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Sham 69 – s69 of the Enterprise and Regulatory Reform Act 2013

Where are we now ?

Robin Cleland, Advocate

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Good old red tape….

- The UK government wished to cut what it called the “unnecessary red tape of” too much health and safety
- Came into force on 1 October 2013 that date referring to the breach of duty
- Removes the ability of pursuer to rely directly on a breach of certain H&S regulations as they no longer confer civil liability

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The new s47 of HSWA 1974

- *"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 provide."*

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Stark v Post Office [2000] ICR 1013

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Strict liability

- This was the purpose of the original exercise to remove the mischief of strict liability
- Such as found under Reg 5 of PUWER
- Difficult to see any controversy in doing so
- But the ramifications of s69 go much further than that especially as regards what are known as the “Six Pack” Regulations

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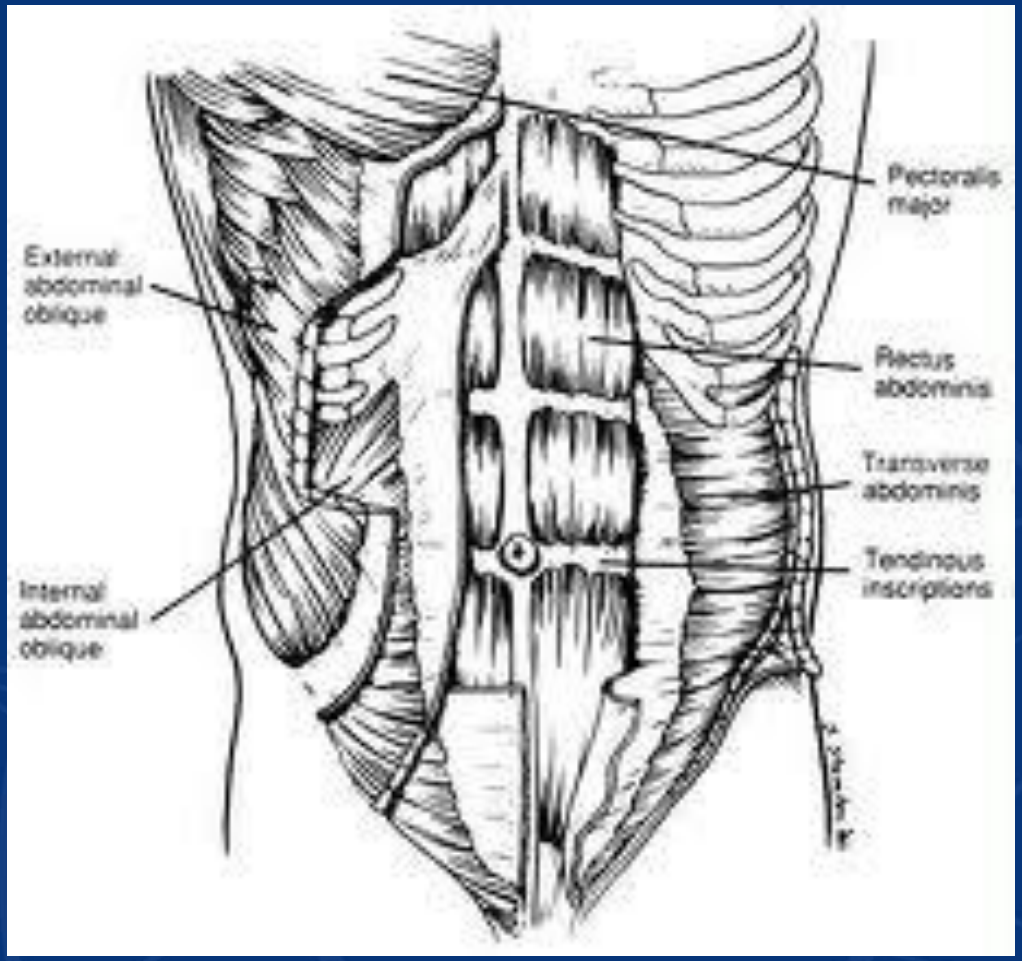
The Six Pack



