temple garden chambers

S. 69 Enterprise and Regulatory Reform Act 2013

"Where are we, 5½ years on?"

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1. On **01.10.13** s. 69 of the ERRA repealed s. 47(2) of the Health and Safety at Work Act 1974 removing any statutory cause of action in a civil claim under the six pack regulations. s. 47(2) changed from:

   (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.

   to:

   (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).

2. The exceptions provided under the regulations are rare. The "daughter directives" of the Framework Directive correspond to the 'six-pack regulations' (in fact now the seven-pack to include COSHH), and apply similar principles to specific areas:

UK Regulations	**European Directive**
Provision and Use of Work Equipment Regulations 1992 / 1999	Work Equipment (the Second) Directive 89/655 (now 2009/104/EC)
Manual Handling Operations Regulations 1992	Manual Handling of Heavy Loads (the Fourth) Directive 90/269
Personal Protective Equipment at Work Regulations 1992	Personal Protective Equipment (the Third) Directive 89/656 (now 96/58)

Workplace (Health, Safety and Welfare) Regulations 1992	Workplace (the First) Directive 89/654
Health and Safety (Display Screen Equipment) Regulations 1992	Display Screen Equipment (the Fifth) Directive 90/270
Management of Health and Safety at Work Regulations 1993 / 1999	Framework Directive 89/391
Control of Substances Hazardous to health Regulations 1994 /1998	Council Directive 80/1107/EEC and 88/364/EEC

3. The introduction to the 16th edition of Munkman on Employer's Liability observed that it took c. seven years after the 'six-pack' regulations came into force before cases involving them reached the higher courts. We are now 5½ years on from the revocation of civil liability in the six pack and the first few cases commenting on the effect of s. 69 have been reported, one of them being the case of Cockerill v CXK Limited and Artwise Community Partnership [2018] EWHC 1155 in which I appeared last year. The purpose of this paper is to comment on how much really has changed, and to provide some tips on how best to approach EL litigation in the post s. 69 era. In order to look ahead, first we must look backwards.

4. The impetus for s. 69 came initially from **Lord Young** of Graffham's report, *Common Sense, Common Safety* published on **18.10.10**, which recommended changes to the health and safety regime with a view to reforming the UK's compensation culture. Responsibility for initiating these reforms to Britain's health and safety system, fell to the Department for Work and Pensions' Minister for Employment, Chris Grayling MP, who commissioned an independent review from a committee chaired by **Professor Löfstedt**. The brief was to investigate:

   - "*the extent to which these regulations have led to positive health and safety outcomes and the extent to which they have created significant economic costs for businesses of all sizes;*
   - *whether the requirements of EU Directives are being unnecessarily enhanced ('gold-plated') when transposed into UK regulation; and*
   - *any evidence or examples of where health and safety regulations have led to unreasonable outcomes, or inappropriate litigation and compensation.*"

5. In **November 2011** the Committee published its 110 page report entitled: *Reclaiming health and safety for all: An independent review of health and safety legislation"*. The report identified the potential unfairness that arises where health and safety at work regulations impose a strict liability on employers, making them legally responsible to pay compensation despite having done all that was reasonable to protect their employees. The report recommended that those regulatory provisions which imposed strict liability should be reviewed. In its response to the review the Government came up with s. 69 that sought to remove the entire regulatory effect of the six pack.

6. On **24.04.13, Viscount Younger** issued a statement on behalf of the Government in the House of Lords that stated:

> "*The codified framework of requirements, responsibilities and duties placed on employers to protect their employees from harm are unchanged, and will remain relevant as evidence of the standards expected of employers in future civil claims for negligence*."

7. In the same debate, **Lord Faulks QC**, stated:

> "*A breach of regulation will be regarded as strong prima facie evidence of negligence. Judges will need some persuasion that the departure from a specific and well-targeted regulation does not give rise to a claim in negligence*."

