

becomes irrelevant if an employer can use the "get-out clause" provided in Regulation 3b). The initial risk assessment carried out under the 1999 Regulations may not refer to specific technical items which are listed in Regulation 4 or be as detailed; however, as stated previously, this becomes irrelevant if the employer has previously carried out a risk assessment under the 1999 Regulations.

Regulation 4 (4) also provides a "get-out clause" to employers, it almost invites them not to bother with any further risk assessments in future. The employer could decide that the nature and extent of the adverse health effects, to the eyes and skin of employees, is so little that they need not carry out a further risk assessment. The Regulations state that it is only when there is a significant change to the possible adverse health effects that a revised risk assessment is necessary. However, APIL would suggest that ***any*** change to the exposure of artificial optical radiation should require the employer to carry out a further risk assessment to ensure that the health and safety of the employees has been fully considered at all times.

One thing which we believe is necessary in the drafting of Regulation 4 is for it to include a section which states that the risk assessment must be carried out by a competent person. Competent person would then be defined within Regulation 1.

**Regulations 5, 6 and 7**

APIL would suggest the drafting of these Regulations be altered so that the term "revised risk assessment" is changed to "risk assessment" in order to emphasise the need for the risk assessment to be compulsory.

For consistency, APIL would point out that Regulation 5(6) refers to the risk assessment, rather than revised risk assessment. Also, Regulation 7 (6) (b) only refers to the skin, whereas previous references to adverse health effects have included eyes and skin. However, APIL would question that rather than restricting this Regulation to only account for adverse health effects to the skin and eyes, should the Regulation account for adverse

health effects in general? Therefore, the Regulation will include diseases such as cancer which may appear in a person in areas of their body other than skin and eyes.

**Conclusion**

When looking at Table 2 in Annex B of the consultation, it seems that the preventative measures which may be carried out by the employer are fairly standard. This implies that exposure to artificial optical radiation in the workplace is preventative, which would suggest that employers should be required to assess and account for dangers within the workplace fully.

The main problem with the drafting of this Regulation is that everything hinges upon the ***revised*** risk assessment, which is worrying when there is no obligation to necessarily carry out a revised risk assessment and there is no obligation for that person to be a competent person.

In the impact assessment[5] it is assumed that 75 per cent of businesses will carry out the revised risk assessment themselves. It is also assumed that this will follow HSE guidance. As stated previously, the checklist detailed within Regulation 4 is highly complex and it should be enforced within the Regulations that this risk assessment is carried out by a competent person. Furthermore, the impact assessment[6] suggests that there will be zero cost to the HSE for the enforcement of this policy, which suggests that there will be no enforcement of this policy or at least that the HSE will be doing nothing new or anything actively to enforce this policy. This may, therefore, give businesses an opportunity to ignore the Regulation.

- Ends -

## Association of Personal Injury Lawyers

[5] Health and Safety Executive, *A Consultative Document on Legislation to Implement the Physical Agents (Artificial Optical Radiation) Directive,* Page 24 Para. 19.
[6] Health and Safety Executive, *A Consultative Document on Legislation to Implement the Physical Agents (Artificial Optical Radiation) Directive,* Page 21

11 Castle Quay, Nottingham, NG7 1FW ● T: 0115 958 0585
● W: www.apil.org.uk ● E: mail@apil.org.uk