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A survey of changes in the volume and composition of claims for damages for occupational injury or ill health resulting from the Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003

Prepared by the **Employment Law Research Unit**
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Research Report

HSE

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A survey of changes in the volume and composition of claims for damages for occupational injury or ill health resulting from the Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003

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The Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003 introduced amendments to the Management of Health and Safety at Work Regulations 1999 and to the Fire Precautions (Workplace) Regulations 1997 such as to allow employees to claim damages from their employer in a civil action where they suffer injury or illness as a result of the employer breaching either of those Regulations.

The Employment Law Research Unit in the University of Warwick was given the task of reviewing:

(i) whether there has been an increase in claims for damages arising from occupational injury or ill health for breaches of the 1999 Regulations, and, if so, the extent of that increase; and

(ii) whether the change in the law has led to new claims, or whether claimants are adding claims for damages to existing heads of claim.

The survey was undertaken over a period of six months, commencing in January 2005 and completed at the end of June 2005. During that period, assistance was solicited from key stakeholders and their representatives for a number of purposes, both in relation to the compilation of data on claims activity and trends over the relevant period, and in relation to evaluating the strategic direction of current developments.

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EXECUTIVE SUMMARY

The Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003 introduced amendments to the Management of Health and Safety at Work Regulations 1999 and to the Fire Precautions (Workplace) Regulations 1997. In particular, they served to allow employees to claim damages from their employer in a civil action where they suffer injury or illness as a result of the employer breaching either of those Regulations.

The Employment Law Research Unit in the University of Warwick was given the task of reviewing *(i)* whether there has been an increase in claims for damages arising from occupational injury or ill health for breaches of the 1999 Regulations, and, if so, the extent of that increase; and *(ii)* whether the change in the law has led to new claims, or whether claimants are adding claims for damages to existing heads of claim.

The survey was undertaken over a period of six months, commencing in January 2005 and completed at the end of June 2005. During that period, assistance was solicited from key stakeholders and their representatives for a number of purposes, both in relation to the compilation of data on claims activity and trends over the relevant period, and in relation to evaluating the strategic direction of current developments.

From the evidence compiled during the course of this survey it would appear that there has been no significant increase in the number of civil liability claims arising from the introduction of the 2003 Regulations. This appears to be because:

(1) Workers already had available to them the right to bring actions in negligence as well as the right to bring actions for breach of statutory duty under other legislation, where there was no exclusion of civil liability;

(2) Breach of these Regulations is not causative of loss, both because the obligations in the Regulations are expressed in terms of general principles and because, in most instances, the immediate cause of the loss can be attributed to a failure to comply with a specific obligation contained in other health and safety legislation.

However, over the course of the next five years, there is felt to be some possibility of an increase of successful claims in two situations:

(1) Cases in which there has been no breach of health and safety regulations or any common law duty of care;

(2) Situations in which the position on establishing causation is complex, such that a worker might wish to supplement the claim by relying on the 1999 Regulations.

Nevertheless, the widely-expressed view is that there would not be a significant number of cases in which a claim in negligence would fail but a claim under the 1999 Regulations would succeed.

With regard to Regulations 3, 10 and 13 of the 1999 Regulations, however, there could well be an increase in claims, although this increase would probably be small.

Finally, it is considered that, in situations in which the position on establishing causation is complex, and a worker supplements the claim by relying also upon the 1999 Regulations, there is unlikely to be a perceptible impact on the total number of claims brought. In some

cases, however, this additional reliance upon the 1999 Regulations might affect the success rate for claimants.

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June 2005

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1 INTRODUCTION

1.1 Background to the Survey

The Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003 introduced amendments to the Management of Health and Safety at Work Regulations 1999 and the Fire Precautions (Workplace) Regulations 1997 to allow employees to claim damages from their employer in a civil action where they suffer injury or illness as a result of the employer breaching the aforesaid regulations.

The Health and Safety Commission's view at the time of proposing these amendments was that the proposed civil liability change would help to underpin efforts to improve health and safety performance and to raise the profile of health and safety.

During the course of public consultation, a variety of concerns were expressed in relation to *(i)* the retrospective application of the civil liability change; *(ii)* the potential increase in the number of compensation claims; *(iii)* the potential for employees to face compensation claims; and *(iv)* the extension of proposals to non-employees.

Furthermore, a range of consultees believed that the number of compensation claims have been under-estimated, for the following reasons: *(i)* the overarching nature of the Management of Health and Safety at Work Regulations 1999 meant that they could be involved in almost any civil action; *(ii)* the ability to cite a breach of statutory duty is less onerous on the claimant than the common law claim of negligence; *(iii)* where employers face civil claims for breach of statutory duty under Management of Health and Safety at Work Regulations 1999, they might fall foul of hindsight; *i.e*. the courts might interpret the risk assessment requirements, and qualifying terms such as "appropriate" and "reasonable" in ways which the employer could not hope to have anticipated when drawing up their risk assessment; *(iv)* the increasingly litigious and compensation-driven environment – typified, for example, by lawyers offering "no win, no fee" terms, and the increase in claims for work-related stress; *(v)* increased evidentiary burdens; and *(vi)* wider implications for fire precautions legislation.

Following the consultation process and debate of the issues raised, Parliament eventually decided that *(i)* there should be a 3-year limit on bringing claims, in line with existing rules governing claims for damages; *(ii)* claims should be monitored by employers' organisations, trade unions and HSE to ascertain the full extent of any increase in claims and identify signs of growth in unmeritorious claims; *(iii)* employees should be open to certain claims including where there have been breaches of duties imposed upon them under regulation 14 of Management of Health and Safety at Work Regulations 1999 and injury or illness has resulted; and *(iv)* the civil liability exclusion for non-employees would be retained.

1.2 Terms of Reference for the Study

The survey was undertaken over a period of six months, commencing in January 2005 and completed at the end of 30 June 2005. Its remit was to survey the extent to which the Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003, which removed the civil liability exclusions contained in the Management of Health and Safety at Work Regulations 1999, had influenced the volume of claims taken to court in respect of workplace incidents and accidents.

In particular, it was given the task to review whether *(i)* there has been an increase in claims for damages arising from occupational injury or ill health for breaches of the

1999 Regulations and the full extent of that increase; and whether *(ii)* the change in the law has led to new claims, or whether claimants are adding claims for damages to existing heads of claim.

In the course of carrying out the survey, a variety of further matters were also considered, including the scale of claims faced by employers and the cause of the breach of the 1999 Regulations leading to the claim, the level of damages being sought by injured parties, and the level of awareness among key stakeholders of the change in the law enacted by the 2003 Regulations.

The key project objectives were thus set out as being *(i)* to achieve successful engagement with all of the key stakeholders – including, in particular, the ABI, the Federation of Insurance Lawyers, the Association of Personal Injury Lawyers, the Law Society, the Department for Work and Pensions, the TUC, the CBI and other employers' organisations – to establish their views on the consequences of the legislative change; *(ii)* to seek to quantify the effect of the 2003 Regulations on the number of personal injury claims brought (in particular, whether there has been a quantifiable increase in the number of claims and the level of damages sought), and *(iii)* to offer an analysis of the factors contributing to any such increase.

Through discussions with representatives from the major stakeholders, it was also sought to give some consideration to the implications of the changes to the 2003 Regulations for stakeholders, and to solicit their impressions of the actual or potential impact of those changes for the volume of claims relating to health and safety at work incidents.

1.3 HSE and Commitments to Report Back on the Impact of the 2003 Regulations

At the time of enacting the 2003 Regulations, a number of concerns had been raised from employers' organisations that the effect of the amending provisions would be to drive up the volume of civil litigation claims in respect of matters concerning health and safety. These concerns were fuelled by widespread publicity and press discussion of what was alleged to be an emerging "compensation culture", whereby such "new" opportunities to embark upon litigation would be seized upon by large numbers of "victims" and their advisors.

Given the strength of many of these representations, the HSE was concerned from the outset that the impact of the amending Regulations should be monitored with a view to discovering whether such fears proved to be well-founded.

At a meeting in October 2002, therefore, it was noted that, in taking forward the recommendation to amend the 1999 Regulations and the Fire Precautions (Workplace) Regulations 1997, the HSC had agreed earlier to work with the Lord Chancellors Department, employers' organisations and the TUC to develop and promote systems that ensure that the civil liability changes are not undermined by unjustified or unmeritorious claims. With this in mind, therefore, HSE undertook to report back to HSC on the outcome of this work.

In the light of the then timetable envisaged for introduction of the amending provisions, this was originally indicated as a matter to be undertaken by late 2003. Given the eventual time taken to introduce and bring into force the amending measures, that report back is now planned to be made during the Autumn of 2005. This survey constitutes part of the investigatory basis upon which that report back is to be made.

