

# The Enterprise and Regulatory Reform Act: Section 61 civil liability for breach of health and safety duties

Thompsons' briefing

November 2012

## Background

The amendments proposed in S61 will stop people who are injured at work from relying on health and safety regulations that exist to protect them. It will overturn law in place since 1898 and will result in:

1. The end of employers being automatically liable to pay compensation in limited circumstances where there is really no excuse - so called strict liability cases where, say, an employer failed to adequately guard a machine and someone suffered a traumatic amputation.

The government has produced no evidence to justify the end of strict liability. It has instead misquoted a review of health and safety law by Professor Ragnar Lofstëdt<sup>1</sup> who referred to ending civil liability but *only* in relation to strict liability provisions and *only* if ending strict liability for those provisions was not possible.

What Professor Lofstëdt actually said was:

*"I 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".*

The government, has gone much further than Professor Lofstëdt.

2. The end of employees being able to rely on or refer to a breach of health and safety regulations within a claim for compensation: "the law says you should have done this and you didn't".

In future the worker injured through no fault of their own will have to prove foreseeability – i.e. that the employer knew or ought to have known that a machine was unsafe.

## Loading the Dice

Requiring injured workers to prove that, for example, the machine that injured them was foreseeably hazardous is loading the dice against them when most machinery today is complex and there can be any number of reasons why it goes wrong. It could be down to the employer, the manufacturer, the service company or anyone who has modified it.

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<sup>1</sup> Reclaiming Health and Safety for All : an independent review of health and safety legislation. Professor Ragnar E Lofstëdt November 2011

The proposed amendment also comes at a time that court rules are changing so that if the cost of proving a case is considered out of proportion to the value of the injury claim the injured worker will not get back the costs even if they were necessary to win the case.

### **Impact on Employee/Employer Relations**

This will do nothing for employer/employee relations. Either people injured through no fault of their own will be put off making a claim because they do not have the requisite knowledge about why they were injured and end up feeling 'hard done by' as a result, or the costs and duration of the claim will increase which will not make the employee feel good about their employer either.

### **Impact on Business**

Good health and safety has been repeatedly recognised as beneficial for business.<sup>2</sup> Regulations encourage good employer behaviour. The changes proposed will not only set health and safety law back but will encourage poor employers to pay lip service to health and safety generally

### **Ending enforcement in over 90% of Health and Safety Breaches**

There are only about 1,000 criminal prosecutions a year by the HSE compared to 78,000 civil claims for compensation following accidents at work. By removing civil liability the government is removing the enforcement of health and safety regulations in 98.7% of cases.

### **A 'Coach and Horses' through Health and Safety Law**

The amendments fly in the face of the 1974 Health and Safety at Work Act, the EU's Framework Directive<sup>3</sup> and consequent Health and Safety regulations.

The object of the Health and Safety at Work Act was "to make further provision for securing the health, safety and welfare of persons at work...". The object of the Framework Directive was to provide "minimum requirements for encouraging improvements...to guarantee a better level of protection of the Health and Safety of workers".

In the words of Baroness Hale in *Fytche V Wincanton Logistics*<sup>4</sup>, "*The overall aim [of the Health and Safety Regulations] was to improve the protection of employee's health and safety*".

### **Yet another blow to injured people**

The change comes on top of the government having already:

- Introduced (in the Legal Aid Sentencing Prevention of Offences Act) the Jackson reforms which will mean that from April 2013 injured people will no longer get 100% of their compensation; and
- Removed Legal Aid in almost all civil claims.

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<sup>2</sup> <http://www.hse.gov.uk/business/business-benefits.htm>

<sup>3</sup> 89/391/EEC

<sup>4</sup> <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040701/fytche-1.htm>