Compensation for Injuries at Work-after s69 of the Enterprise and Regulatory Reform Act 2013

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1st October 2013 is a date for the diary. It is when S69 of the Enterprise and Regulatory Reform Act 2013 (the Enterprise Act) comes into force. It means a significant change for those injured at work from that date onwards in that civil liability will no longer attach to breaches of health and safety regulations.

What is the practical effect of this? How are we going to run our cases? What effect is this coupled with the new costs regimes?

Section 47 of the Health and Safety at Work 1974

47 "Civil liability

1) Nothing in this Part shall be construed—
   a) as conferring a right of action in any civil proceedings in respect of any failure to comply with any duty imposed by sections 2 to 7 or any contravention of section 8; or
   b) as affecting the extent (if any) to which breach of a duty imposed by any of the existing statutory provisions is actionable; or
   c) as affecting the operation of section 12 of the Nuclear Installations Act 1965 (right to compensation by virtue of certain provisions of that Act).
2) **Breach of a duty imposed by health and safety regulations . . . shall, so far as it causes damage, be actionable except in so far as the regulations provide otherwise.**
3) No provision made by virtue of section 15(6)(b) shall afford a defence in any civil proceedings, whether brought by virtue of subsection (2) above or not; but as regards any duty imposed as mentioned in subsection (2) above health and safety regulations . . . may provide for any defence specified in the regulations to be available in any action for breach of that duty.
4) Subsections (1)(a) and (2) above are without prejudice to any right of action which exists apart from the provisions of this Act, and subsection (3) above is

without prejudice to any defence which may be available apart from the provisions of the regulations there mentioned

5) Any term of an agreement which purports to exclude or restrict the operation of subsection (2) above, or any liability arising by virtue of that subsection, shall be void, except in so far as health and safety regulations . . . provide otherwise
6) In this section "damage" includes the death of, or injury to, any person (including any disease and any impairment of a person's physical or mental condition)."

Enterprise and Regulatory Reform Act 2013

69 Civil liability for breach of health and safety duties.

"(1) Section 47 of the Health and Safety at Work etc. Act 1974 (civil liability) is amended as set out in subsections (2) to (7). .

(2) In subsection (1), omit paragraph (b) (including the "or" at the end of that paragraph). .

(3) For subsection (2) substitute—

"(2) 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. .

(2A) Breach of a duty imposed by an existing statutory provision shall not be actionable except to the extent that regulations under this section so provide (including by modifying any of the existing statutory provisions). .

(2B) Regulations under this section may include provision for— .

(a) a defence to be available in any action for breach of the duty mentioned in subsection (2) or (2A);

(b) any term of an agreement which purports to exclude or restrict any liability for such a breach to be void." .

(4) In subsection (3), omit the words from ", whether brought by virtue of subsection (2)" to the end.

(5)In subsection (4)— .

(a) for “and (2)” substitute “, (2) and (2A)”, and .

(b) for “(3)” substitute “(2B)(a)”. .

(6) Omit subsections (5) and (6). .

(7) After subsection (6) insert— .

“(7) The power to make regulations under this section shall be exercisable by the Secretary of State.”

(8) Where, on the commencement of this section, there is in force an Order in Council made under section 84(3) of the Health and Safety at Work etc. Act 1974 that applies to matters outside Great Britain any of the provisions of that Act that are amended by this section, that Order is to be taken as applying those provisions as so amended. .

(9) The amendments made by this section do not apply in relation to breach of a duty which it would be within the legislative competence of the Scottish Parliament to impose by an Act of that Parliament. .

(10) The amendments made by this section do not apply in relation to breach of a duty where that breach occurs before the commencement of this section.”

Effects of the Enterprise Bill-Removal of Civil Liability

In short therefore the UK Government has with the Enterprise Act reversed the presumption in Section 47 of the Health and Safety at Work Act 1974, that regulations made under HSWA carry civil liability for breach.

To quote from my good friend Nigel Tomkins

“Employers will no longer be liable in the civil courts for criminal offences breaching such regulations. Instead in all cases, rather than being able to rely on a breach of the criminal law to prove their case, injured workers will have to prove their employer was negligent.”