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The Six Pack

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The 1992 Six Pack

- Health & Safety (Display Screen Equipment)
- Management of Health and Safety at Work
- Manual Handling Operations
- Provision and Use of Work Equipment
- Personal Protective Equipment
- Workplace (Health, Safety & Welfare)

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Thereafter…

- RIDDOR 1995
- Confined Spaces Regulations 1997
- LOLER 1998
- PUWER 1998
- MHSW Regs 1999
- COSHH Regs 2002
- Control of Vibration at Work Regs 2007
- Construction (Design & Management) Regs 2007/2015

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So what does all this mean ?

- Obviously a breach of statutory duty under the Regs does not mean that civil liability is established
- However, the Regs do still apply in their entirety and a breach of many of the Regs can still amount to a criminal offence
- But, subject to the occasional exception, any PI claims now require to be established under the common law
- This therefore requires reasonable foreseeability to be established and so proving an element of actual or constructive knowledge on the part of the employer is required

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Gilchrist v Asda Stores Ltd 2015 Rep LR 95

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Gilchrist

- Pursuer fell backwards off a dalek stool when hanging clothes on a rack
- Submitted that foreseeable employees could become unbalanced and fall when manual handling above head whilst standing on the footstool
- The judge disagreed but the post s69 law was comprehensively analysed by Counsel for the pursuer and which was accepted by the court albeit with no contradictor by the defender
- “With regard to the effect of the 2013 Act, counsel for the defenders submitted that the section must have some content but did not expand on his argument. I am prepared to accept counsel for the pursuer's argument, no contrary submission being made”

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Gilchrist – the analysis

- The Regulations help define or inform the scope of the common law duty
- If an employer is in breach of its statutory duties it will often result in a criminal offence and if so may often the employer may be regarded as acting unreasonably

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Reference to pre ERRA case law

- It was further argued that the existence of a regulation demonstrates that harm is foreseeable, under reference to Boyle v Kodak in which Lord Reid said: “Employers are bound to know their statutory duty and to take all reasonable steps to prevent their men from committing breaches” ([1969] 1 W.L.R., p.668)

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Reference to pre ERRA case law

- *Baker v Quantum Clothing Group Ltd* [2011] 1 WLR 1003, SC
- Majority decision of the Supreme Court concluded that the criteria for liability under s.29 of the Factories Act were not significantly different from those for negligence at common law, having regard to the proviso for reasonable practicability and the burden of proof.

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Per Lord Dyson

- "I assume that the justification for saying that the statutory duty must differ from the common law duty is that the statutory provisions would otherwise be otiose. But there is no principle of law that a statutory obligation cannot be interpreted as being co-terminous with a common law duty."

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Cockerill v CXK Ltd et al [2018] EWHC 1155 (QB)

- The claimant fell down a 7 inch step at 9.30am on 1 October 2013
- There is some comment on the law post s69 of the 2013 Act at paragraphs
- Regrettably, no cases on the effect of the 2013 Act were cited (such as *Gilchrist*)
- Claimant did rely on the proposition that the statutory duties inform the common law duties

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Cockerill

- “In removing the claimant's cause of action for breach of statutory duty, the 2013 Act did not repeal the duties themselves. Those duties continue to bind employers in law. So they continue to be relevant to the question of what an employer ought reasonably to do. However by enacting s.69 , Parliament evidently intended to make a perceptible change in the legal relationship between employers and employees in this respect. It removed direct actionability by claimants from the enforcement mechanisms to which employers are subject in carrying out those statutory duties.”

