Health and Safety Executive

Consultation on Draft Approved Code of Practice (ACOP): Safe use of lifting equipment (L113)

A response by the Association of Personal Injury Lawyers

October 2014

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 4,000 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.

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Introduction

APIL welcomes the opportunity to respond to the HSE's consultation on a revised draft Approved Code of Practice (ACOP) for the Safe Use of Lifting Equipment. We are pleased with the majority of the revisions, and believe that the new ACOP will be clearer, allowing duty-holders to comply with their obligations more easily. This in turn will lead to safer workplaces and fewer accidents. In particular, we welcome that the ACOP has been updated to ensure that it accurately reflects the Lifting Operations and Lifting Equipment Regulations 1998. It is important that the ACOP reflects the law because although ACOPs are not legally binding, it is heavily implied that if the employer complies with the ACOP, they have done enough to comply with the law.

We do, however, have concerns about several of the proposed deletions, and some suggestions for further improvement.

Concerns with the draft

Deletions at paragraph 14 and paragraph 16

We have concerns about the amalgamation of paragraphs 12 and 14 and subsequent removal of the sentence in paragraph 14 "the higher the level of risk identified through the assessment the greater the measures that will be needed to reduce it and vice versa". This has now been replaced with "You should then tackle these risks as far as reasonably practicable". Regulation 4 of the Management of Health and Safety at Work Regulations, in conjunction with schedule 1 of those Regulations, clearly sets out the approach to take when assessing risk. Schedule 1 sets out the general principles of prevention and issues which should be thought through, including: avoiding risks, evaluating risks which cannot be avoided, combating risks at source, replacing the dangerous by the non-dangerous or less dangerous. This methodology should be reflected in all relevant guidance and ACOPs. If the guidance simply states that the risks should be tackled "as far as reasonably practicable", this does not reflect regulation 4 or schedule 1, and suggests to the lay duty holder that the standard required is much lower than it actually is. The current guidance is clear, and there is no reason why this should be removed and replaced by guidance which is based on a subjective requirement that is neither helpful nor accurate.

Again, at paragraph 16, the final, helpful sentence of "the greater the risk, the greater the measures that you need to take to reduce the risk to an appropriate level" has been removed. There is no justification for removing this, and it renders the ACOP less effective. The current wording is a very good expression of what the duty in the regulation entails.

Schedule 1 of the Management of Health and Safety at Work Regulations implements into UK law the general principles of prevention contained within Art 6(2) of Council Directive 89/391/EEC. The member state, when implementing Directives, is not permitted to reduce the level of protection provided by the Directive – these deletions could be interpreted as watering down the Directive by giving the impression that there is a much lower standard required to comply with risk assessments than there actually is.

Regulation 2

Paragraph 32

We are unhappy with the inclusion of and emphasis on the example of a three-point linkage on a tractor not being lifting equipment. This is not clear cut and the example is misleading. Whilst the principle function of the tractor is not to lift, this does not necessarily mean that a tractor will never be part of a lifting operation, or when it is used to carry out a lifting operation, it will not covered by the LOLER regulations. Where a heavy plough is lifted on to the back of a tractor, this will be a lifting operation and at that point, the tractor should be covered by LOLER. As such, we are concerned that this example is poor, confusing and should not be used.

Regulation 3

New paragraph after paragraph 47

Whilst we welcome the attempt to clarify issues raised by the social care sector about equipment in use in or purchased for patients at home, we believe that the duties could be more clearly stated.

Work equipment

The ACOP states that LOLER does not apply where a member of the public purchases equipment for use solely by them at home, or where equipment has been loaned by a health care or community equipment provider for use solely by the individuals, their family or unpaid carers, as it is not defined as work equipment. We dispute that this will always be the case. Lord Mance has set out that the test[1] for work equipment in circumstances where there is a direct employment relationship, is whether the work equipment has been provided or used in circumstances in which it was, as between the employer and employee, incorporated into and adopted as part of the employer's business or other undertaking, whether as a result of being provided by the employer for use in it or *as a result of being provided by anyone else and being used as an employee in it with the employer's consent and endorsement*. Therefore where the carer uses a hoist installed by the family in the course of their employment, and the employer is aware of this use and so "consents", the hoist should be classed as work equipment and reflected as such in the ACOP.

Further, if a hoist, for example, is necessary in order to safely move a person, and must be used in order for the employer to comply with their duty under the Manual Handling Operations Regulations to avoid risk or reduce the risk to the lowest level reasonably practicable (*Egan v Central Manchester and Manchester Children's University Hospitals NHS Trust*[2]) – the hoist must be classed as work equipment. This is surely correct, as in this circumstance, the employer requires the employee to use the equipment to safely carry out the operation, and to avoid a breach of health and safety regulations – regardless of who has provided the equipment.

