The Enterprise & Regulatory Reform Act: redressing the balance in workplace compensation claims?

by

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Learning outcomes

By the end of the session participants will be able to:

- understand how the law had developed in favour of employees prior to the passing of the Enterprise and Regulatory Reform Act 2013.
- critically analyse the key provisions of the Enterprise and Regulatory Reform Act 2013, so far as they relate to employers' liability claims.
- assess how best an insurer can adapt its practices to ensure that employers' liability cases are dealt with efficiently and without necessarily increasing overall costs.

The Enterprise and Regulatory Reform Act 2013

- The Act came into force on 1 October 2013.
- The Act applies to breaches on or after 1 October 2013.
- Section 69 amends section 47 of the Health and Safety at Work Act 1974, so it now reads as follows:

  "Breach of a duty imposed by a statutory instrument … containing health and safety regulations shall not be actionable …"

- Criminal sanctions may still apply.

The background

- ***Stark v The Post Office*** – Provision and Use of Work Equipment Regulations (PUWER):

"5(1) Every employer shall ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair."

- ***England v IBC Vehicles Ltd*** – Workplace (Health, Safety & Welfare) Regulations:

"The workplace and the equipment, devices and systems to which this regulation applies shall be maintained (including cleaned as appropriate) in an efficient state, in efficient working order and in good repair."

- *Shall -v- so far as is reasonably practicable – see Regulation 12(3) – conflicts within the same regulation.*

- The Lofstedt Report of 2011 stated that strict liability was resulting in employers being overly cautious in implementing health and safety and this was hindering growth.
- The report recommended removing strict liability and replacing it with a defence of reasonable practicability.
- Was this a sledgehammer to crack a nut?

The practical implications

- Potentially, there may be increased litigation costs because of the need for more detailed investigations: at least before it was more clear-cut!
- A third party may not know about systems of work/maintenance – the only way to find out may be litigation or pre-action disclosure applications.
- It's likely that the courts will still look to the regulations when assessing if the employer acted reasonably.
- Will a reduction in successful claims result in employer's becoming more relaxed about health and safety?

- Arguably claims will now be more complex and costly.
- The regulations still place a "burden" on employers because of the potential for criminal sanctions.
- Employers Liability (Defective Equipment) Act 1969 – liability where defective equipment is provided by the employer and where the defect is attributable wholly or partly to a third party.
- So does strict liability survive albeit not in PUWER?

What insurers can do

- Expert evidence – there will be greater reliance on expert evidence with regards to accepted practice and whether an inspection regime would have identified the fault/defect. However, will the courts allow the evidence?
- Insurers will need to be more focused in their disclosure requests from the insured and in turn ensure full and relevant disclosure to the third party.
- A specific question will need to be addressed by the third party – what could have been done to prevent the accident?

- There will be a need for deeper scrutiny of what training or instruction was provided after the accident.
- It is likely that a breach of the regulations will be used as evidence of negligence.
- More focus will be placed on the Approved Code of Practice (ACOP).
- Arguments are likely to arise under the 1969 Act. The problem is, there is little case law because of PUWER.

In summary

- The 2013 Act has removed strict liability for breach of health and safety regulations.
- In the short term, the aim of the Act will not really be achieved – there are still criminal sanctions and litigation is likely to be more costly and complex. It hasn't really lifted the "burden".
- Insurers will need to be more focused in their investigations and may well need to place more reliance on expert evidence.
- It will be a few years and quite a lot of litigation before we see exactly what impact the Act will have. Maybe in the long term the balance will be redressed.

Any questions?

Thank you and please stay in touch

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