

**IN THE MATTER OF THE MANAGEMENT OF HEALTH AND SAFETY AT  
WORK AND FIRE PRECAUTIONS (WORKPLACE) (AMENDMENT)  
REGULATIONS 2003 (SI 2003/2457): CIVIL LIABILITY FOR BREACH OF  
STATUTORY DUTY**

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**ADVICE**

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**Introduction and legislative background**

1. I have been asked to advise the Health and Safety Executive on the impact which the partial removal of the civil liability exclusion from the Management of Health and Safety at Work Regulations 1999 SI 1999/4342 (“MHSWR 1999”) will have on employees.
2. Section 47(2) of the Health and Safety at Work Act, (“the 1974 Act”) provides that a breach of duty imposed by the health and safety regulations shall, so far as it causes damage, be actionable except in so far as the regulations provide otherwise.
3. Subject to certain express exceptions, regulation 22 of the MHSWR 1999 provided that a breach of a duty imposed by those regulations would not confer a right of action in any civil proceedings.
4. The effect of regulation 22 of the MHSWR 1999 when read with section 47(2) of the 1974 Act was that, save for certain express exceptions, employers, employees and third parties could not bring civil claims for damages caused by a breach of the MHSWR 1999.
5. Regulation 6 of the Management of Health and Safety at Work Regulations and Fire Precautions (Workplace) (Amendment) Regulations 2003, (“the 2003 Regulations”) substituted the following for regulation 22 of the MHSWR

1999:

*“Breach of a duty imposed on an employer by these Regulations shall not confer a right of action in any civil proceedings insofar as that duty applies for the protection of persons not in his employment.”*

6. It follows from regulation 6, when read with section 47(2) of the 1974 Act, that employers in breach of a duty imposed by the 2003 Regulations are protected from civil claims brought by non-employees. A question that arises for consideration is whether employees enjoy a similar immunity in respect of any breach of the duty imposed upon them by regulation 14 of the MHSWR 1999.

7. Regulation 14 provides as follows:

*“(1) Every employee shall use any machinery, equipment, dangerous substance, transport equipment, means of production or safety device provided to him by his employer in accordance both with any training in the use of the equipment concerned which has been received by him and the instructions respecting that use which have been provided to him by the said employer in compliance with the requirements and prohibitions imposed upon that employer by or under the relevant statutory provisions.*

*(2) Every employee shall inform his employer or any other employee of that employer with specific responsibility for the health and safety of his fellow employees-*

*(i) of any work situation which a person with the first-mentioned employee’s training and instruction would reasonably consider represented a serious and immediate danger to health and safety; and*

*(ii) of any matter which a person with the first-mentioned employee’s training and instruction would reasonably consider represented a shortcoming in the employer’s protection arrangements for health and safety,*

*insofar as that situation or matter either affects the health and safety of that first mentioned employee or arises out of or in connection with his own activities at work, and has not previously been reported to his employer or to any other employee of that employer in accordance with this paragraph.”*

8. I have been asked to advise on the following:
- a) Whether the 2003 Regulations achieve the Health and Safety Commission's aim ("the HSC") of denying all non-employees and other parties outside the work place ("third parties") the right to bring civil claims for a breach of duty imposed by health and safety regulations.
  - b) Whether employers could be vicariously liable for an employee's breach of duty under regulation 14 of the MHSWR 1999.
  - c) Whether the civil liability to which employees are exposed under regulation 14 of the MHSWR 1999 goes beyond that contemplated by the Framework Directive ("the Directive").
  - d) Whether the MHSWR 1999, as amended, give effect to the principle of the responsibility of the employer as reflected in Article 5(3) of the Directive.
  - e) Whether, if an employee's exposure to third party claims is greater than that envisaged by the Directive, there would be any scope for a *Francovich* claim.
  - f) Whether the Government would expose itself to the risk of a challenge under community law if it amended the MHSWR 1999 by expressly excluding a third party's right to bring a civil claim for breach of an employee's duty under regulation 14.

**Q1. Do third parties have the right to bring civil claims against employees for breach of statutory duty under regulation 14?**

9. If a third party suffered damage as a result of an employee's breach of regulation 14(1), then that third party would be able to bring a civil claim against the employee. Section 47(2) of the 1974 Act would make any such breach by the employee actionable by the third party because neither the

MHSWR 1999 nor the 2003 Regulations provide otherwise.