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Dehenes v T Bourne & Son 2019 SLT (ShCt) 219

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Dehenes

- Pursuer was part of a 4 man lifting team
- Lifting medical equipment called an analysing machine
- Which weighed 250kgs (550 pounds)
- He tripped over pallet and injured his hand and back

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Dehenes

- Pursuer relied on breach of MHOR Regs
- The defenders had performed a "risk assessment" and claimed to perform a dynamic one at the scene
- The submissions from Gilchrist were shamelessly repeated by me and relied upon
- But this time with a different outcome
- A clear breach of MHOR was also found to amount to reasonably foreseeable risk of harm

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Tonkins v Tapp [2018] 12 WLUK 716

- Claimant fell from a scaffold tower
- His claim failed on the facts but he also relied upon breaches of Regulations as being "strong prima facie evidence" of negligence
- Cockerill the only post s69 authority referred to but the judge here came to a different view to the judge in that case

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Tonkins

- "That cannot have been Parliamentary intention…for if that had been the intention, Parliament would instead have chosen to repeal the statutory duties in question. …I do not understand how it can be said…that, on the one hand, those statutory duties bind employers in law and continue to be relevant to the question of what an employer ought reasonably to do while, on the other hand, were evidently intended to make a perceptible change in the legal relationship between employers and employees. Those concepts seem to me to be mutually inconsistent."

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Kennedy v Cordia Services LLP 2016 SC (UKSC) 59

- Contains very important guidance about the common law duty of an employer
- Namely the following propositions:
- A reasonably prudent employer will conduct a risk assessment in connection with its operations so that it can take suitable precautions to avoid injury to its employees.
- A fairly long line of authority now supports the proposition that a common law duty exists to perform a risk assessment

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Conclusions ?

- With the exception of the *Stark v Post Office* type case, it does seem largely that demonstrating a breach of statutory duty will inform the standard of care under the common law
- The proposition that a reasonable employer could be in breach of statutory duty but not civilly liable under the common law is an unattractive one
- It is difficult to see how an employer could argue that harm was not foreseeable in the face of a statutory duty to take precautions against it eventuating.
- Indeed, there has been no concerted attempt by any defender in any of these post s69 cases to argue otherwise

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Some practical tips ?

- Whether there has been a risk assessment and whether it is suitable and sufficient is key and recognised now as being part of the common law duty on behalf of an employer in informing what a reasonable employer should do
- Trying to establish some form of actual or constructive knowledge on the part of an employer is also key as that necessarily leads into reasonable foreseeability
- Therefore evidence of previous accidents and any input from potential witnesses all the more important or whether it can be viewed as being obviously dangerous
- Especially so in more borderline cases such as slipping and tripping

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Expert evidence

- Especially as the court will require to have some evidence about what a reasonable and prudent employer should be doing, instructing an expert report and doing so early may be very important
- Often a fine line between an expert providing true expert input and/or also either simply stating the bleeding obvious and/or usurping the function of the court
- Refer to the test for using expert evidence in *Kennedy v Cordia*
- Skilled expert evidence on factual matters can be important and assist the court

