TURNSTONE LAW TEAM BARRISTER, KEVIN McLOUGHLIN, EXPLAINS THE IMPACT OF CHANGES THAT ALLOW EMPLOYERS TO DEFEND CLAIMS WHEN THEY WEREN'T AT FAULT

Talk of the 'Compensation Culture' arouses strong emotions. You must make your own mind up as to whether it exists at all, and if so, whether it is a monster than must be fought or merely a propaganda soundbite, conjured up by callous capitalists.

This article does not seek to venture into this emotive territory. Instead, its purpose is to alert you to the changes brought about by recent legislation which might significantly affect compensation claims brought by injured employees. But first, an attempt to put the issue in context.

The relationship between the criminal and civil law

When society sets rules, anyone who disobeys them is liable to be punished in the criminal courts. The objective of the criminal law is thus to enforce adherence to the rules. In contrast, the civil law is there to shape and protect the rights of citizens, as between themselves. When they conflict, to balance the competing interests, awarding compensation (known as damages) to anyone harmed as a result.

So, in the health and safety arena, the focus of the criminal law is to 'encourage' conformity with the standards set out in statutes, enacted by Parliament (and regulations made under them), by punishing those whose conduct falls below the required standard. Such offenders are said to be 'in breach of statutory duty.'

In the civil domain, the courts adjudicate on compensation claims in which individuals have suffered injury, by declaring if the defendant has been negligent and if so, determining the amount of compensation to be paid for the harm caused.

The criminal law and civil law are thus separate legal systems, with their own distinct objectives. They apply differing standards of proof and have their own rule books to govern their procedures.

Often, however, they are looking at the same event. After an accident the police or HSE may consider prosecution in the Magistrates or Crown Court, whilst the injured individual pursues a claim for compensation in the County Court. The issue under scrutiny here is whether the injured claimant should be able to use the rules appertaining to safety standards enforced by the criminal courts as a foundation for his or her civil claim. In legal language, whether a breach of statutory duty creates a 'cause of action' for the individual seeking compensation.

Health & Safety at Work Act 1974

The 1974 Act stipulated that breaches of the general duties (contained in sections 2 – 8) should not create a cause of action (Section 47(1)). To complicate matters, however, Section 47 (2) declared that

"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." As you can imagine, this is just the sort of wavy line that keeps lawyers in work. Suffice it to say, for the most part, health & safety regulations have conferred a cause of action on injured claimants for 40 or more years.

Causes of action

For a person injured in an incident at work, there are two routes to claim compensation. An injured claimant has been entitled to rely upon the defendant's breach of a statutory duty, if the regulations applied, but have not been complied with (and is not in the class excluded by section 47(2) of the 1974 Act). The standards imposed by statutory duties vary. Some are said to involve strict liability, but others require compliance only, 'so far as reasonably practicable.'

The alternative route for the claimant is to allege negligence. This is a tortious remedy that has evolved in the common law courts over centuries. The law recognises that certain relationships give rise to a duty of care: employer/employee and occupier/visitor are obvious examples. If such a duty is breached causing damage, then the person harmed can bring an action in negligence. The key point to note is that the Claimant must prove his or her case by satisfying the court, on the balance of probability, that: a duty of care existed; secondly, it was breached; and lastly, that the breach caused the claimant to suffer damage as a result.

In the years since the 1974 Act came into being, claimants have relied upon breaches of statutory duty as the foremost basis for mounting personal injury compensation claims. As a backup, negligence is usually alleged in addition. Once a statutory duty has been proven to apply and non-conformance established, the defendant struggles to avoid a finding of primary liability. The defendant's case then shrinks to arguments concerning contributory negligence and the extent of the harm caused (generally referred to as 'causation').

Enterprise and Regulatory Reform Act 2013

Section 69 of this wide ranging Act came into force on 1 October 2013. This provision removes the right of injured claimants to rely on breaches of statutory duty as a foundation for compensation claims, by amending Section 47 of the Health and Safety at Work Act 1974.

This means that for incidents occurring after 1 October 2013, any injured claimant will recover damages only if he or she can prove negligence.

Why has this change been introduced? It can be argued that the Health and Safety at Work Act 1974 has stood the test of time for nearly 40 years without significant amendment, with the result that the UK's workplaces are safer than those in most other countries.

