Enterprise and Regulatory Reform Act (ERRA)

A Question of Liability

Establishing Liability

Under Section 69 of ERRA, an employee pursuing a personal injury claim for an accident that occurred on or after 1st October 2013 can no longer rely solely on a breach of health and safety regulations to establish liability. Instead they will need to show that the employer was at fault or negligent.

Although this appears to tip the pendulum in favour of the employer, it remains to be seen how courts will interpret non-compliance with health and safety legislation when determining liability. Although strict or no fault liability cases will be unlikely to succeed, a breach of health and safety legislation will continue to have a strong influence over a court's decision making. "ERRA does offer an opportunity to defend more claims, but only where an employer has the right health and safety processes and procedures in place" says Derek Shaw, Senior Claims Investigator, Allianz Insurance PLC.

For example, take a claim for a personal injury arising out of defective work equipment. As an employee can no longer rely on a breach of the health and safety regulations – in this case the Provision and Use of Work Equipment Regulations 1998 – he or she would need to show that their employer had been negligent. Subsequently we would look to establish the efficacy of the employer's systems for maintenance and inspection before we decide whether to concede liability.

Claimants and their solicitors are also likely to look to legislation that is unaffected by ERRA. In this case the Employer's Liability (Defective Equipment) Act 1969 could allow the employee to succeed with a claim if the injury was suffered as a consequence of a defect in work equipment provided by the employer, even if the defect is the fault of another party.

Exceptions to the Rule

There are also some notable exceptions to the rule. Public sector employees will be able to allege a breach of the EC Framework Directive.

This has the potential to create a two tier system where, for example, a nurse working for the NHS will have a higher level of protection than a care worker in a private residential care home. This is likely to be challenged in court.

Pregnant employees and those who have recently given birth or are breastfeeding are also exempt from the provisions of Section 69 of ERRA. The Pregnant Workers Directive, which was enacted under the Management of Health and Safety at Work Regulations 1999, means that a pregnant employee can still rely on a breach of the regulations when bringing a civil claim.

Legal Position

Although the removal of civil liability for the breach of statutory duty represents a significant change in the legislation, it's also important to remember that many things haven't changed at all. An employer still has a legal obligation to comply with the health and safety regulations and risks a criminal prosecution by the Health and Safety Executive (HSE) if they fail to do so.

It's also fair to assume that the standard by which a court will judge whether an employer is responsible has not fundamentally changed and this is likely to take into account their duties under health and safety regulations.

Given this, where a case is brought against an employer, we will still need to be confident that their evidence will withstand close scrutiny in court. This makes it more important than ever to undertake an early and thorough investigation into the specific circumstances of any accident to ensure the correct resolution of liability disputes. "Decisions around liability will come down to evidence that the right processes are in place" adds Derek. "Where an employer can demonstrate these are in place and it wasn't negligent, it will be in a good position to defend itself against claims".