8. On **12.10.12**, the ERRA Bill was sponsored through its second reading in the House of Commons by Mr Grayling's successor, **Matthew Hancock MP**, who stated in the debate:

> *"Professor Löfstedt considered the impact that the perception of a compensation culture has had in driving over-compliance with health and safety at work regulations. The fear of being sued drives businesses to exceed what is required by the criminal law, diverting them from focusing on sensible preventive health and safety management and resulting in unnecessary costs and burdens.*
>
> *Professor Löfstedt identified the unfairness that can arise when health and safety at work regulations impose a strict duty on employers that makes them liable to pay compensation to employees injured or made ill by their work, despite all reasonable steps having been taken to protect them from harm. Employers can, for example, be held liable for damages when an injury is caused by equipment failure, even when a rigorous examination would not have revealed the defect. The new clause is designed to address that and other unfair consequences of the existing health and safety system.*
>
> *We all have different reasons for coming into politics. When I was growing up, I had one of the experiences that brought me to this place, concerning the over-burdensome intervention of health and safety officers. I worked in a family computer software company when an over-long health and safety investigation took place, which took up huge amounts time for the officers and senior management. The only result at the end of it was the recommendation*

that some bleach in a cupboard must be labelled correctly. After a sign was put up saying, "There is bleach in the cupboard. Please do not drink it,"

9. Dissenting argument was offered by **Iain Wright, Labour MP** for Hartlepool, who observed:

> *"On perception, there is a feeling in the country—it is often fuelled by the media—that the so-called health and safety culture is inevitably a drag on economic growth and recovery. We must, however, set the context, and I want to make an important point to the Minister. The TUC estimates that every year at least 20,000 people die prematurely as a result of injuries, illnesses, or accidents caused by or in their place of work. That is far too many … I mentioned that it was the employer, not the employee, who creates the risk. Importantly, however, it is also the employer who can better distribute the cost that the risk creates. Indeed, the employee has no ability to distribute the costs at all. Removing strict liability does nothing to remove unfairness or to mitigate risk. All it does is move it elsewhere to the detriment of the vulnerable employee. There is an inevitable unfairness in that scenario that requires such a policy choice—between innocent employee and innocent employer—and there seems to be no compelling reason why the loss should fall on the employee. … We need to reject tabloid claims and the perception at the centre of the debate so far that health and safety legislation has somehow gone too far. He also recommends that education is provided to employers, workers and students on the dangers they face. However, the short section on strict liability in Professor Löfstedt's report offers no argument or evidence for changing the current legislative arrangements, but rather an assumption that strict liability is unfair on employers. In fact, Löfstedt refers to three cases, but two were not strict liability cases, so would not be affected by the new clause. …"*

10. How perceptive Mr Wright was. It is worth reviewing the only three cases mentioned by the Committee in its report to see whether they would be decided differently now, in the post s.69 era. At page 91 the Committee stated:

> "*A number of examples have been provided where strict liabilities in health and safety regulations have resulted in individuals being paid compensation even though the employer did everything that was reasonably practicable and foreseeable*."

11. The three cases were:

    (1) Stark v Post Office [2000] I.C.R. 1013;
    (2) Dugmore v Swansea NHS Trust and Morriston NHS Trust [2002] EWCA Civ 1689;
        &
    (3) Allison v London Underground Ltd [2008] EWCA Civ 71

12. For reasons I will seek to illustrate below, it is highly arguable that the Claimant victories in all three cases would be the same in the s.69 era.

13. Shortly before s. 69 came into force, the Court of Appeal determined the cases of Blair v. CC of Sussex Police [2012] EWCA Civ 633 and Hide v. The Steeplechase Company [2013] EWCA Civ 545, which are worth reviewing first.

Blair

14. C was a police officer who broke his ankle when falling from his motorcycle whilst being trained to ride off road through deep ruts where falls injuring his lower limbs were foreseeable. He was wearing Police-issued 'Alt-Berg' motorcycling boots. The injury would likely have been avoided had C been provided with bespoke motocross boots which, akin to ski boots, provide more protection for off road motorcycling, though are wholly impractical for the mobility demands of day-to-day policing. C alleged breach, *inter alia*, of **Regs 4(1) & (2)** of the **Provision of Personal Protective Equipment Regulations 1999**:

> *"(1) Every employer shall ensure that suitable personal protective equipment is provided to his employees who may be exposed to a risk to their health or safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective*
>
> *(2), personal protective equipment shall not be suitable unless-*
>
> *(a) it is appropriate for the risks involved, the conditions at the place where exposure to the risk may occur, and the period for which it is worn;*
>
> *(b) it takes account of ergonomic requirements and the state of health of the person or persons who may wear it, and of the characteristics of the workstation of each such person;*
>
> *(c) it is capable of fitting the wearer correctly, if necessary, after adjustments within the range for which it is designed;*
>
> *(d) so far as is practicable, it is effective to prevent or adequately control the risk or risks involved without increasing overall risk;*
>
> *(e) it complies with any enactment (whether in an Act or instrument) which implements in Great Britain any provision on design or manufacture with respect to health or safety in any relevant Community directive listed in Schedule 1 which is applicable to that item of personal protective equipment...."*