The policy statement published by the Department for Business Innovation and Skills in June 2013 attributes the motivation for the reform to a recommendation made by Professor Lofstedt.[1] It is there suggested that employers have been "over-complying" with regulations and hence incurring "unnecessary costs." The change was justified in order to tackle the perception of unfairness arising

[1] Reclaiming Health and Safety for All, published in November 2011

when employers, subject to strict liability regulations, were driven by "the fear of being sued"[2] to settle claims, despite having done all that was reasonable to protect their employees. The policy statement seems to infer that the change is in part symbolic, for the vocabulary is of "perceptions" and "confidence" with the aspiration of restoring "a sensible and practical approach to health and safety."

Reaction

As might have been anticipated, the TUC strongly opposed the change, pointing out that even Professor Lofstedt has commented "The approach being taken [ie Section 69] is more far-reaching than I had anticipated in my recommendation." The TUC say that references to 'unfairness' do not consider the potential unfairness visited on an employee if he or she cannot recover compensation, despite being entirely blameless for an incident in which they were injured. They argue "Removing strict liability does nothing to remove unfairness, it merely moves it somewhere else."[3]

The likely implications

The change will make it more difficult for employees hurt at work to obtain compensation. They must now be able to prove fault on the part of their employer.

More trials might be predicted if employers feel confident they have "taken all reasonable steps to protect their employees."[4] But it would be a mistake to view this legislative change in isolation. Recent alterations to the way personal injury litigation is funded include 'one way costs shifting' which means that employers may now have to shoulder their own legal costs in contesting personal injury claims, irrespective of the outcome. This may militate in favour of employers taking a commercial view in response to claims.

Where an employer does decide to fight a claim through to trial, they must be in a position to call evidence to show that they had devised a system of work, for example, in relation to manual handling in their factory and, moreover, that it was adequate. This will probably involve expert evidence with its associated expense.

Suppose you are a judge hearing a personal injury action based upon allegations of negligence. How will you decide whether the employer has done sufficient to discharge his duty of care to the employee? Would you think it relevant to consider what standards prevailing regulations required to be achieved? Regulations are a potentially useful benchmark of foreseeable risks and prudent practice and so it would be a curious case in which they were not referred to.

Above all, employers still have an obligation to obey the law. If regulations demand that certain actions are taken, then a sensible employer must comply (even if not motivated by the moral imperative that it is the right thing to do), just in case HSE did decide to inspect or an incident triggers an investigation. In the age of Corporate Manslaughter and prosecutions against individual managers, it would be folly not to comply. The evidence of "over-complying" with safety regulations is scant to

[2] See BIS Guide to the Enterprise and Regulatory Reform Act 2013, published in June 2013, page 3 headed "Supporting SMEs."
[3] TUC Briefing to Affiliates, November 2012: Strict Liability in Health and Safety'.
[4] This wording is taken from the BIS policy paper on the 2013 Act, published in June 2013.

say the least, but if there is such a phenomenon in existence, is it motivated more by an employer's fear of imprisonment/fines rather than the unfairness generated by easy compensation claims?

The action list

The personal injury playing field has been tilted slightly in favour of the employer after 1 October 2013, in respect of any breaches of statutory duty occurring after that date.[5]

Any health and safety professional now investigating an incident should strive to enhance the prospects of successfully defending a civil claim by assembling evidence tending to show that the employer had taken all reasonable steps to establish and maintain safe systems of work and equipment. The injured claimant must prove fault on the employer's part and hence it will be to the employer's advantage to demonstrate that adequate systems of training, supervision and refresher training were in place. An effective investigation could make the difference between a sustainable defence and insurers having no option but to settle. As ever, to be admissible, statements must end with a Statement of Truth: "I believe that the facts stated in this statement are true"[6] and be signed by the witness.

It is also very important to obtain legal privilege over incident investigation reports where proceedings are contemplated and this is best done by means of a lawyer commissioning the report. An incident response protocol that sets out arrangements for a specialist health & safety lawyer to commission such reports in appropriate cases is a vital preventive step.

Conclusion

Overall, it would appear that we live in an age of legislative fashion. The politician's urge to be seen to be tackling a perceived problem, does not automatically mean (a) there is a problem or (b) the chosen solution will achieve the desired result. In this situation, much will depend upon the reaction of the judges hearing personal injury claims. Time will tell. The only certainty is that lawyers will make work out of any rule change.

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[5] Section 69 (10) stipulates that the amendment to section 47 of the 1974 Act does not apply to a breach of statutory duty occurring before 1 October 2013.
[6] Civil Procedure Rules Part 22.1 (1)(c)