Damages Claims (EU Directive on Safety and Health at Work) (Scotland) Bill

A Proposal for a Bill to give employees effective legal protection against a breach of their rights under the European Framework Directive on Safety and Health at Work and Daughter Directives by making such a breach actionable in compensation claims for damages.

Consultation by Richard Baker MSP, North East Scotland

December 2014
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HOW THE CONSULTATION PROCESS WORKS

This consultation is being launched in connection with a draft proposal which I have lodged as the first stage in the process of introducing a Member’s Bill in the Scottish Parliament. The process is governed by Chapter 9, Rule 9.14, of the Parliament’s Standing Orders which can be found on the Parliament’s website at:

http://www.scottish.parliament.uk/parliamentarybusiness/17797.aspx

A minimum 12 week consultation period is required, following which responses will be analysed. Thereafter, I would expect to lodge a final proposal in the Parliament along with a summary of the consultation responses. If the final proposal secures the support of at least 18 other members from at least half of the political parties or groups represented on the Parliamentary Bureau, and the Scottish Government does not indicate that it intends to legislate in the area in question, I will then have the right to introduce a Member’s Bill. A Member’s Bill follows a 3-stage scrutiny process, during which it may be amended or rejected outright. If it is passed at the end of the process, it becomes an Act.

At this stage, therefore, there is no Bill, only a draft proposal for the legislation.

The purpose of this consultation is to provide a range of views on the subject matter of the proposed Bill, highlighting potential problems, identifying equalities issues, suggesting improvements, considering financial implications and, in general, assisting in ensuring that the resulting legislation is fit for purpose.

Details on how to respond to this consultation are provided at the end of the document.

Additional copies of this paper can be requested by contacting me at (MSP’s Parliamentary address, telephone number and email address).

Enquiries about obtaining the consultation document in any language other than English or in alternative formats should also be sent to me.

An on-line copy is available on the Scottish Parliament’s website under Parliamentary Business/Bills/Proposals for Members’ Bills/Session 4 Proposals

http://www.scottish.parliament.uk/parliamentarybusiness/Bills/12419.aspx
FOREWORD

The Scottish Parliament has a strong track record of protecting workers’ rights. In 2007 the Parliament passed the Christmas Day and New Year’s Day Trading (Scotland) Act to protect the rights of retail workers to public holidays. In 2005 the Parliament passed the Emergency Workers (Scotland) Act to give greater protection in the law to emergency workers assaulted in the course of their duties. In particular the Parliament has acted to further and to protect workers’ rights in our civil courts. In 2009 members overwhelmingly supported the Damages (Asbestos-related Conditions) (Scotland) Act to re-establish the rights of Scots workers with pleural plaques to compensation if these injuries were the result of negligence of employers, and has passed other measures too to protect the rights of workers with asbestos-related conditions.

The coalition government in Westminster has been responsible for many pieces of legislation which represent a significant retrograde step in terms of the rights of ordinary men and women. There is no better example of this than section 69 of the Enterprise and Regulatory Reform Act 2013 (“The Enterprise Act”).

Section 69 of the Enterprise Act is very small in size but is profound in terms of consequence.

It puts workers’ rights back more than one hundred years, puts the UK in direct conflict with European law; and, according to at least one leading constitutional legal expert, opens the Scottish Government to damages claims that could cost millions of pounds every year.

It is, in my opinion, not only right but absolutely essential that Scottish workers enjoy all of the benefits and protections to which they are entitled under European law. It is self-evidently wrong that legislation brought forward in the UK parliament can expose the Scottish Government to damages claims that could cost millions of pounds every year.

It is therefore essential that the consequences of section 69 of the Enterprise Act, as they affect our rights under European law and as they expose the Scottish Government to the financial risk of compensation claims, is reversed. That is the simple but very important purpose of the Bill proposal discussed in this consultation document.

I think that this proposal is extremely important and I would therefore encourage as wide a range of views as possible from as many stakeholders as possible. I am particularly interested to hear from trade unions, civic Scotland and representatives of employers and insurers.

I would welcome discussions with any interested parties on a one to one basis.

Richard Baker MSP

December 2014
BACKGROUND

European membership and workers’ safety

Both the European Commission and the European Parliament consider the protection of workers to be an extremely important principle. It is indeed one of the fundamental objectives of the creation of the single market and the economic and social freedoms underlying all of European law.

If there is to be free movement of workers throughout the European Union, those workers must be guaranteed a minimum standard of safety and welfare at their workplace, wherever they work within the European Union. If there is to be an open market, no employer should be entitled to reduce workplace safety to unacceptable levels which provide them with an economic advantage over their competitors. These are the theories that underlie the approach of the European Union to workplace safety. This has two consequences for any member state of the European Union:

- The member state’s national law must, at the very least, meet the minimum requirements under European law
- If the member state’s national law is higher than the European minimum standard, they may nevertheless not reduce the standards of safety in their national law.

European Law on Safety and Health Requirements for the Workplace

On 12 June 1989 the Council of the European Communities Adopted Directive 89/391/EEC on the introduction of measures to encourage improvements in safety and health of workers at work. Directive 89/391/EEC is the “Framework Directive” on safety and health of workers at work. The Directive imposed obligations upon employers for the purpose of encouraging improvements in the safety and health of workers at work. The European Commission introduced additional Directives aimed at expanding European law in relation to workers’ safety in relation to specific circumstances. These additional Directives were brought under the Framework Directive. They are known as “Daughter Directives”. They include 89/655(Workplaces); 89/656(Work Equipment); 90/296(Personal Protective Equipment); 90/270(Manual handling of loads).

The law before 1 October 2013

There are many European Directives relating to the protection of workers. They cover general obligations on member states such as the Framework Directive, to specific areas such as the Machinery Directive and Manual Handling Directive.

