



EMPLOYERS LIABILITY AFTER THE ENTERPRISE ACT

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Introduction

1. My objective in this talk is to examine some of the ways in which strict – or perhaps more accurately “no-fault” – liability survives section 69 of the Enterprise and Regulatory Reform Act 2013 (“ERRA”).
2. I am sure everyone has heard quite enough about the practical effects of section 69. The likelihood is that we shall probably not feel those effects in terms of decided cases for some years. Even a quick thumbnail chronological outline assuming an accident on 1st October 2013 (allow a month or so to take instructions, 3 months for the protocol response letter, et cetera) shows that it seems unlikely that many cases under ERRA will be litigated this calendar year. That said, there is undoubtedly a degree of educated crystal-ball-gazing we can do even at this stage.
3. One of the ironies of ERRA is that despite its avowed intentions (to reduce situations where people could be found liable despite having exercised all reasonable care) it did not actually abolish strict liability. What it has done, however, is to shift the discussion into different areas of law. I cannot cover all of those areas in full in an article of this length. My intention is to cover two areas (defective equipment and consumer protection) in some detail before simply ‘flagging up’ a number of others. I shall begin however by briefly reminding us of precisely what ERRA accomplished.

Section 69 of ERRA

4. The technical effect of s69 of ERRA was to amend s47 of the Health and Safety at Work etc Act 1974; for those interested in the precise statutory mechanism s47 ‘before’ and ‘after’ ERRA appears as Annex 1 to these Notes.
5. Section 69 sprang from two reports received by Parliament; Lord Young’s *Common Sense, Common Safety* and Professor Ragnar Löfstedt’s rather less punchy *Reclaiming Health and Safety for All: An Independent Review of Health and Safety Legislation*. Both are long documents but the key point to emerge was concern over employers being found liable to pay compensation in circumstances where they had done all they could reasonably have been expected to do to address the risk in question. Practical experience suggests that this is even now a concept the lay client finds hard to understand – lawyers are familiar with the puzzled expression on the face of the Health and Safety Manager as it is explained that all the risk assessments, inspection regimes, safe systems of work and SWPs in the world cannot save him or her from the consequences of an employee using a bent screwdriver.
6. Professor Löfstedt made some fairly mild recommendations proposing the introduction of defences of ‘reasonable practicability’ into areas where strict liability held sway. Parliament’s response was to almost entirely abolish civil liability for breaches of health and safety Regulations!
7. Many commentators have pointed out elsewhere that the irony of ERRA is that it did not actually reduce legislative burdens because the Regulations remain in force and non-compliance is an offence at criminal law. Be that as it may, and leaving aside (for present purposes) the much-discussed potential to deploy Regulations as ‘evidence of negligence’ and/or as to find creative arguments at European law, which I shall touch upon only briefly in this talk, it is plain that a breach of Regulations passed under the Health and Safety at Work, etc, Act 1974 is now not actionable save in very restricted circumstances.
8. In two important areas, however, strict liability remains as a result of primary legislation entirely separate from the 1974 Act. I now turn to those areas.



