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IS THE EMPLOYERS' LIABILITY (COMPULSORY INSURANCE) ACT 1969 FIT FOR PURPOSE?

BRENDA BARRETT* AND DAVID LEWIS**

ABSTRACT

This article explains the origin of the concept of employers' liability in 1837 and notes the various reasons for the failure of this liability to be developed during the nineteenth century. It proceeds to look at the context in which the Employers' Liability (Compulsory Insurance) Act 1969 was enacted, looking at the content of the Act, and considering the environment at the time of its enactment, noting the then apparent imperfections in the legislation. The account then moves fast forward to the twenty-first century and questions whether the Act is now fit for purpose.

1. INTRODUCTION

The purpose of the Employers' Liability (Compulsory Insurance) Act 1969 (hereafter ELCIA) was to assist employees who suffered either accidents or diseases attributable to their work to obtain damages as compensation for their personal injuries. It is now nearly half a century since ELCIA was enacted. At that time there were critics who contended it was not fit for purpose. This article looks back nearly two centuries to the origin of the concept of employers' liability to compensate injured employees and traces developments in the following century to show the situation at the enactment of the ELCIA. It summarises the provisions of the ELCIA and reviews its operation at that time. Finally, it jumps to the present time, to review how it relates to the current work relationships asking whether it is now serving its purpose.

2. BACKGROUND TO THE 1969 ACT

The concept of employer's liability can be traced back to *Priestley v Fowler* (1837)¹. A father sued in negligence² when the cart in which his son was travelling, having allegedly been overloaded so that one of its wheels gave way, threw the boy to the ground causing him injury. The claim was that the employer had failed in his duty to keep the cart in a proper state of repair. In court Lord Abinger C.B. noted it had been objected that the contract between master and servant had no implied duty to make the master liable for any damage to the servant but concluded:

He is no doubt, bound to provide for the safety of his servant, in the course of his employment, to the best of his judgment, information and belief.

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¹ 3M&W 1.

² Actually it was brought in 'Case', the precursor of negligence.

In *A Case of First Impression* the late Brian Simpson related his search for the story behind *Priestley v Fowler*.³ At first instance the father won the claim and was awarded £100 damages but on appeal, while Lord Abinger made the remark cited above, it was found that on the evidence the master was not liable because the accident was caused by another servant overloading the cart. The employer (Fowler) meanwhile had become bankrupt, Priestley, having lost the case, had to pay the costs of the litigation and was sent to the debtor's prison.

The decision was remarkable by the broad terms in which it classified the relationship between employer and victim as a master and servant relationship whereas this terminology had hitherto been used in only a few types of employment, principally for domestic and agricultural workers. However passages in Lord Abinger's judgment suggest that he had not appreciated the difference between someone with the status of servant working as an independent contractor and someone working under contract to serve the person for whose benefit he was working. This confusion may have helped Victorian courts avoid imposing on employers the duty to compensate injured workers. On its facts the case was interpreted to mean that the employer was not liable for injuries attributable to the actions of a person 'in common employment' with the victim, though this was not a necessary interpretation and was regarded by some as incorrect.⁴ Whatever the merits of the argument⁵ 'common employment' was to be embedded in British employment law for a hundred years and one of a 'trinity' of reasons why employers' liability did not flourish.

Firstly, change came partly due to protective legislation such as the Factory Acts which imposed duties on employers and partly due to the birth of trade unions. In 1876 Alexander Macdonald MP for Stafford laid before the House of Commons a Bill (which had been prepared by the Parliamentary Committee of the Trades Union Congress) whose purpose was to abolish the doctrine of common employment. The Bill was not enacted but it led to the Select Committee on Employer's Liability which in turn led to the Employer's Liability Act 1880 which restricted but did not completely abolish the doctrine. 'Common employment' lingered on until it was delivered a fatal blow by the House of Lords in *Wilson and Clyde Coal Co. v. English* [1938]⁶ where Lord Wright stated an employer had a non-delegable duty to provide a competent staff of men, adequate material and a proper system and effective supervision.

Second, until the end of the nineteenth century the notion that the worker assumed the risks of the workplace also inhibited any development of employers' liability. Under this doctrine⁷ if the evidence showed that a worker knew that there was a risk of injury where he had to work he had no remedy if the risk materialised. Thus in *Smith v Baker* [1891]⁸ when a

³ A.W.B. Simpson, *Leading Cases in the Common Law*, Chapter 5 pp.100-134. (Oxford: Clarendon Press,).

⁴ E.g. Brett LJ. in Evidence of Select Committee on Employer's Liability 1877 (HC 1876 (372) IX, 669, in answer 1919. 'I think it may be suggested that the law as to the non-liability of masters with regard to fellow servants arose principally from the ingenuity of Lord Abinger in suggesting analogies in the case of *Priestley v Fowler*.

⁵ '... there never was a more useful decision, or one of more practical importance in the whole history of the law.' Pollock C.B. in *Vose v Lancashire Railway Co.* (1858) 2LJEx. 249. Contrast: 'a principle as distasteful as it is alien to Scottish jurisprudence.' Lord Macmillan in *Radcliffe v Ribble Motor Services Ltd.* [1939] AC 215, 235.

⁶ AC 57.

⁷ Volenti non fit injuria.

⁸ A.C. 325.

worker, who had to carry out his duties as rocks were carried over his head, was hit by a rock the employer pleaded the worker knew of and had therefore assumed the risk of the injury he suffered. The House of Lords readily distinguished between knowledge of, and assumption of risk.