15. Longmore LJ, stated (§14):

> "*It was then for the Chief Constable, if he wished, to plead and prove that it was not "practicable" for the protective equipment to be used for the prevention of significant injury. That just did not occur in this case. I am unpersuaded that the issue of practicability was ever sufficiently in the arena at trial, since there was no plea of lack of practicality and, although the difficulty of walking in motocross boots was mentioned in the evidence and referred to by*

the judge, he did not squarely address the issue whether that meant that it was impracticable to use the Alt-berg boots. If the issue had been squarely addressed there might have been evidence about the likelihood or necessity of walking around during the training session which, on the face of it, was confined to the handling of motorcycles.

I regretfully conclude not merely that the judgment in favour of the Chief Constable relating to breach of the 1992 Regulations cannot be supported but that he has not discharged the obligation (which is on him) of showing that he did comply with the requirements of the Regulations. It was possible (and not impractical) to prevent significant injury to trainees by proving them with stronger boots than the Alt-berg boots and the Chief Constable is therefore liable. I emphasise that this is not to say that the Chief Constable was in any way negligent at common law. Likelihood or foresight of injury does not come into the matter. Nor is it of any relevance to consider whether it would be sensible (as opposed to impractical) to provide boots such as motocross boots to trainees who would be unlikely to be wearing them in the course of their operational duties as police constables. The 1992 Regulations do not address matters of that kind. This is a sea-change from the old concepts of common law negligence. Whether that is a good or bad thing is not for this court to say, since the 1992 Regulations are now the law of the land."

15. C won because of evidential failings by D in a low value claim. In a post-s. 69 case C would have to assume the evidential burden of demonstrating that D ought to have identified the risk that the Alt-Berg boots offered insufficient support to the specific risk of low limb injuries that the trainee officers were exposed to during their off-road training. The effect of c. 69 is a change of emphasis, not necessarily a change of result.

Hide

16. This was a case in which a jockey injured himself in a collision with a padded upright post adjacent to a steeplechase jump at Cheltenham. The claim was brought under **Reg 4 of Provision and Use of Work Equipment Regulations 1998 ("PUWER")** was relied on:

"*(1) Every employer shall ensure that work equipment is so constructed or adapted as to be suitable for the purpose for which it is used or provided.*

(2) In selecting work equipment, every employer shall have regard to the working conditions and to the risks to the health and safety of persons which exist in the premises or undertaking in which that work equipment is to be used and any additional risk posed by the use of that work equipment.

(3) Every employer shall ensure that work equipment is used only for operations for which, and under conditions for which, it is suitable.

(4) In this regulation "suitable" –

(a) subject to sub-paragraph (b), means suitable in any respect which it is reasonably foreseeable will affect the health or safety of any person; …"

17. The first instance Judge (HHJ Harris QC) was concerned about the impact of the six pack regulations on employers referring to the "*remorseless march of health and safety legislation*" (§42) and to the "*relentless logic of the personal injury lawyer … were jump races to be required to be made so undemanding that all horses could be expected to negotiate them without mishap? How were the requirements of the Regulations to apply, for example, to Beecher's Brook at Aintree*"? (§44).

18. The Court of Appeal only gave permission to appeal on the application of the Regulation. The first judgment was given by Longmore LJ, the critical passage from which was:

> "*the primary purpose of the relevant regulations is to ensure that employers (and other defendants) take the necessary steps to prevent foreseeable harm coming to their employees in the first place and the defendant's obligations are triggered if it is reasonably foreseeable that an employee might injure himself. As the judge himself said (para 54) an accident of the kind that happened to Mr Hide, while not at all likely, was possible and in that sense foreseeable. If it happens, it will be for the defendant to show that it was due to unforeseeable circumstances beyond his control or to exceptional events the consequences of which could not be avoided*." (§26)