Employers' Liability for Defective Equipment

9. Under this heading our story starts with the House of Lords' decision in Davie v New Merton Board Mills [1959] AC 604.
10. The facts of the case were a maintenance fitter employed by the defendants was knocking out a metal key by hitting a piece of metal called a 'drift' with a hammer. At the second blow of the hammer a particle of metal flew off the head of the drift and into his eye. The drift had been provided for his use by his employers. Although apparently in good condition it was excessively hard at one end due to a manufacturing defect. It had been made by reputable makers who sold it to a reputable firm of suppliers who in turn sold it to the employers. The employer's system of maintenance and inspection was not at fault. The fitter claimed damages for negligence against his employers on the ground that they had supplied him with a defective tool.
11. It was found at first instance, and not challenged, that no examination short of a test of the drift would have revealed the problem, that no intermediate inspection between manufacture and use was reasonably to be expected, and that it was unreasonable to expect an employer to test a drift for hardness before issuing it.
12. In the course of a long judgment their Lordships found that the employer's common law obligations did not extend so far as to make them liable. The debate (which now reads as a little dated) centred around whether the employer's non-delegable duty of care extended to make them liable for faults by the manufacturers of equipment. In short, it did not. It was held that the employers, being under a duty to take reasonable care to provide a reasonably safe tool, had discharged that duty by buying from a reputable source a tool whose latent defect they had no means of discovering.
13. In occasionally almost intemperate language, Viscount Simonds found that an employer would not be liable in respect of the negligence of "a manufacturer with whom he never contracted, of whom he may never have heard and from whom he may be divided in time and space by decades and continents". The employee's claim, he thought, was "against reason" and "contrary to principle", let alone (as he saw it) "barely supported by authority".
14. Evidently Parliament disagreed with him, because a little under ten years later it passed the Employer's Liability (Defective Equipment) Act 1969. The key provisions in the Act are as follows:
 - (1) *Where after the commencement of this Act*
 - (a) *an employee suffers personal injury in the course of his employment in consequence of a **defect in equipment provided by his employer for the purposes of the employer's business**; and*
 - (b) *the defect is attributable wholly or partly to the **fault of a third party** (whether identified or not),*
the injury shall be deemed to be also attributable to negligence on the part of the employer...
15. Case law on the 1969 Act is sparse, perhaps unsurprisingly given the advent of the Provision and Use of Work Equipment Regulations 1992 ("PUWER") 23 years later. Aside from passing (sometimes confused) references in various cases, mostly Scottish, the key area of controversy has been whether particular items fell within the scope of the Act. Coltman v Bibby Tankers [1988] 1 AC 276 dealt with whether the *MV Derbyshire*, a 97,000 tonne merchant vessel, fell within the Act (it did). In similar vein Knowles v Liverpool City Council [1994] ICR 243 dealt with whether a flagstone being laid by a highway worker fell within the Act (again, it did said the Lords).



16. Coltman in particular makes interesting reading because of these dicta from Lord Oliver which emphasises the sheer breadth of the Act's coverage, in accordance with Parliament's intentions:
 "The key word in the definition is the word "any" and it underlines, in my judgment, what I would in any event have supposed to be the case, having regard to the purpose of the Act, that is to say, that **it should be widely construed so as to embrace every article of whatever kind furnished by the employer for the purposes of his business**. Thus it is not just particular plant and machinery or vehicles (for instance, a combined harvester) or particular types of aircraft (for instance, a crop-spraying aeroplane) which are to be regarded as "equipment" but plant and machinery, vehicles, aircraft and clothing of all types and sizes subject only to the limitation that they are provided for the purposes of the employer's business" (299A, my emphasis)
17. In similar vein, in what I expect to be an oft-cited dictum:
 "The purpose of the Act was **manifestly to saddle the employer with liability for defective plant of every sort with which the employee is compelled to work in the course of his employment** and I can see no ground for excluding particular types of chattel merely on the ground of their size or the element upon which they are designed to operate." (301B, my emphasis)
18. My researches for this article have revealed a widely-held assumption that the Act, to all intents and purposes, means the effective survival of PUWER. My question then is, to what extent is that assumption justified?
19. The starting point is plainly the statutory language. A direct comparison is revealing. Thus:

PUWER	Defective Equipment Act
Reg 2(1) "work equipment" means any machinery, appliance, apparatus, tool or installation for use at work (whether exclusively or not);	Section 1(3) "equipment" includes any plant and machinery, vehicle, aircraft and clothing;
Reg 3(2) (2) The requirements imposed by these Regulations on an employer in respect of work equipment shall apply to such equipment provided for use or used by an employee of his at work.	Section 1(1)(a) "...equipment provided by his employer for the purposes of the employer's business;"
[Various specific duties rr4-35]	Deemed negligence under section 1: If "the defect is attributable wholly or partly to the fault of a third party (whether identified or not)" then the injury shall be deemed to be also attributable to negligence on the part of the employer" <i>(without prejudice to contributory negligence, right of recovery from third party, etc)</i>

20. The Act and the Regulations plainly operate in different ways. That said, given what was said in Coltman and Knowles I doubt any distinction will arise in relation to what sort of equipment is covered. There are two questions which have not yet been litigated, but which I expect may be controversial.