2 METHODOLOGY

2.1 Organisation of the Survey

The management of the survey was placed in the hands of a Steering Committee, chaired by Mr Neal Stone (HSE), and including the principal investigators (Professor Neal and Professor Wright), along with Mr Steve Vinton (HSE). This Steering Committee first met at HSE headquarters in London on 5 January 2005, and established the broad framework for the work to be undertaken. Having been duly constituted and having met for an initial discussion to confirm the project objectives, and to approve the proposed Work Programme and delivery targets, this Steering Committee has thus provided HSE with a light-touch "hands-on" supervisory mechanism exercised in conjunction with the Principal Investigators working on the project.

The secretariat for the survey has been provided by the University of Warwick, where two self-contained offices were made available for the project and its staff. In addition to the secretarial and clerical support, three research assistants have taken part in the survey, undertaking field work and overall administrative implementation of the research programme agreed with the Steering Committee.

One of the first tasks for the Steering Committee was to approve the profiles identified by the Principal Investigators as constituting the project reference groups representative of the views and experience of key stakeholders in relation to the regulatory provisions under consideration. This was done at the first meeting of the Steering Committee in January 2005, on the basis of suggestions put forward by the Principal Investigators.

The relevant groups were constituted to include *(i)* policy-makers; *(ii)* representatives of the practising Bar in the relevant field; *(iii)* representatives of members of the Solicitors' profession active in the field; *(iv)* representatives of major insurance firms involved in relation to the subject-matter of the regulation under consideration; *(v)* a variety of NGOs (including the CBI and the TUC, as well as representatives of small businesses) reflecting "cutting edge" experience of the provisions in operation since their coming into force; together a number of individuals representing particular sectors of industry in the United Kingdom.

An initial stage in ascertaining the background to activity in relation to the 2003 Regulations was commenced in February 2005, with the convening of two groups of specialists at "brainstorming" seminars held in London. The first of these involved a wide range of representatives from what could broadly be summarised as a "claimant perspective", while the second brought together a number of (generally legally qualified) representatives from employers, employee organisations, and government. On the basis of the discussions held during these sessions, a set of working hypotheses was drawn up, and a substantial quantity of background documentation and indications of further points of contact were identified.

The lines of enquiry opened up through the initial "brainstorming" seminars were followed up by the research assistants, who also made various field trip visits to obtain materials and elicit further sources of information and assistance. The research assistants also undertook extensive web-based research into data concerning HSE enforcement activity under the 1999 Regulations, judicial records in relation to civil litigation trends between 2001 and 2004, and material underpinning assertions that there could be discerned an emerging "compensation culture" in the United Kingdom (particularly in the context of personal injury and related claims which might impact upon the specific areas of interest to the survey).

The general approach to following up contacts with particular individuals who indicated their willingness to contribute to the work of the survey was for initial contact to be made through the research assistants, and then for one or both of the Principal Investigators to meet with the persons concerned to conduct face-to-face interviews. On a number of occasions, further telephone and/or e-Mail exchanges followed, and an impressive array of materials (both openly available and of a restricted nature) was made available to the survey team.

At an early stage in the compilation of statistical data it became evident that the original provision in the budget for an Information Officer and a Statistical Officer to assist in the collation and analysis of the raw data relating to litigation activity would not be necessary to be called upon. This was in large measure due to the generous provision of time and expertise by various specialists in government departments, organisations such as the TUC, and private sector organisations such as Datamonitor.

Various background reports were drafted by the research assistants in collaboration with the Principal Investigators, from which the content of a draft report was drawn for presentation to the Steering Committee at the completion of the field-work period (the end of June 2005).

The final drafting of this Report has been completed in the light of discussion and comment in the Steering Committee.

2.2 Meetings of Reference Groups

In order to establish a set of working hypotheses at the commencement of the survey, a series of meetings was held between the principal investigators and representatives of workers, employers, insurers and the practising legal professions. The purpose of these gatherings, which took place in January and February 2005, was to gain an impressionistic view, without having had recourse to statistical or other empirical evident, of the impact made by the 2003 Regulations to date. In particular, views were sought as to *(i)* whether there was any first-hand experience to date of use having been made of the 2003 Regulations, and *(ii)* as a matter of conjecture, what areas of potential claim were felt to be most susceptible to litigating with the assistance of the opportunity to plead breach of statutory duty as permitted by the Regulations since October 2003.

A total of 18 specialists in the field attended two “core” meetings, held in London on 7 and 8 February 2005. Subsequent to these meetings, a number of invitees who had been unable to attend the collective sessions but had indicated their willingness to contribute to the survey, were interviewed on an individual basis by one or both of the Principal Investigators.

2.3 Collation and Assessment of Raw Data

While the initial contacts were being made with various stakeholder representatives, both through meetings and by telephone and e-Mail communication, work progressed on collating available data concerning the volume and distribution of claims brought to the courts in the period immediately prior to the date of the 2003 Regulations coming into force and subsequently.

For this purpose, a pre-coming into force period of 21 months was decided upon, drawing upon data from 1 January 2002 until 30 September 2003. The data for the period post-October 2003 was eventually collected for a period up until 31 December 2004.

Judicial statistics for the period up until the end of 2003, together with an indication of the 2004 trend, were obtained from the Department of Constitutional Affairs, whose staff also provided valuable assistance in identifying a number of issues relating to the disaggregation of available data sets.

Material in relation to the processing of claims through the Compensation Recovery Unit (CRU) was sought with a view to identifying any indication of a pattern over the relevant period, as was material from representatives of the insurance industry. In particular, assistance from the Association of British Insurers (ABI) served to reinforce indications already obtained that disaggregation of available data would prove to be a significant problem across the totality of the raw material.

In order to test the robustness of the data with which we were being provided by the "official" sources, the investigators also enlisted the assistance of Datamonitor – a leading analyst and provider of industry data and related assessments in a number of areas touching upon the field for this survey. The picture obtained by Datamonitor was then compared with the picture emerging from the "official" data, and the views of staff involved in the compilation and analysis of that data were contrasted with the position indicated to us by staff at the Department of Constitutional Affairs (DCA) and through representatives of the insurance industry.

2.4 "Stakeholder" Assessments

The survey made use of stakeholders and their representatives for a number of purposes, both in relation to the compilation of data on claims activity and trends over the relevant period, and in relation to evaluations of the direction of current developments.

In relation to the former (compilation) component, the early group meetings of interested parties served to identify a number of specific contacts and sources, and these were followed up by meetings between representatives of those contacts and the principal investigators. This resulted in important information being furnished through the trade union movement, both at the level of the TUC and through specialists working within individual member trade unions of the TUC. It also gave rise to further specific information from employer's organisations, including from the Federation of Small Businesses.

From the "legal technical" perspective, information was sought from members of the Bar, the solicitors' profession, and legal departments within major trade unions and the TUC, in order to identify any trends which might be emerging in the handling of claims and the construction of patterns for litigation in relation to matters which might be affected by the changes introduced in the 2003 Regulations. A large proportion of the information thus obtained was communicated under strict conditions of confidentiality, although a number of individuals with knowledge of the "bigger picture" in their own areas of activity were of particular assistance in providing us with a composite evaluation of the trends to date.

The stakeholders and their representatives were also encouraged to furnish the investigators with "anecdotal" evidence and more impressionistic views of the emerging picture immediately prior to, and following the coming into force of, the 2003 Regulations. While furnishing the survey with evidence of a different kind from the available statistical and court records evidence compiled elsewhere, the opportunity of collecting such "soft" evidence from so many industry specialists operating at the strategic level in relation to claims and litigation forming the subject-matter of the investigation was felt to be important both as an impressionistic "sounding board"

against which to test the available "hard" data, and as a channel through which to explore potential trends for future impact of the 2003 Regulations.

In particular, the collective views of senior trade union officials, representatives of employing organisations and the insurance industry were felt to be of value in gauging the mood of stakeholders following the introduction of the 2003 Regulations, while the technical input of leading practitioners on both the claimant and respondent sides was sought in order to identify both any identifiable trend in volume of litigation touching the fields under investigation and in order to "brainstorm" potential use which might be made of the litigation opportunities introduced by those Regulations. To this end, solicitors in private practice dealing with larger volumes of claims for members of trade unions, legal staff within trade unions and trade organisations, and senior members of the Bar contributed a wealth of specific examples and general observations to enrich the evidential findings of the survey.

2.5 Consultation Procedure Follow-up

In order to obtain a further level of "impressionistic" evidence with a view to testing whether there has been a perceptible change in circumstances since the introduction of the 2003 Regulations, compared with the situation prevailing previously, the investigators approached all of the individuals and organisations which had responded to the government's consultation exercise which preceded the enactment of the Regulations.

The government's consultation process took place after HSC had agreed on 25 September 2001 to consult on the proposals to amend MHSWR and FPR. A consultative document (CD177) was published in December 2001, and the consultation ran for 15 weeks. By the end of the consultation period, a total of 128 responses had been received – 76 respondents offering little or no comment on the content of the consultative document, and the remaining 52 responses being split in the proportion of roughly two-thirds actively supporting removal of the civil liability exclusion and the remaining one-third expressing varying degrees of concern about the proposed change.

Each of the consultation respondents was furnished with a copy of their submission to the consultation exercise, and asked to indicate whether they had experienced anything since October 2003 which might have led them to change their views as expressed in those consultation responses.