The third obstacle was contributory negligence.⁹ If the victim had been negligent this defeated his claim until the Law Reform (Contributory Negligence) Act 1945 enabled courts to apportion blame and award appropriate damages.¹⁰

However the Workmen's Compensation Act 1897 distracted employees' attention from claiming damages. This Act introduced a scheme under which compensation became payable automatically whenever a workman met with an accident 'arising out of and in the course of employment' and was incapacitated from work. Compensation took the form of weekly payments during incapacity. By its final form in 1925 the scheme covered specific diseases as well as accidents. A claim was processed through a simple procedure, but a claimant could not claim both damages and the statutory compensation.

Following the decision in *Groves v Wimborne*¹¹ the injured worker was also able to sue the employer for compensation for injury caused by the employer's breach of a strict statutory duty; evidence of the breach was sufficient, it was not necessary to prove the employer had been negligent.

The increased risk of incurring liability resulted in the growth of employers' liability insurance. Nevertheless claims were more frequently made under the Workmen's Compensation Acts than at common law. This may have been due to 'touting' by insurance companies.¹² There was some growth in common law claims in the 1930s. It has been suggested that this was due to awareness of the comparatively large awards made to road accident victims.¹³ The real growth in claims for damages had to wait until the repeal of the Workmen's Compensation Acts in 1948.

In the 1960s the 6th edition of Munkman's *Employer's Liability at Common Law*,¹⁴ after making brief reference to *Priestley v Fowler*, traced the development of both common law liability for negligence and liability for breach of statutory duty up to the eve of the 1969 Act. Interestingly the author does not confine himself to the master and servant relationship; his coverage, deals also with liability to 'workers', a term whose meaning must not be confused with that given by statute to the same word today.¹⁵ The author explained¹⁶ the National

⁹ This 'trinity' of defences is fully explained in B. Markesinis and S. Deakin's *Tort Law* 7th edition, (Oxford: OUP), Chapter 23, 'Defences' pp 749-792.

¹⁰ However In *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 their Lordships alleviated the harshness of the law by declaring 'It is not for every risky thing which a workman may do in his familiarity with the machinery that a plaintiff ought to be found guilty of contributory negligence.

¹¹ [1898] 2 QB 402.

¹² *Holman Gregory Report on Workmen's Compensation* (1920) Cmd.816. 3858.

¹³ A. Russell Jones 7 M.L.R 13 at pp.20/21.

¹⁴ Published by Butterworths (London) in 1966, intended primarily for practitioners.

¹⁵ The Employers and Workmen Act 1875 distinguished 'workmen' from 'higher status' employees according different rules to each category. This Act was finally repealed in the Statute Law (Repeals) Act 1943. The situation is explained fully in S. Deakin and F. Wilkinson, *The Law of the Labour Market* (Oxford, OUP), Chapter 2, *The Origins of the Contract of Employment*. The meaning of worker depended very much on the context. The Workmen's Compensation Act 1897 s.7 defines a workman

Insurance (Industrial Injuries) Scheme which replaced the Workmen's Compensation Acts in 1948 and applied to all employees and apprentices. Under the scheme employees and employers paid weekly contributions into the Industrial Injuries Fund, and the fund received contributions from the Exchequer. Benefits were paid out of the Fund in the case of industrial accidents and certain specified diseases Thus reliance on social security could be more attractive to the victim than undertaking the risk and expense of suing for damages for work-related injuries.¹⁷

In 1969 a private member's Bill, which led to the Employer's Liability (Defective Equipment) Act, was presented by Mr Hugh D. Brown, MP. This Act was prompted by, and intended to reverse, the decision of the House of Lords in *Davie v New Merton Board Mills*.¹⁸ The claimant in that case suffered an eye injury because a 'drift'¹⁹ shattered when he hit it with a hammer; their Lordships held the employer was not negligent and therefore not liable for the injury.

The intent of the Act (hereafter DEA) is encapsulated in s.1(1):

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

the injury shall be deemed to be also attributable to negligence on the part of the employer

In prolonged discussion in committee, there had been concern about imposing liability on an employer who had not been negligent:

If it is said that when an employee is injured in the course of his employment, when there has been a genuine, bona fide, accident, he should be entitled to compensation on a generous scale through some insurance scheme, that may be a first class idea, but it is a different kind of argument.²⁰

as 'any person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise'.

¹⁶ Appendix 2, p.557.

¹⁷ Relying on the social security may be disproportionately burdensome to the national economy compared with employers' liability. In his book *Accidents, Compensation and the Law* 1970 ed. (London: Weidenfeld and Nicholson) P.S. Atiyah noted employers' liability had the merit of making people pay for the costs they impose and the cost of insurance may cause employers to take care, but he nevertheless favoured social security. By way of contrast, in the *Cost of Accidents*' Student ed. (YUP: 1970) Calabresi, though critical of tort liability, argued that tort liability was preferable to universal no-fault accident compensation, by reason of the deterrent effects of the tort system and its resulting effect on the allocation of resources. However, neither take into account the preference of victims and notably both New South Wales and New Zealand have reinstated employers' liability.

¹⁸ [1969] AC 604.

¹⁹ A kind of chisel.

This concern proved unnecessary because in the same Parliamentary session the ELCIA was enacted through a private member's Bill. It was introduced, by David Watkins on 27th November 1968,²¹ by the 'Presentation' procedure. Under this procedure a Member formally introduces the title of the Bill but does not speak in support of it. Thus it is not immediately apparent what prompted it. However a debate in the Upper House makes a passing reference²² to a horrific fire in 1968 in a furniture factory in James Watt Street Glasgow. Twenty-two people were unable to escape because the windows had been barred.²³ The employers carried no employers' liability insurance. The resulting legislation was the short Act which together with subsequent regulations, is central to this article:

3. THE EMPLOYERS' LIABILITY (COMPULSORY INSURANCE) ACT 1969

In summary, the Act provided:

S.1(1) ... every employer carrying on business in Great Britain shall insure ... with an authorised insurer ... against liability for bodily injury or disease sustained by his employees, and arising out of and in the course of their employment in Great Britain ...²⁴

S.2(1) ... 'employee' means an individual who has entered into or works under a contract of service or apprenticeship with an employer.