How strictly will the Courts treat the requirement for equipment to have been "provided by the employer"?

21. The PUWER case of Smith v Northamptonshire County Council [2009] ICR 734 neatly illustrates the difficulty. The employee in that case was using a ramp that was provided by an outside agency to access a service-user's home. The ramp broke and she fell. She failed in



her claim under PUWER because their Lordships held that the equipment was outside of her employer's "control" (Lord Neuberger) and/or had not been adopted or incorporated into their undertaking (Lord Mance). Presumably the same result would pertain under the 1969 Act but for the more simple reason that they had not "provided" it.

22. There might be considerable scope for argument over what amounted to "provision" for the purposes of the 1969 Act.

How strictly will the Courts treat the requirement for "fault" on the part of the third party?

23. "Fault" is defined in section 1 (3) of the Act to mean "negligence, breach of statutory duty or other act or omission which gives rise to liability in tort in England and Wales or which is wrongful and gives rise to liability in damages in Scotland".
24. Will it be sufficient proof simply to show that the equipment failed? In principle such an approach seems unsatisfactory because the failure itself could have multiple causes, including simple maintenance issues. If the employer has a good system of maintenance which could not reasonably have detected and remedied the problem, then it seems to me that he should theoretically escape at common law, and for there to be no third party at fault to engage the 1969 Act. The claim should surely then fail, when it would have succeeded under PUWER.
25. What if nobody can establish why the equipment failed? This is an issue that has troubled the courts from well before the Act or PUWER. As long ago as 1884 we find this in the judgment of Lord Moncrieff in Macfarlane v Thompson (1884) 12 R 232:

"provided that it is proved that some defect in the machinery or plant caused the accident, it is not necessary to show the precise nature of that defect, and an onus is thrown upon the master to show that the defect was one for which he was not to blame".

26. His Lordship was at pains to explain that this only applied where equipment was implicated in some way. It did not apply to every case which happened to involve equipment and where the cause was unexplained. Nevertheless, it might well be thought that, to some extent, in cases involving injury caused by equipment, claimants may think they have a vested interest in avoiding discussion of precisely why it happened.
27. My concluding point in this section however is that the 1969 Act was plainly passed for a very specific purpose and its ambit is more limited than might first appear. Certainly as I see it, and on the present state of the law, it would be wrong to simply assume that PUWER survives in full by an alternative statutory mechanism.

The Consumer Protection Act 1987

28. The Act was born of the Product Liability Directive 85/374/EC passed in July 1985. It and its huge quantity of subordinate safety Regulations are unaffected by ERRA. It is quite a technical piece of legislation and my objective here is to provide an overview of its core provisions and some pointers as to likely key areas.
29. Anyone seeking a full and well-reasoned guide to the Act could do worse than to read the judgment of Burton J in A v National Blood Authority [2001] 3 All ER 289.
30. In simple terms the Act imposes strict liability in respect of damage done by defective products. Beyond that straightforward outline however there are a series of particular questions which have to be worked through in any given case if the Act is to apply.

Who is entitled to sue under the CPA?



31. Persons entitled to sue are not specified within the Act but the short answer is anyone who has suffered “damage” as defined in section 5, which includes death or personal injury. (There are specific provisions in relation to damage to property which I shall not cover here).

Who can be liable under the CPA?

32. The relevant provisions are in section 2. Parties to whom strict liability can attach fall into the following categories under subsection (2):
- a. The **producer** of the product (defined in section 1 to include the manufacturer. Products which are not ‘manufactured’ but brought into being by other means e.g. being abstracted are addressed separately);
 - b. Any person who by **putting his name or trademark** or other distinguishing mark on the product has held himself out to be the producer of the product;
 - c. Any person who has **imported** the product into a Member State from outside the Member States.
33. There is then an interesting further provision in s2 (3) attaching liability to **suppliers** of products who are reasonably asked for, but fail to provide within a reasonable period, the identity of the person to whom the subsection (2) criteria apply.

To what does the Act apply?

34. “Product” is defined widely by section 1(2) to mean any goods or electricity. “Goods” is defined in section 45 to include substances, growing crops and things comprised in land by virtue of being attached to it and any ship, aircraft or vehicle. In the Blood Authority case the term was held to be wide enough to cover transfused blood. It seems to be accepted that it does not cover information, services, or advice.