19. The Court of Appeal reiterated that Reg 4 did not confer strict liability on the employer. As Davis LJ explained:

> "*Once it is accepted that the Regulations apply to what happened here then the outcome cannot be determined simply by the application of common-law principles. … What happened here was reasonably foreseeable, for the purposes of Regulation 4, even if the way in which the accident actually happened was most unusual and hitherto unprecedented. … (it) was not only foreseeable, it had in fact been foreseen: the placing of the padding round the upright of itself evidenced that. …As Lord Hope said in Robb v Salamis at paragraph 24: "The obligation is to anticipate situations which may give rise to accidents. The employer is not permitted to wait for them to happen...."*
>
> *At paragraph 29 he went on to say (citing authority for this purpose): "The employer must anticipate that it may not be possible to predict the precise ways in which situations of risk may arise, especially where the risk is created by carelessness. The employer is liable even if he did not foresee the precise accident that happened...*."

20. There was evidence before the Court from an equestrian expert called by C that there were a series of further remedial measures such as fitting thicker padding and creating a safer distance between the landing area and the railings. As Davies LJ observed (§43), the effect of the regulations was such as to impose a burden on D to show that such remediable options were not reasonably practicable. Of course, the effect of s.69 would

be to ensure that the burden of proof rests solely with the claimant; however, the result in Hide ought to be the same.

21. Before I consider the three cases of Stark, Dugmore and Allison that featured in the Löfstedt paper, it is worth reminding ourselves of the following propositions of law:

(1) Employers owe employees a more onerous duty of care than the basic common law duty of care deriving from the Donoghue v. Stevenson neighbour principle:

> "*Miss Kennedy was not, however, in the same position as an ordinary member of the public going about her own affairs. It was her duty, as someone employed by Cordia as a home carer, to visit clients in their homes in different parts of the city on a freezing winter's evening despite the hazardous conditions underfoot. Unlike an ordinary member of the public, she could not choose to stay indoors and avoid the risk of slipping and falling on the snow and ice. Unlike an ordinary member of the public, she could not choose where or when she went. She could not keep to roads and pavements which had been cleared or treated. She could not decide to avoid the untreated footpath leading to Mrs Craig's door. Unlike an ordinary member of the public, she was obliged to act in accordance with the instructions given to her by her employers: employers who were able, and indeed obliged under statute, to consider the risks to her safety while she was at work and the means by which those risks might be reduced. In those circumstances, to base one's view of the common law on the premise that Miss Kennedy was in all relevant respects in the same position as an ordinary member of the public is a mistake*" Per Lord Reed and Lord Hodge SCJs in Kennedy v Cordia [2016] UKSC 6, § 108

(2) Pre- s. 69 ERRA, health & safety statutory regulations defining a criminal liability are relevant when construing a civil liability, even in the face of an explicit exclusion of civil liability:

> "*the relevance of regulation 3 is that it helps to identify the standard of care to be expected of a reasonable employer*" Griffiths v. Vauxhall Motors [2003] EWCA Civ 412, §22 - This was a case where at the time of the accident **s. 15(1) of the Management of Health and Safety at Work Regulations 1992** provided: "*Breach of a duty imposed by these Regulations shall not confer a right of action in any civil proceedings*." See also the comments in Gilchrist below.

(3) Risk assessment remains the cornerstone of assessment of an employer's duty of care, a legacy of the six pack, and untouched by s. 69 ERRA.

> "*Risk assessments are meant to be an exercise by which the employer examines and evaluates all the risks entailed in his operations and takes steps to remove or minimise those risks. They should be a blueprint for action. ... It seems to me that insufficient*

judicial attention has been given to risk assessments in the years since the duty to conduct them was first introduced." – Per Smith LJ in Allison @ §58; &

"*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. In many circumstances, as in those of the present case, a statutory duty to conduct such an assessment has been imposed. 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. The duty to carry out such an assessment is therefore, as Lord Walker of Gestingthorpe said in Fytche v Wincanton Logistics plc [2004] ICR 975, para 49, logically anterior to determining what precautions a reasonable employer would have taken in order to fulfil his common law duty of care*." Per Lord Reed and Lord Hodge SCJs in Kennedy v Cordia [2016] UKSC 6, § 110

Stark

22. Mr Stark was a postman injured when the brake stirrup of the 14-year-old bicycle provided to him by his employer failed and he was thrown over the handlebars. The bicycle had no visible fault before the accident. The cause of the stirrup breaking was either metal fatigue or some manufacturing defect. The judge found that the defect would not and could not have been discoverable on any routine inspection. **Reg 6(1) PUWER 1992** was relied on:

"*Every employer shall ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair*."