S.2(2) This Act shall not require an employer to insure:

(a) in respect of an employee of whom the employer is the husband, wife, father, mother, grandfather, grandmother, step-father, step-mother, son, daughter, grandson, grand-daughter, stepson, stepdaughter, brother, sister, half-brother or half-sister.²⁵
...,²⁶

S 4(1) Provision may be made by regulations for securing that certificates of insurance ... are issued by insurers to employers ...

S.4(2) Where a certificate of insurance is required to be issued to an employer ... the employer shall ...

a) comply with any regulations requiring him to display copies of the certificate of insurance for the information of his employees;²⁷

²¹ Hansard 27th November 1968 Vol.774 c.512. David Watkins was Labour MP for Consett from 1966-1983.

²² <http://hansard.millbanksystems.com/lords/1969/oct/14/employers-liability-compulsory-insurance> .

²³ Originally reported in The Glasgow Herald November 19th 1968; recalled more recently <http://glasgowfirejournal.blogspot.co.uk/2012/09/james-watt-street.html> .

²⁴ SI 1975/1443 applied the Act to offshore installations; otherwise s.1 exempts insurance for employment outside Great Britain.

²⁵ SI 1998/2573 and SI 2004/2882 have the effect of limiting this to the employer who is an unincorporated sole trader.

²⁶ S.3 contained a list of public bodies not covered by the Act. The list of public servants covered has also been amended by Employers' Liability (Compulsory Insurance) (Amendment) Regulations 2011. SI 2011/286.

b) produce the certificate of insurance ... to any inspector authorised by the Secretary of State ...

S.5 An employer who on any day is not insured in accordance with this Act ... shall be guilty of an offence and shall be liable on summary conviction to a fine

S.6(1) The Secretary of State may by statutory instrument make regulations

S.7(2) This Act shall not extend to Northern Ireland.²⁸

There were at least 9 statutory instruments made between 1971 and 1998 but these were revoked by SI 1998/2573 which consolidated and updated the earlier regulations. The new statutory instrument included the following provisions:

Reg. 2 prohibited the insurer from qualifying its liability by any condition in the contract with the employer.

Reg. 3 required the employer to be insured for £5 million in respect of any one employee in respect of a single claim.

Regs.6 and 7 required the employer to enable an inspector to inspect the insurance certificate.

Reg.8 required an inspector, when visiting the employer's premises to provide evidence of his authority.

4. THE ELCIA IN THE CONTEXT OF ITS ENACTMENT IN 1969

The ELCIA and the DEA²⁹ were two of the earliest pieces of legislation relating to the employment contract to use the then modern terminology 'employer and employee' to distinguish employees from independent contractors³⁰. It is unsurprising therefore that s.2(1) of ELCIA found it necessary to define employee as a servant or apprentice.

Section 1 of the ELCIA imposed on the employer liability to compensate 'for bodily injury or disease sustained by his employees, and arising out of and in the course of their employment'. This phrase had its origins in the Workmen's Compensation Acts. In this respect the coverage of the 1969 Act coincided exactly with the wording of the National Insurance Industrial Injuries legislation which had in turn reiterated the wording of the earlier Workmen's Compensation Acts. The association between employers' liability and 'course of employment' can even be traced back to the statement of Lord Abinger C.B., but it had by 1969 been the subject of much litigation. Mansfield Cooper commented that; 'The phrase has been productive of a torrent of litigation, but Parliament has evolved no better definition.' The author footnotes:

²⁷ SI 2008/1765 exempts the employer from displaying the certificate at workplaces stating it will be sufficient 'if the certificate is made available in electronic form and each relevant employee to whom it relates has reasonable access to it in that form.

²⁸ Regulations to a similar effect have now been made.

²⁹ No attempt has been made to consolidate the two pieces of employers' liability legislation. Interestingly neither Act applied to 'workers' although Munkman had demonstrated their importance and that 'employee' and 'worker' might not be synonymous. However arguably the definition of employee in s.2(1) is wide enough to cover workmen.

³⁰ The first was the Contracts of Employment Act 1963.

It is true that the National Insurance (Industrial Injuries) Act 1946, s.7 (4) provides that an accident arising in the course of an insured person's employment will be deemed, in the absence of evidence to the contrary, also to have arisen out of that employment. But it is submitted that this does not extend the definition of an accident. At the most, it removes the burden of proof from the plaintiff.³¹ In spite of apparently justifiable concerns about inclusion of the phrase in ELCIA s.1(1) it does not appear to have caused difficulties in practice.

These remarks are made at the end of the Chapter on the Master's Liability for Injury, the greater part of which is devoted to common law liability and analyses this in terms of case law on the tort of negligence without reference to the phrase 'arising out of and in the course of employment'.

The ELCIA did not change the existing laws on liability; the intention was to ensure compensation in cases where there was liability; for the most part this was liability for negligent conduct but there were some areas of strict liability, notably liability under the new DEA and for some breaches of statutory duty. However, the ELCIA was almost immediately subject to scathing criticism because it:

Contains so many flaws and gaps that some employees will continue to go uncompensated or have to settle with insurance companies for a fraction of the amount they would have been awarded by a court of law.³²

Yet it is noteworthy that the ELCIA system survived unscathed by the Royal Commission on Civil Liability and Compensation for Personal Injury which reported in 1978.³³ The Commission reported:

There was a remarkable unanimity among our witnesses that the structure of the industrial injuries scheme had stood the test of time.