In other words whilst the raft of health and safety regulations will still have criminal applicability, and their breach in theory be capable of forming the basis of criminal prosecution (in practice the HSE rarely prosecute, and one pauses to ask whether this will lead to litigation), injured people will no longer be able to rely **directly** upon those breaches in claims for compensation.

It should be noted that this will only apply where the breach takes place after the commencement of any legislation. Clearly therefore for a short while longer accident claims will be brought alleging breach of statutory duty as well negligence. The changes of course post-date by 2 months the advent of the new EL/PL portal making it even less likely that injuries at work claims will remain within the portal. (A reminder of course that injuries in the workplace will be both be employers’ liability and public liability.)

However because the legislation is not retrospective industrial disease claims (in particular long tail claims) will still be brought on the basis of breaches of statutory duty. This means that there is the potential for a dual approach for a considerable time in the future.

Take for example regulations even as recent as *the Control of Asbestos Regulations 2012* and the duty with regard to Information, instruction and training

“10.—(1) Every employer must ensure that any employee employed by that employer is given adequate information, instruction and training where that employee—

(a) is or is liable to be exposed to asbestos, or if that employee supervises such employees, so that those employees are aware of—

(i) the properties of asbestos and its effects on health,…….”

Lawyers dealing with noise and vibration claims will still need to have regard for instance for the Provision and Use of Work Equipment Regulations of 1992 and 1998 in addition to Regulations dealing specifically with noise and vibration.

What is the significance of the removal of civil liability for breach of statutory duty?

Again to quote from Nigel Tomkins in commenting on the Bill,

"Löfstedt recommend that regulatory provisions that impose strict liability should be reviewed 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. In other words he was only concerned with the very few regulations to which strict liability attaches.
This clause, if it becomes law, will mean that a worker can be injured through no fault of his own due to an employers' breach of the criminal law but that worker (or his family in the case of a fatal accident) will be prevented from relying upon that breach of statutory duty in a civil claim. This is not just when strict liability applies either but in respect of all regulations including those (the vast majority) which are qualified with a "reasonably practicable" defence."

It is not the health and safety regulations that are being revoked

It should be emphasised that the raft of health and safety regulations are not being revoked and that the duties set out in for instance the regulations set out below (in no particular order) will still apply

- *Management of Health and Safety at Work Regulations 1999;*
- *Workplace (Health, Safety and Welfare) Regulations 1992;*
- *Provision and Use of Work Equipment Regulations 1998;*
- *Personal Protective Equipment at Work Regulations 1992;*
- *Manual Handling Operations Regulations 1992;*

- *Health and Safety (Display Screen Equipment) Regulations 1992.*
- *The Work at Height Regulations 2005*
- *Control of Substances Hazardous to Health Regulations 2002*
- *Control Design and Management Regulations 2007*

Those regulations contain certain key duties, including risk assessment, risk avoidance and reduction, the provision of suitable work equipment, workplace and protective equipment, maintenance of the workplace and equipment and the provision of information, instruction and training. These are of course consistent with the non-delegable duty owed at common law by an employer to an employee to provide a safe place of work, a safer system of work, competent staff and proper equipment which is the essence of ***Wilson and Clyde Coal Company Limited v. English*** *[1937] 3 A. E. R. 628]*

Strict Liability

In the main regulations where strict liability applies are those relating to duties to maintain which are set out in a number of regulations such as Regulation 5 (1) of the Provision and Use of Work Equipment Regulations 1998.

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

The application and meaning of the regulation was of course considered in **Stark v Post Office** [2000] ICR 1013 (CA). Any thought that the wording of the regulation is derived from Europe is of course entirely misconceived as it is almost 80 years old.

Reasonable Practicability and the Reversal of the Burden of Proof

It is here where the removal of civil liability will have drastic effect in claims brought for injured claimants of the future as the health and safety Regulations are peppered with the qualification of the reasonable practicability.

A typical example might be Regulation 26(2) of the Construction (Design and Management) Regulations 2007.

“(2) Every place of work shall, so far as is reasonably practicable, be made and kept safe for, and without risks to health to, any person at work there.”