The Directives do not currently give an automatic right to compensation to all Scottish workers. The Directives can only be relied upon by workers in Scotland to a limited extent. Workers employed by “emanations of the State”, which is to say local government, central government, the NHS, Police and other employers who are funded or controlled by the State, can rely upon the Directives in a dispute with their employers. For those public sector workers, European law has “Direct Effect”. All other employees may not.
For that reason, and to ensure that the minimum protections apply to all workers as part of its membership of the European Union, the UK government has introduced many regulations over the years to give effect to the various European Directives. Those regulations include the Workplace (Health, Safety and Welfare) Regulations 1992, Personal Protective Equipment at Work Regulations 1992, Provision and Use of Work Equipment Regulations 1998 and Personal Protective Equipment Regulations 2002.

Until 1 October 2013, when section 69 of the Enterprise Act came into force, there were two consequences for an employer if they breached the UK’s health and safety regulations:

- The employer would have committed a health and safety crime and would be open to prosecution (to be fined only) by the Health and Safety Executive
- The injured employee could rely upon the breach of the health and safety regulations in a claim for compensation to the extent that the employee would automatically receive compensation unless the employer was able to establish one of a limited number of statutory defences.

Thus, public sector workers had a choice open to them as to how to pursue a claim as a result of an accident at work. They could rely on evidence of:

- A breach of the Directive; or
- A breach of the UK health and safety Regulations.

In practice, until section 69 of the Enterprise Act, such workers generally relied on the UK regulations, and all cases proceeded on that basis. By contrast, all other employees could only rely on the UK Regulations, and could not have relied solely on evidence of a breach of the Directive.

Protecting workers – prosecution rates compared with damages claims

Prosecution rates by the Health and Safety Executive (HSE) are extremely low. Statistics show that companies that are in breach of the health and safety regulations and cause injury to their workers are prosecuted in only 0.5% of cases.¹

“Prevention is the guiding principle for occupational health and safety legislation”.² The purpose of health and safety legislation is therefore to regulate the behaviour of employers in order that accidents do not occur in the first place. In that context, it can be argued that the occurrence of a workplace accident is a failure of the legislation or the enforcement process behind the legislation. It is self-evident that with prosecution rates at only 0.5% criminal sanctions have no deterrent effect and therefore have no impact on improving or maintaining workplace safety.

By contrast, the health and safety regulations have been regularly and consistently used by injured workers, in the vast majority of occasions supported by their trade unions, to

¹ See report prepared by Unite the Union “Incidents Reported to Health & Safety Executive – “Lack of Investigation 2001 – 2007”.
² Communication from the Commission to the European Parliament, the Council, European Economic and Social Committee and the Committee of Regions on the Practical implementation of the Provisions of the Health & Safety At Work Directive 89/391 (Framework).
successfully pursue claims against their employers. In this context, the claims process serves two purposes. It obtains justice for the individual victim of the accident and of course for the victim’s family which may have been just as, if not more, affected by the consequences of the accident; and it puts pressure on the employer to improve workplace safety. Trades Unions report that bringing compensation claims has a positive impact on workplace safety.

Section 69 of the Enterprise Act

The reason that the health and safety regulations permitted injured workers to rely upon them in a claim for compensation was because of section 47 of the Health and Safety at Work etc. Act 1974. That section said in terms that a breach of regulations could be relied upon in a damages claim. Section 69 of the Enterprise Act reversed that provision and at a stroke meant that workers who were injured in circumstances in which their employers were in breach of health and safety regulations could no longer rely upon that breach to obtain compensation.

This had the following, very serious, consequences:

- Workers in the UK, including Scottish workers, no longer had the protection provided by UK Health & Safety Regulations
- Nevertheless, because of the law of “direct effect” public sector workers continued to benefit from European law on workers safety
- Thus a two tier workforce was created whereby workers employed by emanations of the State had more protection under the law than other employees
- Given the incredibly low prosecution rates, the UK health and safety regulations were rendered almost worthless and now offer no deterrence against employers ignoring workplace safety
- Therefore the standard of safety offered by the national law was reduced considerably.

Case studies

The two following case studies show the impact that section 69 of the Enterprise Act will have:

**Michael Adamson**

Michael was a 29 year old electrician. He suffered a fatal electrocution in the course of his employment in August 2005. He was employed by Mitie Engineering Services. The accident occurred during the construction of a retail outlet in Dundee. He touched a cable labelled “not in use”. The cable was however live and when Michael came into contact with it, he was fatally injured.

Michael’s family saw justice because they were able to rely on the Electricity at Work Regulations 1989. If they could not have relied on the regulations, they would not have been compensated for the loss of a son and brother.
George Hardie

George Hardie suffered fatal injuries as a result of being struck by a fork lift truck with the Halls of Broxburn factory where he was employed. The accident occurred in circumstances where it was very difficult to blame the driver of the fork lift but there was a very clear breach of Regulation 17 of the Workplace (Health, Safety and Welfare) Regulations 1992 which says that “every workplace shall be organised in such a way that pedestrians and vehicles can circulate in a safe manner”.

It is clear that if Mr Hardie’s widow could not have relied upon the regulations, she would have been denied all compensation.

Ensuring that Scottish workers have the protection to which they are entitled under European law and avoiding the current two tier workforce that exists is reason enough to introduce the Bill I propose but there is also the additional factor in that these changes in the law have also exposed the Scottish Government to the risk of compensation claims being brought against it.

Francovich damages

There is a well-established legal principle which states that if a member State of the European Union fails to implement a European Directive and that results in a citizen of the member State suffering loss then the citizen is entitled to compensation from the member State. This legal principle is derived from a case of the European Court of Justice called Francovich v Italy and it is called Francovich damages.