What is a “defect”?

35. This is a key area. The starting point is section 3 which provides as follows:

3. Meaning of “defect”.

*(1) Subject to the following provisions of this section, there is a defect in a product for the purposes of this Part if the **safety of the product is not such as persons generally are entitled to expect**; and for those purposes “safety”, in relation to a product, shall include safety with respect to products comprised in that product and safety in the context of risks of damage to property, as well as in the context of risks of death or personal injury.*

(2) In determining for the purposes of subsection (1) above what persons generally are entitled to expect in relation to a product all the circumstances shall be taken into account, including—

(a) the manner in which, and purposes for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product;

(b) what might reasonably be expected to be done with or in relation to the product; and

(c) the time when the product was supplied by its producer to another;

and nothing in this section shall require a defect to be inferred from the fact alone that the safety of a product which is supplied after that time is greater than the safety of the product in question.

36. The test of what is objectively safe is the governing standard. Interestingly, a product that is found to be safe overall will therefore not be ‘defective’ even if strictly-speaking it was not as intended.



37. This point is illustrated by the decision in Tesco Stores v Pollard [2006] EWCA Civ 393. A container of dishwasher powder had a manufacturing glitch that meant it was not as childproof as it would otherwise have been, the consequence being that a little child was able to get at it and eat its contents. The Court nonetheless held that the product was as safe as persons generally were entitled to expect, and therefore it was not 'defective'.
38. Famously there is also nothing deficient in products which carry obvious risks – B (a child) v McDonalds [2002] EWHC 490 (QB) held that piping hot coffee and tea in polystyrene cups were not defective products because customers liked their drinks like that and knew the risks.
39. Having said that, some products which are inherently dangerous (e.g. knives, guns, chainsaws, some types of drugs, et cetera) can be 'defective' if not subject to proper warnings, advice, et cetera. Section 3(2) (a) makes it quite clear that instructions are a specific part of the test. There is an interesting debate to be had over precisely how the Court should approach products of this kind. Will general knowledge amongst the public about the qualities of a product be sufficient?
40. The most interesting questions arise in relation to questions of *proof*. There is no doubt that the burden of proof of deficiency is upon the Claimant. The difficult question arises in relation to what evidence will be regarded as sufficient to discharge that burden.
41. It seems reasonably clear in the UK that it is not enough merely to show that the product failed and caused injury. Foster v Biosil Ltd (2000) 59 BMLR 178 (involving the unexplained rupture of a breast implant) and Richardson v London Rubber Co Ltd [2000] PIQR P164; [2000] Lloyd's Rep Med 280 (involving the failure of a condom) are authority for that proposition.
42. As the authors of *Clerk & Lindsell* point out, courts elsewhere in Europe don't necessarily accept this proposition. Other countries' approach to product liability is to treat failure as proof of deficiency. To date, the UK Courts have stopped short of adopting such a principle.
43. Having said that, the Courts may accept proof by inference if, for example, the product fails in use and the defendant cannot put forward any explanation for why it would have done so other than the existence of a defect. Thus in Ide v ATB Sales Ltd [2008] EWCA Civ 424; [2008] PIQR P13 the Court of Appeal upheld a decision in favour of the rider of a bicycle who had suffered a serious fall. The bike's handlebar had broken and the Defendant sought by expert evidence to explain that this was as a consequence of the fall rather than a cause. The Judge, having rejected that evidence, was (it was held) entitled to find that the handlebar had caused the fall notwithstanding the absence of evidence of a specific defect.
44. It is interesting to consider how this sort of approach chimes with the approach of Lord Moncrieff to defective equipment in the EL context (see above).
45. In a very recent TCC case in Birmingham, Hufford v Samsung Electronics (UK) Ltd [2014] EWHC 2956, HHJ David Grant summarised the key legal principles as regards what had to be proved, the means by which it was to be proved, and the burden of proof, as follows:
- (1) The Court should first consider whether the claim is a 'closed list' case (that is, in simple terms, whether all possible causes have been identified and addressed by the evidence before the Court);
 - (2) It is important that the Court has regard to all the circumstances of the case and all of the evidence (cases based on circumstantial evidence depend for their cogency on the combination of circumstances and the likelihood or unlikelihood of coincidence);
 - (3) The claimant does not have to specify or identify with accuracy or precision the defect in the product. It is enough to prove the existence of a defect in broad or general terms;