The classic test as to the meaning of the phrase remains that contained in **Edwards -v- National Coal Board** [1949] 1KB 704, page 712:-

“The construction placed by Lord Atkin on the words "reasonably practicable" in **Coltness Iron Co. v. Sharp** seems to me, with respect, right. "Reasonably practicable" is a narrower term than "physically possible" and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and that if it be shown that there is a gross disproportion between them - the risk being insignificant in relation to the sacrifice - the defendants discharge the onus on them. Moreover, this computation falls to be made by the owner at a point of time anterior to the accident.”

It is not for the claimant either to plead or prove that it was reasonably practicable for the defendant to take the steps required of it by the regulation, rather it is for the defendant to plead its case and prove that it had taken all reasonably practicable steps (**Nimmo v Alexander Cowan & Sons Ltd** (HL) 23 July 1967 [1968] A.C. 107) to comply with whichever regulation or indeed statute.

Perhaps the position was best expressed by Smith LJ in the Court of Appeal in the noise-induced hearing loss claim of **Baker v Quantum Clothing Group Limited, Meridian, Pretty Polly** [2008] EWCA Civ 823

“It appears therefore from the authorities that the process is well-established by which liability under section 29 is to be proved. First, the claimant must show that his place of work was not safe. If he achieves that, the burden passes to the employer to show that it was not reasonably practicable for him to eliminate the risk

of harm. To avoid liability he has to show that the burden of eliminating the risk substantially outweighed the 'quantum of risk'. When that forensic process is compared and contrasted with the process by which liability at common law is established, it is hard to understand how lawyers and judges have so often fallen into the error of thinking that there is no significant difference between the two."

One might add the comments of Lord Dyson in the Supreme Court in **Baker v Quantum Clothing Group Limited and others** [2011] UKSC 17.

"There are, in any event, two important respects in which section 29(1) clearly does not reflect the common law. First, if a defendant wishes to say that it was not reasonably practicable to make or keep a place of work safe, the burden is on him to do so; it is not on the claimant to prove that it *was* reasonably practicable. I accept that few cases of this kind are likely to be decided on an application of the burden of proof. Nevertheless, in this respect there is a legal difference between the statutory and common law positions. Secondly, the fact that breaches are offences is a very significant difference. The fact that, as we were told, there have been few (if any) prosecutions is immaterial. Parliament considered that a breach of section 29(1) was sufficiently serious to attract potential liability to criminal sanctions."

Help from Hansard?

How this will work after the removal of civil liability, when there is no direct reliance upon the regulation is difficult to predict. An interesting pointer comes from what the Minister Viscount Younger said in the Lords debate on 24 April 2013:

> *"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 employe[r]s[1] in future civil claims for negligence".

If breach of the regulation is to be relied upon as evidence of negligence, then it is likely that the claimant will now have to plead and prove that the Defendant took all steps reasonably practicable to comply with the regulation. This will mean that there will be an increase in pressure for expert evidence. What will the effect of this be when it comes to litigating cases? Does the need for expert evidence and/or the complexity mean that these cases become cases for the Multi-Track irrespective of value? If the courts take the view that for reasons of proportionality expert evidence should not be allowed, does this mean that claimants will be denied access to fair trial?

In fact what is the impact upon the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims and in particular,

"General provisions

7.59 Where the claimant gives notice to the defendant that the claim is unsuitable for this Protocol (for example, because there are complex issues of fact or law or where claimants contemplate applying for a Group Litigation Order) then the claim will no longer continue under this Protocol. However, where the court considers that the claimant acted unreasonably in giving such notice it will award no more than the fixed costs in rule 45.18"

Surely this is a source for more satellite litigation?

Bringing a claim in Negligence

The statement from Viscount Younger confirms the argument that with the removal of civil liability that the health and safety regulations (with of course the accompanying Approved Codes of Practice and Guidance where relevant) will set the standard for negligence.

An important case in this regards relates to the Management of Health and Safety at Work Regulations 1999, which largely did not attract civil liability until 2003 (and even then not completely).

