

The Government Response to the Löfstedt Report *“Reclaiming Health and Safety for all: An independent review of Health and safety legislation.”*



A response by the Association of Personal Injury Lawyers

March 2012

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 approximately 4,800 members in the UK and abroad, 100 of which in Northern Ireland, 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:

Karl Tonks – APIL Vice President;

Cenic Clement-Evans – APIL Executive Committee Member;

Matthew Stockwell - APIL Executive Committee Member;

Nigel Tomkins - APIL Executive Committee Member; and

Mark Turnbull – APIL Executive Committee Member.

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

Katherine Elliott, Legal Policy Officer

APIL

3 Alder Court

Rennie Hogg Road

Nottingham NG2 1RX

Tel: 0115 958 0585; Fax: 0115 958 0885 E-mail: Katherine.elliott@apil.org.uk

Introduction

APIL's remit has always been to protect and promote the rights of people who are injured through negligence.

The key to a proper understanding of health and safety legislation, which is designed to protect people from needless injury, is education.

Professor Ragnar Löfstedt's report, *Reclaiming health and safety for all: An independent review of health and safety legislation* concluded that the health and safety system was fit for purpose and "*in general, there is no case for radically altering current health and safety legislation*"¹. What therefore alarms us, is the Government's recent pledge to tackle a 'Health and Safety monster' when Professor Löfstedt's carefully researched report revealed no such concerns. Additionally, not all of the reforms that the Government have announced they are intent on implementing are even recommended in the report. The government's interpretations of the report, and the speed with which they wish to implement reforms, are questionable and not necessarily how Professor Löfstedt intended.

Consultation Response

This response deals with each of the recommendations in Professor Löfstedt's report and provides our further comments, which should be read in conjunction with our earlier submissions.

- **Professor Löfstedt recommends exempting those self-employed whose work activities pose no potential risk of harm to others from health and safety law.**

Introducing such a regulation will not, in our view, exempt the one million people² from the requirement of conducting a workplace risk assessment as suggested in the report.

¹ *Reclaiming health and safety for all: An independent review of health and safety legislation*, Professor Ragnar Löfstedt, November 2011, Page 1 paragraph 3.

² *Reclaiming health and safety for all: An independent review of health and safety legislation*, Professor Ragnar Löfstedt, November 2011, Page 39 paragraph 17.

For the savings that could potentially be made there will be inherent difficulties with any guidance or definition that is produced as it will be open to interpretation in the same way existing guidance already is.

Professor Löfstedt makes it clear that this exemption should only apply to self-employed people whose work poses no potential risk of harm to others³. It is not clear what is meant by “*whose work poses no potential risk of harm to others*”. Such an omission will give rise to confusion and arguments about whether a particular person’s work fits into such a category.

He also recognises that many self-employed people carry on work in environments where there can be a significant risk of injury or harm, for example in the agricultural and construction industry. However, we remain concerned how such an exemption will be defined. There are self employed individuals who work largely in low risk environments but who may visit high risk environments from time-to-time. Such individuals could be exposed to unnecessary risk under these proposals. For example, there are very few people who do not use a motor vehicle for work purposes. Those vehicles as a very minimum require maintenance and failure to maintain equipment is a frequent cause of accidents. As a result of this they should be subject to the maintenance provisions of the Provision and Use of Work Equipment Regulations 1998.

Current regulations are not onerous. They do not require extensive record keeping or maintaining of numerous documents. They are simple and only require sensible steps to have been taken to manage a risk. A common sense approach would provide clearer

³ *Reclaiming health and safety for all: An independent review of health and safety legislation*, Professor Ragnar Löfstedt, November 2011, Page 38 paragraph 13.

guidance on the current regime without eroding the protection currently afforded to those individuals.

If the Government remains intent on introducing these reforms we would be willing to engage with the Department for Work and Pensions (DWP) and the Health and Safety Executive (HSE) to assist with any drafting of definitions or guidance that may result from Professor Löfstedt's recommendations in order to ensure that his intentions here are fully achieved. For example, what does “*whose work activities pose no potential risk of harm to others*” mean? Who defines it? How will it be interpreted? It has the potential to cause more red tape that it is meant to cure.

The courts have previously given clear guidance on the importance of carrying out risk assessments in terms of context as in the case of Koonjul v Thameslink Healthcare Services⁴ where Lady Justice Hale states the following,

“It also seems to me clear to be that the question of what does involve a risk of injury must be context-based. One is therefore looking at this particular operation in the context of this particular place of employment and also the particular employees involved. In this case, we have a small residential home with a small number of employees. But those employees were carrying out what may be regarded as everyday tasks, and this particular employee had been carrying out such tasks for a very long time indeed. The employer in seeking to assess the risks is entitled to take that into account.”