...

The present degree of overlap between social security and tort is especially marked in this field. Nearly all those who obtain tort compensation in respect of work injuries will also have been entitled to industrial injury benefit. A decision to recommend an end to the duplication of compensation, without anything to balance it, would have implied a drop in entitlement for those injured through the fault of the employer.³⁴

Interestingly while the Commission supported the retention of employers' common law liability it did not expressly endorse 'no fault' liability for breach of statutory duty, though an earlier paragraph recommended the continuation of no fault provision in the context of the industrial injuries scheme.^{35, 36}

³¹ W. Mansfield Cooper and J.C. Wood, *Outlines of Industrial Law*, 4th ed. (London: Butterworths) at p.345.

³² R. A. Hanson, *The Employers' Liability (Compulsory Insurance) Act 1969 – A Broken Reed* ILJ Vol. 3 pp. 79-86. Many of the criticisms were actually made in the Hansard report on the debate already referenced <http://hansard.millbanksystems.com/lords/1969/oct/14/employers-liability-compulsory-insurance>.

³³ The Pearson Commission CMND.7054-1.

³⁴ Paragraphs 283 and 284 at p 69 of the Report.

³⁵ At paragraph 281 on p.69.

Neither the ECLIA, nor the Industrial Injuries Act made any provision for the self-employed. They were expected to provide for themselves, or sue the employer for whom they were working at the time of their injury. The unskilled manual worker would be most unlikely to even consider, let alone afford, taking out personal injury insurance. The employer was not required by legislation to carry public liability insurance and the small employer, possibly self-employed, would be unlikely to carry public liability insurance. Finally, the self-employed were much less likely than employees to be members of a trade union; employees who were members of a trade union would then, as now, be quite likely to enjoy the support and guidance of their union in pursuing compensation.

A Road Accidents

Damages in respect of road accidents were never intended to be recoverable under the ELCIA.³⁷ Compensation for injuries caused by a vehicle were always claims against vehicle insurance.³⁸

An exceptional case was *Lister v Romford Ice and Cold Storage Co. Ltd.*³⁹ Father and son were employed by the defendant and the son, negligently driving the employer's lorry, ran over his father. The House of Lords held the son, not the employer, was liable for the damages payable to the father because the employer was not liable for the son's negligence. After this case insurers entered a 'gentleman's agreement' not to pursue this practice unless there were exceptional circumstances. Thus any attempt to reintroduce the doctrine of common employment was defeated.

The victims of road traffic accidents had a number of advantages over the victims whose claims lay under the ELCIA. First, vehicle insurance unlike s.2 of the ELCIA does not exclude liability for injury to close relatives. Second, the Motor Insurers' Bureau provides compensation to the victim of uninsured drivers.⁴⁰ Third, under road traffic law an insured driver cannot escape liability for injury caused by an uninsured driver who he or she permits to drive the insured vehicle.⁴¹

5. FAST FORWARD TO TODAY: IS THE ELCIA NOW FIT FOR PURPOSE?

A. Addressing Problems with ELCIA

In 2003 the Department of Work and Pensions opened a review of the operation of the ELCIA, setting out the then current difficulties with the scheme and suggesting an agenda for action. The focus of the investigation was on the insurance industry. DWP was concerned at the high costs of insurance; it noted that some insurers had opted out of providing cover in high risk situations and 'long tail' diseases⁴² might endanger cover. It was concerned that

³⁶ One of the authors together with Bob Hepple and Richard Howells gave evidence to the Pearson Commission on behalf of the Industrial Law Society. The memorandum of their evidence was published in the ILJ Vol. 4, No.4 pp.195-217.

³⁷ SI1978/2573, Reg.9 (Sch.2) expressly excludes such claims.

³⁸ Road accident compensation was subject to the same criticism as employers' liability by both Atiyah and Calibresi. Atiyah suggested these compensation schemes owed their survival due to the vested interests of the Bar and insurance companies.

³⁹ [1957] A.C.555.

⁴⁰ These two matters were identified by R.A. Hasson in his article in the ILJ in 1974.

⁴¹ *Monk v Warbey* [1935] 1KB 75. This has some parallels with the DE Act.

⁴² Diseases like asbestos that often do not become manifest till long after exposure resulting in difficulties in attributing liability.

these developments were causing some failures to insure, particularly in SMEs. The impact of this report can be traced in much that has happened since.⁴³

B. Rehabilitation

The DWP's review expressed concern that the ELCIA scheme of insurance made inadequate provision for rehabilitation of victims. This matter was addressed in a wide ranging research report commissioned by HSE.⁴⁴ This research included telephone interviews an outcome of which was:

All were very supportive of rehabilitation. All felt there was enough evidence in the UK, even if anecdotal, to convince them there was a cost benefit as well as a moral case. ... All were open to the idea of rehabilitation being compulsory and paid for from insurance, but suppliers of rehabilitation need to be amenable to this. All felt that employers should have more responsibilities for rehabilitation.⁴⁵

No evidence has been found that this recommendation has been progressed.⁴⁶

C. Enforcement of the Act

The Health and Safety Executive (HSE) was created by the Health and Safety at Work Act 1974 (HASAWA). The Act makes provision for the appointment of inspectors⁴⁷ and for the enforcement of the Act⁴⁸ and regulations made relevant to it (known as relevant statutory provisions) through these Inspectors. There has been no legislation empowering HSE to enforce the ELCIA. Nevertheless HSE guidance on its powers of enforcement makes clear that it can enforce the 1969 Act:⁴⁹

The maximum fines for offences under the Employers' Liability (Compulsory Insurance) Act 1969 are £1,000 (level 3 on the standard scale) in respect of s.4 offences, and £2,500 (level 4 on the standard scale) in respect of s.5 offences. These offences are triable only in the magistrates' courts.