In the Court of Appeal decision of **Griffiths v Vauxhall Motors Limited** [2003] EWCA Civ 412**,** which had been consigned to the long grass after the House of Lords in **Robb v Salamis MMI Limited** [2007] ICR at 175 had effectively indicated it was wrong insofar as the Provision and Use of Work Equipment Regulations was concerned, there are some useful indicators.

Before civil liability applied generally, in respect of the Management Regulations, it used to be argued that a breach of those regulations was evidence of negligence. **Griffiths v Vauxhall** may now be useful when arguing that the raft of Health and Safety Regulations set the standard of care expected of a reasonable employer.

The Claimant was injured following the kick back of a torque gun that he was using. He argued that his employers failed to carry out a risk assessment with regard to the operation of the Stanley gun and that that failure was causative of the accident.

It was common ground that no risk assessment was carried out before the accident. He pleaded a breach of the duty contained in regulation 3 of The Management of Health and Safety at Work Regulations 1992

"(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; ..."

Regulation 15 of the 1992 regulations specifically excluded civil liability.

In the judgment it was set out that it was “common ground that the relevance of regulation 3 is that it helps to identify the standard of care to be expected of a reasonable employer.”

“The Recorder was right to hold that the appellant should have carried out a risk assessment well before the accident, especially having regard to the previous

experience of kickbacks. The real issue was whether the failure to carry out a risk assessment was causative of the accident.

“It seems to me that what the Recorder was in effect saying was that if there had been a risk assessment it would have been plain to the appellant that clear instructions should be given to its employees, that it would in fact have given such instructions, and that it is more probable than not that the respondent would have obeyed such instructions and that the accident would not have occurred.
…As to the merits of the point, I would only say this. The whole point of a proper risk assessment is that an investigation is carried out in order to identify whether the particular operation gives rise to any risk to safety and, if so, what is the extent of that risk, which of course includes the extent of any risk of injury, and what can and should be done to minimise or eradicate the risk. Mr Alldis correctly concedes that that is the type of risk assessment which should have been carried out, which it may be noted is quite different from the "risk assessment" in fact carried out after the accident. If it had been carried out, it is much more likely than not that it would have identified the risk of injury, albeit of a comparatively low order. In those circumstances, a competent employer would surely have communicated that there was such a risk to the operators, and would at the very least have instructed them that in order to avoid the risk they must, in the judge's or perhaps Mr Alldis' phrase, hang on tightly at all times. The Recorder was, in my opinion, entitled so to hold.”

Two points seem to arise from this. Firstly the Court of Appeal accepts the argument that where civil liability does not attach, regulations set the standard of care to be expected of a reasonable employer. It may be necessary to argue this in respect of each and every case. However it would be illogical were it otherwise.

Secondly the Court of Appeal again gives helpful comment regarding risk assessment in general including consideration of what steps should be taken to “minimise or eradicate” risk.

At this stage it is worth pausing to mention that risk assessment did not feature as such in health and safety law until 1992. One might argue it was there in all but

name in many court judgments over the years, Lord Reid often being a common denominator. However as a specific concept it was introduced by the Management of Health and Safety at Work Regulations 1992 (replaced by the 1999 version and then amended). It is a core duty in modern health and safety law. The Regulation is set out below.

Regulation 3 Risk assessment

"(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 . . ..

(2) Every self-employed person shall make a suitable and sufficient assessment of--

(a) the risks to his own health and safety to which he is exposed whilst he is 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."

I pause to mention 2 important cases on risk assessment

ALLISON v LONDON UNDERGROUND LTD
CA (Civ Div) (Sir Anthony Clarke MR, Smith LJ, Hooper LJ) 26/02/2008
[2008] EWCA Civ 71

This concerned a tube train driver who developed tenosynovitis due to the prolonged use of a modified traction brake controller. Allegations were made this was an unsuitable piece of work equipment in breach of the reg. 4 of the Provision and Use of Work Equipment Regulations 1998. She also also alleged a breach reg. 9 of PUWER 1998 that her training was not adequate.

For our purposes I wish to consider the comments made regarding the allegations by the claimant that there had been a breach of Regulation 3 of the Management Regulations in that the risk assessment had not been suitable and sufficient. The judge failed to make a finding on this point. Smith LJ had the following to say.