Further obligations of the employer

Additionally, relevant parts of the further guidance directed to in this paragraph – HSIS4 - should be quoted to draw attention to the employer's extra duties, even if LOLER does not apply. HSIS4 states that in cases where the equipment is not work equipment, LOLER will

[1] *Smith v Northamptonshire* [2009] UKHL 27
[2] [2008] EWCA Civ 1424

not apply. However where the equipment has been loaned to the person solely to be used by them, their family or unpaid carers, the more general duties under HSWA 1974 section 3 (to provide safe equipment and maintain it, so far as is reasonably practicable) will apply. Paragraph 47 of the ACOP as it currently stands, gives the impression that when the equipment is on loan, the employer/duty holder will have no obligations at all. This is not true, and it is important to emphasise and direct the duty holder to other obligations that they may have. As demonstrated in *Egan v Central Manchester,* for example, further duties will arise under the Manual Handling Operations Regulations 1992, when the employee uses a hoist to lift a person.

The employer's duty to plan the lifting operation

Regardless of whether the equipment used for lifting is work equipment and so falls under LOLER, there is also a duty on the employer to plan the lifting operation. This should involve a risk assessment as provided for by regulation 4 of the Management of Health and Safety at Work Regulations. Paragraph 47 therefore, rather than focusing on whether or not the equipment is work equipment, should focus on the requirement that the employer should plan and carry out a risk assessment where the employee will be carrying out a lifting operation. This will include assessing the equipment for use in lifting and whether this is fit for purpose (regardless of who the equipment belongs to, or who provides it).

Regulation 8

Paragraph 234

We are unsure why the first part of current paragraph 234 has been deleted. This is helpful information and would aid the duty holder to comply with their obligations – in turn resulting in safer workplaces and fewer accidents. This should be reinstated.

APIL welcomes the majority of changes

APIL does welcome the majority of the changes to the ACOP. Whilst most are small, they should ensure that the ACOP is clearer and more user-friendly. This will help duty holders to comply with their obligations and keep employees and workers safe.

Regulation 1

Paragraph 21 reworded

We welcome the rewording of this paragraph, as the ACOP now correctly states that LOLER applies to all lifting equipment – even that which was manufactured and put into use before 1998.

Regulation 2

Paragraph 27

We are pleased with the additional wording at paragraph 27: "in addition, the weight of equipment designed to hold the load, e.g. skips or stillages, should be considered as part of the load". This piece of additional information will remind duty-holders to take account of the

weight of the equipment, helping to prevent accidents and dangerous practices. This will be more effective than the current wording.

Regulation 3

New paragraph before 40

We welcome the inclusion of a new paragraph to protect self-employed as employees, if they are treated as self-employed for tax and national insurance purposes. In a time where the protection of self-employed people is looking likely to be reduced through the implementation of an exemption for self-employed people from the scope of the Health and Safety at Work Act, we welcome this provision. Just because someone is self-employed, it does not mean that they are low risk or that they should not be entitled to the same level of protection as employees, especially if they are under the control of an employer and classed as self-employed simply for tax reasons.

Paragraph 77

We welcome the deletion of paragraph 77, as this now removes an unnecessary limitation and will provide greater protection. The ACOP now more accurately reflects the regulations.

Regulation 8

Paragraph 220 has been amended

We are pleased that paragraph 220 has been amended to include additional information requiring the organisation to have a simple plan, generic risk assessment and procedures in place to support those carrying out the operations. The organisation has a responsibility to support those operating the equipment, and we welcome that the ACOP now makes this clear. Duty holders may not in the past have realized that they had such an obligation, and may not have properly complied with the regulations as a result.

It is important that the ACOP accurately reflects the law, because ACOPs have a special status. Although they are not legally binding, it is heavily implied that if the employer does everything outlined in the ACOP, they will have done enough to comply with the law. If the ACOP is missing vital references to certain obligations, the employer may incorrectly interpret the regulations and this could put employees and workers at risk.

Further recommendations for improvement

We have previously suggested that the revised ACOPs should include clear practical examples of how to comply fully with the regulations, and reiterate this for the Safe Use of Lifting Equipment ACOP. It would be useful to include any relevant court decisions as case study examples. This will provide employers with a practical knowledge of when and where an ACOP is applicable.

For example, at paragraph 84 regarding regulation 3, where the paragraph refers to “when selecting lifting machinery you should consider whether the environment in which it will be used is likely to have an adverse effect on the operators. Where your risk assessment concludes that this may be a possibility you should provide operators with adequate protection, particularly where they need to be positioned at the operating station for long

periods" it would be useful to direct duty-holders to the facts of *Willock and Others v Corus*[3] to demonstrate circumstances where lifting equipment may have an adverse effect on the operators. In this case, crane operators developed back pain due to the positioning of controls in the crane cabin, requiring them to stand and stretch themselves in awkward positions. It would be helpful to include real case facts and outcomes within the ACOP – to give further weight to the guidance, and illustrate the correct actions to take.

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[3] [2013] EWCA Civ 519