The court also stated in this case that when making risk assessment “*there has to be an element of realism.*”

- **Professor Löfstedt recommends that the HSE should review all of its ACoPs. The initial phase of the review should be completed by June 2012 so businesses have certainty about what is planned and when changes can be anticipated.**

⁴ *Koonjul v Thameslink Healthcare Services* [2000] EWCA Civ 3020

APIL agrees in principle with the recommendation from Professor Löfstedt to review all of its ACoPs. The HSE ACoPs, like the regulations they refer to, have become disjointed due to various amendments over the years by government and the EU. These ACoPs exist to assist employers but they also help employees and their representatives who rely upon them being updated on a regular basis following any amendments from the EU. Therefore, one set of regulations per category would provide a greater level of understanding for businesses and for employees. For example, the COSHH Regulations would apply to all substances hazardous to health and also concern all industry sectors, such as retail, manufacturing and healthcare.

Historically the problem is that amendments have been introduced by way of new ACoPs with different names from the original rather than amendments to the original regulations. This has caused confusion. Consolidated regulations would act to reduce this confusion. When conducting this consolidation it is important, however, that the intention of the regulations or ACoPs is not revised or the duties on the employer reduced in anyway as this is not what Professor Löfstedt recommended.

- **Professor Löfstedt recommends that the HSE undertakes a programme of sector specific consolidations to be completed by April 2015.**

As stated previously, it is important that any consolidation exercise does not dilute the current health and safety legislation that provides a largely successful framework of protection from needless injury for employees. As stated by Professor Löfstedt in his report,

There is no case for radically altering current health and safety regulation.⁵

This was further reiterated by Professor Löfstedt at the Policy Forum at Westminster on 17 January 2012 where he stated that he was not in favour of radical reform of health and safety legislation. It is, therefore, important that his report is interpreted as intended and that no drastic changes are made to the detail of the regulations and their intention.

⁵ *Reclaiming health and safety for all: An independent review of health and safety legislation*, Professor Ragnar Löfstedt, November 2011, Page 1 paragraph 3.

- **Professor Löfstedt recommends that the original intention of the pre-action protocol standard disclosure list is clarified and restated and that regulatory provisions which impose strict liability should be reviewed by June 2013 and either qualified with ‘reasonably practicable’ where strict liability is not absolutely necessary or amended to prevent civil liability from attaching to a breach of those provisions.**

This one recommendation deals with two quite distinct recommendations. Therefore, we have distinguished between the two separate issues here.

The original intention of the pre-action protocol

The original intention of the pre-action protocols is to ensure that the parties take all reasonable steps to avoid the necessity for litigation. One way this is achieved is through the exchange of early and full information about the potential claim. The proper exchange of information and documents helps to narrow issues and settle claims.

We agree that asking for inappropriate documents is not right. Nor however, are routine failures by insurers to respond to reasonable requests for documents. We propose that the parties should be re-educated on how to use the protocols, including the disclosure lists, effectively. This will ensure that unnecessary pre-action disclosure applications are not made and that an application is only made where there is a failure to exchange documents by the defendant. When used correctly, protocols work well and achieve their original objectives. The original intentions of the protocols need to be restated. It has been our experience that the protocols have resulted in far greater exchange of information and led to many more cases settling pre-issue and have been very successful in achieving their aims.

Strict liability

We are gravely concerned that the reform of strict liability will erode the protection of employees.

Strict liability provides a reasonable, and expected, level of protection for employees as well as giving them access to fair and appropriate redress. Strict liability has existed within health and safety law in England and Wales for centuries; and has not been generated as a result of EU legislation or recommendations. The modern concept of strict liability goes back at least as far as the Factories Act 1901. Section 10 of that Act imposed an absolute duty on the employer to fence securely dangerous parts of machinery. This absolute duty is just one example of the way the law continues to protect employees during the course of their employment. It ensures a reasonable standard of health and safety practices.

The absence of strict liability will allow employers to pass their responsibility to provide a safe working environment on to the employee. APIL recommends that the retention of strict liability is essential in health and safety law. Any savings that may result from its replacement with 'reasonably practicable' will be overwhelmed by additional cost burdens. Additional costs are likely to be incurred by those defending a claim if the regulations are watered down from absolute to 'reasonably practicable'. Any audit trail will increase costs for employers as they will be expected to provide evidence of investigation into any preventative measures they could have put in place.