“57. How is the court to approach the question of what the employer ought to have known about the risks inherent in his own operations? In my view, what he ought to have known is (or should be) closely linked with the risk assessment which he is obliged to carry out under regulation 3 of the 1999 Regulations. That requires the employer to carry out a suitable and sufficient risk assessment for the purposes 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. What the employer ought to have known will be what he would have known if he had carried out a suitable and sufficient risk assessment. Plainly, a suitable and sufficient risk assessment will identify those risks in respect of which the employee needs training. Such a risk assessment will provide the basis not only for the training which the employer must give but also for other aspects of his duty,such as, for example, whether the place of work is safe or whether work equipment is suitable.

58. Judge Cowell recognised that there was a connection between risk assessment and adequacy of training but thought that, once he had decided that the training had been adequate in all the circumstances he did not need to decide whether the risk assessment had been sufficient and suitable. With respect to the judge, I think he put the cart before the horse. Risk assessments are meant to be an exercise by which the employer examines and evaluates all the risks entailed in his operations and takes steps to remove or minimise those risks. They should be a blueprint for action.I do not think that Judge Cowell was alone in underestimating the importance of risk

assessment. It seems to me that insufficient judicial attention has been given to risk assessments in the years since the duty to conduct them was first introduced. I think this is because judges recognise that a failure to carry out a sufficient and suitable risk assessment is never the direct cause of an injury. The inadequacy of a risk assessment can only ever be an indirect cause. Understandably judicial decisions have tended to focus on the breach of duty which has led directly to the injury."

THRELFALL v HULL CITY COUNCIL
CA (Civ) (Ward LJ, Smith LJ, Jackson LJ) 22/10/2010
[2010] EWCA Civ 1147

There was further consideration of issues relating to risk assessment by Smith LJ. The claimant was employed by the defendant council as a street scene operative. Part of his job included the clearance of gardens of properties owned by the council into which material had been dumped. At the time of his accident, with others he was in a garden that was overgrown and had items of rubbish in it, including at least one black plastic bag and contents. He was wearing a pair of gloves, supplied by the Defendants, described as standard riggers' gloves when he suffered a serious injury to the inner aspect of his little finger on the left hand. An artery was severed, the tendon partially severed and the nerve of the finger was damaged.. The issue was whether the defendant failed to provide suitable protective gloves.

The case concerned breaches of the Personal Protective Equipment at Work Regulations 1992.

He lost at first instance and appealed with the single issue in the appeal to Blake J being whether the judge was correct to conclude that the injury suffered by the claimant was not caused by a breach of the Personal Protective Equipment at Work Regulations 1992. Dismissing the appeal Blake J held that the trial judge was right to conclude that the claimant had failed to establish that his injury was caused by breach of Regulation 4 of PPE because at the end of the trial it remained unclear how his finger came to be cut, and apart from the fact that the injury occurred there was no evidence to suggest a risk assessment revealed that the gloves were unsuitable.

The Court of Appeal criticised both earlier judgments and firmly restated the importance of proper risk assessment:

> Lady Justice Smith[2]:
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> "For the last 20 years or so, it has been generally recognised that a reasonably prudent employer will conduct a risk assessment in connection with his operations so that he can take suitable precautions to avoid injury to his employees. In many circumstances, a statutory duty to conduct such a risk assessment has been imposed. Such a requirement (whether statutory or not) has to a large extent taken the place of the old common law requirement that an employer had to consider (and take action against) those risks which could be reasonably foreseen. The modern requirement is that he should take positive thought for the risks arising from his operations. Such an assessment is, as Lord Walker of Gestingthorpe said in Fytche v Wincanton Logistics[3], 'logically anterior' to the taking of safety precautions. I said something similar, in rather less elegant language, in paragraph 58 of Allison v London Underground Ltd[4]."

The Court held that the Council's assessment processes were "*manifestly defective*" and it was impermissible for the trial judge to base his conclusions "*on the result of so inadequate a risk assessment*".