- (4) The Court should not simply examine rival contentions on the issue of causation and then find that the one it prefers has been proved on the balance of probabilities (in other words it must not fall into the old ‘Sherlock Holmes’ trap – the Court cannot simply eliminate all but one of the causes and then find that the remaining one, however improbable, must have been the cause);
- (5) The burden of proof remains upon the claimant throughout; s/he must prove the existence of a defect and that the defect caused the peril or accident which occurred;
- (6) There is no burden of proof on the defendant in relation to deficiency; s/he may raise or seek to prove an alternative cause but does not have to prove it.
- (7) Whilst the court’s analysis will involve a consideration of the issue of causation, the court is not required to embark upon a detailed analysis of precisely how the injury or peril was caused.

Is there a Defence?

46. The CPA imposes strict but not absolute liability. Section 4 provides a number of defences. The list in simplified form is:
- Compliance with a legal requirement;
 - Product not in fact supplied to anyone;
 - Supply otherwise than in the course of a business;
 - Defects arising subsequently to the ‘relevant time’ (usually the time of supply);
 - Lack of scientific or technical knowledge (the so-called “development risks” defence);
 - Defects in subsequent products (the ‘component’ defence)
47. Some of these are politically interesting but probably of only rare application in practical legal terms (e.g. compliance with legal requirement, development risks). The crucial feature of them all is that the **burden of proof is upon the defendant**. Thus in the most commonly deployed defence (that the defect was not present in the product at the time of supply) the burden of proof rests upon the defendant and not upon the claimant (something which seems to have been overlooked in the Scottish case of McGlinchey v General Motors UK Ltd[2012] CSIH 91). As we have seen, the claimant has to prove the defect, but once that is done then the burden passes to the defendant. It can be hard burden to discharge.

Final thoughts on the CPA and PUWER

48. For defendants in PI claims I find myself looking at the CPA almost exclusively in the context of potential contribution proceedings. For claimants, like many others in equipment cases, I am used to having to look no further than PUWER. PUWER ironically made life a little easier for defendants because liability would at least be clear-cut – if something went wrong with a piece of equipment then the employer was extremely likely to be liable under r4 if not r5. Will a similar state of affairs persist under ERRA? Ironically I suspect it probably will. However, I think cases have to be divided into two categories:
- i. Cases where the reason for the failure is known and identifiable. In these cases it should be tolerably straightforward to work out the position. Defective maintenance will (I would have thought) usually end up coming back to the employer under their non-delegable duties of care at common law. There may be a few cases where it can be shown that no reasonable maintenance system could have avoided the problem. Cases of identified manufacturing defects will also end up at the employer’s door via the 1969 Act although one would hope for good prospects of recovery from the manufacturer under the CPA.
 - ii. Cases where the reason for the failure is unknown and unascertainable. These could well end up at the employer’s door **if** the Courts adopt a sympathetic approach to the issue of proof. I.e. that the employer bears an evidential burden of coming up with an explanation for the failure and will be liable if it cannot (as per Macfarlane). Ultimately it is a question of how far the Courts will be prepared to go.