Each of the consultation respondents was also invited to make any general observations in relation to the enactment and subsequent operation of the 2003 Regulations which they might wish to offer in the context of the current survey.

3 CONTEXT TO THE 2003 REGULATIONS

3.1 The 1974 Framework for Health and Safety Protection in the United Kingdom

The 2003 Regulations form part of the regulatory framework established under the Health and Safety at Work Act 1974. That framework, which is primarily sanctioned through criminal law penalties, sets out, in Part I of the 1974 Act, a number of "general duties" to which employers are subject as regards the health, safety and hygiene of persons working within, or affected by, their workplace activities. Further "general duties" concerning health, safety and hygiene are imposed upon other persons (including workers) in specific circumstances.

3.2 The "Framework" Directive 89/391/EEC

Council Directive 89/391/EEC of 12 June 1989, on the introduction of measures to encourage improvements in the safety and health of workers at work, required, by virtue of Article 18, Member States to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 31 December 1992.

Article 1 of the Directive sets out the objective of introducing measures to promote improvement of the health and safety of workers at work. The key provision to this end is contained in Article 5 of the Directive, which provides that "the employer shall have a duty to ensure the health and safety of workers in every aspect related to the work". Meanwhile, Article 6(1) of the Directive provides that the employer is to take measures necessary for the safety and health protection of workers.

These key requirements contained in Directive 89/391/EEC are implemented into the United Kingdom through sections 2 and 3 of the Health and Safety at Work Act 1974, within the framework of "general duties" established by that statute.

A variety of specific requirements set out in Articles 6(2) to 12 of the Directive were implemented into United Kingdom law by way of the Management of Health and Safety at Work Regulations 1992, which were, in turn, replaced by the Management of Health and Safety at Work Regulations 1999.

Penalties in relation to breach both of the 1974 Act's provisions and requirements contained in the 1999 Regulations are contained in the overall framework established by the 1974 Act.

However, Regulation 22(1) of the 1999 Regulations provided that, except for two specified situations, "breach of a duty imposed by these Regulations shall not confer a right of action in any civil proceedings" – a formula which subsequently became known as the "exclusion of civil liability principle". This provision was taken from the terms of s.47(1) of the 1974 Act, which contained the original policy approach to health and safety breaches constituting matters in which enforcement and remedies should lie with the State through a specially constructed system of "improvement notices", "prohibition notices" and criminal prosecutions.

3.3 Issues raised by the European Commission

Right from the outset, following United Kingdom enactment of measures to implement the framework Directive 89/391/EEC, there has been dispute between the European Commission and the United Kingdom authorities as to the adequacy of that implementation.

At root, there is a dispute as to whether the "classical 1974" model of placing health and safety duties upon employers to a level "so far as is reasonably practicable" delivers an adequate standard of protection to workers for the satisfaction of Community Law obligations. Numerous exchanges have taken place between the European Commission and the United Kingdom authorities, and, indeed, the whole question of the "so far as is reasonably practicable" standard is now before the European Court of Justice, following the initiation of infringement proceedings by the European Commission in Case C-127/05, *Commission v United Kingdom.*

However, controversy over the United Kingdom's implementation of the framework Directive 89/391/EEC has not been confined to this sole issue, and, on 27 September 2000, the European Commission sent a notice of intent to the United Kingdom government, under Article 226 of the EC Treaty, setting out two areas of concern in respect of the implementation of the framework Directive 89/391/EEC, by reason of the exclusion of civil liability provision in the existing Regulations.

The European Commission's concerns were presented in terms that *(i)* the exclusion was contrary to the general duty to provide effective judicial protection to Community Law rights which is accessible by the individual and has adequate deterrent effect, and *(ii)* the exclusion was contrary to the principle that Community Law rights be penalised under conditions which are no less favourable than those applicable to infringement of domestic rights of a similar nature and importance.

3.4 The View Formed by the Government

The preliminary view taken by HSE on the question of whether there would be a significant increase in litigation which would not previously have been undertaken, by reason of claims being brought based upon the civil liability provision opened up by the 2003 Regulations, was that this was unlikely. The view was generally to the effect that *(i)* workers already have available to them the right to bring actions for negligence and the right to bring actions for breach of statutory duty under other legislation, where there is no exclusion of civil liability (something which applies to most of United Kingdom health and safety legislation), and *(ii)* breach of the Regulations is unlikely to be causative of loss in any event, both because the obligations in the Regulations are expressed in terms of general principles and because, in most instances, the immediate cause of the loss can be attributed to a failure to comply with a specific obligation contained in other health and safety legislation.

However, in order to test the propositions underlying their preliminary view, HSE took Counsel's opinion on the matter in November 2000, and were advised that, broadly speaking, the expectation would be that no significant increase in claims would result from the amending provisions.

Counsel identified two situations in which it was felt that the potential might arise for "new-style" claims, namely: *(i)* cases in which there had been no breach of the targeted Regulations or any other common law duty of care, or where there might be difficulties in proving either, and *(ii)* situations in which the case on causation is complex, such that the worker might wish to supplement the claim by relying upon the 1999 Regulations.

Overall, however, Counsel's opinion was that *(i)* with regard to the majority of the 1999 Regulations which impose qualified duties, there would not be a significant number of cases in which a claim in negligence would fail but a claim under the 1999 Regulations would succeed; *(ii)* with regard to the limited number of Regulations concerning the provision of information and which impose absolute duties (Regulations 10, 12 and 15),

there could well be a significant increase in the number of claims – although, in the context of the Regulations as a whole, and the total number of claims based on other sources, the overall increase would probably be relatively small; *(iii)* in complex cases on causation, workers might be encouraged to use the 1999 Regulations to supplement other existing claims – something which would not have an impact upon the total number of claims being brought.

Counsel also drew attention to the possibility that the act of removing the civil liability exclusion might have the effect of encouraging workers to bring unmeritorious claims.

Finally, the possibility was canvassed that the removal of the civil liability exclusion might give rise to an entitlement for a worker to seek declaratory relief, although it was felt that, in practice, the likelihood of formal proceedings being commenced was relatively small.

3.5 Routes to Amendment

In the light of Counsel's advice, the HSC decided to recommend to Ministers that the UK address the European Commission's concerns over the Management of Health and Safety at Work Regulations 1999 by undertaking to remove the civil liability exclusion for breach of statutory duty towards employees. This would thus enable an employee to bring a claim for damages against their employer, for personal injury or death consequent on the employer's failure to comply with the 1999 Regulations.

Ministers agreed to act upon this recommendation, and, on 16 January 2001, the European Commission was notified that the 1999 Regulations would be amended accordingly and that corresponding amendments would be made (on the recommendation of Home Office Ministers) to the "civil liability exclusion" covering the Fire Precautions (Workplace) Regulations 1997. At a subsequent meeting in Luxembourg in July 2001, the European Commission was provided with an early draft of Regulations to introduce the proposed amendments, and an initial target was indicated of enacting the relevant provisions by the end of 2001.

At a meeting on 25 September 2001, HSE agreed to consult on the proposals, and, following a 15 week period of consultation on the basis of a document published in December 2001 (CD177), the legislative procedures were set in motion, leading to the eventual enactment of the 2003 Regulations and their commencement in October 2003.

3.6 The 2003 Regulations

The 2003 Regulations came into force on 27 October 2003. Their key effect was summarised in an opinion prepared by Counsel for the HSE in October 2001 on the (then) draft for the Regulations, in terms that:

> "…the proposed Regulation 6 does not itself confer a statutory right of action on employees for a breach of a duty imposed on an employer by the 1999 Regulations. Its effect is to make a breach of duty actionable by employees, under section 47(2) of the Health and Safety at Work Act 1974 ("the 1974 Act"), if the breach causes damage. The source of any right of action would therefore be section 47(2) and not the amending Regulations. The proposed Regulation 6 simply removes certain breaches of duty from the exception to section 47(2) ... The position with regard to the 1997 Regulations is different. The proposed Regulation 9A(1) itself confers a right of action. This is necessary because section 27A of the Fire Precautions Act 1971 effectively excludes the right to bring any civil claims arising out of a breach of the 1997 Regulations."

Counsel's opinion to the HSE at that time was to the effect *inter alia* that the (then) proposed amending Regulations would *(i)* be partially retrospective, in that they grant a prospective right which could be exercised by reference to conduct preceding the effective date, but that the degree of retrospectivity to which they give rise would not oblige a court to ignore conduct prior to the effective date; and that *(ii)* employers would, in general, be exposed to the risk of claims being brought in respect of conduct three years prior to damage incurred after the effective date, and that this would not be affected by s.16(1)(c) of the Interpretation Act 1978.

3.7 Post-2003 Initiatives – Proposed Amendment of the 2003 Regulations

It is noteworthy that, in its consideration of responses to the consultative document in September 2002, the HSC addressed conflicting views over the proposal that employees as well as employers should be open to compensation claims for breach of their statutory duties (be it from their fellow employees, employer, or third parties. Views differed among consultees as to whether employees should be liable for damages for injury or ill health arising from breach of Regulation 14 of the 1999 Regulations.