In the context of section 69 of the Enterprise Act, if it is shown that the UK Government is now in breach of its obligation to implement European health and safety directives with the effect that injured workers are no longer entitled to compensation in circumstances where they would have recovered damages if Section 69 did not exist and the UK Government had properly implemented the various European Directives, then the injured worker is entitled to compensation from the Government. The measure or quantification of the worker’s financial damage, which the Government must pay, is the amount of compensation they would have received from their employer had the law not changed. There is a strong argument that, in bringing forward Section 69 of the Enterprise Act, the UK Government is in breach of European law and has exposed itself to Francovich damages. It will be seen that if this is correct, the amount of compensation each year will run to tens of millions of pounds.

Under the Scotland Act 1998, the Scottish Parliament and Scottish Government are obliged to comply with European law in all their Acts and Statutory Instruments. Aidan O’Neill QC is a leading constitutional lawyer. He has provided written opinions upon the legal consequences of section 69 of the Enterprise Act. His opinions are annexed to this consultation document. He is clearly of the opinion that the UK Government is exposed to Francovich damages. He goes further than that. In his opinion, the Scottish Government is also exposed to Francovich damages. Aidan O’Neill’s opinion is based upon case law from the European Court of Justice in relation to other member states with limited devolved powers. In summary, it is Aidan O’Neill’s opinion that a Scottish citizen who is denied compensation because of section 69 of the Enterprise Act and who wishes to seek
Francovich damages will have the choice as to whether to sue the UK or Scottish Government. Aidan O’Neill QC is entirely clear in his advice that Francovich damages can be competently brought against the Scottish Government and any claims brought are likely to succeed. It will be seen that if this happens, the cost to the Scottish Government because of the legislative conduct of the Westminster Parliament, will be significant.

Accordingly, I believe the Bill that I propose should be introduced to not only protect workers but to also protect the finances of the Scottish Government.

**Aim of the proposed Bill**

I would therefore propose a Bill that has two simple, but very clear, objectives.

They are:

- That all Scottish workers, no matter by whom they are employed, enjoy the benefit of the same level of protection to which they are entitled under European law.
- That every Scottish worker can rely directly upon European Directives in relation to worker safety to pursue a compensation claim if they are injured in circumstances where those directives are breached.

I therefore propose a Bill to give employees effective legal protection against a breach of their rights under the European Framework Directive and Daughter Directives by making a breach of those Directives actionable in compensation claims for damages.

**Legislative Competence**

In terms of section 29 of the Scotland Act 1988 any Bill that “relates to” Part 1 of the Health & Safety at Work etc. Act 1974 would be outwith the legislative competence of the Scottish Parliament. The Health & Safety Regulations that are affected by section 69 of the Enterprise Act are contained within Part 1 of the 1974 Act. Indeed, Section 69 of the Enterprise Act amends Section 47 of the 1974 Act. A very narrow view of legislative competence may therefore hold that this proposal is for a Bill that would be outwith the competence of the Scottish Parliament. I do not agree with that view.

I do not propose to reverse section 69 of the Enterprise Act. I do not propose to amend section 47 or any other section within Part 1 of the Health & Safety at Work etc. Act 1974. I do not seek to alter UK Health and Safety Regulations in any way.

Instead, I propose a Bill that will end the current two tier workforce and ensure that all Scottish workers will have effective legal protection against a breach of their rights under European law.

The leading constitutional lawyer, Aidan O’Neill QC, has offered clear written advice that the proposal upon which I am consulting would be within the competence of the Parliament.
QUESTIONS

1. Do you agree that Scottish workers should be entitled to benefit from the European laws that are aimed at protecting workers? YES/NO – give reasons for your answer

2. Do you agree that Scottish workers should have the same level of protection under the law irrespective of whether they are employed by an extension (emanation) of the State or a private employer? YES/NO – given reasons for your answer

3. Do you agree that the Scottish Government should do everything that it can to avoid being exposed to Francovich damages claims? YES/NO – give reasons for your answer

4. Do you support, in general terms, the Member’s Bill that is proposed in this consultation paper? YES/NO – give reasons for your answer

5. Do you agree with the opinion of Aidan O’Neill QC (annexed) that the proposed Bill would be within the legislative competence of the Scottish Parliament?

6. What do consider would be the financial implications of the proposed Bill, either for you or your organisation, or more generally?

7. Do you think the proposed Bill would have any positive or negative implications for equalities?
HOW TO RESPOND TO THIS CONSULTATION

You are invited to respond to this consultation by answering the questions in the consultation and by adding any other comments that you consider appropriate.

Responses should be submitted by **Friday 24 April 2015** and sent to:

Richard Baker MSP  
80 Rosemount Place  
Aberdeen  
AB252XN

Tel: 01224 641171  
E-mail: richard.baker.msp@scottish.parliament.uk

Please indicate whether you are a private individual or an organisation

Respondents are also encouraged to begin their submission with short paragraph outlining briefly who they are, and who they represent (which may include, for example, an explanation of how the view expressed was consulted on with their members).

To help inform debate on the matters covered by this consultation and in the interests of openness, please be aware that the normal practice is to make responses public – by posting them on my website www.richardbakermsp.org.uk. I am also obliged to provide copies of all responses to the Scottish Parliament’s Information Centre (SPICe), which may then make them available to MSPs or staff on request.

Therefore, if you wish your response, or any part of it, to be treated as **anonymous**, please state this clearly along with the reasons for this. If I accept the reasons, I will publish it as “anonymous response”, and only the anonymised version will be provided to SPICe. If I do not accept the reasons, I will let you know and give you the option of withdrawing it or submitting it on the normal attributable basis. If your response is accepted as anonymous, it is your responsibility to ensure that the content of does not allow you to be identified.

If you wish your response, or any part of it, to be treated as **confidential**, please state this clearly and give reasons. If I accept the reasons, I will not publish it (or publish only the non-confidential parts). However, I would still be obliged to provide a redacted copy of the response to SPICe when lodging my final proposal. As the Parliament is subject to the Freedom of Information (Scotland) Act (FOISA), it is possible that requests may be made to see your response (or the confidential parts of it) and the Parliament may be legally obliged to release that information. Further details of the FOISA are provided below.