Perhaps the most significant aspect of this judgment now, is the fact that the Court of Appeal are effectively applying a common law test and applying the standards in negligence of the time, i.e. standards derived from modern health and safety regulations. Again it is worth the reminder that those regulations still apply and have not been revoked by the Act. Therefore it remains essential to plead breaches of the regulations.

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[2] See paragraph 35.
[3] *Fytche v Wincanton Logistics* [2005] PIQR 975
[4] *Allison v London Underground Ltd* [2008] ICR 719

Contributory Negligence

Where there is an applicable statutory duty the courts take a different approach to contributory negligence. Again it must be restated that it is civil liability that no longer applies and the employer etc remains under a duty to comply with the statutory duty. As that duty remains then it must logically be relevant insofar as any allegation of contributory negligence is concerned. Whilst contributory negligence is a matter which deserves considerably more attention and from those more learned than myself, I will flag it up.

Firstly one should recall what Lord Tucker said in **Staveley Iron & Chemical Co. Ltd. v Jones** [1956] A.C. 627 when considering the impact of the obligations of statute in the context of contributory negligence:

> "[I]n Factory Act cases the purpose of imposing the absolute obligation is to protect the workmen against those very acts of inattention which are sometimes relied upon as constituting contributory negligence so that too strict a standard would defeat the object of the statute."

More recently Hale LJ stated in **Alison Dugmore v Swansea NHS Trust, Morriston NHS Trust** [2002] EWCA Civ 168 “that the purpose of the regulations is protective and preventive: they do not rely simply on criminal sanctions or civil liability after the event to induce good practice. They involve positive obligations to seek out the risks and take precautions against them. It is by no means incompatible with their purpose that an employer who fails to discover a risk or rates it so low that he takes no precautions against it should nevertheless be liable to the employee who suffers as a result.”

In **Robb v Salamis** Lord Rodger stated “The primary purpose of the relevant regulations is not to give a ground of action to employees who are injured in some particular way but to ensure that employers take the necessary steps to prevent foreseeable harm coming to their employees in the first place.”

In **Reeves v Commissioner of Metropolitan Police** [2000] 1 AC 360 Lord Hoffmann advised that the question to be determined is the relative responsibility of the two parties, not degrees of carelessness. That question has to take into account the policy behind the rule by which the liability is imposed. Regulations are

designed, at least in part, to protect the employee from the consequences of his own negligence.

Referring to what Lord Tucker said in **Staveley Iron & Chemical Co. Ltd. v. Jones** *(*quoted above) Lord Hoffman went on to say:

> "This citation performs the valuable function of reminding us that what section 1 [of the Law Reform (Contributory Negligence) Act 1945] requires the court to apportion is not merely degrees of carelessness but "responsibility" and that an assessment of responsibility must take into account the policy of the rule, such as the Factories Acts, by which liability is imposed. A person may be responsible although he has not been careless at all, as in the case of breach of an absolute statutory duty. And he may have been careless without being responsible, as in the case of "acts of inattention" by workmen."

Therefore the argument will be that whilst direct reliance by the claimant on the breach of statutory duty is no longer possible, the employer's duty under the regulation must be relevant as a starting point before one can go onto consider whether and to what extent the worker has been contributory negligent.

Reasonable Practicability

Does how this operates change with the Enterprise Act?

As has been mentioned above health and safety regulations are peppered with the qualification of reasonable practicability. Baker v Quantum both before the Court of Appeal and confirmed by the Supreme Court, clearly confirms the reversal of the burden of proof, with in effect the Defendant needing to show that it took all steps reasonably practicable.

Recent examples of how this might work in practice can be seen in 2 recent Court of Appeal decisions concerning the Manual Handling Operations Regulations 1992.

In **Donna Egan v Central Manchester NHS Trust** [2009] ICR 585 the court held that the burden of proof was on the employer to prove that it had taken appropriate steps to reduce the risk of injury to the lowest level reasonably practicable. Smith LJ (with whom Sedley and Keene LJJ agreed) said *inter alia* :-
"I accept, of course, that, in practice, if a claimant wants to allege that there were steps which could and should have been taken and the employer says there were none, there will be an evidential burden on the claimant to advance those suggestions, even though the legal burden will remain on the employer."

