Löfstedt's report

Issues forum - Restoring balance to civil justice in health and safety – December 2011

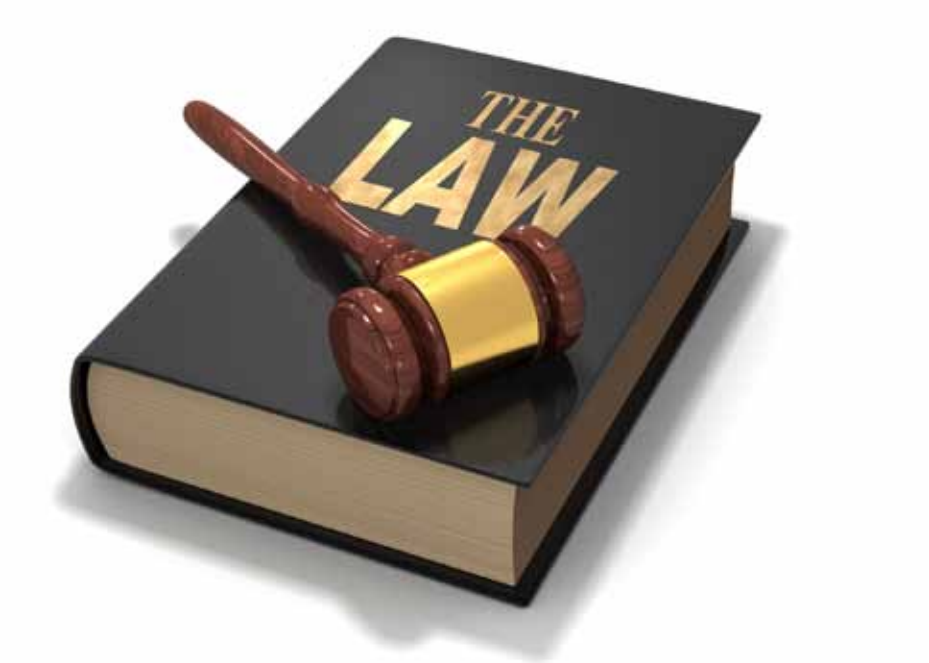
QBE

Löfstedt's Wider Perspective:

Restoring balance to civil justice in health and safety

In March 2011 the Employment Minister, Chris Grayling, announced an independent review of health and safety as part of the government's plans to reform Britain's health and safety system, by reducing the burden of legislation on UK businesses. The review, chaired by Professor Ragnar Löfstedt, was touted as the first step in reducing bureaucracy and bringing 'common-sense' back to Britain's health and safety legislation. On 28 November his 110 page report, 'Reclaiming health and safety for all: An independent review of health and safety legislation' was unveiled, offering a diagnosis of what has gone wrong and a prescription for the best way forward.

In this Issues Forum, Simon Denyer of DWF solicitors dissects the main aspects of the report and its potential wider implications.



When the Health and Safety at Work etc Act 1974 was introduced, it was seen as a radical new step forward, and followed a review of the former legislation which had operated prior to that time. That review revealed that there was simply too much, over-elaborate law which was potentially counterproductive, and the new simplifying Act was needed.

Are we in the same place again? Almost 30 years on, there is a perception that complex health and safety regulation which has come into force since, is overburdening business, compounded by increasing media ridicule of "elf 'n' safety". Some commentators blame our membership of the European Union, on the basis that many of the regulations which have been implemented since then, including the overarchingly important "six pack" which came into force in 1993, have come about to meet UK obligations to introduce measures to implement EU Directives.

The announcement earlier this year by the Department for Work and Pensions (DWP) of Prof. Löfstedt's review therefore provided an opportunity to take a fresh look at the regulations and consider whether they "are still suitable for the modern workplace and continue to deliver improvements in health and safety outcomes, or whether they have gone too far."

Published on 28 November 2011, the review concludes that health and safety legislation remains broadly fit for purpose and does not require radical change. The concern though, is over the way in which regulations are interpreted and applied.

With that in mind Prof. Löfstedt has made six key recommendations on which the Government is taking action. These are supplemented with recommendations to revoke, amend or clarify certain specific regulations. It is of interest that the particular regulations being reviewed in this way include two recent ones of particular relevance to insurers as regularly applying to certain types of claim; that is the main regulations now governing the construction industry – the Construction (Design and Management) Regulations – as well as the Work at Height Regulations.

In summary the main recommendations of the review are:

- **Exempting from health and safety law those self-employed whose work activities pose no potential risk of harm to others.** Some other EU states do this already
- **A Health and Safety Executive (HSE) review of all of their Approved Codes of Practice.** Are they all still required? Are they up to date and unambiguous so as to justify their existence?
- **A HSE programme of sector-specific consolidations of health and safety regulations.** This is expected to make the various sets of regulations more user friendly, but it is also hoped that this will play a part in reducing regulatory red-tape by 50%, without reducing the extent of the protection provided by the regulations. This will also allow consideration as to where there has been what is termed "gold plating", that is where the UK regulations go beyond the Directive, so that unnecessary burden can be removed without disturbing our obligations to the EU
- **HSE authority to direct all local authority health and safety inspection and enforcement activity rather than the current divided responsibility alongside local authorities.** This though is one area where Government does not fully support the Löfstedt review as the DWP want to ensure that while the lead can be taken by the HSE, the local knowledge likely to be stronger on the part of local authorities is not lost
- **The Government should work more closely with the EU Commission to ensure that new and existing health and safety legislation is both risk-based and evidence based.** We are used to impact assessments being carried out before UK legislation is taken forward, but this only happens to a limited extent with EU Directives, and Löfstedt finds as a result that on a costs: benefits ratio, the UK regulations which originate from EU Directives score much less well than regulations which have a solely UK origin
- **The original intention of the pre-action protocol standard disclosure list should be clarified and restated; and regulatory provisions which impose strict liability should be reviewed by June 2013 and either qualified with "reasonably practicable" where strict liability is not absolutely necessary or amended to prevent civil liability from attaching to a breach of those provisions.**