In summarising and analysing the results of this consultation we will normally aim to reflect the general content of any confidential response in that summary, but in such a way as to preserve the confidentiality involved. You should also note that members of the committee
which considers the proposal and subsequent Bill may have access to the full text of your response even if it has not been published in full.

There are a few situations where not all responses will be published. This may be for practical reasons: for example, where the number of submissions we receive does not make this possible or where a large number of submissions are in very similar terms. In the latter case, only a list of the names of people and one response who have submitted such responses would normally be published.

In addition, there may be a few situations where I may not choose to publish your evidence or have to edit it before publication for legal reasons. This will include any submission which contains defamatory statements or material. If I think your response potentially contains such material, usually, this will be returned to you with an invitation to substantiate the comments or remove them. In these circumstances, if the response is returned to me and it still contains material which I consider may be defamatory, it may not be considered and it may have to be destroyed.

Data Protection Act 1998

As an MSP, I must comply with the requirements of the Data Protection Act 1998 which places certain obligations on me when I process personal data. Normally I will publish all the information you provide (including your name) in line with Parliamentary practice unless you indicate otherwise. However, I will not publish your signature or personal contact information (including, for example, your home telephone number and home address details, or any other information which could identify you and be defined as personal data).

I may also edit any information which I think could identify any third parties unless that person has provided consent for me to publish it. If you specifically wish me to publish information involving third parties you must obtain their consent first and this should be included in writing with your submission.

If you consider that your response may raise any other issues concerning the Data Protection Act and wish to discuss this further, please contact me before you submit your response.

Further information about the Data Protection Act can be found at: www.ico.gov.uk.

Freedom of Information (Scotland) Act 2002

As indicated above, once your response is placed in the Scottish Parliament Information Centre (SPICe) or is made available to committees, it is considered to be held by the Parliament and is subject to the requirements of the Freedom of Information (Scotland) Act 2002 (FOI(S)A). So if the information you send me is requested by third parties the Parliament is obliged to consider the request and provide the information unless the information falls within one of the exemptions set out in the Act, even if I have agreed to treat all or part of the information in confidence or to publish it anonymously. I cannot
therefore guarantee that any other information you send me will not be made public should it be requested under FOI.

Further information about Freedom of Information can be found at: www.itspublicknowledge.info.
RE: THE ENTERPRISE AND REGULATORY REFORM BILL

on the EU compatibility of the proposal to amend Section 47 of the Health and Safety at Work Act 1974 so as to remove civil liability for breaches of health and safety legislation

FURTHER ADVICE

February 2013

RE: THE ENTERPRISE AND REGULATORY REFORM BILL

on the EU compatibility of the proposal to amend Section 47 of the Health and Safety at Work Act 1974 so as to remove civil liability for breaches of health and safety legislation

1. INTRODUCTION

1.1 I refer to my instructing solicitor’s E-mail of 23 February 2013 together with associated papers. Further to my advice of 6 February 2013 I am asked, in the light of the letter of 21 February 2013 from the Department for Business Innovation and Skill, to advise on the EU compatibility of the proposal to amend Section 47 of the Health and Safety at Work Act 1974 so as to remove civil liability for breaches of health and safety legislation

2. BIS LETTER OF 21 FEBRUARY 2013

2.1 The following statements in relation to the explanation and justification of the Government’s plan to remove civil liability for breaches of UK health and safety regulations law may be gleaned
from the letter of 21 February 2013, Viscount Younger of Leckie, the Government Minister piloting this Bill through the House of Lords:

Löfstedt report

(1) In his report on Health and Safety law in the UK *Reclaiming health and safety for all: An independent review of health and legislation* (November 2011) , Professor Löfstedt recommended that there be review of each individual health and safety duty which currently imposes strict liability as a matter of UK criminal law, with a view to determining whether this strict liability duty could be subject to a “reasonably practicable” qualification and/or to remove the possibility of civil liability arising from a breach of that duty.

(2) Any such individual assessment of strict liability duties (a “Löfstedt review”) would need to be made as to the impact of changing the qualification applied to each duty taking account of the purpose and intent of the provision and also the requirements of relevant EU law.

(3) Any Löfstedt review would involve an analysis across over 200 health and safety regulations,

Rejection of individual review of strict liability duties because of complexity of exercise

(4) Because the Löfstedt analysis would involve looking at so many health and safety regulations, the Government considers that this would be too complex an exercise and so has decided not to review and/or to individually amend each strict liability duty currently contained in these national implementation provisions of EU health and safety measures

Reasonable practicability exemption (probably) already considered on implementation of original EU law requirements

(5) In any event, when the various UK strict liability duties were drafted with a view to their implementing the possibility of having them subject to a “reasonably practicable” qualification will have been considered (and rejected). The Government therefore consider that it is “unlikely that there would be many instances” where a reasonably practicable qualification it could be now inserted and still enable correct transposition of EU Directive requirements.
Rejection of individual review of strict liability duties because of complexity of result

(6) If an individual examination of the various strict liability duties were undertaken to determine whether any of them should be amended specifically to exclude civil liability, this would be “likely to result in a significant number of exceptions having to be made to the right to bring claims for breach of statutory duty. This would add a layer of complexity to the existing framework with different approaches to civil liability being applied within one particular regulation, within a particular set of regulations and across the regulatory framework more generally.

Decision to impose blanket exclusion of civil liability for all and any breach of health and safety regulations

(7) The Government has decided to introduce a blanket measures without individual examination of the various duties (strict liability) and otherwise currently imposed under UK health and safety law which would remove the possibility of civil liability accruing to all and any duties imposed under health and safety regulations.

(8) The criminal and enforcement regimes are unaffected by the proposed amendments to section 47 of the Health and Safety at Work etc. Act 1974 (HSWA).