Some consultees supported the proposal contending that it would capture those cases where accidents resulted from employees failing to abide by control measures, and which would not necessarily be pursued by the enforcing authorities. However, other consultees were concerned about its possible practical effects, including the need for employees, or where appropriate their trade unions, to have personal indemnity insurance cover. Concerns were also expressed about the potential liability of employees to third parties.

HSE advised that the scope for claims against employees (who are already open to common law claims for negligence) was limited in practice by vicarious liability (that is the legal principle that the breach by the employee was so closely connected with the performance of their employment that it would be fair to place the liability on their employer).

Eventually, however, the HSC concluded that the regulatory proposal should proceed as set out in the public consultative document. In particular, it was considered inappropriate to maintain the civil liability exclusion for employees given that the proposals arose in the context of the framework Directive 89/391/EEC and that the Directive places duties on both employers and workers.

Subsequent to the enactment of the 2003 Regulations, the HSE sought and received Counsel's opinion on various issues concerning employee liability in early October 2004. Counsel advised, *inter alia*, that *(i)* third parties would have the right to bring civil claims against employees for personal injury caused by a breach of duty under the 1999 Regulations; *(ii)* vicarious liability for personal injury caused by an employee's breach of duty under Regulation 14 of the 1999 Regulations would be very rare and may never arise; *(iii)* the 2003 Regulations, when read with the common law on vicarious liability, give effect to the principle of employer's responsibility in Article 5 of the framework Directive.

Furthermore, Counsel advised that, if the United Kingdom Government was minded to introduce new laws 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.

The HSE, having considered the issues raised by particular consultees and its own Counsel's Opinion on these matters, has subsequently announced proposals to amend the 2003 Regulations in order to exclude the right of third parties to seek damages from employees in breach of their duties under the 1999 Regulations. With this in view, the HSE has initiated consultative proposals concerning amending Regulations, and, at the time of writing, it is anticipated that the legislative process should result in provisions to take effect early in the new Parliamentary session.

4 EXPERIENCE WITH THE 2003 REGULATIONS: OCTOBER 2003 – MARCH 2005

4.1 Overview – The Problem of Limited Statistical Data

Specific data on the operation of the 2003 Regulations during the relevant period for this survey is almost non-existent from official statistics. The series of judicial statistics issued by the Department of Constitutional Affairs (DCA) has, at the time of undertaking the survey, only been available for the calendar year 2003, with no thoroughgoing indication of trends for the calendar year 2004. No figures are available for claims brought in 2005.

Even were sufficiently contemporaneous statistics available, a second problem raises its head – namely, that the format of the official statistics does not facilitate a disaggregation of the data in order to reflect specifically the basis upon which claims have been brought, and, more particularly, if claims are made alleging breach of statutory duty or the like, the statutory or other provisions which have been used to underpin those claims.

To illustrate the point, it may be noted that, in response to a Parliamentary question tabled by Andrew Dismore MP (Hendon), concerning the volume of personal injury cases commenced over the previous ten years, an answer was given by Mr David Lammy providing statistics drawn from the DCA's judicial statistics for High Court claims in the period 1994-2003. This Parliamentary answer indicated the following:

Year	Claims Issued
1994	1,474
1995	1,224
1996	1,543
1997	1,464
1998	1,754
1999	1,187
2000	1,024
2001	1,019
2002	827
2003	570

No answer was furnished in relation to claims issued in the County Court, on the ground that these were not available, and could only be obtained at disproportionate cost.

When one looks at the sources from which the data in this Parliamentary answer were drawn, it may be seen that the figures set out reflect the data given in the Judicial Statistics for the total number of claims issued in the Queen's Bench Division of the High Court (including originating summonses) under the rubric of "personal injury actions".[1]

[1] See, therefore, in relation to the reference period taken for purposes of the present survey, *Judicial Statistics 2002*, Chapter 3, Table 3.2, and *Judicial Statistics 2003*, Chapter 3, Table 3.2.

However, it is not possible, in the framework of the statistics as presented by the DCA, to break down that figure for "personal injury actions" to indicate those claims which concern "health and safety at work" incidents – still less, those which may include a head of claim founded upon an alleged breach of statutory duty (whether by reference to the 1999 Regulations or any other statutory duties).

Discussions with staff at the DCA confirmed that figures are not collected in a form which makes it possible to carry out such a disaggregation of the "personal injury actions" statistic – and, indeed, that the associated resource implications involved in such detailed data compilation would render highly unlikely any future prospects of such detailed raw data collation.

The situation in relation to proceedings commenced in the County Courts is, arguably, even more problematic. It may be noted that the Parliamentary answer referred to above declined to offer any statistics for County Court proceedings, citing "disproportionate cost" for such an exercise as the justification for this non-availability.

Drawing upon such data as is provided through the annual Judicial Statistics in relation to the situation in the County Courts, a similar problem to that encountered in the context of High Court data arises in relation to the inability to disaggregate composite data on the detailed nature of claims.

Indeed, no composite statistic for "personal injury claims" is provided at all in relation to the County Courts, although there is such a specified statistic offered in relation to "small claims" (*i.e*. claims up to a value of £5,000) heard, under the heading of "Negligence – personal injury" and distinguished from claims reported under the heading of "Other negligence".[2]

The potential problem of such shortcomings in the officially obtainable data for the purposes of this survey were identified early on in the project, both at the first meeting of the Steering Committee in January 2005, and in the initial "brainstorming" seminars which took place at the beginning of February 2005. Nor was it anticipated that any data emerging from the Compensatory Recovery Unit (CRU) in relation to payments in respect of industrial accidents and injuries would throw much additional light upon trends in claims activity over the relevant period of the survey.

It was therefore decided that a range of "soft data" sources should be utilised in order to supplement any available "hard data" which might be derived from the officially collated statistics. This "soft data" was sought from as wide a range as possible of stakeholders in the field of litigating claims in relation to workplace accidents and injuries. In particular, assistance was sought from representatives of the United Kingdom insurance industry, the TUC and major trade unions, and legal practitioners actively involved in processing matters which might give rise to civil litigation claims in this area.

4.2 Statistics on "General" Personal Injury Litigation – High Court (1999-2003)

Drawing upon the reported *Judicial Statistics* for each of the years between 1999 and 2003, the following general picture in relation to trends in personal injury litigation emerges:

[2] See, therefore, in relation to the reference period taken for purposes of the present survey, *Judicial Statistics 2002*, Chapter 4, Table 4.9, and *Judicial Statistics 2003*, Chapter 4, Table 4.9.

Number of claims issued: As indicated in the Parliamentary answer referred to above, the picture is of a steady decline in the number of personal injuries actions for which claims were issued in the Queen's Bench Division of the High Court. These dropped from 1,187 in 1999,[3] to 1,024 in 2000,[4] 1,019 in 2001,[5] 827 in 2002,[6] and 570 in 2003.[7]

This can be seen in conjunction with the statistics for "Other negligence claims (including professional negligence)" issued in the same period. These reveal a level of 373 in 1999, dropping to 225 in 2000, then, after a rise to 292 in 2001, eventually falling to 268 in 2002 and revealing a significant drop to 128 in 2003.

Value of claims issued: The Judicial Statistics also provide some refinement (since 2002) in relation to the value of claims issued. Between 1999 and 2003, the picture in respect of "personal injury actions" in the Queen's Bench Division was:

Year	Up to £15K	£15K - £50K	Over £50K	Unspecified	Total
1999	…	…	…	1,187	1,187
2000	…	…	…	1,024	1,024
2001	…	…	…	1,023[*]	1,019
2002	…	2	4	821	827
2003	…	22	52	496	570

The figures for "other negligence claims (including professional negligence)" during the same period reveal the following:

Year	Up to £15K	£15K - £50K	Over £50K	Unspecified	Total
1999	…	…	…	373	373
2000	…	…	…	225	225
2001	…	…	…	292	292
2002	…	2	4	262	268
2003	…	4	6	118	128

4.3 Statistics on "General" Personal Injury Litigation – County Courts (1999-2003)

The same series of Judicial Statistics for each of the years between 1999 and 2003, reveals the following in relation to proceedings in the County Court (limited only to the "small claims" activities before those courts, and drawn up in estimated terms, on the basis of a weighted sample covering three months):

Number of claims issued: The number of "small claims" recorded during the relevant period under the heading of "Negligence – personal injury" and "Other negligence" in the County Courts is as follows:

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3 *Judicial Statistics 1999*, Chapter 3, Table 3.2.
4 *Judicial Statistics 2000*, Chapter 3, Table 3.2.
5 *Judicial Statistics 2001*, Chapter 3, Table 3.2.
6 *Judicial Statistics 2002*, Chapter 3, Table 3.2.
7 *Judicial Statistics 2003*, Chapter 3, Table 3.2.
* The figure of 1,023 for 2001 would appear to be a misprint in the official statistics – the reference total of 1,019 being consistent with all other indicators.

