Return of the dark satanic mills: the end of civil liability in health and safety

Analysis from Thompsons Solicitors

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Introduction

The Enterprise and Regulatory Reform Bill (ERRB) has been amended by the government at the very last minute – at Report Stage – in the House of Commons to remove a basic right of injured workers.

A new clause (section 61 of ERRB) will mean that a worker can be injured due to an employers' breach of a statutory duty within health and safety at work regulations but the worker will be prevented from enforcing that breach.

At present a civil claim for personal injury can be brought for negligence and/or breach of statutory duty. A breach of statutory duty would occur, for instance, if an employer failed to comply with regulations under the Health and Safety at Work Act (HSWA), such as failure to guard a machine or keep a gangway clear of obstructions.

If this clause remains, employers will no longer be liable in the civil courts for the criminal offence of a breach of the HSWA regulations. In every case, rather than be able to rely on the breach of the regulations, the worker will have to prove the employer was negligent.

The Labour Party challenged the amendment and the matter was put to a vote on 17 October but the arithmetic of the House of Commons means that the challenge failed. The Bill as amended has now moved to the House of Lords.

There has been no public consultation on removing or amending civil liability in health and safety and there has been no impact assessment.

The government is using the relatively recent review of health and safety by Professor Ragnar Löfstedt to justify the failure to consult. He recommended that the strict liability provisions in the HSWA regulations should be abolished (in civil and criminal cases), ie those provisions which do not have a defence of reasonable practicability, or civil liability should be removed; not both (as the government appears to be trying to do).

The amendment

Section 47 of the HSWA 1974 contains a presumption that regulations made under the Act (i.e. all health and safety regulations) carry civil liability for breach, unless expressly excluded. That is why the Management Regulations, until they imposed civil liability, had to contain an express exclusion of civil liability.

The government's amendment proposes to *reverse* that presumption meaning that no H&S regulation (whether made under the HSWA or otherwise) would impose civil liability, unless express provision was made for them to do so.

As the regulations do not have express provision, and there is no proposal to amend them, there will be no civil enforcement.

The amendment enables the government to create general defences that would apply across all H&S regulations without having to insert that defence into every set. This is likely to provide the power to impose a

general defence of 'reasonable practicability' (that the cost of controlling workplace health and safety risks are "grossly disproportionate" to the reduction in the risk).

BIS minister Matthew Hancock said in the debate:

"We are ensuring…that there is a test of reasonableness for the actions of employers, so that those who have taken all reasonable precautions cannot be prosecuted for a technical breach.

"The definition of reasonableness will come from the common-law interpretation, and the concept is already well regarded and specified in law."

However, the new section 47 does not have this effect, though it allows the government to make such changes through further regulations.

Victorian Claims Direct (©Horrible Histories)

The amendment drives a coach and horses through over a hundred years of UK health and safety law.

Strict liability dates back to 1898 and the case of **Groves v Lord Wimborne** in which the Court of Appeal ruled "the defence of common employment is not applicable in a case where injury has been caused to a servant by the breach of an absolute duty imposed by statute upon his master for his protection."

Ironically, the Factories Act of 1937 and subsequent Acts including the 1974 Act that this amendment is targeted at were enacted by Tory governments.

There has been no suggestion of an amendment to the six pack regulations, which came into force in 1992 (again under the Conservatives) to ensure the UK complied with various European directives, to expressly provide for civil liability. Without civil liability, injured people will have to *prove* in each case that there has been a breach of the regulations.

What is this about?

We face the only enforcement being through the underfunded Health and Safety Executive. HSE enforcement rates are already so low as to be virtually non-existent.

The government is yet again dancing to the tune of the insurance industry that is a huge donor to the Conservative Party.

- It has forced through the Jackson reforms;
- It has removed most legal aid;
- It is seeking to reduce the amount an injury victim can recover in costs to win a case even if the court rules those costs were necessary to win.
- They want to stop injured people with cases under £5,000 in value getting the cost of the lawyer representing them; and
- They are seeking to put all cases under £25,000 in value through an automated system that isn't even working for road accident cases.

This latest attack is a yet further restriction of access to justice for the most vulnerable in our society injured through no fault of their own.