(9) The right to sue for compensation will remain for a breach of the common law.

(10) A single change to HSWA is said to provide a consistent approach to civil litigation across health and safety legislation which will be simpler for both employers and employees to understand and therefore be “more likely to have an impact in tackling the perception of a compensation culture”.

EU law compatibility

(11) The way in which EU health and safety law requirements are implemented in national law is left to the discretion of Member States subject to underlying EU law principles such as effectiveness and equivalence.

(12) Currently EU law derived health and safety law requirements are enforced in a number of ways in the UK including criminal penalties, a system of enforcement and prohibition notices as well as civil law remedies for individuals.
There is no general requirement under the relevant EU directives to provide for an individual right to compensation where they have suffered damage as a result of a breach of a health and safety duty.

The Government considers that the current system of enforcement of EU health and safety legislation in the UK (involving currently criminal penalties, a system of enforcement and prohibition notices as well as civil law remedies for individuals) would be regarded as a matter of EU law as an effective enforcement system.

The Government considers that, notwithstanding the removal of civil liability for breach of these EU provisions, the system of enforcement of EU health and safety legislation in the UK will remain an effective one for the purposes of EU law.

The Government has not discussed this proposed change with the European Commission.

3. **Workplace Health and Safety and EU Law**

3.1 As I noted in my Advice of 6 February 2013, the general law relating to safety and health in the workplace in the UK has, since 1 January 1993, been based on EU law. Such matters as the duties incumbent upon an employer to provide his employees with a safe place of work, a safe system of work, and suitable and appropriate personal equipment where reasonably necessary for the performance of their job, are now covered by UK regulations which seek to implement EU directives.

3.2 Accordingly, the existing common law relating to safety and health, as well as the provisions of such statutes as the Factories Act 1961 and the Health and Safety at Work etc. Act 1974 which have not been expressly repealed by these regulations, can be properly understood, interpreted and applied in the UK only in the light of the relevant provisions of EU Law.

**No reduction in level of existing national protection of Health and Safety of workers**

3.3 Since health and safety in the workplace is a matter which falls within the ambit of EU law, this means that the UK Government can only exercise its powers in this area in a manner which is compatible with the requirements of EU law.
3.4 Article 151 of the Treaty on the Functioning of the European Union (TFEU) provides, so far as relevant as follows:

“The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.”

And Article 153(1)(a) TFEU notes that:

“1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:

(a) improvement in particular of the working environment to protect workers’ health and safety”

3.5 As I noted in the Advice of 6 February 2013, the Second Framework Directive 89/391/EEC was conceived as the bed-rock of a new EU-wide programme which was intended, in time, completely to replace the existing national legislation of Member States on safety and health at work with a common basic standards framework as regards the safety and health of workers throughout the territory of the EU. The rationale for this project was that the legislative provisions of the present Member States which covered safety and health in the workplace differed widely; and all, in any event, needed to be improved.

3.6 Recitals 5 and 6 to the Second Framework Directive 89/391/EEC confirm that the national implementation of this directive (and those daughter directives adopted under its framework) cannot result in any reduction in the level of protection given to employees under pre-existing national law. As is noted in Recitals 5 and 6 of the Directive’s Preamble:

“Article 118a of the Treaty [now Article 153 TFEU] provides that the Council shall adopt, by means of Directives, minimum requirements for encouraging improvements, especially in the working environment, to guarantee a better level of protection of the safety and health of workers;

…[T]his Directive does not justify any reduction in levels of protection already achieved in individual Member States, the Member State being committed, under the Treaty, to

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3 [1989] OJ L 183/1
encouraging improvements in conditions in this area and to harmonizing conditions while maintaining the improvements made”

**Basic principle of employer responsibility for breaches of health and safety regulation**

3.7 The Directive imposes a number of basic duties on employers throughout the EU and applies to all sectors of industrial activity. The operative provisions of the Directive 89/391 include the following

“Article 1

Object

1. The object of this Directive is to introduce measures to *encourage improvements* in the safety and health of workers at work.

2. To that end it contains general principles concerning the prevention of occupational risks, the protection of safety and health, the elimination of risk and accident factors, the informing, consultation, balanced participation in accordance with national laws and/or practices and training of workers and their representatives, as well as general guidelines for the implementation of the said principles.

3. This Directive shall be without prejudice to *existing or future national* and Community provisions which are *more favourable to protection of the safety and health of workers at work*. 

…

**Article 4**

1. Member States shall take the necessary steps to ensure that employers, workers and workers representatives are subject to the legal provisions necessary for the implementation of this Directive.

2. In particular, Member States shall ensure adequate controls and supervision.

…

**Article 5**

**General provision**

1. The employer shall have a duty to ensure the safety and health of workers in every aspect related to the work.

…

3. The workers' obligations in the field of safety and health at work shall not affect the principle of the responsibility of the employer.

4. This Directive shall not restrict the option of Member States to provide for the exclusion or the limitation of employers' responsibility where occurrences are due to unusual and unforeseeable circumstances, beyond the employers' control, or to exceptional events, the
consequences of which could not have been avoided despite the exercise of all due care. Member States need not exercise the option referred to in the first subparagraph.”

3.8 In his Opinion in Commission v United Kingdom Advocate General Mengozzi noted that the prescriptive nature of the duties laid down in Directive 89/391 emerges clearly from Article 4(1) of Directive 89/39, which requires Member States to “take the necessary steps to ensure that employers ... are subject to the legal provisions necessary for the implementation of this Directive”.  

3.9 In Sindicato de Médicos de Asistencia Pública (Simap) and Conselleria de Sanidad y Consumo de la Generalidad Valenciana, the Court of Justice examined the scope of Framework Directive 89/391 and noted that

it is clear both from the object of the basic Directive, namely to encourage improvement in the safety and health of workers at work, and from the wording of Article 2(1) thereof, that it must necessarily be broad in scope …

and that

it follows that the exceptions to the scope of the basic Directive, including that provided for in Article 2(2), must be interpreted restrictively.