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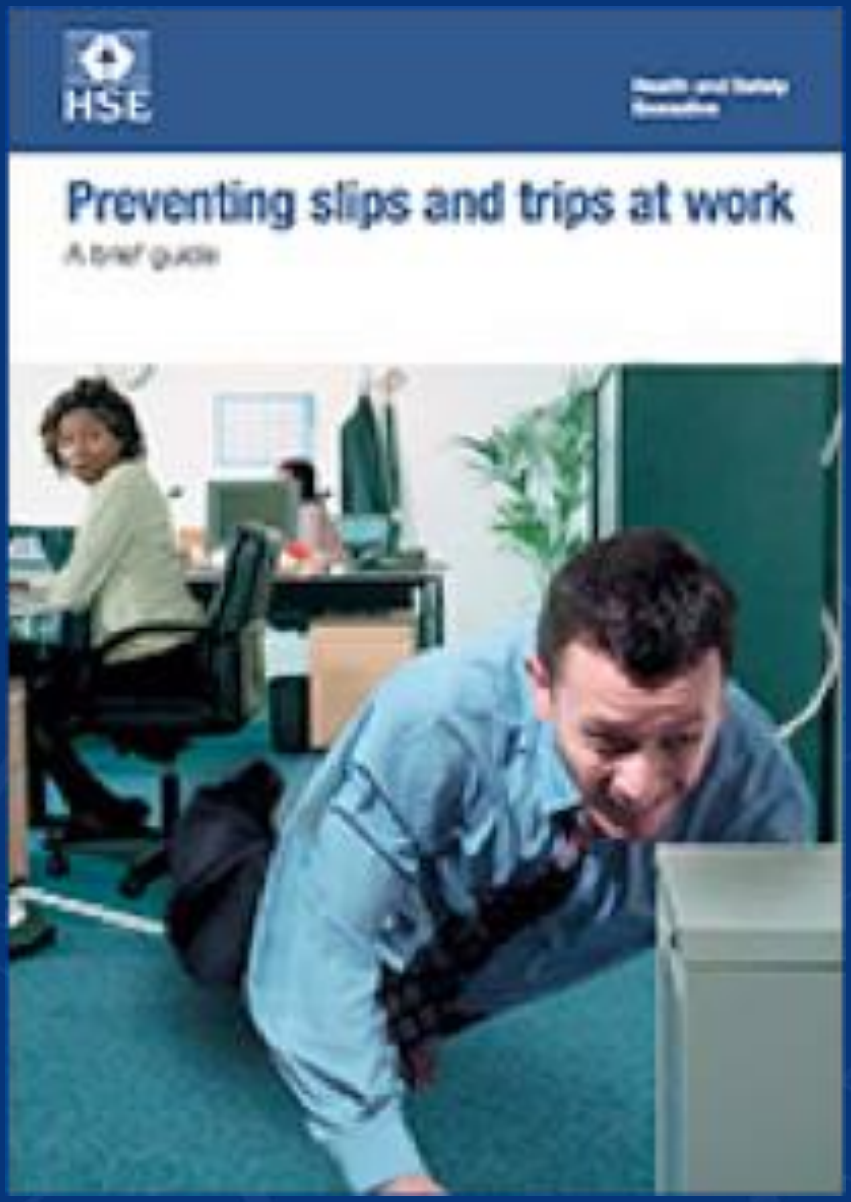

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Health and Safety Guidance

- HSE publications
- www.hse.gov.uk/index.htm
- Guidance to employers
- Leaflets for employers
- ACOP
- Union representatives ?

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Where civil liability may still attach under express provisions in the Regs

- MHSW Regs 1999: possibly . . .
- Originally, civil liability for breach of 1999 Regs expressly excluded
- October 2003 – amended Reg 22 limits exclusion to cases involving third parties

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Will Civil Liability Under MHSW Regs Survive?

- "Reg 22. –
- (1) Breach of a duty imposed on an employer … shall not confer a right of action in any civil proceedings insofar as that duty applies for the protection of a third party."
- Implicit provision for civil liability re employees – is this sufficient?
- Hardly an express provision though . . .

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Employer's Liability (Defective Equipment) Act 1969

- **1.— Extension of employer's liability for defective equipment.**
- (1) Where after the commencement of this Act—
- (a) an employee suffers personal injury in the course of his employment in consequence of a defect in equipment provided by his employer for the purposes of the employer's business; and
- (b) the defect is attributable wholly or partly to the fault of a third party (whether identified or not),

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- the injury shall be deemed to be also attributable to negligence on the part of the employer (whether or not he is liable in respect of the injury apart from this subsection), but without prejudice to the law relating to contributory negligence and to any remedy by way of contribution or in contract or otherwise which is available to the employer in respect of the injury.
- Is limited to actual employer/employee relationships
- What this means is that if equipment is defective but caused by a third party, the employer will be liable to its employees even if the employer has no knowledge of the defect
- *Edwards v Butlins Ltd* 1998 SLT 500

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