49. The practical problem will remain the difficulty of identifying what has gone wrong. Tools and other equipment which cause injury are not always retained – the first reaction to an accident can often be to assume employee error and it is only at later stages that the person (sometimes more in self-exculpation than anything else) blames equipment for their injury. Engineering evidence is expensive. I suspect however that many work equipment cases may be heading down the same path as Noise-Induced Hearing Loss and Hand Arm Vibration cases have been for some time, even on the fast track, i.e. routine single joint instruction of Consulting Engineers.
50. It is interesting to consider who would win and who would lose in the new era. Would Mr Stark (Stark v Post Office [2000] ICR 1013) still succeed? The defect in his bicycle was not identified (although it was said somewhat loosely that it was “*either metal fatigue or some manufacturing defect*”). He did not rely on the 1969 Act and of course did not have to because he had PUWER. It tends to be assumed that he would have failed at common law because the employer’s system of maintenance was reasonable. If the above had been the only evidence, could the employer have argued that there was no evidence of any fault on the part of a third party either (and thus no deemed negligence under the 1969 Act?). Or would the Court have taken a sympathetic approach and said the failure raised a *prima facie* case of deficiency which the employer could not rebut? In the modern climate the answer could well be the latter.
51. What about Mr Hide (Hide v The Steeplechase Co Ltd & ors [2013] EWCA Civ 545)? His case rightly made headlines in the PI world because of the sheer strictness of the Court of Appeal’s approach to regulation 4 of PUWER (despite which the Supreme Court has refused permission to appeal, and so the decision will continue to loom over pre-1/10/13 cases involving all health and safety Regulations). Hide’s injury was caused by a guardrail, which in the broad sense had nothing defective about it and was essentially just a piece of racecourse furniture. The common law claim would have failed due to the lack of any reasonably foreseeable injury (as found by the judge at first instance). In the post-ERRA world could the employee have relied upon the 1969 Act? Personally I doubt it – if there was no foreseeable risk of injury, where would be the ‘fault’ of a third party?

No-fault liability at common law

52. The particular areas I would flag up for consideration are as follows.

Vicarious liability

53. This is a familiar topic but bears mention because plainly it involves no fault on the part of the actual employer. It is a huge topic in its own right and I shall not try to analyse it here.

Non-delegable duties of care

54. We could have a nice debate over whether these are ‘no-fault’ cases, although certainly they do involve no fault on the part of the duty-holder. Again they are a separate topic in themselves, of vital (but familiar) importance in the context of employer’s liability, and of course to some extent highway maintenance.

Rylands v Fletcher (1868) LR 3 HL 330

55. You will probably recall that this line of authority concerns liability for the escape of dangerous things from land. It doesn’t arise unless the defendant has brought the thing onto land in the course of an artificial change from its natural use, and harm or injury must be foreseeable. There is some doubt as to whether it applies to personal injury cases at all, although some actions have succeeded. I think this doctrine plainly has a fairly limited ambit and I cannot see that it will be relevant in many cases.

Europe



56. I am not going to try to analyse this aspect in full. For present purposes I note with interest that some commentators have argued that a “two-tier” system may develop as between public and private sector employees consequent on the right of those in the public sector (as employees of “emanations of the state”) to rely on the European Law doctrine of the “direct effect” of EU Regulations and Directives. Practically ever since the ‘Six Pack’ Regulations were first enacted, some employees have sought to argue that particular provisions (e.g. the Manual Handling Regulations and the Equipment Regulations) represented defective implementation by the UK of the European law (Hide featured an argument that the concept of reasonable foreseeability did not belong in regulation 4 of the Equipment Regulations because it was not mentioned in the Directive). Such employees may try to argue that they can still rely on strict obligations imposed directly by EU law – those in the private sector of course will have no such option open to them.
57. As I say, I shall not try to analyse this fully here. Plainly much would ultimately depend upon showing that the relevant European Directive did indeed impose strict or at least stricter obligations. Perhaps ironically, Stark v Post Office [2000] ICR 1013 actually suggests otherwise, it having been accepted by the Court of Appeal in that case (see Waller LJ at 1022E-F) that the language of articles 3 and 4 of the Work Equipment Directive was “not such as to compel a member state to introduce absolute obligations”. The finding in that case was that the Member State was free to impose absolute obligations if it chose (as indeed it was found the UK had done) but did not have to do so.

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November 2014**



ANNEX 1 – SECTION 47 OF THE 1974 ACT, 'BEFORE AND AFTER' SECTION 69 OF ERRA

BEFORE...