3.10 In Þór Kolbeinsson v The Icelandic State the EFTA Court, on a reference from the Reykjavík District Court, Iceland, concerning the interpretation of the Second Framework Directive 89/391/EEC (and the eighth individual daughter Directive 92/57/EEC on the implementation of minimum safety and health requirements at temporary or mobile construction sites) held that, save in exceptional circumstances, it is not compatible with the principles of EU health and safety law as embodied in these directives to hold a worker liable under national tort law for all, or the greater share, of the losses suffered as a result of an accident at work due to his own contributory negligence when it has been established that the employer had not on his own initiative complied with rules regarding safety and conditions in the work place. The EFTA Court considered that exceptional circumstances may exist where the employee has caused the accident wilfully or by acting with gross negligence, but even in such cases a complete denial of compensation would be disproportionate and not in compliance with the Directives except in extreme cases of the employee being substantially more to blame for the accident than the

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4 Case C-127/05 Commission v United Kingdom [2007] ECR I-4619

5 Case C-303/98 Sindicato de Médicos de Asistencia Pública (Simap) and Conselleria de Sanidad y Consumo de la Generalidad Valenciana [2000] ECR I-7963 at paras 34, 35.
employer. The EFTA Court also ruled that, in principle, the Icelandic State’s imposition of a rule on worker’s contributory negligence and damages which ran contrary to the principles it outlined might give rise to its liability for *Francovich* damages (which will be discussed more fully below). In reaching its judgment the EFTA Court noted as follows:

“27. Responding to questions put to them by the Court in advance, the Plaintiff and the Defendant stated at the oral hearing that an employer who has not complied with the relevant safety requirements for work places may also face sanctions under criminal law and administrative law. These sanctions are in principle not linked to the employer’s civil liability and may therefore be imposed even if the employee has been denied compensation from the employer under civil law due to contributory negligence. Criminal and administrative sanctions for non-compliance may also be imposed even if there has been no accident as a result of the non-compliance. However, such sanctions are imposed by way of different processes than is the case with a claim under civil law and those processes cannot, or only exceptionally, be initiated by the employee himself. Furthermore, it is far from certain that in reality such processes would be initiated or would lead to sanctions in a situation where compensation under tort law has been completely denied due to contributory negligence; …

43. … The Commission argues, it is decisive for the effective attainment of the objective of the Directive to ensure that employers comply with their obligations. The objective of providing for a safe work place could not be achieved effectively by a rule which states that the responsibility for achieving the objective falls on the employer but does not provide for any form of liability in case of a breach of his duty. In this context, the Commission submits that Case C-127/05 Commission v United Kingdom [2007] ECR I-4619 cannot be interpreted to mean that the Directive may not have implications for national rules on the liability of the employer even though the ECJ rejected the view that Article 5(1) of the Directive implies no-fault liability for the employer.

44. This leads the Commission to conclude that in a situation, such as the one in the national proceedings, where it has been established that an employer has not on his own initiative complied with rules regarding safety in the work place, the employer should bear a responsibility for the failure to fulfil the obligations, both general and specific, laid down in Directives 89/391 and 92/57 in order to achieve the objective of improving the health and safety of workers at work.

47 The ECJ has repeatedly held that while the choice of penalties remains within the discretion of the Member States, they must ensure that infringements of European law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive, see Joined Cases C-58/95, C-75/95, C-112/95, C-119/95, C-123/95, C-135/95, C-140/95, C-141/95, C-154/95 and C-157/95 *Gallotti and Others* [1996] ECR I-4345, paragraph 14, and the case law cited therein. These considerations are equally valid in the context of the EEA Agreement. Provisions establishing a duty would be reduced to mere declarations of intent if they were imposed without any form of liability in the event of the duty being breached, see to this effect the Opinion of Advocate General Mengozzi in Case C-127/05 Commission v United Kingdom [2007] ECR I-4619 paragraph 76.
49. EEA States are under an obligation to sanction infringements of rules implementing Directives 89/391 and 92/57. It is not sufficient that these sanctions are analogous to sanctions for infringements of national law of a similar nature. They also need to be effective, proportionate and dissuasive.

50. In the case at hand, it appears that it is the application of general principles of national tort law which has led the Supreme Court of Iceland to conclude that an employee, due to his own contributory negligence, should be completely denied compensation from his employer for injuries he would probably not have sustained had the employer on his own initiative complied with rules regarding safety in the work place.

51. The question is then whether, in a situation such as this, the requirement of effective, proportionate and dissuasive sanctions means that an employee may not be denied compensation under tort law, fully or in part, due to his own contributory negligence.

52. The assessment of what constitutes effective, proportionate and dissuasive sanctions must take into account the provisions with which the sanctions are meant to secure compliance. Thus, the conclusion in this regard may depend on the directive concerned.

53. Article 5(1) of Directive 89/391 provides that the employer shall have a duty to ensure the safety and health of workers in every aspect related to the work……

54. Article 13 of Directive 89/391 requires workers to take care as far as possible of their own safety and health. To this end, they must, *inter alia*, immediately inform the employer of any work situation they have reasonable grounds for considering represents a serious and immediate danger to safety and health and of any shortcomings in the protection arrangements.

55. However, Article 5(3) of Directive 89/391 provides that the workers’ obligations in the field of safety and health at work shall not affect the principle of the responsibility of the employer. Thus, the Directive establishes the principle that the employer bears the main responsibility for safety and health in work places. Pursuant to Article 16 of Directive 89/391, this principle also applies to work covered by Directive 92/57.