10. I have considered whether it could be argued as a matter of statutory construction that regulation 14(1) was not intended to protect third parties with the consequence that third parties would not have a right to bring a civil action for damage caused by an employee's breach. However, in view of the subject matter of the provision, and in particular the fact that transport equipment and dangerous substances are intrinsically liable to affect third parties, I do not consider this to be a viable argument. Further, the absence of an express limitation on the class of persons to whom the duty is owed and whose members would therefore have an actionable claim, is a powerful indicator that that class is at large and is therefore broad enough to include third parties.
11. I have reached the same conclusion with regard to regulation 14(2). Under that provision, any failure to inform an employer or relevant employee of either a work situation which represents a serious or immediate danger to health and safety, or of any matter which represents a shortcoming in the employer's protection arrangements for health and safety, would give rise to an actionable claim by a third party. A claim by a third party would be even stronger under regulation 14(2) than under regulation 14(1) because the duty under regulation 14(2) is engaged even if the situation or matter in question does not concern the employee's own activities at work.
12. Section 47(2) of the 1974 Act envisages an express provision in regulations which directly addresses the question whether any civil claim under health and safety regulations would be actionable. Accordingly, even an implicit intention to protect employees from civil claims, as deduced from the legislative scheme as a whole, would not suffice. Further, the absence of an equivalent to regulation 6 of the 2003 Regulations for employees, which clearly and expressly addresses the restriction of civil liability, tends to the conclusion that an equivalent restriction does not apply to employees in respect of breaches of regulation 14.

13. In summary, the Health and Safety Commission has not therefore achieved its aim of denying all third parties the right to bring civil claims for a breach of duty imposed by health and safety regulations. Further, and for the reasons set out below, employers could be vicariously liable to third parties for an employee's breach of statutory duty under regulation 14.

**Q2. Vicarious liability**

14. In two relatively recent decisions of the House of Lords, the principles relating to vicarious liability were analysed and authoritatively decided. See *Lister v Hesley Hall* [2002] 1 AC 215 and *Dubai Aluminium Co Ltd v Salaam* [2002] 3 WLR 1913. Both of those cases must now form the starting point of any analysis of the scope and nature of the concept of vicarious liability. However, as Lord Nicholls observed in the *Dubai* case, regard must nevertheless be had to previous court decisions which may inform the correct approach on the particular facts in question. (See paragraph 26 of the judgment).
15. The simple approach favoured by the House of Lords involves asking the question whether, approaching the matter broadly, the act or omission in question was so closely connected with what the employee was authorised or expected to do in the performance of his employment that it would be fair and just to fix the employer with liability. (See paragraph 28 in the *Lister* case). The focus on the connection between the employee's conduct and the employment makes it unnecessary to attempt to answer the more difficult and potentially complex question whether an employee has engaged in an unauthorised mode of performing an authorised act. It would appear from cases such as *Mattis v Pollock* [2003] 1 WLR 2158 that this approach, described by the House of Lords as the strict application of verbal formulae (see the *Lister* case paragraph 70), is now very much out of favour and has been displaced by the simpler approach in *Lister* and *Dubai*.
16. Despite the apparent simplicity of the problem, it is still not possible to lay down an exhaustive definition of what amounts to a sufficient connection with the scope of an employee's employment. Each case must depend on its own

particulars facts. (See the *Lister* case paragraphs 41 and 66). Further, because ultimately the court must make an evaluative judgment, the outcome of borderline cases may be difficult to predict. (See paragraph 26 of the *Dubai* case).

17. What is clear from the approach outlined above, and in particular from Lord Clyde's judgment in the *Lister* case, is that the statutory context may determine the extent and application of the principle of vicarious liability. In that regard, regulation 14(1) of the MHSWR 1999 must be considered separately from regulation 14(2).
  
18. In very general terms, the clear objective of regulation 14(1) is to protect any person from being harmed by an employee's use of potentially dangerous machinery and the like. (For convenience, this advice will simply refer to the tools and materials of an employee's trade). This objective is secured by burdening an employee with a statutory duty to use those tools in accordance with any proper training and instructions given to him by his employer. Both the objective of Article 14(1) and the means by which it is to be achieved are generally in the same class of regulations as those considered in cases such as *Harrison v National Coal Board* [1951] AC 639; *Stapley v Gypsum Mines Ltd* [1953] QAC 663; *National Coal Board v England* [1954] AC 403 and *ICI v Shatwell* [1965] AC 656. In each of those cases the question whether an employer can be vicariously liable for his employee's breach of statutory duty was addressed by the House of Lords in the general context of a failure by an employee to comply with a statutory duty to carry out his job in a particular manner. Ultimately, the *Harrison* line of cases does not produce a clear answer to that question. However, given that vicarious liability is not confined to any particular tort and therefore necessarily encompasses breaches of statutory duty, the mere fact that the employee's wrong comprises a breach of his own statutory duty does not fundamentally change the nature and scope of the concept of vicarious liability. For example, in cases of negligence an employee has acted in breach of a duty of care which he and not his employer owed to the injured party. (See *Harrison v National Coal Board* [1951] AC

639 at 671).

