Section 69 of the Enterprise and Regulatory Reform Act 2013 ("ERRA") changes the landscape of health and safety PI law in a major way. Section 69 came into force on 1 October 2013 and will impact on causes of action after that date. In a nutshell, what it does is amend the law such that a breach of duty imposed by health and safety regulations will no longer be actionable in the civil courts unless the regulation says so. It does this by amending the Health and Safety at Work Act 1974, section 47, which has been around for long enough for most of us simply to take it for granted. What the old section 47 said was that:

"*Breach of a duty imposed by health and safety regulations…shall so far as it causes damage, be actionable except in so far as the regulations provide otherwise", What the new section 69 says is: "(2) Breach of a duty imposed by a statutory instrument containing (whether alone or with other provision) health and safety regulations shall not be actionable except to the extent that regulations under this section so provide. (2A) Breach of a duty imposed by an existing statutory provision shall not be actionable except to the extent that regulations under this section so provide (including by modifying any of the existing statutory provisions).*"

Section 69(10) makes clear that the amendment is not retrospective: "The amendments made by this section do not apply in relation to breach of a duty where that breach occurs before the commencement of this section." Thus, in an industrial disease claim for example, the key date will be when the breach occurred which could have been many years ago and not when symptoms first manifested, which could be in the future.

The explanatory notes to the ERRA put it this way: "The amendment…reverses the present position on civil liability, with the effect, unless any exceptions apply, that it will only be possible to claim for compensation in relation to affected health and safety legislation where it can be proved that the duty holder (usually the employer) has been negligent. This means that in future, for all relevant claims, duty-holders will only have to defend themselves against negligence."

Prime examples of legislation which does not state that they give rise to a relevant civil cause of action are the 1992 "6-pack" as amended all of which are silent on the issue (except for the Management of Health and Safety at Work). These regulations (and all the other regulations with which PI practitioners are most familiar) will no longer give rise directly to a civil claim unless they are amended. The Construction (Design and Management) Regulations 2007 does specifically state that some of its parts do confer a civil right of action (see regulation 45) but this has been specifically repealed by ERRA (Health and Safety) (Consequential Amendments) Order 2013. It looks as if the intention is that the right of employees to sue directly for failure to carry out risk assessments has also gone but this is not wholly clear.

In brief, some of the likely ramifications are
a) The end of *Stark v Post Office* and similar claims which rely on breach of a statutory provision without any degree of fault/negligence;
b) The onus being on the claimant to establish the ingredients of negligence e.g. to show what went wrong rather than simply that something must have gone wrong in a workplace. Claimants should be able to rely on breaches of health and safety legislation as evidence of negligence (as if pleading breach of an Approved Code of Practice or the Highway Code) but breaches are not proof of negligence and it will be interesting to see how the Courts sort out this area;
c) Increased need for expert evidence in areas such as engineering as claimants try to meet the requirement of showing what happened and why it was negligent. There will be a tension between this need and current attempts to limit the costs of litigation by reducing reliance on experts.
d) Defendants saying "prove it" with increased denials of liability at the letter of claim stage and, probably, increased need for pre-action disclosure on a wide front;
e) A tougher culture for claimants with increased "front loading" of liability costs.

Inevitably, there will be a lot of litigation arising from these changes over the next few years.

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