ENTERPRISE AND REGULATORY REFORM BILL

(Clause 62: civil liability for breach of health and safety duties)

A parliamentary briefing from the Association of Personal Injury Lawyers (APIL) for members of the House of Lords

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Introduction to APIL

The Association of Personal Injury Lawyers (APIL) is a not-for-profit membership organisation, established more than 20 years ago to fight for the rights of people injured needlessly, through no fault of their own. APIL has more than 4,500 members, who are mostly solicitors, with some barristers, academics and students. Many of the association's members specialise in workplace injuries.

Executive Summary

The Government introduced a new clause (62) into the Enterprise and Regulatory Reform Bill when the Bill reached report stage in the House of Commons. The new clause will amend the Health and Safety at Work Act 1974 and radically change the way injured workers claim compensation from their employers.

- The clause will put the health and safety clock back to Victorian times;
- If an employer breaches health and safety regulations and injures an employee, that employee will no longer have a consequent right to compensation: he will have to prove negligence has occurred;
- The burden of proof will transfer to injured workers, who will find it harder to claim compensation as a result – more people will lose valid claims, leaving the state to look after them rather than the guilty party;
- Litigation will be more protracted and expensive;
- The proposals go much further than recommended in an independent health and safety review commissioned by the Government;
- At least 70,000 cases are likely to be affected in England, Wales and Scotland;
- The proposal has occurred without a review, when a review was recommended in the independent health and safety review;
- Safety standards will fall as bosses will find it easier to escape their civil law liabilities, while at the same time criminal prosecutions by the Health and Safety Executive are falling.

BRIEFING

Impact of clause 62 - summary

If the Health and Safety at Work etc Act 1974 is amended in accordance with this clause, the law relating to workplace health and safety will, quite literally, be returned to where it was more than a century ago. Since a landmark case in 1898 the law on claiming compensation for workplace injury, where the employer has breached his statutory duty, has been very clear. If this change is implemented the law will return to being complex and uncertain; it will be more difficult and more risky for people who have been injured just because they went to work, to claim proper redress; more meritorious cases will be lost, which means the burden of caring for these injured workers will be borne by themselves, their families or the state rather than the wrongdoer; the litigation process will be more protracted and expensive, which is exactly what the Government is trying to avoid; the costs of bringing claims will inevitably increase, which means there is every chance that insurers will increase premiums – something else the Government is trying to avoid.

Detail

At the moment, section 47(2) of the Health and Safety at Work Act says:
“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.”

In practice, what this means is that if a worker is injured and he can prove that the employer has breached his statutory duty, he is entitled to claim compensation. This is the basis on which workplace injury claims are usually brought. The law on this is clear, it is well understood by all parties, and legal appeals in this field have been almost unheard of in recent years. It has also been the basis upon which health and safety legislation has been drafted and passed by Parliament, with the dual purpose of setting out the criminal law and giving people injured as a result of breach of that law a right to compensation.

Without this legal provision, the injured person would be obliged to rely only on the law of negligence to claim compensation. The law of negligence is much more complex, as the burden of proof lies with the injured worker, when it is the employer who holds all the knowledge about workplace systems, tools, procedures etc. This means much more evidence has to be gathered, more witnesses interviewed, and more documents prepared if the case is to succeed.

This is time consuming, costly and can be a very difficult situation in which to succeed because the guilty employer holds all the cards. The situation obviously becomes even more difficult if the claimant has been killed. These are the very reasons the law was changed in the first place, in Victorian times.

A typical example would be the case of an employee who is provided with special breathing equipment to enable him to work in a fume-filled environment. The equipment is faulty and the employee is fatally poisoned as a result. At the moment, the employee's family would only have to prove there have been breaches of the of statutory regulations in order to claim compensation. If this proposal goes ahead, however, the family would have to go much further and prove that the employer knew the equipment was faulty. Proving what the employer actually knows is incredibly difficult. It is certainly far more difficult than proving the fact that regulations put in place to protect that worker have been breached.