(i) Number of "Negligence – Personal injury" Small Claims Heard (1999-2003)

Year	By Individuals	By firms	By Corporations	Total
1999	3,270	250	40	3,560
2000	1,590	120	80	1,790
2001	2,080	80	120	2,280
2002	2,710	240	200	3,150
2003	1,820	240	140	2,210

(ii) Number of "Other negligence" Small Claims Heard (1999-2003)

Year	By Individuals	By firms	By Corporations	Total
1999	14,490	1,000	1,260	16,750
2000	6,930	440	640	8,010
2001	8,780	560	960	10,300
2002	6,750	320	730	7,800
2003	6,330	290	670	7,290

Value of claims issued: For these "small claims"in the County Courts, the statistics give some further information in relation to the value of the award in cases heard. During the relevant period the picture appears as follows:

(i) Amount of Award in "Negligence – Personal injury" Small Claims (1999-2003)

Year	Non-monetary	£1K or less	£1K - £3K	£3K - £5K	Over £5K	Total
1999	840	1,420	840	290	170	3,560
2000	280	800	480	160	80	1,790
2001	280	840	1,000	160	-	2,280
2002	480	1,820	690	160	-	3,150
2003	190	1,390	480	140	-	2,210

(ii) Amount of Award in "Other negligence" Small Claims (1999-2003)

Year	Non-monetary	£1K or less	£1K - £3K	£3K - £5K	Over £5K	Total
1999	2,390	9,420	4,400	500	40	16,750
2000	1,790	3,900	1,870	280	160	8,010
2001	1,200	5,670	3,070	320	40	10,300
2002	1,330	3,310	2,260	690	200	7,800
2003	1,390	3,070	2,160	430	240	7,290

4.4 Datamonitor

Faced with the problems described above in respect of identifying those elements, if any, in the statistical data which might relate specifically to litigation falling within the purview of this survey, approaches were made to Datamonitor, one of the leading providers of industry information in a variety of fields, including personal injury incidents within the framework of health and safety at work in the United Kingdom.[8]

Researchers from Datamonitor who have been, and are currently, engaged in compiling and evaluating the available statistical and related data in the context of health and safety at work and the picture of civil litigation concerning personal injury at work met with the Principal Investigators to discuss the material from which they had been working.

During the course of those discussions, both the problem of availability of relevant data outside the official judicial statistics series and the problem of disaggregating elements presented in composite form under the broad heading of "personal injury claims" were raised. In respect of both of these issues, the researchers from Datamonitor confirmed the initial view formed by the Steering Group and the Principal Investigators that the necessary raw data is simply not available.

4.5 Compensation Recovery Unit (CRU)

Although not falling strictly within the purview of the current survey, since the data does not relate to "litigation" in the sense of claims made to the civil courts, discussions were held with staff of the CRU in Washington, Tyne & Wear, with a view to ascertaining whether any general trend might be discernible in the pattern of claims (in the form of "CRU1" applications)[9] made during the relevant period.

Substantial caveats are made in relation to this data. First, the overall figures are heavily influenced by the inclusion of statistics relating to a special scheme for miners' compensation, operated through the CRU.[10] Second, the familiar problem of disaggregation of composite data raises its head again – both in respect of differentiating statistics relating to "accident" and "disease" claims, and in terms of separating out "miners" and "non-miners" cases. More generally, even if it were to be possible to identify these categories separately, there appears to be no reliable basis

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8 The annual reports produced by this organisation were made available to the principal investigators for the purpose of this survey, and discussions with the relevant members of the Datamonitor research team covered the sources from which primary data had been drawn, the availability of relevant information specific to the field of enquiry of the survey, and indications which might be drawn from the available data. For full details of the activities undertaken by this organisation, see the public web-site which can be accessed at <www.datamonitor.com>.

9 See the framework established for Great Britain under the provisions of the Social Security (Recovery of Benefits) Act 1997 and the Road Traffic (NHS Charges) Act 1999. The CRU arrangements fall within the field of activity of the Department of Work and Pensions, and details of the scheme can be accessed on the relevant public web-site at <www.dwp.gov.uk/advisers/compensation_recovery.asp>. Introduced in October 1997, the scheme covers compensation payments made to a person after an accident, injury or contracting a disease, so that the compensator (usually an insurance company) is liable to repay any benefits already received in respect of the injury or disease. The scheme is based on 2 main principles: *(i)* that a person should not be compensated twice for the same accident, injury or disease – for example, by getting social security benefits and compensation from a liable third party, and *(ii)* taxpayers should not subsidise a liable third party in their obligation to fully compensate a person for the injury or disease they have contracted.

10 The data available in relation to that scheme is, itself, subject to further reservations, since the operation of the scheme is currently under criminal investigation – the implications of which could, conceivably, have relevance to the reliability of the sources from which this data has been derived.

upon which to specify which claims, if any, have been, or might have been, underpinned with an allegation of breach of statutory duty.[11]

In relation to the period July 2002 – February 2005, for which statistics have been provided for the purposes of the current survey, the general picture which emerges is as follows:

(i) Volume of "CRU1" Applications (July 2002 – February 2005)

Period	Total "Accidents"	Total "Disease"	Of which "Miners"
2002			
July	8,907	6,705	5,338
August	7,193	8,075	7,172
September	7,932	7,714	6,734
October	9,176	10,340	9,116
November	8,749	10,214	8,910
December	7,180	4,091	3,108
2003			
January	8,528	5,517	3,870
February	5,955	8,438	6,984
March	5,723	7,471	6,031
April	4,000	6,686	5,701
May	4,604	7,162	6,070
June	4,249	7,111	6,060
July	4,876	7,853	6,591
August	6,493	16,739	15,246
September	6,481	17,657	15,839
October	9,301	20,492	18,609
November	8,609	22,657	20,856
December	8,474	19,068	17,462
2004			
January	7,659	33,394	31,420
February	6,472	24,230	22,676
March	8,068	28,875	26,874
April	5,858	27,887	26,523
May	6,116	27,993	26,656
June	7,164	22,046	19,915
July	7,185	11,580	9,652
August	7,307	7,037	5,299
September	6,557	24,563	22,892
October	6,244	28,819	27,236
November	6,715	15,507	13,343
December	5,813	4,021	1,831
2005			
January	6,354	2,240	312
February	6,062	2,193	252

[11] This is a general problem in relation to any of the possible statutory duties upon which such an allegation might be made, let alone an allegation founded specifically upon breach of the 1999 Regulations.

(ii) Value of "CRU1" Applications (July 2002 – February 2005)

Period	Total "Accidents"	Total "Disease"	Of which "Miners"
2002			
July	£6,759,685.35	£3,947,269.13	£3,021,626.78
August	£4,666,839.72	£2,443,064.49	£1,753,627.14
September	£4,603,662.63	£2,248,745.88	£1,649,339.23
October	£5,334,884.40	£2,493,658.22	£1,732,115.49
November	£5,068,310.52	£1,976,275.67	£1,202,995.46
December	£4,423,242.86	£1,504,879.05	£887,862.60
2003			
January	£6,314,125.90	£4,233,882.55	£3,145,651.37
February	£5,694,702.35	£4,403,535.04	£3,367,700.33
March	£5,868,738.45	£3,311,645.05	£2,247,382.21
April	£4,913,910.91	£4,799,018.11	£4,013,572.94
May	£5,111,902.39	£3,269,192.28	£2,598,623.82
June	£5,799,220.61	£2,872,552.31	£2,108,220.36
July	£6,471,066.84	£3,251,344.48	£2,287,682.12
August	£4,822,092.65	£2,844,394.81	£2,064,721.75
September	£5,816,955.46	£3,706,644.04	£2,510,473.32
October	£4,852,401.50	£3,730,913.15	£2,789,894.51
November	£4,892,836.37	£2,999,447.01	£2,107,238.08
December	£4,727,379.44	£2,291,247.56	£1,702,709.43
2004			
January	£5,413,407.43	£2,854,243.11	£1,774,780.85
February	£4,771,928.98	£2,435,081.23	£1,729,552.17
March	£8,341,087.43	£4,000,207.45	£2,785,466.69
April	£5,116,665.43	£1,557,582.76	£854,315.66
May	£4,559,023.29	£1,981,949.01	£1,150,882.47
June	£5,215,835.27	£2,417,523.23	£1,656,717.95
July	£5,629,215.28	£2,401,539.61	£1,422,649.57
August	£5,420,001.68	£2,319,763.33	£1,441,233.20
September	£4,827,737.41	£2,361,061.66	£1,457,068.99
October	£4,847,869.29	£2,824,779.62	£2,058,557.35
November	£5,499,581.19	£2,702,382.56	£1,768,165.57
December	£5,543,147.20	£2,638,772.51	£1,782,875.17
2005			
January	£6,789,156.16	£2,747,069.77	£1,609,461.99
February	£5,334,884.31	£5,771,759.34	£4,768,330.02

4.6 "Soft Data": Available Statistics and Related Data

In response to the paucity of "hard" data upon which to evaluate the trend in litigation during the relevant period, the Principal Investigators turned to a range of sources for relatively "soft" data, in the form of claims handling departments of major United Kingdom trade unions, insurance companies and other claims handlers, and legal advisors acting both for workers and employing organisations.