The last recommendation is the one which will be of greatest interest to liability insurers. Whilst acknowledging that compensation and civil litigation falls outside the scope of his review Prof. Löfstedt has carefully dovetailed his review with the earlier work done by Lord Justice Jackson and Lord Young. He recognises that the current initiatives designed to deliver reform and remove the so-called "chilling effect" of litigation will not have the desired effect if fears over civil litigation continue to drive businesses to over comply with the regulations.

The concern with the personal injury pre-action protocol disclosure lists is that they are being interpreted as an absolute requirement to produce documents, with the perception that some insurers and their insureds do not feel able to contest claims if all of the paperwork is not available. In our view, this can be a mistaken approach even on the current law, as of course claims can be successfully defended without full documentation – albeit it can certainly put defendants on the back foot. Nevertheless, Löfstedt's views will be influential and this is a welcome recommendation which should encourage claims defensibility as a more frequent option.

The standard disclosure lists are, it suggests, leading some health and safety professionals to advise that large numbers of documents need to be kept in case an insured is taken to court, ultimately diverting time and funds away from businesses' core activities. The review should improve this position.

Current practice of course is that some claimants' solicitors will needlessly pursue applications for pre-action disclosure looking to hunt down documents from the standard disclosure lists, seeking recovery of costs as they do so. Löfstedt's approach to the lists should assist a determined response to this type of exercise.

Ultimately of greater significance is the proposal to review the regulatory provisions which impose strict liability and either qualify them with "reasonably practicable" or prevent civil liability attaching to any breach. The concern is that awarding compensation on the basis of a technical breach has the potential to stop employers taking a common sense approach to health and safety.

By way of example, in Stark v The Post Office (2000), the defect in the claimant's bicycle could not have been detected, yet the employer was held liable by the Court of Appeal because regulation 6 of the Provision and Use of Work Equipment Regulations was deemed to impose a strict liability.

Prof. Lofstedt suggests that it is not clear that outcomes such as this one should be considered reasonable or indeed what the government originally intended.

Comment

When it was first announced, there was considerable criticism of Prof. Löfstedt's review on the basis that it was too limited, not including within its remit the seventeen Acts and the regulations not owned and regulated by the HSE or local authorities. Now that the report has been published however, whilst not rocking health and safety legislation to the core, it covers the ground thoughtfully and includes some useful recommendations that the Government seems minded to implement. The review of strict liability which we have seen as applicable from judicial decisions such as Stark v The Post Office is to be particularly welcomed and the other proposal directly affecting civil justice, to restate the purpose of the disclosure list in the pre-action protocol for personal injury claims, will also be beneficial as it ought to assist insurers in tackling the ongoing problem of unnecessary pre action disclosure applications. The conclusions and recommendations on the regulations emanating from Europe are to be welcomed although it remains to be seen how much progress can be made there whilst other issues are dominating the EU/UK agenda. The specific recommendations on reform of particular sets of regulations are a sensible move.

There is much in the report that will still rest on further research and review. There will be further consultation on the consolidation proposals and, as the Government notes in its response, the review of the HSE's Approved Codes of Practice which accompany some of the regulations will be a major piece of work. There are very few quick fixes here. The bulk of the work will take time to complete with Prof. Löfstedt's timetable extending to 2015. However, much of the difficulty with health and safety legislation has come from incremental changes over many years and from the development of a culture of over-compliance. The regime that those issues have created is not one that, even with political will, can be overturned overnight. With the continuing changes coming through from Lord Young's report, even with its limitations and extended timeframe, Prof Löfstedt's report is a further significant step in the right direction.

Government Timeline

By the summer of 2012

- Simplification of health and safety guidance for small businesses
- Simple and consistent guidance on the need to bring in expert health and safety advice
- No inspections for low risk businesses that manage their responsibilities properly
- Legislation to abolish the Adventure Activities Licensing Authority.

By 2013

- Exemption of self-employed people in low-risk occupations
- Completion of review of Approved Codes of Practice
- Revocation of unnecessary regulations.

By 2014

- A simpler accident reporting regime
- Closer work with the EU to ensure health and safety legislation is risk and evidence based
- A dedicated independent regulator for the nuclear industry
- Enhanced HSE powers to help drive consistent enforcement
- Sector-specific consolidations of regulations
- Reduction in total number of regulations by 50 per cent.

Further Information

For further information and a full copy of the report, visit www.dwp.gov.uk/docs/lofstedt-report.pdf

Author Biography

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Simon is Head of occupational health within DWF and has been a Partner within the firm since 1994. He specialises in employers liability and public liability claims, including occupational disease cases.

He advises on subrogated recovery claims by insurers across the range of claims and acted for the insurers against the major UK asbestos companies in a pioneering group action based on cases arising out of the shipbuilding industry.

Simon specialises in costs issues and represented the defendants in the leading case on the significance of costs estimates in the Court of Appeal, Leigh v. Michelin Tyre plc, which directly led to the strengthened provisions found in the Costs Practice Direction.

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