The source of HSE's authority is explained in operational guidance:⁵⁰

Since 1975, HSE has been the enforcement body for the Employers' Liability (Compulsory Insurance) Act 1969 (ELCI) as a result of an agency agreement

⁴³ Unfortunately DWP has now archived this report.

⁴⁴ http://www.hse.gov.uk/research/crr_pdf/2002/crr02436.pdf *Changing business behaviour - would bearing the true cost of poor health and safety performance make a difference?* Report prepared by Greenstreet Berman Ltd.

⁴⁵ At p.129.

⁴⁶ Damages awarded in personal injury cases may include a sum for rehabilitation, but this would be directed to support for those permanently disabled, e.g. employment of a carer, or adaptation of living accommodation. The cost of recovery in the immediate aftermath of injury is likely to fall on social services, especially the NHS.

⁴⁷ Ss.18-32.

⁴⁸ Much enforcement is delegated to local authority inspectors, under Health and Safety (Enforcing Authority) Regulations SI 1998/494 and the premises for which they are responsible are possibly those most likely to be in default in respect of the 1969 Act.

⁴⁹ http://www.hse.gov.uk/enforce/enforcementguide/court/sentencing-penalties.htm#P28_3036 .

⁵⁰ <http://www.hse.gov.uk/foi/internalops/og/og-00042.htm> .

between HSC⁵¹ and the Department of Employment (now the Department for Work and Pensions (DWP)).

All HSE operational Band 2, 3, and 4 inspectors should be warranted to enforce ELCI, and should routinely ask for sight of ELCI certificates during inspection visits (NB. 'Routinely' does not necessarily mean 'all').

Local authority inspectors are not so authorised. This guidance, which is intended primarily for inspectors, makes clear that as ELCIA is not a relevant statutory provision the enforcement powers under HASAWA (which in some cases include the power to bring a case upon indictment for trial before jury) cannot be used in respect of offences under the ELCIA. Nor can notices be issued to require an employer either to improve its performance⁵² or to prohibit it from continuing a course of conduct.⁵³ The guidance continues:

Where the only offence that could be proved is failure to display a certificate, employers would not, as a rule, be prosecuted unless they appear to have been intentionally uncooperative and obstructive. Employers who have been cooperative should be sent a letter reminding them of the obligations to keep the certificate on display.

In some instances we may consider it appropriate to prosecute for non-insurance on the day on which a particular accident happened. But, the delay in receiving notification of that accident means there is limited time in which to bring the case to court, because of the six month time limit for laying informations about a summary only offence ...

Where failure to insure is discovered at the same time as an offence under the relevant statutory provisions is being considered for prosecution, it is desirable that all charges should be prosecuted together.

HSE's publishes enforcement statistics⁵⁴, but these statistics apply only to offences under the HASAWA and there is no evidence in statistical reports of prosecutions under the ELCIA. Nevertheless HSE 'Press Releases' do show that there have been some prosecutions for failure to insure and unsurprisingly the offenders appear to be small enterprises.⁵⁵

It is disappointing that the DWP proposals that local authority inspectors be given enforcement powers has apparently not been progressed and it is not clear that the

⁵¹ The Health and Safety Commission, a tripartite body responsible to Parliament for the operation of the Act, was abolished and its work given to HSE (SI 2008/960).

⁵² S.21 of HASAWA explains the inspector's power to serve an improvement notice on a person contravening relevant statutory provisions, requiring them to rectify the situation.

⁵³ S.22 of HASAWA may be served where the inspector considers activities create a risk of serious personal injury.

⁵⁴ <http://www.hse.gov.uk/Statistics/overall/hssh1314.pdf> .

⁵⁵ E.g. A restaurant owner was fined a total of £1500 (£500 for each offence) for failing to provide Employers' Liability Compulsory Insurance; a contractor fined after admitting unsafe work at height practices and insurance breaches; Staffordshire plastics firm fined for failing to maintain workers insurance; Merlin Mouldings (Hednesford) Ltd have been fined for failing to have Employers Liability Insurance.

suggested liaison with insurers has become operational to provide inspectors with particulars of employers who are insured.⁵⁶

It may be speculated that the majority of employers will be covered by insurance in compliance with ELCIA.⁵⁷ In many cases cover will be provided in the context of a package including insurance against public liability, through one insurance company.⁵⁸ Most employers may be happy to pay the insurance premium and be spared dealing with a claim; most claims where liability is not disputed will be settled out of court by the insurance company.⁵⁹ There is of course the danger that too many claims will result in an increased insurance premium. HSE investigated the extent of failure to insure.⁶⁰ The report stated that in 2002 the Federation of Small Businesses stated 8% of businesses were trading without insurance. The HSE researchers carried out a postal survey and then estimated:

‘...112,559 employees in total employed in firms without ELCI. This is 0.53% of the 21,018,000 employed workforce, excluding 3,677,000 central and local government employees and 2,937,000 people in organisations with no employees (i.e. sole proprietorships and partnerships comprising only self-employed owner managers). Expressed as the number of organisations this equates to about 10,000 organisations lacking ELCI out of about 1.2million enterprises with employees in the UK (1.01m micro, 175,660 small, 29,470 medium enterprises and 8,210 large organisations).’