19. On the current state of the case law, I can see no reason why any court considering vicarious liability in the context of an employee's breach of statutory duty would depart from the simple approach endorsed in the cases of *Lister* and *Dubai*. The outcome of any claim brought under regulation 14(1) would therefore principally depend upon the closeness of the connection between the conduct in question and the scope of the employee's employment. Since an employee's duty under regulation 14(1) only arises if he is using machinery provided to him by his employer, and since the limit of his duty is to use that machinery in accordance with instructions and training given to him by his employer, it is difficult to envisage any circumstance in which an employer would not be vicariously liable for an employee's breach of regulation 14(1). This is a further respect in which the Health and Safety Commission has failed to achieve its aim of protecting employers from claims by third parties for breach of the health and safety regulations.
  
20. Regulation 14(2) shares the same objective as regulation 14(1), namely to protect the health and safety of employees and all others who may be harmed by the activities of employees at work. However, regulation 14(2) secures that objective by quite different means. The statutory duty with which an employee is fixed does not directly concern the manner in which he carries out his job. For example, an employee would have no obligation under regulation 14(2)(a) to remove or otherwise deal with a source of danger. The limit of his obligation would be to inform his employer or the appropriate employee of that danger.
  
21. I have been unable to find any case law which directly addresses the question whether an employer could in principle be vicariously liable for personal injury caused by an employee's failure to inform his employer of his, the employer's, own shortcomings. This is hardly surprising in view of the fact that the concept of "whistle blowing" is a relatively new concept. Accordingly, many of the statements of principle found in the older case law with regard to vicarious liability are either inapposite or difficult to transpose onto the

legislative policy which drives regulation 14(2). However, I can see no reason why any court considering a regulation 14(2) case in the future would not apply the “close connection” test set out in the cases of *Lister* and *Dubai*.

22. For the following reasons, the cases in which the “close connection” test would not be satisfied in the context of claims founded on an employee’s breach of regulation 14(2) would be very rare indeed:
- a) Under regulation 14(2)(a), the duty only arises in respect of a work situation.
  - b) The duty under regulation 14(2)(a) is only breached if an employee with his training and instruction would reasonably consider that it represented a serious and immediate danger to health and safety. That training and instruction would generally have been given by or on behalf of his employer and would therefore naturally tend to have a close connection with the employee’s performance at and during the course of his work.
  - c) The same point can be made with regard to the duty under regulation 14(2)(b) where, again, the objective standard is referable to an employee’s training and instruction.
  - d) In cases where the situation or matter in question does not affect the health and safety of the employee in question, the regulation 14(2)(b) duty does not arise and can therefore only be breached if the situation or matter in question arises out of or is in connection with the employee’s own activities at work.
23. In view of the fact that in many cases it would have been the employer’s own failing which fixed an employee with a duty under regulation 14, the overwhelming likelihood would be that a court in such cases would have little difficulty in concluding that a finding of vicarious liability would be fair and

just.

24. I note from the summary opinion of Tim Kerr QC dated 26 May 2004 that no reference is made to the *Lister* and *Dubai* cases, or to the simple approach favoured in those cases by the House of Lords. Having regard to those and subsequent cases, I respectfully disagree with the opinion expressed by Tim Kerr QC at paragraph 13 of the summary opinion that “*there remains a strong possibility*” that a court hearing a case founded on an employee’s breach of regulation 14(2) would find that the employer was not vicariously liable. On the current state of the law and for the reasons given above, it is difficult to envisage a situation in which an employer would not be vicariously liable for an employee’s breach of regulation 14(2).
25. Fixing an employer with vicarious liability for damage caused to third parties due to a breach of an employee’s duty under regulation 14 produces what at first blush is an anomalous situation: By reason of regulation 22 as amended by regulation 6 of the 2003 Regulations, an employer cannot be civilly liable to a third party for damage caused by his own breach of duty under the MHSWR 1999. By contrast, he may be so liable in respect of damage caused by his employee’s breach of duty under the same regulations. However, this result can only properly be described as anomalous if there was an intention to protect employers from *all* third party claims arising out of a breach of the MHSWR 1999. However, the very fact that regulation 6 of the 2003 Regulations only applies to a breach of duty *imposed on an employer* demonstrates that no such intention can be discerned from the words used. Those words do not include breaches of duty imposed on an employee. The actual intention of the HSC was to exclude any third party right to bring claims against both employers and employees. However, in the context of any claim for damages, a court would regard that intention as immaterial; focusing instead on discerning the intention of Parliament by reference to the words used.