Employers have been required to insure against their liability to employees since 1972⁶. Baroness Hale in *Smith v Northamptonshire County Council*⁷ observed that the policy behind the imposition of strict liability on employers for personal injury sustained by their employees at work came down to choosing which party is better placed to effect, and to bear, the costs of insurance. There can be only one answer to that question - the employer.

Not all of the cases relied upon by Professor Löfstedt in his report to support his recommendations concerning strict liability are indeed strict liability cases. This includes the case of *Allison v London Underground*⁸; a case in which Lady Justice Smith set out a careful analysis of what is meant by strict liability. In her judgement she also considered

⁶ Employer Liability (Compulsory Insurance) Act 1969

⁷ [2009] UKHL 27 at para 40

⁸ *Allison v London Underground Ltd* [2008] EWCA Civ 71.

the other two cases referred to be Professor Löfstedt, namely Stark v Post Office⁹, and Dugmore v NHS Trust and another¹⁰. In the case of Allison, the construction of Regulation 9 of the Provision and Use of Work Equipment Regulations 1998 was considered in conjunction with the risk assessment requirements of Regulation 3 of the Management of Health and Safety at Work Regulations 1999 and whether the employer had ensured that the employee had received adequate training.

In Allison the Court of Appeal considered carefully the effect of the European Directives and their purpose namely to achieve the minimum standards of safety. Furthermore, the case of Stark v Post Office¹¹, which is relied upon in the Government's response as evidence of 'over-the-top' European standards, is also concerned about the fact of the European Directives laying down minimum standards. The Work Equipment Directive sought only to impose a minimum standard. The Directive did nothing to discourage a Member State from imposing more stringent obligations if existing standards went further.

The duty to maintain work equipment considered in Regulation 6 (1) of the Provision and Use of Work Equipment Regulation 1992 (now Regulation 5 of the 1998 Regulations) amounts to the incorporation of the duty as originally set out in sections 22 (1) and 152 (1) of the Factories Act 1937. The meaning of duty to maintain was first considered by the House of Lords in 1949 in the case of Galashiels Gas Co Ltd v Millar¹². In Stark the Court of Appeal followed Galashiels and stated that,

“the words had been used intentionally by a draftsman in a field where authority had laid down what those words would be taken to mean. Indeed, by following the definition in the Factories Act 1937 the intention could not be more clear.”

In Galashiels Lord Morton states,

⁹ *Stark v Post Office* CA [2000] I.C.R. 1013.

¹⁰ *Dugmore v Swansea NHS Trust and another* [2002] EWCA Civ 1689.

¹¹ *Stark v Post Office* CA [2000] I.C.R. 1013.

¹² *Galashiels Gas Co Ltd v Millar* [1949] AC 275.

“In my opinion... there is imposed on the defenders an absolute and continuing obligation binding upon them which is not discharged if at any time their lift mechanism, in this case the brake, is not maintained in an efficient state, in efficient working order, and in good repair.

The words of the subsection are imperative 'shall be properly maintained' and I can find nothing in the context or in the general intention of the Act, read as a whole, which should lead your Lordships to infer any qualification upon that absolute obligation. It is quite true that the subsection, so read, imposes a heavy burden upon employers, but the object of this group of sections is to protect the workman. I think the subsection must have been so worded in order to relieve the injured workman from the burden of proving that there was some particular step which the employers could have taken and did not take. This would often be a difficult matter, more especially if the cause of the failure of the mechanism to operate could not be ascertained. The statute renders the task of the injured workman easier by saying, 'You need only prove that the mechanism failed to work efficiently and that this failure caused the accident.'”

In other words, the duty set out in the Provisions and Use of Work Equipment Regulations is based upon a long established duty predating the European Directive by over half a century to relieve the burden from the claimant of proving that the employer did not take a particular step that they could have done.

Additional comments

APIL supports the streamlining and simplification of confusing regulations and ACoPS but not at the expense of the current health and safety framework that has significantly improved health and safety in the workplace. Professor Löfstedt found no reason for any radical change to this framework or the existence of health and safety legislation. APIL hopes that the government will use this opportunity to simplify confusing legislation without “watering-down” good regulation that provides protection from needless injuries to millions of employees every day.

The current regulations save lives. This is evidenced in the HSE statistics, which prove year-on-year that the number of fatalities and major injuries in the workplace is falling.

- Ends -

Association of Personal Injury Lawyers

- ▶ Unit 3 Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX
 - T: 0115 958 0585 ● W: www.apil.org.uk ● E: mail@apil.org.uk