The survey also found a number were refused insurance by their previous insurer. The Federation of Small Business survey had reported that 25% of their respondents said that ELCI was difficult or impossible to find. Central and local government employees are exempted from insuring under ELCI Act because there is another scheme for them

The report confirms that defaulters are likely to be small enterprises that are likely to be ‘under the radar’ of the inspectorates unless there is an accident, and the occurrence of the accident may well put the employer out of business, thus frustrating any attempt to enforce liability to compensate.⁶¹

D. Long Tail Claims

Another cause for concern, highlighted by HSE statistics, is that in 2012 there were 2535 deaths due to mesothelioma (a cancer of the lung lining) caused by past exposure to asbestos. As the DWP report noted the incidence of such ‘long tail’ claims has been of

⁵⁶ http://www.detini.gov.uk/dw2583_employers_review.pdf at p.78.

⁵⁷ Insurance must be with an ‘authorised insurer’ i.e. an individual or company authorised working under the terms of the Financial Services and Markets Act 2000.

⁵⁸ The internet indicates there is no shortage of insurance companies vying for the provision of this particular cover.

⁵⁹ Raising questions whether Atiyah was correct in suggesting the vested interest of barristers in supporting employers’ liability.

⁶⁰ <http://www.hse.gov.uk/research/rrpdf/rr188.pdf> *Survey of compliance with Employers’ Liability Compulsory Insurance (ELCI) Act 1969* Prepared by Greenstreet Berman Ltd 2003.

⁶¹ If the uninsured employer is solvent the employee may sue it for damages for personal injury. If the employer was a corporate entity that has been liquidated since the injury was suffered claims against a former director have been regarded as claims for economic loss and found to be unrecoverable. *Richardson v Pitt-Stanley* [1995] 1 QB 123. This English decision appears to have been followed with some reluctance in a recent Scottish claim. *Campbell v Peter Gordon Joiners Ltd and Derek Forsyth* [2015] CSIH 11 PD672/09.

special concern in relation to settlement of compensation claims.⁶² The Mesothelioma Act 2014 enabled setting up a scheme for a levy on insurers in order to fund the compensation of victims of this disease.⁶³

E. Problem of Uninsured Employers

There is still no general arrangement comparable to the Motor Insurers' Bureau to assist in other situations where employees have no recourse to compensation under the ELCIA. In 2009 an Employers' Liability Insurance Bureau Bill was lodged by Andrew Dismore MP, by presentation, but it failed to be enacted.⁶⁴

F. National Insurance

The National Insurance (Industrial Injuries) Act has been repealed and the burden of ensuring income maintenance during the time an employee is off work due to sickness has been transferred to the employer.⁶⁵ The statutory sick pay scheme requires the employer to pay an employee, who earns more than the minimum each week⁶⁶ statutory sick pay, after the employee has been off work for 3 days, during the period of absence from work for up to 28 weeks, subject to medical certification that the employee is unfit for work. To be entitled to receive statutory sick pay the employee does not need to have suffered an industrial injury or have an industrial disease. The criteria is simply unfitness for work. Consequently the difficult phrase 'arising out of and in the course of employment' has ceased to have any relevance in this context.

While the current scheme places more responsibility on both employer and employee, it maintains the advantage which the national insurance scheme gave to the employee: workers who are not employees do not benefit. In some respects returning to the employer responsibility for the provision of compensation harks back to the nineteenth century Workmen's Compensation Acts, but it differs in that the employer's responsibility today is not confined to illness due to an accident or industrial disease but extends to all sickness whatever its cause. Also, unlike the nineteenth century scheme, the employee does not have to choose between income maintenance and damages: taking advantage of the sick pay provisions does not disentitle the claimant to the benefit of the ELCIA scheme, where there has been an industrial injury, whether or not that injury results in time off work.⁶⁷

The employee who becomes disabled as the result of an industrial disease or accident is entitled to claim from the social security system industrial disability benefit scheme.⁶⁸ Section 94(1) of the Act provides:

⁶² B. Barrett, *Zero + Zero + Zero=Zero* (2009) *The Journal of Business Law* Issue No.3 pp.229-247. This article concerned the claims of men who had pleural plaques that would probably develop into an asbestos related disease.

⁶³ In *Zurich Insurance PLC UK Branch (Appellant) v International Energy Group Limited (Respondent)* [2015] UKSC 33 Lord Mance delivered an opinion with which his brethren agreed, in which he traced 21st century case law, prior to the 2014 Act, taking into account the Compensation Act 2006, which allowed claimants to recover full compensation if they could identify one employer who had exposed them to the risk of asbestos related disease.

⁶⁴ <http://www.publications.parliament.uk/pa/cm200809/cmbills/031/2009031.pdf>.

⁶⁵ The Social Security Contribution and Benefits Act 1992. Northern Ireland is covered by separate legislation.

⁶⁶ The minimum is subject to regular review.

⁶⁷ In a claim under ELCIA the benefits received will be clawed back and the sum paid by way of damages reduced accordingly.

⁶⁸ As established by the Social Security Claims and Benefits Act 1992.

Industrial injuries benefit shall be payable where an employed earner suffers personal injury caused after 4th July 1948 by accident arising out of and in the course of his employment ...

To this extent therefore the troublesome phrase 'arising out of and in the course of employment' lives on.

G. Employees and Other Workers

In 1969 workers who were not employees would be classified as self-employed under contracts for services rather than contracts of service unless the word 'workman' was used indicating distinction from a 'higher status' employee, as was the case in the Workmen's Compensation Acts.⁶⁹ Since then 'worker' has been given a statutory definition. Section 230(3) of the Employment Rights Act 1996 provides:

In this Act 'worker' ... means an individual who has entered into or works under (or where the employment has ceased) worked under -

- (a) a contract of employment, or
- (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

And any reference to a worker's contract shall be construed accordingly.