The approach adopted in relation to these sources of information was to seek any material which might indicate the volume of claims being handled generally in respect of actual or potential personal injury litigation, and to discuss this information in face-to-face meetings with individuals within the relevant organisations who are actively involved in the processing and handling of such claims or potential claims.

A number of difficulties were encountered in the course of this part of the survey, not least in respect of much of the information under discussion commonly constituting privileged material in the context of on-going litigation or pre-litigation. Notwithstanding such limitations, however, a number of those consulted were able and willing to provide anonymised examples of current practice, along with indications of the trends in volume and value of claims during the relevant period.

4.7 "Claimant Stakeholders": TUC and Related "Trade Union" Sources

A variety of information was supplied for the purposes of the survey by representatives of the TUC, legal advisers to major United Kingdom trade unions, and broader organisations representing the interests of workers in relation to health and safety at work.

Some of the material provided through the TUC is generally available in published form, including the most recently available picture of trends in legal services for trade union injury victims contained in an April 2003 report.[12] That report, which draws upon figures for the calendar year 2001, indicates that, in the period under consideration, trade union members started 53,222 new personal injury claims – representing an increase of 3% over the corresponding figure for the previous year. It is reported that a total of 104,682 claims were being investigated or progressed during the year.

During the same period, 39,024 claims were settled (a decrease of 5% by comparison with the previous year), while a total of £304,818,761 was awarded in respect of all claims (also down 5% on the corresponding figure for the previous year). Of the settled cases, the majority are reported to have been related to accidents.

Within those overall figures, however, it is significant that the area of claims in relation to stress was continuing an already-noted increase in importance, with 2,503 new claims being started under this heading. Some 27 unions reported that they had started claims relating to stress, although the overall number of such claims was slightly down on the previous year's total. It was also reported that a number of cases had been closed in direct consequence of case-law developments at the level of the Court of Appeal in relation to civil liability for stress.[13]

Meanwhile, the position in relation to asbestos claims also underlined the continuing significance of that specific issue, with a total of 1,029 new claims being started in the year under consideration. These claims reflected activity on the parts of 18 trade unions.

In addition to the perceptible trends in relation to stress and asbestos, trade unions were also reporting increases in relation to claims dealing with vibration white finger, acoustic shock, working time, assaults on staff, and clinical negligence.

None of this information, however, relates either specifically to claims which included an allegation of breach of statutory duty or to litigation trends in the period since the coming into force of the 2003 Regulations. As regards these two issues, anecdotal

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12 TUC, *Trade Union Trends: Focus on Union Legal Services for Injury Victims* (London 2003).

13 The modern cause of action in relation to stress has developed out of the High Court case of *Walker v Northumberland County Council*, [1995] 1 All ER 737. Detailed guidelines were set out by the Court of Appeal in the case of *Sutherland v Hatton*, [2002] EWCA Civ 76, and these were applied by the Court of Appeal in *Bonser v RJB Mining (UK) Ltd*, [2003] EWCA Civ 1296, and by the High Court in *Vahidi v Fairstead House School Trust Ltd*, [2004] EWHC 2102 (QB). Subsequently, the House of Lords delivered its opinions in *Barber v Somerset County Council*, [2004] UKHL 13, and these have been explained in a group of hearings before the Court of Appeal, the lead case being *Hartman v South Essex Mental and Community Care NHS Trust*, [2005] EWCA Civ 06.

evidence from those individuals interviewed about the developing picture suggests nothing to indicate that there has been any growing reliance upon a basis of claim other than had already been available prior to the coming into force of the 2003 Regulations. Indeed, the views of all of those with whom discussions were held appear to be that such matters would already have been adequately covered under the general heading of "negligence", and that, if any account were to be taken at all of the potential for new underpinning of claims subsequent to the 2003 Regulations, it would merely have been in terms of adding a self-contained head of alleged liability in a context where litigation would have been launched in any event.

4.8 "Respondent Stakeholders": Business Organisations

Similar approaches were made to organisations representing business, who might be expected to be familiar with the situation affecting potential respondents to any litigation of the kind under investigation in the survey. These bodies included the CBI as well as representatives of small business, in the guise of the Federation of Small Businesses (FSB).

In these cases, however, little information proved to be available with a view to building a comprehensive picture of trends in this field, reflecting the "individual" nature of business affiliation to the relevant representative bodies as compared with the more "collective" affiliation ethos of trade unions to a body such as the TUC.

Nevertheless, once again, the views obtained matched the impressions formed by claimant stakeholder representatives, in so far as nothing had, as yet, emerged to suggest that the situation since the coming into force of the 2003 Regulations had given rise to any perceptible increase in self-contained or new forms of civil litigation for the areas under investigation.

In passing, it may also be noted that some indication was provided, during the course of discussions with respondent stakeholders, about matters of current concern within policy-making bodies on which representatives of these organisations held seats. These included bodies closely related to governmental policy-building initiatives and activities, as well as more traditional "trade associations". None of those with whom these matters were discussed was of the view that cause for concern had been voiced in such contexts about a perceived impact since the coming into force of the 2003 Regulations upon levels of claims being made to the Courts or in relation to the nature of any such claims being litigated.

4.9 "Process Stakeholders": Insurance Companies and other Claims Handlers

Following the initial "brainstorming" seminars held in February 2005, the Principal Investigators made contact with a number of representatives of the United Kingdom insurance industry and other claims handlers, in order to ascertain whether any trend was emerging in relation to personal injury litigation in the context of health and safety at work since the coming into force of the 2003 Regulations.

Some idea of the broad picture emerging across the insurance industry was obtained from the leading bodies in this sector, while indications of the levels of activity at more "grass-roots" levels were gleaned from trade union organisations, and, in particular, from legal practitioners acting on behalf of trade union members. Both in relation to the general picture and the flow of individual claims, the impression of those stakeholders consulted was consistently that no particular impact could be measured upon the volume of claims emerging since the coming into force of the 2003 Regulations.

4.10 "Litigation Drivers": Senior Legal Practitioner Activity

In order to obtain some impression of the way in which specialist legal practitioners are viewing the prospects of potential litigation on the basis of alleged statutory breaches such as might arise in the context of the 2003 Regulations, meetings were held with senior members of the Bar of England and Wales whose practices involve significant involvement in this field. During the course of these meetings, the views of these practitioners were sought, in particular, in relation to actual examples where a pattern might be emerging, and in respect of more conjectural opinions as to how the potential liability framework since 2003 might be utilised in given circumstances.

So far a current trends are concerned, the unanimous view expressed by the reference group of specialist legal practitioners was that many more cases are being settled now because of the operation of the reformed civil procedures introduced since 1999 (the "Woolf Reforms").[14]

In relation to the general volume of claims arising, the common view emerging from the reference group of senior legal practitioners was that some growth in personal injury claims is foreseen over the next five years. This, it is felt, will be observed, in particular, in the public sector. However, it is felt that such a rise will not be reflected in the litigation activity of the Courts, where only around 1% of all claims are eventually heard. Rather, it is felt that insurance companies and their legal advisers can be expected to witness such an increase at the level of initial handling of claims.

Whilst, once again, it does not appear possible to disaggregate the reasons for the foreseen increase, there was no doubt in the minds of the reference group members that the anticipated growth in claims will be assisted by the 2003 Amendments to the Management of Health and Safety at Work Regulations 1999 and the Fire Precautions (Workplace) Regulations 1997.

The reasons put forward by the members of the reference group were, however, particularly interesting:

- First, it was felt that the obvious reason for such an increase already exists – namely, there is widespread evidence that the statutory requirements placed upon employers to carry out a risk assessment, to provide information, and to provide training, are often breached. This is because employers either fail to make any provision at all, or because such provision as is made is inadequate. It therefore follows that the evidential potential for underpinning claims alleging breach of statutory duty is already to hand;

- Second, a common view was expressed that there is evidence to suggest that the numbers of insidious disease claims and stress claims are increasing because of the nature of work in the United Kingdom. In particular, it is suggested that the mere existence of the 2003 Regulations, together with, in the case of stress, newly-issued

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[14] *See The High Court and County Courts Jurisdiction (Amendment) Order 1999 (SI 1999 No 1014) which came into force on 26 April 1999, together with associated Practice Directions. For early assessments of the impact of the reforms to civil procedure introduced by this measure, see the studies undertaken for the Department for Constitutional Affairs (DCA):* Emerging Findings: An early evaluation of the Civil Justice Reforms *(March 2001), and* Further Findings: A continuing evaluation of the Civil Justic Reforms *(August 2002). Both sets of findings indicate a decline in the volume of claims issued, along with some evidence that the newly-introduced "pre-action protocols" are operating to promote settlement of claims, as well as an indication that settlements "at the door of the court" are now fewer while settlements before the hearing day have increased*

Stress Management Standards and associated guidance,[15] will aid the prospects of success where such actions are brought. This, is it felt, will, in turn, serve to stimulate further claims of a like nature.