56. The Defendant has pointed to Article 5(4) of Directive 89/391 which gives the EEA States the right to limit the responsibility of the employer for accidents caused by unusual and unforeseeable circumstances beyond his control or by exceptional events having consequences which could not have been avoided despite the exercise of all due care. However, this does not detract from the duty of the employer to prevent accidents which do not fall under Article 5(4). Clearly, the possibility that employees might perform their work even when the necessary safety measures have not been put in place by the employer cannot qualify as an occurrence falling under Article 5(4).

57. In order to be effective, proportionate and dissuasive, sanctions for breach of the duties established by Directives 89/391 and 92/57 must reflect the principle that the employer bears the main responsibility for the safety and health of workers. This does not exclude the possibility of attributing responsibility for an accident to an employee who has contributed to the accident through his own negligence.

58. However, save in exceptional circumstances it would be contrary to the principle that the main responsibility lies with the employer to attribute all, or the greater share, of the losses suffered as a result of an accident at work to the employee due to his own contributory negligence when it has been established that the employer, in disregard of his duties
according to the Directives, had not on his own initiative complied with rules regarding safety and conditions in the workplace. Exceptional circumstances may exist where the employee has caused the accident wilfully or by acting with gross negligence, but even in such cases a complete denial of compensation would be disproportionate and not in compliance with the Directives except in extreme cases of the employee being substantially more to blame for the accident than the employer.

59 This conclusion is not altered even if, as a result of the accident, sanctions under criminal law or administrative law are imposed upon the employer for not having complied with the relevant safety requirements. In a civil lawsuit between employer and employee following such an accident, the apportionment of responsibility between the parties would be a central issue. The attribution of all or the greater share of the responsibility for the accident to the employee would constitute a strong statement, not only to the parties directly involved but also to others. An apportionment of responsibility contrary to the Directives would therefore undermine the effective attainment of compliance with the Directives even if, in other proceedings, the employer is sanctioned for non-compliance with the safety regulations in a way which is in accordance with the Directives.

60 Nor can it matter that the employee may obtain compensation from a mandatory accident insurance scheme. If, due to his own contributory negligence, he is still denied compensation under national tort law in a situation where this would be contrary to the Directives, the result would be the same negative effect on compliance as pointed out at paragraph 59 above. Moreover, if the accident insurance does not lead to the employer having to bear some of the financial burden caused by the accident, either by having to reimburse the insurer for parts of the pay-out or by being charged higher premiums for the coming years, the insurance scheme could hardly be characterised as a sanction at all.”

3.11 This decision of the EFTA Court in Þór Kolbeinsson v The Icelandic State is clearly highly relevant to the present issue of the UK Government seeking to remove completely the possibility of any civil liability by employers in respect of their breach of national provisions implementing EU health and safety measures. In order more fully to understand the decision of the EFTA it is necessary to consider the relevant general principles of EU law more fully as these have been developed in the case law of the Court of Justice of the European Union (“CJEU”).

The duty to provide an Effective Remedy for the Protection of EU Law derived Rights

3.12 The Court of Justice has derived an increasing number of procedural duties from the principle that EU law derived rights must be effectively protected. National administration and national court courts must have regard to these duties in all matters which have an EU law element, regardless of any prior inquiry as to whether or not the substantive EU rights which they seek to vindicate and protect themselves have “direct effect”.

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6 Case E-2/10 Þór Kolbeinsson v The Icelandic State (10 December 2010, EFTA Court)
3.13 It is a basic principle of EU law that national courts should ensure the existence of an effective judicial remedy to enforce and protect individuals’ rights under EU law.\(^7\) This principle now appears as an express obligation under the EU Treaty post-Lisbon, with Article 19(1) Treaty on European Union (“TEU”) now providing that

“Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”

3.14 Article 6 of the Treaty on European Union (“TEU”) specifies that the EU Charter of Fundamental Rights (“CFR”) has the same legal value as the Treaties.\(^8\) Provisions of the Charter now constitute part of the primary law of the EU. The Article 19(1) TEU reference to “effective remedy” is taken up and repeated in the terms of Article 47(1) CFR which states:

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.”

3.15 The Praesidium Explanation on Article 47 CFR – to which the national courts are directed to have due regard by Article 52(7) CFR (which states that “the explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States”) provides as follows:

“The first paragraph is based on Article 13 of the ECHR:

‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’

However, in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court. The Court of Justice enshrined that right in its judgment of 15 May 1986 as a general principle of Union law (Case 222/84 Johnston [1986] ECR 1651; see also judgment of 15 October 1987, Case 222/86 Heylens [1987] ECR 4097 and judgment


\(^8\) Article 6(1) TEU states:

“The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.”
of 3 December 1992, Case C-97/91 *Borelli* [1992] ECR I-6313). According to the Court, that general principle of Union law also applies to the Member States when they are implementing Union law.

The inclusion of this precedent in the Charter has not been intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to admissibility for direct actions before the Court of Justice of the European Union. The European Convention has considered the Union's system of judicial review including the rules on admissibility, and confirmed them while amending them as to certain aspects, as reflected in Articles 251 to 281 of the Treaty on the Functioning of the European Union, and in particular in the fourth paragraph of Article 263. *Article 47 applies to the institutions of the Union and of Member States when they are implementing Union law and does so for all rights guaranteed by Union law.*

3.16 The conditions governing the availability of this judicial remedy are, in principle, matters for national law. In the absence of procedural harmonisation at an EU level, the domestic legal systems of the Member States may designate which of their courts have jurisdiction in, and what procedural conditions apply to, actions seeking to invoke EU law directly. This procedural autonomy is, however, limited in certain respects by EU principles, as follows:

a) National procedural rules should not be applied in such a manner as to make the enforcement of EU rights more difficult than the enforcement of analogous national rights; that is, there should be no procedural discrimination between national law and EU law rights (“the principle of equivalence”).

b) Even where they apply equally both to national and to EU law rights, national procedural rules should not have the effect of making it impossible in practice, or even excessively difficult, to exercise rights guaranteed under EU law (“the principle of effectiveness”).

