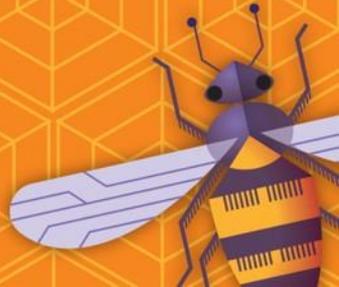




ALARM

embrace risk

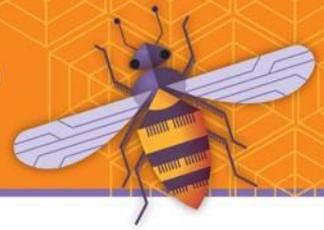


WORKING TOGETHER

ALARM CONFERENCE 2019

#alarmrisk2019

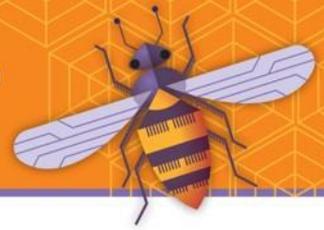




Working together – pre and post-litigation

Tim Smith, Forbes Solicitors

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Introduction

- What are we going to cover this morning?
- Why are we going to cover it?
- Worked examples at the end of the seminar
- Current experience of claims numbers and types?
- Any change since the Enterprise Act came into force?
- Expert evidence – did the prediction come true?



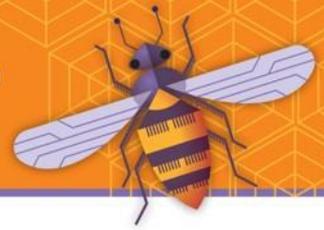
Link between teamwork, risk assessment and the Enterprise and Regulatory Reform Act 2013

- Team work
- Risk assessment
- Risk based approach
- Highways
- EL claims
- PL claims.



The usual team involved with claims

- Employee – goes on to become the Claimant
- Claimant's Manager
- Accident Investigator/Health and Safety Officer
- Insurers/Insurance Team
- Third Party Investigator
- Defendant Solicitor
- Trial Judge
- Any other personnel?
- Who can we harvest information from?



What are the team seeking to achieve?

- Reduce accidents
- Reduce claims
- Reduce claims exposure – damages and costs
- Reduce the local authority target.

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Is there an opportunity for greater cooperation?

- Risk assessment formulation
- Standard risk assessment example
- Risk assessment calculation
- Your views.

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Definition of teamwork

- Few facts about teamwork
- Teamwork is a noun
- Cambridge dictionary defines teamwork as 'the ability of a group of people to work well together'
- Oxford dictionary defines teamwork as 'the combined action of a group, especially when effective and efficient'
- Your own views on teamwork
- Your own views when a claim is received into the department.



Teamwork

Teamwork comes in to play from numerous perspectives but in terms of claims there are a number of key stages:

1. Producing the initial risk assessment
2. Post accident
3. Post claim
4. Post litigation
5. Post trial/settlement review – lessons learned.



Definition of risk assessment – HSE guidance

- Oxford dictionary defines risk assessment as 'a systematic process of evaluating the potential risks that may be involved in a projected activity or undertaking'
- Cambridge dictionary defines risk assessment as 'the process of examining the risks involved in a planned activity'
- Health and Safety Executive defines risk assessment as 'part of managing the health and safety of your business you must control the risks in your workplace. To do this you need to think about what might cause harm to people and decide whether you are taking reasonable steps to prevent that harm. This is known as risk assessment and is it something you are required by law to carry out. **If you have fewer than five employees you don't have to write anything down.**



Definition of risk assessment – HSE guidance

- **A risk assessment is not about creating huge amounts of paperwork, but rather about identifying sensible measures to control the risks in your workplace.** You are probably already taking steps to protect your employees, but your risk assessment will help you decide whether you have covered all you need to.
- Think about how accidents and ill health could happen and concentrate on real risks – those that are most likely and which will cause the most harm.



Definition of risk assessment – HSE guidance

- For some risks, other regulations require particular control measures. Your assessment can help you identify where you need to look at certain risks and these particular control measures in more detail. These control measures do not have to be assessed separately but can be considered as part of, or an extension of, your overall risk assessment.
- The law says that as an employer you must assess and control the risks in your workplace.
- You need to think about what might cause harm to people and decide whether you are going enough to prevent that harm.
- If you have five or more employees you must write down what you've found. That record should include:
 - The hazards (things that might cause harm)
 - How they may harm people
 - What you are already doing to control the risks.