4.11 Consultation Procedure Follow-up

Questionnaires were sent to each of the organisations or individuals who had responded to the government's consultation procedure which was launched in December 2001 prior to the final presentation of the draft 2003 Regulations to Parliament.

Each of those approached was asked *(i)* to confirm whether the observations set out in their response to the public consultation preceding the enactment of the 2003 Regulations appear to remain valid in the light of experience with the Regulations to date, and *(ii)* to state whether, since the coming into force of the 2003 Regulations, circumstances have caused them to reconsider the vies expressed in their response to the public consultation.

Of the 128 organisations or individuals involved, a total of 55 responded (43%) – some limiting their responses simply to a YES/NO in relation to the two direct questions, and others accepting the invitation to make further observations in respect of experience under the 2003 Regulations to date.

[15] See, in particular, the Guidance Note, *Tackling Work-related Stress* (HSG218), together with detailed guidance in the "action pack" *Real Solutions, Real People* (HSE 2003). A model stress policy is also to be found on the HSE web site at <www.hse.gov.uk>. More recently, a formal set of Management Standards was published on 2 November 2004 (see <www.hse.gov.uk/stress/standards/standards.htm>).

5 SUPPLEMENTARY STAKEHOLDER INPUT

5.1 Pre-Survey – "Brainstorming" Reference Groups

The first group of "brainstorming" seminars, held in February 2005, were designed not only to obtain impressionistic views about claims trends from practitioners closely involved with litigation management in the areas relevant to the survey, but also to stimulate assessment of the likely legal grounds which might give rise to a change in the pattern of litigation following the coming into force of the 2003 Regulations.

During the course of these initial sessions, a number of important propositions emerged – some of which had already been identified in the course of discussions with legal advisers within HSE on the occasion of the first Steering Group meeting in early January 2005, some of which had been raised by Counsel instructed by the HSE prior to the drafting of the 2003 Regulations, and some which reflected preliminary thoughts voiced by the principal investigators while designing the organisation of the survey.

A commonly expressed view was that there should be little or no discernible increase in the volume of litigation, consequential upon the 2003 amendments, since it is highly probable that a self-standing claim based upon "breach of statutory duty" would merely be ancillary to a firmly-established cause of action in negligence litigated through the well-trodden PI channels. There was some discussion as to whether the addition of such a head of claim might serve to "bolster" an already-existing negligence claim. However, the general impression tended towards the view that this might, at best, provide a little increase in the pre-trial negotiating position of a claimant, although the effects of the "post-Woolf" civil procedure reforms were already pushing cases significantly in the direction of settlement before reaching the door of the court.

Even where a claim founded upon alleged "breach of statutory duty" might be included, however, there was widespread agreement that this was not, in itself, sufficient to provoke an increase in the volume of claims. The practitioner stakeholders consulted were primarily concerned with the requirement to show "causation" by reference to the statutory duty breach – something which does not flow automatically from the fact of such a breach, and might even, in some cases, make establishing the "causation" component for a "traditional" negligence cause of action more difficult.

Only in relation to a limited range of potential claims was it felt that there might be fertile ground for the development of self-contained claims founded upon breach of a relevant statutory duty. These related to *(i)* "stress" claims – the most commonly cited; *(ii)* "inadequate training" claims – particularly by reference to competence-related duties of employers under the 1999 Management Regulations; and *(iii)* "inadequate information" claims – seen to be closely related to "inadequate training" issues.

Although, as already indicated, there is little or no "hard data" to hand which might support any of these suggested areas for claims development, it was decided to revisit these initial propositions with both experienced claims handlers in the insurance sector and amongst members of the Solicitors' profession, as well as with the group of senior practitioners representing the England and Wales Bar, who met towards the end of the survey to reflect upon experience to date, and emerging litigation strategy in this field.

It should also be noted, at this stage, that a number of stakeholders pointed out that the relevant limitation periods for potential claims of the kind under consideration continue to run for some considerable time, and that, with that in mind, it might be suggested that a survey undertaken only eighteen months after the coming into force of the 2003 Regulations is somewhat premature.

5.2 Continuing Inputs – Additional Contributions from Stakeholders

The outcome of the subsequent discussions held with members of the relevant practising professions proved slightly surprising, in the light of a strongly-expressed view during the early discussions with stakeholders that there was unlikely to be any discernible increase in the volume of claims developing in the wake of the 2003 Regulations coming into force.

Amongst legal practitioners handling claims for claimants (primarily raised through trade unions), the view of the likelihood that new-style claims are being, or would be, developed was largely negative to that prospect. Indeed, such patchy evidence of trends in claims handled through the larger TUC-affiliated trade unions appeared to support this position during the period up until March 2005. Certainly, no evidence was adduced which might indicate a "surge" of claims for any reason connected with the changes introduced by virtue of the 2003 Regulations.

This picture was also broadly consistent with the experience reported in the insurance sector, although there were several mentions of "stress" claims giving cause for concern – without, however, suggesting that there was tangible evidence of any significant increase in such claims which might be attributable to the potential opened up by the 2003 amendments.

However, the "litigation driver" thinking which emerged from the final discussion sessions held with senior members of the Bar, in June 2005, produced some sense that the potential for an increase in self-standing claims based not only upon "stress" but also upon "training-related" or "inadequate information" breaches of duty is a real one. Although it has to be recognised that the Principal Investigators were inviting the Bar discussants to "think creatively" in terms of claim development, there nevertheless emerged a common view that there were some signs of "stress" claims already having an impact in terms of bolstering existing claims.

More speculatively, there was also a sense that, in particular, statutory breaches relating to alleged "inadequate information" or "training" were beginning to become more common and more widely recognised. In this context, mention has already been made (*supra* 4.10) of the suggestion that the mere existence of the 2003 Regulations, together with, in the case of stress, newly-issued Stress Management Standards and associated guidance, will aid the prospects of success where such actions are brought. It was also felt that the existence of such guidance and "standards" – something emerging from modern HSE practice in a number of areas – spelling out in clear terms the standard of care expected of employers, serves, in itself, to heighten awareness of the potential for litigation, and assists in encouraging settlements of potential or actual claims well before there is any prospect of proceedings coming before the courts.

6 EVALUATION OF EVIDENCE AND RESULTS

6.1 Trends In Personal Injury Litigation 2001-2004: A Comment

Overall claims numbers have not been consistent since 2001. The year 2001-2002 saw a 7.4% fall in overall claims numbers on the previous year, largely due to a 39.9% reduction in disease claims. A rise in disease claims the following year contributed to a 2.65% rise in personal injury claims made to insurance companies. 2003-2004 saw the highest number of personal injury claims received by insurers since the changes to the civil legal system in the wake of the 1999 "Woolf reforms". Again, largely due to a 134% rise in disease claims, the number of personal injury claims rose to 779,243, although accident claims fell by 9.5%.

The rise in personal injury claims has fuelled rumours of a "compensation culture" growing in the United Kingdom. However, it is acknowledged that "no win, no fee" advertising has decreased dramatically since 2001, and it would seem that the growing cost of claims, rather than a rise in claims frequency is the main concern for insurers.

However, in the year 2001-2002, when there was widespread press coverage and when fear of a growing "compensation culture" was causing concern throughout the United Kingdom, it was found that only 64.6% of potentially successful motor claims were made and only 32.8% of workplace injury claims were made. It has been suggested that, as well as indicating a potential growth in the market for insurers and solicitors, this shows that the growing cost of personal injury litigation is largely due to the growing costs of individual claims, and cannot solely be blamed on a rise in claims frequency.[16]

Regarding personal injury within employers' liability, reported workplace injuries have seen a decline since 1998, both in accidents that put the employee out of work for more than three days, and non-fatal major injuries. This decline has been attributed to improvements in health and safety in the workplace as well as a reduction in the workforce of manufacturing and construction-based industries.

Workplace fatalities have also been falling from 2000, and the rate of fatal injury proportional to total workers is the lowest on record. However, the number of work-related mental ill health claims has been increasing since 1999, only seeing a decline since 2002. This decline is said to be due to efforts by employers to reduce stress and maintain an improved duty of care, as well as an influential ruling that the employee should alert the employer of his or her anxiety as the employer cannot be expected to detect depression or stress and is therefore not liable if the employee makes a personal injury claim against them.

It has also been shown that the proportion of accidents in the workplace reported under RIDDOR has increased,[17] as has the number of personal injury claims made in 2003-2004. This was largely due to a rise in disease claims since the closure of the British

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[16] The cost of personal injury claims has risen on average since 2001. The fears for the future are that the United Kingdom claims market will follow that of the United States. Although fears of developing a claims culture such as that in the United States have largely subsided, it is feared that the cost of claims will continue to rise and the average award won will also rise. This so-called 'Harvest Scenario' predicts minimal growth in claims numbers at about 0.7% per year. However, as the average claim cost is also set to increase, the potential cost facing insurers in 2007 will be as much as £11 billion.