However more recently again in **Ghaith v Indesit Co UL Ltd** [2012] EWCA Civ 642 **Longmore LJ stated:-**

"Here there is no doubt that the onus is firmly on the employer to show that he took all reasonable practicable steps to reduce the risk. It is a burden that is inevitably difficult to discharge. Of course it is, as Smith LJ says, open to an employee to suggest ways in which the risk could have been reduced (and Mr Ghaith has done so) but there is no obligation on the employee to do so."

The issue which arises is whether, when arguing such a breach of duty as under Regulation 4 (1) (b) (ii) of the Manual Handling Operations Regulations 1992, which requires that where employers are unable to avoid the employee undertaking a manual handling operation involving a risk of injury, that they "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", there is a reversal of the burden of proof. In other words who will be required to prove that the employer took all reasonably practicable steps.

If it is a matter for the employee who does not have the benefit of the employer's resources, then in many cases expert evidence will be required. This has the capacity to drive a cart and horses through the recent reforms and make the case arguably unsuitable for the Fast Track.

To make the assumption that the burden may be shifted now to the claimant may be erroneous. Indeed it may vary between different duties.

One might take for instance Regulation 12(3) of the Workplace (Health Safety and Welfare) Regulations 1992

"(3) So far as is reasonably practicable, every floor in a workplace and the surface of every traffic route in a workplace shall be kept free from obstructions and from any article or substance which may cause a person to slip, trip or fall."

If one then compare this with the shopper slipping in the supermarket, why should the person injured at work be in a different position.

In the Court of Appeal decision in Ward v Tesco Stores Limited [1976] 1WLR 810 Lawton LJ stated:-

> Now, in this case the floor of this supermarket was under the management of the defendants and their servants. The accident was such as in the ordinary course of things does not happen if floors are kept clean and spillages are dealt with as soon as they occur. If an accident does happen because the floors are covered with spillage, then in my judgment some explanation should be forthcoming from the defendants to show that the accident did not arise from any want of care on their part; and in the absence of any explanation the judge may give judgment for the plaintiff. Such burden of proof as there is on defendants in such circumstances is evidential, not probative. The judge thought that prima facie this accident would not have happened had the defendants taken reasonable care. In my judgment he was justified in taking that view because the probabilities were that the spillage had been on the floor long enough for it to have been cleaned up by a member of the staff.
>
> The next question is whether the defendants [illegible]

and Megaw LJ added:-

"It is for the Plaintiff to show that there has occurred an event which is unusual, and, which in the absence of explanation, is more consistent with fault on the part of the defendants than the absence of fault …… When the Plaintiff has established that, the defendants can still escape from liability. They could escape from liability if they could show that the accident must have happened, or even on balance of probability would have been likely to have happened, even if there had been in existence a proper and adequate system, in relation to the circumstances, to provide for the safety of customers. But if the defendants wish to put forward such a case, it is for them to show that on balance of probability, either by evidence or by inference from the evidence that is given or is not given, this accident would have been at least

equally likely to have happened despite a proper system designed to give reasonable protection to customers……..”

What is clear from all of this that from a position of comparative certainty, the Enterprise Act will lead to considerable uncertainty for some considerable time.

Emanations of the State

The Enterprise Act does curiously allow for a 2 tiered approach. Whilst direct reliance upon health and safety regulations is no longer open to future injured claimants, those working for instance in the public sector may be in a stronger position than those of us working in the private sector. This is because where an employee is an emanation of the State, then direct reliance can be placed upon the Directives upon which the Regulations have been derived.(See **Fratelli Costanzo SpA v Commune di Milano** [1989] E.C.R. 1839) Emanations of the State will typically include for instance local authorities and the NHS. They may however include banks and aspects of those working in rail transport. We may see therefore actions founded on the Directives relating to the Workplace, Manual Handling or Work Equipment. The Directives do not pack quite the same punch as the health and safety regulations and there is no strict liability to be found. They should not however be ignored.