If this clause is enacted, all workplace accident claims will be required to rely only on the law of negligence. According to the Government's own figures for 2011-2012, this would affect at least 70,000 cases in England, Wales and Scotland.[1]

Background: Professor Lofstedt's review of health and safety law

In November 2011, Professor Ragnar Lofstedt produced a review of health and safety law, commissioned by the Government. There is a great deal in his review which is to be commended, and it is noteworthy that, in the foreword to his report, Professor Lofstedt writes 'in general, there is no case for radically altering current health and safety legislation.'[2]

What Professor Lofstedt does recommend, however, is that 'regulatory provisions that 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.'[3]

[1] Based on figures from the Compensation Recovery Unit
[2] Reclaiming health and safety for all: an independent review of health and safety legislation
[3] Ibid, page 92

It is clear that Professor Lofstedt's concerns in this context relate only to strict liability and, although we believe his concerns are not justified, he does at least suggest a review period in which to examine the issue.

There has been, as far as we are aware, no such review. Instead, clause 62 has been introduced into draft legislation at extremely short notice, and with indecent haste. It is important to be clear that the impact of the clause goes far beyond addressing concerns about strict liability and will dramatically affect all workplace claims in the ways outlined above. It also sends a very clear signal to employers that the health and safety of their workers is not as important as it used to be.

In addition, at a time when Health and Safety Executive inspections are subject to swingeing cuts, this move is a charter for rogue bosses simply to flout the regulations in the double comfort of knowing that they are both unlikely to be prosecuted and that it will now be easier for them to avoid meeting their responsibilities to injured workers under the civil law.

Background: Strict liability

Strict liability is a complex issue which merits some discussion in this context. Strict liability is imposed in a limited set of situations, where the employer has control of a dangerous situation. Perhaps the best example of strict liability is where an employer is held liable for a faulty machine which injures a worker, even though the employer had no reason to know it was faulty. Some may believe this to be unfair. Yet if, for example, a machine saw which no-one is aware is faulty breaks and cuts off a worker's hand who is best placed to provide redress? The worker? The state? Or the employer, who is already required by law to have insurance to cover workplace injury?

Myth and misconception

The introduction of clause 62 has been presented as a way of reducing the 'burden' of health and safety; as the enactment of Professor Lofstedt's recommendations; as a reduction of the 'burden' on business, which will help Britain to compete. In his comments to the House of Commons at report stage, business minister Matthew Hancock MP said it 'strengthens and underpins our health and safety system, thereby ensuring that people think it is fit for purpose.'

It is clear, however, that this proposal goes much further than Professor Lofstedt's recommendations, and that there has been no review as recommended in his report. It is clear that the proposal will simply transfer the burden from the well-resourced employer to the individual employee which is unjust and unfair. It undermines, rather than underpins, the health and safety system. In addition, surely education rather than legislation is a more effective way of influencing how people think.

It is absurd in the extreme to consider that putting such health and safety burdens back onto the shoulders of vulnerable workers will help Britain compete in the world market place. Responsible competition should mean encouraging the raising of health and safety standards in competing economies, such as India and China, rather than lowering Britain's own standards to meet theirs.

Finally, some commentators have said that employers will still face the consequences of criminal breaches of statutory duty in the courts. This completely misses the point that, according to the Health and Safety Executive, in 2011/2012 there were 156,000 accidents at work which led to more than seven days' absence yet in the last year, the HSE, which is the main prosecuting authority, prosecuted just 584 cases. Cuts to HSE inspections and changes to the way workplace accidents are reported, will inevitably continue to exert downward pressure on prosecutions. At the moment, employers are effectively policed by the compensation system. If this proposal is enacted, it will be a charter for employers to abnegate their responsibilities, leaving the vulnerable individual, and the state, to pick up the tab.