The Enterprise and Regulatory Reform Act 2013 (ERRA)

- Rebalance – rights of employee and employer
- Reports to Parliament – Lord Young’s Common Sense, Common Safety and Professor Loftstedt’s Reclaiming Health and Safety for All: An Independent Review of Health and Safety Legislation
- Concerns regarding employers paying compensation – where they had done all that they could have reasonably done – the end of strict liability?



The Enterprise and Regulatory Reform Act 2013 (ERRA)

- What was new?
- What was different?
- Sea change – risk based approach
- 7 years of case law to come through – roll on 2020
- Document trail
- Financial resources.



The Enterprise and Regulatory Reform Act 2013 (ERRA)

- Back to basics
- 'Six Pack' regulations
- Section 47 of the Health and Safety at Work Act 1947 used to read:
“Breach of a duty imposed by health and safety regulations shall, so far as it causes damage, be actionable except insofar as the regulations provide otherwise.”



The Enterprise and Regulatory Reform Act 2013 (ERRA)

- Back to basics
- Section 47 of the Health and Safety at Work Act 1947 was amended by Section 69 of the Enterprise and Regulatory Reform Act 2017 Section 47 (2): “Breach of 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.”
- In practical terms, no civil liability for breach of duty under the health and safety regulations for accidents that occurred on or after 1 October 2013?



The Enterprise and Regulatory Reform Act 2013 (ERRA)

- But criminal liability may still apply
- Reversed the burden of proof onto the employee
- Claimant may need expert evidence to comment on 'good practice and sufficient steps'
- Breach of the regulations may still indicate negligence.



The Enterprise and Regulatory Reform Act 2013 (ERRA)

- Local authority – emanation of the state – EU Directives directly actionable?
- European Court considered this point – did not consider obligations under the European Articles – had been breached.



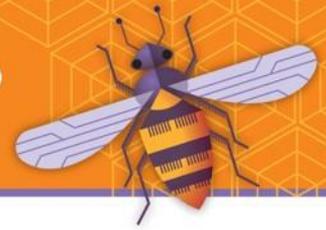
Case law

- *Cockerill* case – The Claimant injured at work at about 9:30 on the 1 October 2013. Just nine and a half hours after the Enterprise and Regulatory Act 2013 came into force.
- Judge adopted the guidance provided by the Supreme Court in the Scottish case of *Kennedy*
- "... a reasonably prudent employer will conduct a risk assessment in connection with its operations so that it can take suitable precautions to avoid injury to its employees ... The requirement to carry out such an assessment, whether **statutory** or not, forms the context in which the employer has to take precautions in the exercise of reasonable care for the safety of its employees. That is because the whole point of a risk assessment is to identify whether the particular operation gives rise to any risk to safety and, if so, what is the extent of that risk, and what can and should be done to minimise or eradicate the risk."



Case law

- *Cockerill* (continued)
- "It follows that the employer's **duty** is no longer confined to taking such precautions as are commonly taken or ... such other precautions as are so obviously wanted that it would be folly in anyone to neglect to provide them. A negligent omission can result from a failure to seek out knowledge of risks which are not themselves obvious."



Case law

- *Tonkins v Tapp 2019 – HHJ Gore*
- *103. Also in those circumstances it is unnecessary for me to decide the unresolved issue of whether breach of a statutory duty rendered non-actionable by Section 69 of the Enterprise and Regulatory Reform Act nonetheless constitutes negligence ipso facto. Bearing in mind that what I believe was a line of authority dealing with the analogous issue of whether breach of statutory duty in the days before statutory duties were ever civilly actionable, constituted common law negligence, none of which was cited to me or discussed, as opposed to merely being referred to by Ms Rice, sitting as a Deputy High Court Judge in Cockerill v CXK Ltd [2018] EWHC 1155, which decision is persuasive but not binding upon me, I choose not to follow it and express my concern that the danger of producing the contrary result would be to emasculate the statutory duties.*



Case law

- *Tonkins v Tapp 2019 – HHJ Gore (continued)*
- *103. That cannot have been Parliamentary intention in 2012, for if that had been the intention, Parliament would instead have chosen to repeal the statutory duties in question. Ms Rice does identify that in [18] of her judgment but, with respect to her, I do not understand how it can be said in neighbouring sentences that, on the one hand, those statutory duties bind employers in law and continue to be relevant to the question of what an employer ought reasonably to do while, on the other hand, were evidently intended to make a perceptible change in the legal relationship between employers and employees. Those concepts seem to me to be mutually inconsistent.*



What other legislation is relevant?