Old Law

Section 1 of the **Employer's Liability (Defective Equipment) Act 1969** provides:-

“Where ……(a) an employee suffers personal injury in the course of his employment in consequence of a defect in equipment provided by his employer for the purposes of the employer’s business; and .
(b) the defect is attributable wholly or partly to the fault of a third party (whether identified or not), .

the injury shall be deemed to be also attributable to negligence on the part of the employer (whether or not he is liable in respect of the injury apart from this subsection), but without prejudice to the law relating to contributory negligence and to any remedy by way of contribution or in contract or otherwise which is available to the employer in respect of the injury."

The Act has been often overlooked following the implementation of the Provision and Use of Work Equipment Regulations but remains in force and will still be applicable after the passing of the Enterprise Act. It will only apply as to employees but nevertheless remains a powerful tool in the armoury, not least because of the wide definition of equipment which has been taken to include e.g. soap, ships and paving flags.

Other tools?

The next case of **Ellis v Bristol City Council** [2007] EWCA Civ 685 may be useful to illustrate the standard of care required of the reasonable employer by reference to official literature in support of Health and Safety Regulations.

Susan Ellis was employed as a care assistant in a home for the elderly. She was injured when she slipped in a pool of urine on the floor. The issue in the case related to whether a floor was suitable as the result of being slippery when wet, a regular but temporary conditions as opposed to being a permanent one.

At first instance the Judge had declined to take into account the Approved Code of Practice issued by the Health and Safety Commission pursuant to the Health and Safety at Work etc. Act 1974 as an aid to understanding the construction of Regulation 12.

The Court of Appeal confirmed that it is well established that official publications emanating from a relevant government department can be referred to in civil proceedings as an aid to construction. Importantly they concluded that it was of no significance that the code had neither been pleaded nor put to witnesses. They held that a code of practice designed to give practical guidance to employers on how to

comply with their duties under statutory regulations can be taken as providing assistance as to the meaning of those regulations.

“32 I will deal first with the judge's approach to the Code of Practice . As has been seen, she declined to take it into account. Mr Reddiford submitted that she should have considered it as an aid to construction of the regulation. It was not conclusive but was persuasive as to the intention of the legislature in passing this regulation. Mr Walker submitted that the judge had been right to ignore the Code. He had not objected to reliance on it on the grounds mentioned by the judge; his argument was that the Code threw no light on the meaning of the regulation. He accepted that, pursuant to Section 17 of the Health and Safety at Work etc Act 1974 the Code of Practice was of real significance in the context of criminal proceedings. Evidence of a breach of the Code created a presumption that there had been a breach of the relevant regulation. However, as section 16 of the 1974 Act showed, the purpose of the Code was to give ‘ practical guidance with respect to the requirements’ of the health and safety regulations. The Code, he submitted, was of no assistance in construing the meaning of Regulation 12

33 In my view, the judge was wrong to refuse to have any regard to the Code, as an aid to construction. It was, as Mr Walker accepted, of no significance that the Code had not been pleaded or put to the respondent's witnesses. It is well established that official publications emanating from the relevant government department can be referred to in civil proceedings as an aid to construction: see the cases cited in Bennion on Statutory Interpretation 4th Edn at page 599. It seems to me that a Code of Practice which is designed to give practical guidance to employers as to how to comply with their duties under statutory regulations can be taken as providing some assistance as to the meaning it was intended those regulations should have. However, it is always necessary to treat such guidance with caution. It may be wrong. It does not carry the authority of a decision of the courts. Here, in construing the meaning of the regulation, the judge should have considered the meaning and purpose of the regulation, any relevant judicial authority and also the Code of Practice.”

Summary

It may therefore be noting therefore the following

- Civil Liability no longer applies to breaches of health and safety regulations.
- However those Regulations have not been revoked
- The Regulations set the standard to be applied when considering negligence
- Don't give up yet on reversal of the burden of proof?
- Consider also HSE ACOPs and Guidance
- Is the Defendant an emanation of the state?
- Don't overlook the Employers' Liability Defective Equipment Act 1969

Good luck as one thing is entirely clear-that nothing is clear at all!

Cenric Clement-Evans

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PS My thanks to my good friend and colleague Nigel Tomkins with whom I have lectured over many years, and who has allowed me to use some of the case summaries used in this paper.