[17] The Reporting of Injuries Diseases and Dangerous Occurrences Regulations 1995 (RIDDOR) came into effect on 1 April 1996, replacing earlier 1985 Regulations. Under these, responsibility for reporting cases of work-related injuries, disease and dangerous occurrences rests primarily with employers and the self-employed. Reports are submitted to the health and safety enforcing authorities, and the information is used to target action to improve prevention and control.

Coal respiratory disease scheme in March 2004. However, the number of accidents claims fell almost 15%, said to be showing the success of improvements to health and safety in the workplace since 2003.

Meanwhile, the numbers of claims heard at Employment Tribunals have continued to rise to over 100,000 in 2004, mainly due to multiple applications and unfair dismissal hearings. This has led to an increase in employer's liability claims costs, seeing an increase of 72% between 1999-2003.[18]

6.2 Measurable Impact of the 2003 Regulations

In relation to the "hard data" available to indicate the impact of the 2003 Regulations by reference to the volume of claims brought, there is no available evidence to suggest that the amending measure has given rise to either a rise in, or decrease of, the number of claims. Not only is the required data not available for the period since the coming into force of the Regulations, but even the data that is available in respect of judicial statistics is inappropriate for addressing the question of what impact these Regulations may have had.

The only (generalised) indications of trends in personal injury litigation during the relevant period suggest a fall in the number of claims made both to the High Court and to the County Courts, although the value of those claims which are made has tended to show an upward trend.

Even the available "peripheral" data relating to work-related claims suggests a similar trend of decreasing numbers – although there are severe reservations about the extent to which data obtained from the CRU and through trade unions or PI claims handlers can be relied upon to provide anything more than circumstantial support for the proposition that there is an overall downward trend in claims development.

Certainly, there is no evidence, one way or the other, to support the development of the widely-trumpeted "compensation culture" – with, if anything, all of the available indicators pointing in the opposite direction.

6.3 Impressions of the Non-measurable Impact of the 2003 Regulations

Taking into account "soft data" sources, those stakeholders who were consulted during the course of the survey were almost unanimous is stating that they would not have expected the 2003 Regulations to have given rise to a quantitative change to the number of successful claims. Rather, it was felt that the only impact would be to provide "an extra string to the bow" (the alleged breach of statutory duty being, it is said, very likely to be pleaded now), and might affect the success rate of claims launched.

There is no dispute that more cases are now being settled – largely because of the "Woolf reforms" – so that just looking at the number of decided cases is an unreliable indicator of the impact deriving from the 2003 Regulations. However, there was a widespread view that the likelihood of success in areas such as stress claims and insidious disease cases could have increased.

In addition, looking to the future, an employer's lack of a suitable and sufficient risk assessment or the failure to review a risk assessment (Regulation 3), shortcomings in

[18] However, it should be noted that the number of health and safety cases (for some of which the Employment Tribunals perform an appellate function) dealt with by these bodies is extremely small – the majority of cases concerning payment of wages, dismissal, and discrimination at work.

relation to capabilities and training (Regulation 13), and shortcomings in the provision of information for employees (Regulation 10) should be seen as key areas which may affect the number of successful claims.

6.4 Overall Conclusion

From the evidence compiled during the course of this survey it would appear that there has been no significant increase in the number of civil liability claims arising from the introduction of the 2003 Regulations. This is because:

(1) Workers already had available to them the right to bring actions in negligence as well as the right to bring actions for breach of statutory duty under other legislation, where there was no exclusion of civil liability;

(2) Breach of these Regulations is not causative of loss, both because the obligations in the Regulations are expressed in terms of general principles and because, in most instances, the immediate cause of the loss can be attributed to a failure to comply with a specific obligation contained in other safety legislation.

Over the course of the next five years, there is felt to be the possibility of an increase in successful claims in two situations:

(1) Cases in which there was no breach of the targeted Regulations or any other common law duty of care;

(2) Situations in which the case on causation is complex, such that a worker might wish to supplement the claim by relying on the 1999 Regulations.

However, the widely-expressed view is that there would not be a significant number of cases in which a claim in negligence would fail but a claim under the 1999 Regulations would succeed. With regard to Regulations 3, 10 and 13, however, there could well be an increase in claims, although this increase would probably be small.

Finally, it is considered that, in situations in which the case on causation is complex, such that a worker might wish to supplement his claim by relying also upon the 1999 Regulations, there is unlikely to be an impact on the total number of claims brought. In some cases, however, this might affect the success rate.

7 CONCLUSION AND RECOMMENDATIONS

This survey is the first attempt to assess the impact upon litigation patterns of the amendments introduced by the Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003, which removed the civil liability exclusions contained in the Management of Health and Safety at Work Regulations 1999, and to assess whether those amendments have influenced the volume of claims taken to court in respect of workplace incidents.

The investigation, which was undertaken over a period of six months, commencing in January 2005 and completed at the end of 30 June 2005, has sought to obtain an impression of the volume and value of claims brought during the period 1 January 2002 until 31 December 2004. For that purpose, the limited available formal statistical data for High Court and County Court claims was drawn upon, along with interview and "brainstorming" discussion inputs from a wide range of stakeholders with relevant experience in the handling and litigating of claims arising out of workplace incidents of the kind under consideration. Ancillary data was also obtained from insurance industry sources, business and trade union representatives, and specialist practitioners within the legal profession.

The formal results, as set out in Part 6 above, confirm initial impressions that none of the available data serves to enable a definitive picture to be drawn of the volume and value of claims specifically incorporating a head of claim based upon the "breach of statutory duty" potential unlocked by the 2003 Regulations. Indeed, the near impossibility of disaggregating judicial statistics, records maintained by the Compensation Recovery Unit (CRU), and even information held by trade unions and other claimant representative organisations, confirms that the necessary empirical material upon which to form such a judgment is not available. Furthermore, from discussions with specialists within the Department for Constitutional Affairs and other involved public bodies, it would appear that there is a very low likelihood of raw data being compiled, in future, in a form which might make it possible to evaluate any trends in civil litigation founded upon the amended position established by the 2003 Regulations.

Much of the evidence collected during the course of this investigation, therefore, has relied upon "soft" sources, reflecting the recent experience of practitioners in the field, along with the strategic litigation planning musings of senior members of the legal profession.

Such indicators as there are, however, are broadly consistent. Not only is there no evidence to indicate an increase (or, indeed, a decrease) in claims following the coming into force of the 2003 Regulations, but, with the exception of a very narrow range of issues (involving "stress", "training" and "information provision" under the relevant statutory provisions), claims handlers across a wide range of stakeholders report no significant change in the situation since the 2003 Regulations took effect. That narrow group of claim bases also reflects the more "theoretical" forecasts of senior legal practitioners in respect of "potential claims" for the future.

Two key points emerge from the overall results and the stakeholder representatives with whom they have been discussed. First, this survey has probably been undertaken rather too early to pick up much in the way of an emerging trend for claims in the context of the 2003 Regulations – particularly, when the limitation periods for such claims are considered, and the time-lag in data feeding through is taken into account. Second, it would be helpful to repeat the investigation at a later date (most commentators suggesting another five years hence – *i.e.* in early 2010) – particularly if some means

could be found to stimulate the collection of raw data in a form which allowed for some measure of disaggregation to be achieved in order to focus upon claims specifically founded upon allegations of breach of statutory duty.

As regards the first observation, the Principal Investigators would endorse the view that the investigation has been requested at a rather early stage, given the need to identify trends over time. In relation to the latter observation, the Principal Investigators are of the view that the current methods of data compilation in respect of the relevant matters are wholly unsuited to informing a survey such as the present one, so that, unless there is a commitment (whether as a matter of changed practice, or through targeted "sample" surveys being undertaken) to the production of more appropriate raw data sets, future investigators will encounter precisely the same difficulties as have been noted in the present exercise.

These things having been said, however, the Principal Investigators present their findings to the HSE for consideration in the light of developing policy for workplace health and safety regulation. In so doing, they wish to record their appreciation of the substantial amount of time, effort, and enthusiasm which has been contributed to the investigation by a wide variety of organisations, individuals, and public bodies. Responsibility for the conduct of the study, evaluation of the material collected, and the conclusions formulated on the basis of that material remains, of course, with the Principal Investigators.

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A survey of changes in the volume and composition of claims for damages for occupational injury or ill health resulting from the Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003

The Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003 introduced amendments to the Management of Health and Safety at Work Regulations 1999 and to the Fire Precautions (Workplace) Regulations 1997 such as to allow employees to claim damages from their employer in a civil action where they suffer injury or illness as a result of the employer breaching either of those Regulations.

The Employment Law Research Unit in the University of Warwick was given the task of reviewing:

(i) whether there has been an increase in claims for damages arising from occupational injury or ill health for breaches of the 1999 Regulations, and, if so, the extent of that increase; and

(ii) whether the change in the law has led to new claims, or whether claimants are adding claims for damages to existing heads of claim.

The survey was undertaken over a period of six months, commencing in January 2005 and completed at the end of June 2005. During that period, assistance was solicited from key stakeholders and their representatives for a number of purposes, both in relation to the compilation of data on claims activity and trends over the relevant period, and in relation to evaluating the strategic direction of current developments.

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