In respect of the statutory rights set out in the 1996 Act itself care is necessary to distinguish those which give rights to workers under s.230(3)(b) from those (such as unfair dismissal) which apply only to employees. HSE is right to state in its guidance to ELCIA that it is not obvious whether a worker who is not clearly an employee is now covered under ELCIA. It suggests:

You may need employers' liability insurance for someone who works for you where:

- you deduct national insurance and income tax from the money you pay them;
- you have the right to control where and when they work and how they do it;
- you supply their work materials and equipment;
- you have a right to any profit your workers make although you may choose to share this with them through commission, performance pay or shares in the company;
- you require that person only to deliver the service and they cannot employ a substitute if they are unable to do the work; or
- they are treated in the same way as other employees, for example, they do the same work under the same conditions as someone else you employ.⁷⁰

HSE's advice that the employer may need to seek legal advice is sound.

Case law provides numerous examples of the difficulty of identifying a worker from an independent contractor. Relevant in the current context is *Hospital Medical Group Ltd v*

⁶⁹ It has been noted that Munkman did this in his text. The first edition of Wedderburn's seminal book *The Worker and the Law* was published in 1965 and with hindsight that title may represent to-day's law more accurately than he could have imagined.

⁷⁰ <http://www.hse.gov.uk/pubns/hse40.pdf>.

*Westwood*⁷¹ where the Court of Appeal found that a doctor who had willingly signed a contract describing him as self-employed⁷² was a worker within s.230(3)(b) on the basis that he was integrated into the hospital organisation.⁷³ However, he was not actually an employee, which meant, if this had been material to his claim that he would not have been within the remit of ELCIA. Nevertheless employers should bear in mind that the courts do not sympathise with employers who require the worker to sign a sham contract as a self-employed person. This was well demonstrated in both *Protectacoat Firthglow Ltd v Szilagyi*⁷⁴ and *Autoclenz v Belcher*.⁷⁵ Whether a contract is a sham or not will only be tested if the person who has signed the contract subsequently claims s/he is being deprived of an entitlement and it has yet to be established that the right to obtain compensation under ELCIA could be secured in this way.

H. Agency Workers

Another category of people who may not be covered are agency workers. European directive 2008/104 EC envisages that the worker will have a contract of employment or an 'employment relationship' with the agency⁷⁶. However, Regulation 3 (1)(b) of the Agency Workers Regulations 2010⁷⁷ offers a more flexible definition of this relationship by providing that an agency worker is an individual who :

- Has a contract with the temporary work agency which is –
- (i) a contract of employment with the agency, or
- (ii) any other contract with the agency to perform work or services personally

Given the frequency of reliance by employers on agency contracts this suggests that there are likely to be many workers who are not insured under ELCIA, particularly as it is apparent that an individual assigned to an employer would not be deemed to be an employee of the organisation to which the assignment is made.

I. Volunteers

Most insurers have traditionally interpreted 'employees' to include volunteers which is surprising because in some organisations the number working as volunteers may greatly exceed the number of employees, for example in a chain of charity shops or in wildlife trusts. In the latter case volunteers may work outdoors in heavy manual labour, challenging the employer to carry out careful risk assessments, and provide close supervision to ensure safe systems of work are fully observed.

A technique developed by employers in recent years is persuading someone seeking employment to accept work as a volunteer with the possibility, which rarely materialises, of paid employment if their work is considered satisfactory.⁷⁸ It is to be hoped that insurers are

⁷¹ [2012] EWCA Civ 1005.

⁷² Apparently, there is a growing practice of professional workers electing to work as self-employed consultants; see P. Leighton, *Future Working: The Rise of Europe's Independent Professionals* (London: Professional Contractors Group Ltd) .

⁷³ B. Barrett *A Question of Integration* B.L.R., Vol. 34, No.1, pp.24-27.

⁷⁴ [2009] EWCA Civ 98.

⁷⁵ [2011] UKSC 41.

⁷⁶ Article 3 (1) (c).

⁷⁷ SI 2010/93.

⁷⁸ It is a moot point whether this generation of volunteers (frequently young persons recently graduated) could argue that the express or implied promise of future employment constituted the

as ready to treat these people as employees as they have traditionally been in respect of volunteers who generously sign up to give their time to charities. On the other hand those who accept zero hours contracts should be covered by ELCIA during the times they are at work. Likewise, employee shareholders would seem to be eligible for cover as, despite their unusual status, they are still employees.

J. Domestic Servants

The householder who employs a cleaner to visit occasionally is unlikely to be legally responsible for taking out ELCIA insurance for that person who may either be self-employed or working through an agency. However where the home help lives in and works only for one household insurance should be taken out, but it is doubtful whether in practice such employers will carry ELCIA. Indeed many such home helps are immigrants whose very entitlement to be working in this country may be dubious. Unfortunately, this is not a situation where HSE can intervene to ensure the employer is insured, because s.51 of the HASAWA 1974 Act denies the enforcement agency jurisdiction:

In relation to a person by reason only that he employs another, or is himself employed as a domestic servant in a private household.

Unless inspectors have access to a workplace under the HASAWA 1974 Act they cannot be aware of any employment in those premises.

J. Homeworkers

Live-in domestic servants must be distinguished from employees working at home whose employers require a permit. If they are injured while at home and their injury is attributable to work undertaken for their employer they too should be covered. However, this is a situation where the much maligned phrase 'arising out of and in the course of employment' will be very relevant.⁷⁹ The employer will always be advised to do a risk assessment of the domestic work place.⁸⁰ Many homeworkers, (or 'outworkers' as they used to be called under the old Factories Acts) may be supplied with articles or substances for use at home. In this case it is important to determine whether they are employees or self-employed. If they are employed, HSE spells out the need to ensure as far as is reasonably practicable that the articles or substances are safe⁸¹ and that there is a risk assessment that the home environment is suitable for this work.⁸²

K. No Fault Liability

By 1900 and thereafter⁸³ case law had established that employers were liable not only for the consequences of their negligence but also for injuries which arose from breach of strict

'consideration' needed to make an enforceable contract. If it did make the person a worker this would not help unless the arrangement were a contract of employment.