**Q3. Does regulation 14 expose employees to a liability that goes beyond that intended by the Directive?**

26. Under Article 13(1) of the Directive, a worker is burdened with a responsibility to take care, not merely of his own safety and health, but also that of other persons affected by his acts. The obligation under Article 13(2)(d) to inform employers or other workers of serious and immediate danger and of any shortcomings in the protection arrangements, is merely an example of the ways in which that primary obligation must be discharged. This is clear from the words “*to this end*” and “*in particular.*”
27. In general, Regulation 14(2) faithfully transposes the Directive, as demonstrated by the helpful table prepared by my instructing solicitor as part of my instructions. However, there is one respect in which regulation 14(2) could potentially expand the class of persons to whom employees owe a duty: Regulation 14(1) of the MHSWR 1999 is limited to the employee’s tools and materials of his trade which are used by him. It does not therefore go beyond Article 13(1) of the Directive which creates a duty towards other persons affected by *his* acts. The words “*To this end*” and “*in particular*” in Article 13(2) make it plain that the duty to inform under Article 13(2)(d) is intended to protect all persons affected by the acts of the worker. By contrast, the duty to inform under regulation 14(2) extends to any work situation and any matter which objectively represents either a serious and immediate danger to health and safety or a shortcoming in the employer’s protection arrangements for health and safety. The class of persons which the duty to inform is intended to protect is not therefore expressly restricted to those persons affected by the acts of the employee. The class under regulation 14(2) is broader in that it extends to a situation or matter which arises out of or in connection with the employee’s own activities at work.
28. However, for the reasons set out below, it does not follow that regulation 14(2) is ultra vires the Directive:
- a) Insofar as the words permit, Regulation 14 must be construed in a way which is consistent with the Directive. (See Case C-106/89 *Marleasing Scheme Accommodation v La Comercial Internacional de Alimentacion Scheme Accommodation* [1990] ECR I 4135 paragraph 8

of the Advocate General's opinion and paragraph 9 of the judgment). Despite the absence of an equivalent to Article 13(1) which clearly defines the ambit of the protected class, it is perfectly possible to construe regulation 14(2) so as to be consistent with Article 13(1).

b) In general, the object of the Directive is not to provide legal remedies to third parties but to encourage improvements in the health and safety of workers at work.

29. The Directive burdens various parties with a number of duties and responsibilities. It does not however address the extent to which any of those various parties may be held liable in law to compensate a victim of personal injury caused by a breach of duty. It therefore cannot be said that regulation 14 exposes employees to a liability that goes beyond that envisaged by the Directive.

**Q4. Do the MHSWR 1999 as amended give effect to the principle of responsibility of the employer?**

30. Article 5(1) of the Directive provides that the employer shall have a duty to ensure the safety and health of workers in every aspect related to the work. Article 5(3) provides that the worker's obligations in the field of safety and health at work shall not affect the principle of the responsibility of the employer. This principle is also reflected in Articles 6(5), 7(2) and 11(4).

31. Regulation 21 provides that nothing in the relevant statutory provisions shall operate so as to afford an employer a defence in any criminal proceedings for a contravention of those provisions by reason of any act or default of an employee or a person appointed by him under regulation 7. I have been asked to advise whether the failure to extend regulation 21 to civil claims amounts to a failure to give effect to the principle of responsibility of the employer.