23. The Court of Appeal found that regulation conferred strict liability. In the judgment the Court observed that it was open to the Member State to impose more stringent duties than the minimum required by the Directive.

24. Of course, the Stark judgment would not survive s. 69 on the way it was pleaded; however, it would have been open to Mr Stark's legal team to have pleaded an alternative statutory cause of action under **s. 1 of the Employer's Liability (Defective Equipment) Act 1969 (the 1969 Act)**, which provides:

(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...

25. This Act of Parliament was enacted following the case of Davie v New Merton Board Mills [1959] AC 604 in which C's claim failed because a manufacturing defect in a 'drift' that caused it to shear off and injure him was latent and could not have been detected by any proactive visual inspection by the employer. The 1969 Act was not mentioned in the Löfstedt report, not debated in either House and not repealed by s. 69. It is still good law and would likely bring home the same result in Stark.

26. In the case of PT Civil Engineering v Davies [2017] EWHC 1651 in which a self-employed ground worker sustained injury when a fire erupted for reasons that could not subsequently be explained in a work's vehicle belonging to the entity that engaged his services, the 1969 Act was not pleaded, presumably because C was not an employee, and his claim failed because of the operation of s.69.

27. There was a common law argument available in Stark that was not (because it did not need to be) run; namely, that it was negligent of the Post Office not to follow and maintain its proactive policy of replacing all bicycles every 10 years; the policy had been designed and instituted but not maintained. Had it been, then Mr Stark's 14-year-old bicycle would not have been in operation to fail. Rather like aircraft parts, it could have been argued that they should have been replaced at intervals as part of a proactive system of risk management.

Dugmore

28. C, a nurse, became allergic to latex at some time between 1993 and 1995 through using latex gloves during her employment as a nurse at D1's hospital. Before 1993, international medical literature suggested that there was a risk that the use of latex could result in an allergy. However, until 1996, there was no evidence that the use of latex gloves was giving rise to a problem in England and no guidance had been given about such a risk. In June 1996, the Claimant suffered a serious reaction to latex gloves and thereafter D1 supplied her with vinyl gloves. In January 1997, she went to work for D2, which was made aware of her allergy. In December 1997, as a result of her extreme sensitivity, she suffered an anaphylactic shock when picking up an empty box which had contained latex gloves. She was unable to return to work. She sued both Defendants for

common law negligence and a breach of **Reg 7(1) Control of Substances Hazardous to health Regulations 1994 /1998 (COSHHR)**:

"*Every employer shall ensure that the exposure of his employees to a substance hazardous to health is either prevented or, where this is not reasonably practicable, adequately controlled*."

"*In this regulation 'adequate' means adequate having regard only to the nature of the substance and the nature and degree of exposure to substances hazardous to health and 'adequately' shall be construed accordingly*."

29. The judge dismissed C's claim against both Ds. As against D1, he held that the date by which D1 ought reasonably to have known of the risk of latex allergy was January 1997. It did not and could not reasonably have been expected to know of the risk at the time when C developed her allergy. That holding was made primarily in the context of an allegation of common law negligence. However, the judge also held that the employer's lack of knowledge was fatal to the claim under COSHHR. He considered that it was not reasonably practicable for the employer to avoid all exposure to latex and that the provision of vinyl gloves to C had amounted to adequate control.

30. A superficial reading of the appeal judgment would suggest that it was determined on the basis that Reg. 7 of COSHHR conferred strict liability. In fact, the judgment of Hale LJ (as she then was) was more nuanced. The Court did not hold that exposure was not adequately controlled merely because C developed the allergy. It held that control was not adequate because it would have been quite possible, well before C developed her allergy, for the employer to have discovered the risks of exposure to latex and to have provided vinyl gloves. The Court drew a distinction between the common law duty (for the employer to take reasonable care to avoid reasonably foreseeable risks) and the more onerous duty imposed by the regulations, which, the Court held, required the employer to go out and discover the risks and to take the appropriate steps. It follows, therefore, that properly argued, the result in Dugmore could be achieved in the post-s. 69 era.