⁷⁹ In the case of homeworking such as sewing or ironing one of the biggest risks is of accidents caused by the presence of children.

⁸⁰ Para.26 of the Guidance to the Health and Safety (Display Screen Equipment) Regulations 1992 explains that while the requirement that every employer must assess work stations, in the case of a homeworker the most practicable means of carrying out this assessment is for the employee to complete and submit to the employer an ergonomic checklist.

⁸¹ Section 6 of HASAWA 1974.

⁸² <http://www.hse.gov.uk/pubns/indg226.pdf>. Unfortunately while HSE draws attention to the great increase in homeworking in recent years it admits its own research paper is now outdated. <http://www.hse.gov.uk/research/rrpdf/rr262.pdf>.

⁸³ Following *Groves v Wimborne* [1898].

statutory duties. The Enterprise and Regulatory Reform Act 2013 changed that. The general intention of the Act was to lighten the burdens that legislation imposed on business enterprises. Section 69, which came into effect on 1st October 2013 amended s.47(2) of HASAWA. Section 47 in its original form was intended to maintain civil liability for breach of statutory duty but now reads:

(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).

The explanatory note to the Regulatory Reform Act explains 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.

Section 69 makes clear that the change in the law is not to have retrospective effect. This means it should not impact on claims for diseases where the cause of the disease is exposure at work before this amendment to the law occurred.⁸⁴ The strict liability under the DEA should not be affected by the Regulatory Reform Act, since it is not a relevant statutory provision under the HASAWA 1974 Act⁸⁵.

The impact of this deregulation upon the liability of the employer is a major cause for concern among workers who have traditionally benefited from this form of strict liability, but whether s.69 will have a large impact is unclear. In practice it could be that cases are contested on the basis that the employer was negligent in breaking the strict duty. Insurance companies providing cover could find their costs of dealing with claims are increased.⁸⁶

6. CONCLUSIONS

The purpose of this article is to determine whether the concept of employers' liability, embedded in British employment law with such difficulty in the century following the statement made by Lord Abinger in *Priestley v Fowler* (1837) is an appropriate way to

⁸⁴ Clearly the revised s.47(2) will not impact on Mesothelioma cases as they are now covered by the 2014 Act.

⁸⁵ In addition the DEA specifically states that where the employer supplies the employee with a defective tool the employer will be deemed to be negligent (Supra).

⁸⁶ In an as yet unpublished lecture *Fault in Personal Injury Claims Post-Enterprise Act 2013: A Comparison of Statute and Common Law* delivered as Richard Davies Memorial Lecture, Inner Temple, 14 November 2013, S. Deakin appears after very close scrutiny to share the view that s.69 will have little impact on employers' liability. He concludes: 'Some claims may fail as a result of the need to show fault, but the set of failing claims may not be very large ...'.

fund the needs of those who suffer work-related injury or disease.

The Employers' Liability (Compulsory Insurance) Act 1969 purported to enact a comprehensive scheme to require employers to pay damages to compensate employees who suffered injury arising out of and in the course of their employment. Five years afterwards this statute was described as a broken reed not least because it failed to provide anything comparable to the Motor Insurers' Bureau to ensure the compensation of employees whose employer did not carry insurance. This remains the situation apart from the coverage made by the Mesothelioma Act 2014 for those who suffer from this disease.

The first decade of the current century witnessed a concern, focused on the insurance industry, that the ELCIA was not working well, including that it failed to take account of the cost of rehabilitating victims. Two research reports commissioned by HSE were reassuring.

One report estimated that only '0.53% of the 21,018,000 employed workforce' were without cover and this was either because insurance companies rejected them or their employers were ignorant of their legal responsibilities. Considering the twenty-first century workplace it is hard to reconcile the reality with this report when, as has been shown in this account, so many in the workforce are excluded from cover because they are not technically employees.

The other report stated that there was common agreement that more needed to be done about rehabilitation but appeared to have a conviction that this was a curable problem; curable it may be but nothing has yet been done to cure it. The major cost of rehabilitation immediately following injury falls on the National Health Service.

In some jurisdictions (e.g. Canada, Kenya and Singapore) the only statutory liability of employers is to provide income maintenance not dissimilar to that provided in Britain under the Social Security Contribution and Benefits Act 1992. In such cases any further provision for victims of industry has to come from whatever social security systems exist, or possibly from the victim's personal insurance cover.

In Britain, the social security system bears more of the burden of providing for workplace injuries than is generally appreciated. Apart from the role played by the NHS, there is the Industrial Disability scheme providing income for those with long term disabilities. There is also the need to provide income maintenance and meet other costs, such as housing, for all those 'workers' and others who are not within the ambit of the ELCIA but have been rendered incapable of employment. Further, if s.69 of the Enterprise and Regulatory Reform Act 2013 achieves its intended purpose and relieves employers of liability for breach of statutory duties the consequences of this will also fall back on social security.

Additionally compliance with the 1969 Act is not very well monitored. Enforcement depends on HSE picking up offences in the course of inspections. It appears that local authority inspectors do not have this power and there is also no statistical record published of the number of prosecutions and the penalties imposed.

Thus our final question is whether Britain should take Professor Atiyah's view and repeal the ELCIA. This would entail reliance on the social security system to make provision for the victims of industry and the HSE to punish (and thereby deter) employers whose

negligence causes injury or disease. Alternatively, bearing in mind the views of the Pearson Commission, and the interests of the victims, can the present system be improved by legislation so that it truly reflects the intentions of the Employers' Liability (Compulsory Insurance) Act 1969?