47 Civil liability

- (1) Nothing in this Part shall be construed:
 - (a) as conferring a right of action in any civil proceedings in respect of any failure to comply with any duty imposed by sections 2 to 7 or any contravention of section 8; or
 - (b) as affecting the extent (if any) to which breach of a duty imposed by any of the existing statutory provisions is actionable; or
 - (c) as affecting the operation of section 12 of the M1Nuclear Installations Act 1965 (right to compensation by virtue of certain provisions of that Act).
- (2) 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.
- (3) No provision made by virtue of section 15(6)(b) shall afford a defence in any civil proceedings, whether brought by virtue of subsection (2) above or not; but as regards any duty imposed as mentioned in subsection (2) above health and safety regulations may provide for any defence specified in the regulations to be available in any action for breach of that duty.
- (4) Subsections (1)(a) and (2) above are without prejudice to any right of action which exists apart from the provisions of this Act, and subsection (3) above is without prejudice to any defence which may be available apart from the provisions of the regulations there mentioned.
- (5) Any term of an agreement which purports to exclude or restrict the operation of subsection (2) above, or any liability arising by virtue of that subsection shall be void, except in so far as health and safety regulations provide otherwise.
- (6) In this section “damage” includes the death of, or injury to, any person (including any disease and any impairment of a person’s physical or mental condition).

AFTER...

47 Civil liability

- (1) Nothing in this Part shall be construed:
 - (a) as conferring a right of action in any civil proceedings in respect of any failure to comply with any duty imposed by sections 2 to 7 or any contravention of section 8; or
 - (b) omitted
 - (c) as affecting the operation of section 12 of the M1Nuclear Installations Act 1965 (right to compensation by virtue of certain provisions of that Act).
- (2) Breach of a duty imposed by a statutory instrument containing (whether alone or with other provision) health and safety regulations **shall not be actionable except to the extent that regulations under this section so provide**.
- (2A) Breach of a duty imposed by an existing statutory provision **shall not be actionable except to the extent that regulations under this section so provide** (including by modifying any of the existing statutory provisions).



- (2B) Regulations under this section may include provision for:
- (a) a defence to be available in any action for breach of the duty mentioned in subsection (2) or (2A);
 - (b) any term of an agreement which purports to exclude or restrict any liability for such a breach to be void.”
- (3) No provision made by virtue of section 15(6)(b) shall afford a defence in any civil proceedings.
- (4) Subsections (1)(a), (2) and (2A) above are without prejudice to any right of action which exists apart from the provisions of this Act, and subsection (2B)(a) above is without prejudice to any defence which may be available apart from the provisions of the regulations there mentioned.
- (5) and (6) *Omitted*
- (7) The power to make regulations under this section shall be exercisable by the Secretary of State.

ANNEX 2 – THE EMPLOYER’S LIABILITY (DEFECTIVE EQUIPMENT) ACT 1969

1969 CHAPTER 37

An Act to make further provision with respect to the liability of an employer for injury to his employee which is attributable to any defect in equipment provided by the employer for the purposes of the employers’ business; and for purposes connected with the matter aforesaid.

s1 Extension of employer’s liability for defective equipment

- (1) Where after the commencement of this Act:
- (a) an employee suffers personal injury in the course of his employment in consequence of a defect in equipment provided by his employer for the purposes of the employer’s business; and
 - (b) the defect is attributable wholly or partly to the fault of a third party (whether identified or not),

the injury shall be deemed to be also attributable to negligence on the part of the employer (whether or not he is liable in respect of the injury apart from this subsection), but without prejudice to the law relating to contributory negligence and to any remedy by way of contribution or in contract or otherwise which is available to the employer in respect of the injury.

- (2) In so far as any agreement purports to exclude or limit any liability of an employer arising under subsection (1) of this section, the agreement shall be void.

- (3) In this section:

“business” includes the activities carried on by any public body;

“employee” means a person who is employed by another person under a contract of service or apprenticeship and is so employed for the purposes of a business carried on by that other person, and “employer” shall be construed accordingly;

“equipment” includes any plant and machinery, vehicle, aircraft and clothing;



“fault” means negligence, breach of statutory duty or other act or omission which gives rise to liability in tort in England and Wales or which is wrongful and gives rise to liability in damages in Scotland; and

“personal injury” includes loss of life, any impairment of a person’s physical or mental condition and any disease.

- (4) This section binds the Crown, and persons in the service of the Crown shall accordingly be treated for the purposes of this section as employees of the Crown if they would not be so treated apart from this subsection.

s2 Short title, commencement and extent

(not material for present purposes).