- Section 14 of the Factories Act 1961 - stricter duty than EU Law
 - Application of breach of regulation and guidance, as evidence of negligence. Lord Faulks in the House of Lords referred to a breach of regulation as “strong prima facie evidence in negligence” (Hansard 22 April 2013)
- *Employers Liability (Defective Equipment) Act 1969*
 - When an employee suffers an injury due to defective work equipment, and the defect is wholly or partly attributable to the fault of a 3rd party, that injury shall be deemed to be attributable to the negligence of the employer.



What other legislation is relevant?

- *Employers Liability (Defective Equipment) Act 1969 – (continued)*
 - The Act states:
 - 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.....*



What other legislation is relevant?

- *Consumer Protection Act 1987*
- The definition of defect relates to “*the safety of the product is not such as persons generally are entitled to expect*”.
- Defence - requirement that the producer or supplier must demonstrate that they “*could not reasonably have known of the defect in the light of scientific and technical knowledge*”.
- Covers defective products
- Producer and Importer potentially liable
- Claimant to prove the product was defective but then burden on Defendant to prove Section 4 Defences are applicable.



Traditional approach to dealing with claims

The stages of the process:

- Accident - Initial Reporting – completing the accident report form
- Claim submitted – CNF/Letter of claim
- Investigation
- Deny/Admit
- Proceedings
- Investigation
- Trial
- Any other approaches?



Different approach

- Understanding the claim
 - Why did it settle?
 - Why did it win/lose at trial?
- Why review?
- When to review?
- Lessons learned
- Change.



Case study 1

The Claimant works as a refuse worker and brings a claim for a needle stick injury whilst moving an overloaded domestic blue bin. The Claimant is used to moving black bins at 240 litres in volume but not blue bins at 320 litres.

The accident occurred as the Claimant was trying to pull the bin from the property to the refuse wagon. The bin jolted as it went down the pavement kerb. The bin lid flew upwards and as the refuse worker went to steady the bin his hand pushed down on the rubbish in the open bin and a needle punctured the Claimant's hand.



Case study 1 – risk assessment

To be handed out.



Case study 1 – teamwork

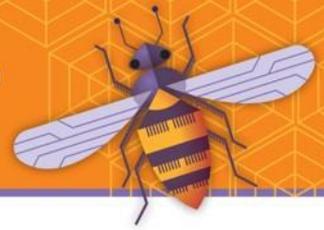
- Is there an opportunity for teamwork engagement?
- If so when?
- If so what?
- If so why?
- Is there an opportunity for an improved risk assessment?
- If so how?
- If so what?
- If so why?
- Is the claim any easier to defend post Enterprise Act?



Case study 2

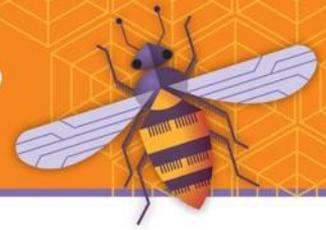
The Claimant, who was a member of the public, was using the local Council swimming pool. He swam a number of lengths in the pool. On starting the 5th length he pushed off from the side of the pool and cut his foot on a damaged tile.

The swimming pool had been subject to significant refurbishment 3 months earlier and part of which included renewal of the tiles to the side of the pool. The works were signed off by the Council's Maintenance Team and the swimming pool is subject to daily checks by Leisure Centre Staff, but the checks were not formally recorded in writing.



Case study 2 – risk assessment

To be handed out.



Case study 2 – teamwork

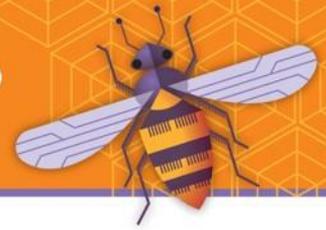
- Is there an opportunity for teamwork engagement?
- If so when?
- If so what?
- If so why?
- Is there an opportunity for an improved risk assessment?
- If so how?
- If so what?
- If so why?
- Is the claim any easier to defend post Enterprise Act?



Case study 3

The Claimant employee works in the local Council library. They have been instructed to move a number of books using a wheeled trolley from floor 1 to floor 3 of the library via the Library lift.

The books are successfully loaded onto the trolley but as the Claimant starts to move the trolley one of the wheels falls off, making the trolley unusable. The Claimant decides to manually carry the books up in the lift. They pick up a number of books and enter the lift. However, as the lift sets off the Claimant becomes unbalanced. She seeks to keep upright and balance the books but in doing so, she bends awkwardly and sustains an injury to her lower back



Case study 3 – risk assessment

To be handed out.



Case study 3

- Is there an opportunity for teamwork engagement?
- If so when?
- If so what?
- If so why?
- Is there an opportunity for an improved risk assessment?
- If so how?
- If so what?
- If so why?
- Is the claim any easier to defend post Enterprise Act?
- Would the position have been any different if the trolley wheel had caused the accident?