31. This point is underlined by Smith LJ's analysis in Allison.

Allison

32. C developed tenosynovitis after prolonged exposure to use of a 'Traction Brake Controller' [TBC] (a 'dead man's handle') working as a tube driver on the Jubilee Line over prolonged periods between 1998 and 2003. C alleged breach, *inter alia* of **Reg 9(1) of the Management of Health and Safety at Work Regulations 1999**:

> "*Every employer shall ensure that all persons who use work equipment have received adequate training for purposes of health and safety, including training in the methods which may be adopted when using the work equipment, any risks which such use may entail and precautions to be taken*."

33. The Court of Appeal rejected the submission that Reg 9 imposed no fault liability and acknowledged that no fault liability was rare in English law (§33) and acknowledged that "*adequate training meant "adequate in all the circumstances" and imported some element of foreseeability into the test*" (§55). The Court went onto find in C's favour because D had failed adequately to risk assess the ergonomic risks of using the TBC, because it had failed to commission an ergonomist's opinion on it before providing training to its employees. Smith LJ stated as follows:

> "*the test for the adequacy of training for the purposes of health and safety is what training was needed in the light of what the employer ought to have known about the risks arising from the activities of his business. To say that the training is adequate if it deals with the risks which the employer knows about is to impose no greater a duty than exists at common law. In my view the statutory duty is higher and imposes on the employer a duty to investigate the risks inherent in his operations, taking professional advice where necessary*."

34. The Court emphasised the importance of conducting proactive risk assessments lay at the heart of defining an employer's duty of care towards its employees (see § 19(3) above). It follows, therefore, that the Allison judgment ought to survive s. 69. Section 69 ERRA has been considered in three first instance judgments to date:

    (1) Gilchrist v. Asda Stores [2015] CSOH 77
    (2) Cockerill v CXK Limited and Artwise Community Partnership [2018] EWHC 1155
    (3) Tonkins v. Tapp 07.12.18 (Unrep)

Gilchrist

35. On **03.12.13** C, who was 5'5" tall, fell off a 'dalek' design footstool in the course of her employment as a shop assistant whilst attempting to hang clothes on hooks c. 7' high. Her Counsel pleaded a claim in negligence against the employer, citing several of the

'six pack' regulations in the pleading as defining the standard of common law duty of care that ought to have been owed by the employer to its employee. The Outer House judgment stated:

> "*Counsel submitted that employers remain under a statutory duty to comply with health and safety regulations, as the duties set out in statutory instruments made prior to the 2013 Act inform and may define the scope of duties at common law. She made reference to a ministerial statement in the House of Lords in which a government spokesman stated that the act did not undermine core health and safety standards and that employers' statutory duties would remain relevant as evidence of standards expected of employers in civil cases. She argued that an employer who breached a regulation and was thereby committing an offence could hardly argue that he was acting reasonably. She referred to Munkman p. 668, Charlesworth & Percy para 12 -73 and Robb v Salamis 2007 SC (HL) 71. Counsel argued that the existence of a regulation demonstrates that harm is foreseeable, under reference to Boyle v Kodak [1969] 1 WLR 661 in which Lord Reid said "Employers are bound to know their statutory duty and to take all reasonable steps to prevent their men from committing breaches".*

36. Unsurprisingly that elegant submission was accepted by the Court. Indeed, in my view, the moment that Parliament elected to leave the criminal liability for breaching the six pack regulations intact, and once it elected not to disturb the common law's emphasis on the importance of pro-active risk assessment, s. 69 was shorn of the teeth intended for it. All it succeeded in doing was to remove the strict liability attaching to Reg. 6(1) of PUWER, which covered latent defect cases; however, leaving the 1969 Act untouched nullified the effect of that too.

37. The principal effect of s. 69 is to re-focus the burden of proof firmly on claimants, because they must adduce evidence of what a proactive risk assessment ought to have identified as risks and control measures. The principal consequence of s. 69, in my view, is to make expert evidence more important to enable claimants to discharge that evidential burden.

Cockerill

38. On **01.10.13** (the day s. 69 came into force) C fell over a 7" step from a lobby into a kitchen area of a former Victorian School she was visiting for the first time in the course of her employment to deliver a presentation. D1 was her employer, a charity and D2 the occupier of the premises, described by the Court as a "*public spirited couple running a community partnership*". D2 had conducted a risk assessment which had identified the risk of injury posed by the step and identified three control measures: (1) application of yellow and black warning tape over the lip of the step; (2) prominent warning notices

about the presence of the step fixed to the door separating the lobby from the kitchen that opened inwards over the step; & (3) a system requiring the door to be closed and locked and operated by a buzzer. The employer had not conducted any risk assessment of its own but adopted the occupier's risk assessment.