32. The Directive does not dictate the means by which the principle is to be given effect to, with the consequence that there is no obligation to give effect to it by

legislation. For the following reasons I have concluded that in any civil proceedings, a court would be in a position to give effect to the principle:

- a) An employer would generally be vicariously liable for an employee's breach of statutory duty. (See above).
  - b) Under regulation 14(2), the limit of an employee's duty is to pass on information, not to remove the source of danger. This ensures that ultimate responsibility for health and safety remains with the employer.
  - c) Under the community law principle of effectiveness, procedural rules must not render the exercise of community law rights virtually impossible or excessively difficult to exercise. (See Case C-228/96 *Aprile* [1998] ECR 7141, paragraph 18 of the judgment). If an employee was injured as a result of a fellow employee's failure to discharge his duty under regulation 14, it could be argued that if his only remedy was against an uninsured and impoverished fellow-employee, the injured employee would have been denied an effective community law remedy for breach of a community law obligation. In considering the question whether an employer should be held vicariously liable for his employee's breach, or the question whether he should be permitted to raise that breach as a defence in civil proceedings, any court would be obliged to give effect to the principle of effectiveness.
  - d) Any court would be obliged to construe the MHSWR 1999 and to apply common law principles of negligence and breach of statutory duty, in a way which was consistent with the principle of the responsibility of the employer. (See cases such *Marleasing* cited above).
33. A further question that arises is whether the failure to expressly protect employees from third party claims leads to the conclusion that the regulations have failed to give effect to the principle of the responsibility of the employer

because, in respect of third parties, they enable an employer to hide behind the default of an employee to escape civil liability. For the following reasons, I have concluded that there has been no such failure:

- a) The principle of the responsibility of the employer is limited to an employer's relationship with his employees and does not extend to third parties.
- b) The Directive does not contain any obligation to shield employees from all civil claims. Indeed Article 8(5) specifically envisages the possibility that claims may be brought against employees for carelessness or negligence.
- c) A third party has no directly effective community law right to have his health and safety protected under the Directive; nor would he have any realistic prospect of relying upon the principle of effectiveness.

#### **Q.5 Francovich**

34. I can see no reasonable basis upon which a *Francovich* claim could be brought against the Government for exposing employees to third party claims. The Directive does not give employees any community law right to be protected from claims brought by third parties. That was not a result which the Directive was prescribed to achieve. Further, it would not be possible to identify the content of any such right on the basis of the provisions of the Directive.

#### **Q.6 Further amending the MHSWR 1999**

35. I have been asked to advise whether the Government would expose itself to the risk of a challenge under community law if it amended the MHSWR 1999 further by expressly excluding a third party's right to bring a civil claim for breach of an employee's duty under regulation 14. The particular concern is that third parties might claim that the community law principles of

effectiveness and equivalence had been breached.

36. It is clear in particular from the first preamble to the Directive and from Article 1, that its object is to encourage improvements in the health and safety of workers at work and not third parties in general. There are however provisions in the Directive which address the position of third parties:

- a) Under Article 8(5), an employer's obligation to ensure that all workers are able to avoid the consequences of a serious and imminent danger includes ensuring that his workers are able to avoid the consequences of danger to third parties.
- b) In general, and as a corollary to the principle of the responsibility of the employer, one of the objectives of the Directive is to protect workers from being placed at a disadvantage or from being exposed to any financial cost in relation to measures concerning safety, health and hygiene at work. (See Articles 6(5), 7(2) and 1(4)). As an exception to this general approach, the last sentence of Article 8(5) recognises that employees may be placed at a disadvantage if they have acted carelessly or there was negligence on their part. This would include exposure to civil claims by third parties.
- c) An employer's obligation under Article 10 to provide information concerning health and safety extends to other employers of workers.
- d) Under Article 12(2) an employer's obligation to provide training extends to workers from outside undertakings and/or establishments engaged in work in his undertaking.
- e) Under Article 13, a worker owes an obligation to take care of the safety and health of all persons affected by his acts or commissions at work.

37. In view of the Directive's acknowledgment that obligations are owed to third parties and in particular having regard to Article 13(1), the question that arises for consideration is whether in the event of an express exclusion of the right to bring a civil claim for breach of statutory duty, a third party could challenge the Government for breaching the community law principles of effectiveness and equivalence.
38. Under the principle of equivalence, domestic procedural rules must be applied without distinction to actions alleging infringements of community law and similar domestic actions. (See for example Case C-231/96 *Edis v Ministero delle Finanze* [1998 ECR I 4951]). In general, it must not be any more difficult for a party to assert a community law right than it would be for him to assert an equivalent domestic law right.
39. A third party's equivalent domestic law right would be section 7 of the 1974 Act which imposes on employees a duty to take reasonable care for the health and safety of persons who may be affected by his acts or omissions at work. By reason of section 47(1) of the 1974 Act, section 7 does not confer a right of action in any civil proceedings in respect of an employee's failure to discharge that duty. I am instructed that there are no health and safety regulations which would permit similar claims to be brought against employees. On that basis, if the Government were minded to expressly exclude the right of third parties to bring a civil claim for damages against employees, it would not be exposed to the risk of a community law challenge by a third party based upon the principle of equivalence.
40. Under the principle of effectiveness, procedural rules must not render the exercise of community law rights virtually impossible or excessively difficult to exercise. (See Case C-228/96 *Aprile* [1998] ECR 7141, paragraph 18 of the judgment).
41. Despite the fact that there are provisions in the Directive which are designed to protect the health and safety of third parties, they do not have any directly effective rights. In particular, third parties do not have a directly effective right

