AN IER BRIEFING

# The consequences of clause 14 of the Enterprise and Regulatory Reform Bill

## A Department for Business, Innovation and Skills Bill that entered the Lords in October 2012


By

**Charlie Woodhouse**



THE INSTITUTE OF EMPLOYMENT RIGHTS

The Institute of Employment Rights
4TH Floor
Jack Jones
House 1
Islington
Liverpool L3 8EG
0151 207 5265
www.ier.org.uk

The Institute of Employment Rights is an independent charity. We exist to inform the debate around trade union rights and labour law by providing information, critical analysis, and policy ideas through our network of academics, researchers and lawyers.

This IER Briefing, kindly drafted by the legal expert named, reflects the authors' own work not the collective views of the Institute. The responsibility of the Institute is limited to approving its publications, briefings and responses as worthy of consideration.

Charlie Woodhouse is a Barrister at Old Square Chambers, where he specialises in personal injury and clinical negligence. He has been ranked by Chambers & Partners since 2010.

Carolyn Jones
Director, Institute of Employment Rights
16 November 2012
cad@ier.org.uk
07941 076245

At a very late stage in committee the government introduced a new Clause 14 to ERRB which has the effect of reversing s.47(2) of The Health and Safety at Work Act 1974 so that *Breach of a duty imposed by a statutory instrument containing health and safety regulations shall not be actionable except to the extent that regulations under this section so provide.*

Since all relevant health and safety regulations are made under the act and, for obvious reasons, none specify civil liability the effect of this is that breach of regulations will cease to give rise to civil liability in all cases. An injured employee will only be able to succeed if they can establish negligence on the part of the employer.

The genesis of clause 14 is said to be a report prepared by Professor Lofstedt in November 2011 and a desire to do away with the "perceived unfairness" of strict liability.

Whether or not regulations that impose a strict liability are fair is a moot point. As far as I am aware there are only 4 regulations that actually do so (regs 5 of PUWER & W(HSW)R, Reg 4 PPE & Reg 9 COSHH) all of which relate to the suitability and maintenance of equipment that is provided by an employer to their employee and over which the employee has no choice or control. My personal view is that it is not only fair but essential that an employer does warrant the safety of the equipment that they provide to their employees. It is far too easy to see a perfectly *reasonable* employer buying cheap equipment, or equipment from abroad (where the manufacturer cannot be easily sued) or taking a cheaper, but nevertheless *reasonable*, approach to maintenance and replacement.

I am prepared to accept that the abolition of strict liability *might* be legitimate political goal but there has been absolutely no parliamentary debate about this issue because of the very late stage at which the amendment was introduced in the commons.

However, by far the greater concern is that clause 14 goes much further than merely addressing strict liability. By abolishing civil liability for breach of health and safety regulations altogether clause 14 returns the injured employee to a position that he has not faced since the decision of *Groves v Lord Wimborne* in 1897 of having to prove negligence against his employer. The ramification of this in employer's liability claims are serious.

The most important issue is the evidential burden created by claims for breach of statutory duty. The employee is at a serious evidential disadvantage in claims against their employers. The workplace, system of work and work equipment are outside their control; they cannot know whether they are the most appropriate or suitable or whether they have been adequately maintained or replaced sufficiently regularly. For an employee to prove failings in any of these regards is extremely difficult, necessitating either co-operation (amounting to an admission) by their employer or the obtaining of expert engineering evidence. This will lead to a increase in the cost and difficulty of these claims. In cases where the employer repairs or disposes of equipment or paperwork it will be impossible to gather the necessary evidence – this will give rise to the obviously unjust situation that an unscrupulous employer could dispose of evidence to avoid liability.

Common law duties are necessarily framed in broad terms: to provide a safe place and system of work, to provide safe plant and equipment. Conversely statutory duties are phrased with far greater specificity and detail. At present the employee only needs to show a prima facie breach of one of

these specific duties and the burden of proof then shifts to the employer to prove compliance. This shifting of the burden is fair, placing the burden of proof on the party who is charged with compliance in the first place.

Accordingly Clause 14 will unsettle what is currently a very settled area of law. There has been very little court of appeal activity in employers' liability law for the last few years. An entirely new bank of case law will have to be developed over the next decade to establish the scope of an employer's common law duties and to add detail to those duties.

Clause 14 has the surprising effect that it may be easier to secure the criminal conviction of an employer than for the injured worker (or worse, their widow/widower) from obtaining compensation. Whilst the Government claim that HSE provides a suitable enforcement body this is unrealistic. The HSE will only investigate the most serious and fatal accidents but it is by policing the more minor elements of danger that the more serious accident will be avoided entirely.

A more political issue is that clause 14 will pass the burden of the cost of accidents at work from insurers to the tax payer. CRU recovered £75,000,000 in EL claims in 2011/12, more than 50% of the total recovered and there is a danger that much of this will cease to be recoverable.