39. At the time of the accident it was agreed that someone had propped the door wide open into the kitchen area such that when C stepped into the lobby from the street, she was deprived of control measures (2) and (3). Rowena Collins Rice, sitting as a Judge of the High Court, stated the following at §18 of the judgment:

> "*The 2013 Act did not repeal the duties themselves. Those duties continue to bind employers in law. So they continue to be relevant to the question of what an employer ought reasonably to do. However by enacting s.69, Parliament evidently intended to make a perceptible change in the legal relationship between employers and employees in this respect. It removed direct actionability by claimants from the enforcement mechanisms to which employers are subject in carrying out those statutory duties. What I have referred to as this 'rebalancing' intended by s.69 was evidently directed to ensuring that any breach of those duties would be actionable by claimants if, but only if, it also amounted to a breach of a duty of care owed to a particular claimant in any given circumstances; or in other words, if the breach was itself negligent"*

40. Finding in favour of the Ds, the Court found that the fixing of the yellow and black tape was sufficient to discharge any duty of care owed by the occupier to its visitor, and by the employer to its employee. The warning sign on the door was not necessary because the marked step was sufficiently visible, notwithstanding that C failed to see it. Reliance was placed on Staples v. West Dorset District Council [1995] PIQR 439 in reaching that finding. In Staples, a member of the public slipped on algae on the Cobb at Lyme Regis. The fact that the occupier applied two further strips of warning tape, one across the threshold of the door after being notified of the accident was not indicative of a failure to discharge the duty of care (Staples relied on again).

41. C failed to persuade the Court that had the door been closed that the act of buzzing to be let in would have put her on notice of the presence of the step. The Court was persuaded that when the door was open the hazard taped lip of the step needed no warning. The judgment stated: "*Parliament's intention that claimants must prove that their accidents were someone else's fault before they are entitled to compensation must presumably mean just that*."

42. The difficulty in this case was the fact that C failed to see a step marked with hazard warning tape that was there to be seen. She was unfortunate to lose, given that two thirds of the control measures devised and instituted were not maintained on the day; however, the decision was unappealable on the facts. Whilst s.69 may have stiffened the judicial sinews, it was not in my view determinative of the case.

Tonkins

43. On **04.07.15** C fell off a defective scaffold that he had erected. He was a self-employed contractor and attempted to sue a fellow self-employed contractor who owned the scaffold. The case was difficult to win on its facts and the six pack would not have bitten pre-s. 69 ERRA because D did not have sufficient control of the operation to assume any duty of care towards C. The Judge, HHJ Gore QC, the DCJ of the Western Circuit reviewed §18 of the Cockerill judgment and stated:

> "*… 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.*
>
> *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.*
>
> *It seems to me to be no answer to that argument to say that Parliament could not do so because many, if not now most, of the statutory duties had their origin in EU law which the UK was obliged to implement. That begs the similarly unanswered question of whether to deprive the statutory duties of civil actionability would have constituted a breach of EU law for failure to implement EU directive intent. I accept that that is not the Claimant's pleaded case in this case but, had it been necessary to fully argue and determine this point, it might have become his pleaded case by amendment, which amendment would not have been said to have caused any evidential prejudice to the Defendant despite having been made very late.*
>
> *Accordingly, I would not have been prepared to find, without much more analysis and argument, that the effect of Section 69 was to deprive an accident victim of entitlement to rely upon a finding that breach of statutory duty constituted ipso facto negligence as constituting breach of the scope and standard of care reasonably required of the alleged tortfeasor by the statutory duty even if no civil right of action was available for its breach*."

44. These *obiter* comments by an experienced Judge, who was also an experienced PI practitioner, resonate with my own views that s. 69 ERRA with its clumsy drafting failed to achieve its objectives.

45. Finally, I should add, that I represented the unsuccessful claimant in Cockerill. The moral of the presentation, is that if you wish to avoid the detention of having to prepare and present a paper such as this, win your cases!

Marcus Grant

Temple Garden Chambers

9th March 2019