to be compensated for injury caused by a breach of Article 13 or any other article. However, it does not necessarily follow that the principle of effectiveness would not be engaged in respect of third parties. In the case of *Francovich*, [1991] ECR 5357, the Court found that the employees in that case did not have a directly effective right to receive payment on account of the insolvency of their employers. However, the Court nevertheless affirmed the employees' right to rely upon the principle of effectiveness. (See paragraph 43 of the judgment). In *Francovich* the principle of effectiveness was discussed in the context of a claim for state damages. However, the possibility that a third party may challenge the government on the basis that an exclusion of the right to bring civil proceedings breaches the principle of effectiveness cannot be ruled out. However, the risk to the Government of an effective challenge being made would in my view be very small indeed: It does not follow from the fact that an employee owes an obligation to take care of the safety and health of all persons affected by his acts that a third party has a community law right to compensation. In my view, having regard to the fact that the clear objective of the Directive is to protect workers at work, any third party would find it very difficult indeed to construct a community law right from Article 13 when that provision is put into the more general context of the Directive as a whole. The express or implied references to third parties elsewhere in the Directive would not in my view be sufficient to support the existence of a community law right to compensation.

**General observations on the justification for the current legislation and any possible amendments to be made to it.**

42. The fact that regulation 14 would allow a third party to bring a civil action against an employee is not inconsistent with the Directive. However, the express removal of that right would not cause the Government to be in breach of its obligation to give effect to the result intended by the Directive.

43. I can see no difficulty with the amendment proposed by my instructing solicitor in his e mail to me dated 11 October 2004<sup>1</sup>.
44. I have been asked to advise whether the PCA can be told that allowing third parties to bring claims against employees was required by community law. I think the better way of putting it is that allowing third party actions against employees is consistent with Article 13 of the Directive because under that provision employees owe a duty to third parties.
45. I have also been asked to advise whether the PCA can be told that taking away the right would run the risk of breaching the principles of equivalence and effectiveness. For the reasons given above, there would be no risk of a challenge based upon the principle of equivalence and the risk of an effective challenge based upon the principle of effectiveness would be very small indeed.

### **Summary**

46. My advice can be summarised as follows:
- a) Third parties would have the right to bring civil claims against employees for personal injury caused by a breach of duty under Regulation 14 of the MHSWR 1999, a result which is not consistent with the aim of the HSC.
  - b) The cases in which an employer would not be vicariously liable for personal injury caused by an employee's breach of duty under regulation 14 would be very rare indeed and may never arise.
  - c) Although it could be argued that regulation 14 could potentially expose employees to a liability that goes beyond that intended by the

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<sup>1</sup> "Breach of a duty imposed on an employee by regulation 14 shall not confer a right of action in any civil proceedings insofar as that duty applies for the protection of persons not in the employment of his employer."

Directive, it is possible to construe regulation 14 consistently with it.

- d) The MHSWR 1999 when read with the common law on vicarious liability, give effect to the principle of employer's responsibility in Article 5 of the Directive.
  - e) There is no reasonable basis upon which a *Francovich* claim could be brought in respect of the implementation of the Directive.
  - f) If the Government were minded to expressly exclude the right of third parties to bring a civil claim for damages against employees:
    - (i) It would not be exposed to the risk of a community law challenge by a third party based upon the principle of equivalence.
    - (ii) The risk to the Government of an effective challenge founded on the principle of effectiveness would be very small indeed.
47. If my instructing solicitor would like to discuss any of the issues addressed in this advice, or the case generally, he should feel free to contact me by telephone.

**MELANIE HALL QC**

13 October 2004

IN THE MATTER OF:

THE MANAGEMENT OF HEALTH  
AND SAFETY AT WORK AND FIRE  
PRECAUTIONS (WORKPLACE)  
(AMENDMENT) REGULATIONS 2003  
(SI 2003/2457): CIVIL LIABILITY FOR  
BREACH OF STATUTORY DUTY

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