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10 Case 33/76 *Rewe v Landwirtschaftskammer für Saarland* [1976] ECR 1989 What constitutes the relevant analogue in national law (and hence the procedural rules applicable to the claim) may itself be the subject of dispute: see *Alabaster v Barclays Bank plc* [2005] ICR 1246 (CA), where the Court of Appeal held that the relevant analogue to a claim to maternity pay guaranteed and protected under EU law was a (modified) claim under the Equal Pay Act 1970 rather than a claim to unlawful deduction of wages under and in terms of the Employment Rights Act 1996.

11 Case 45/76 *Comet v Produitschaap voor Siergewasen* [1976] ECR 2043.

c) In deciding whether or not to apply a national procedural rule in a case involving EU law rights, the national court must not only look at the effects of the application of that rule to the case before it, but should consider the role or purpose which that rule serves in the national procedure and whether or not it is justified in the light of such considerations as “the protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure”13 (“the principle of integrity”).

d) Member States must adhere to the fundamental principle of equality when implementing EU law within their territory.14 This requires that similar situations should not be treated differently unless such differentiation is objectively justified15 and does not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed’.16 Member States must comply with this principle where EU rules leave them discretion to choose between various methods of implementation. Thus Member States and their courts may not choose an option the implementation of which would be liable to create, directly or indirectly, discrimination within the territory of the Member State as between individuals in relation to their right to access the national courts to have their grievances in relation to EU law rights heard and determined. The United Kingdom is the relevant Member State,17 and none of England, Wales,

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14 See Cases 201 and 202/85 Klensch v Secretary of State [1986] ECR 3477 at paras 8–11


“Third, it is settled case-law that where Community rules leave Member States to choose between various methods of implementation, the Member States must exercise their discretion in compliance with the general principles of Community law ... Consequently, a claw back measure such as that at issue in the main proceedings must be established and applied in compliance with the principles of legal certainty and protection of legitimate expectations ... Moreover, it must be proportionate to the aim pursued ... and applied without discrimination. ... Similarly, such a measure must respect fundamental rights ...”


'In that connection, it should be observed that it is for all the authorities of the Member States, whether it be the central authorities of the State or the authorities of a federated State, or other territorial authorities, to ensure observance of the rules of Community law within the sphere of their competence.
Scotland or Northern Ireland – even after devolution\(^{18}\) – is a separate Member State (‘principle of non-discrimination’).

**Duty to provide effective sanctions in respect of breach of EU law derived rights**

3.17 National legal systems are in general permitted a measure of discretion as to the sanctions which they provide for breach of EU law rights. The Court of Justice stated in *Amsterdam Bulb* that in the absence of provisions in EU rules providing for specific sanctions to be imposed on individuals for failure to observe those rules, Member States were free to adopt such sanctions as appeared to them appropriate,\(^{19}\) although in exercising their power the Member States must provide effective protection of the EU right and otherwise observe the requirements of EU law.

3.18 The effective protection of EU rights has been held to mean that the sanctions available in national law for breach of an EU law right must have a 'real deterrent effect ... such as to guarantee real and effective judicial protection'\(^{20}\), and the relevant general principles of EU law include equal treatment or non-discrimination and proportionality.\(^{21}\)

\(^{18}\) In Case C-428/07 *R (on the application of Horvath) v Secretary of State for Environment, Food and Rural Affairs* [2009] ECR I-6355, the Grand Chamber held that simple divergences between the measures provided for by the various administrations within the one Member State would not, alone, constitute discrimination so long as the various measures were compatible with the minimum standard obligations on the Member State in question which stemmed from EU law.

\(^{19}\) Case 50/76 *Amsterdam Bulb v Produktschap voor Siergewassen* [1977] ECR 137 at para 32.


\(^{21}\) See Case C-413/08 *P Lafarge SA v European Commission*, 17 June, [2010] ECR I-nyr at para 70:

“[T]he principle of proportionality requires that the time elapsed between the infringement in question and a previous breach of the competition rules be taken into account in assessing the undertaking’s tendency to infringe those rules. For the purposes of judicial review of the Commission’s measures in matters of competition law, the General Court and, where appropriate, the Court of Justice may therefore be called upon to scrutinise whether the Commission has complied with that principle when it increased, for repeated infringement, the fine imposed, and, in particular, whether such increase was imposed in the light of, among other things, the time elapsed between the infringement in question and the previous breach of the competition rules.”

And Art 49(3) of the EU Charter now provides: 'The severity of penalties must not be disproportionate to the criminal offence.'
3.19 Thus in Commission v France, the Court of Justice found in an Article 258 TFEU infringement action that France had contravened EU law (specifically Article 110 TFEU) by imposing more severe penalties for offences concerning the non-payment of VAT on goods imported from other Member States than the penalties imposed in the case of VAT avoidance in purely domestic transactions.

3.20 And in Danish Public Prosecutor v Hansen, a case concerning the Danish implementation of the EU tachograph regulations, the EU law in relation to sanctions in criminal proceedings was summarised as requiring Member States to take all measures necessary to guarantee the application and effectiveness of EU law. For that purpose, while the choice of penalties remained within their discretion, the Member States were to ensure that infringements of EU law were penalised under conditions, both procedural and substantive, which were analogous to those applicable to infringements of a national law of a similar nature and importance, and which, in any event, made the penalty 'effective, proportionate and dissuasive', as follows:

a) an 'effective' sanction is one which is in fact aimed at achieving the objective of the EU provision in question;

b) a 'proportionate' sanction is one which is not, in all the circumstances of the case, excessive;

c) a 'dissuasive' sanction is one which is not so minimal as to fail to deter a breach of EU law.

23 See also Case 299/86 Italy v. Rainer Drexl [1988] ECR 1213.
26 See, eg, Case C-45/08 Spector Photo Group NV and Chris Van Raemdonck (CBFA) [2009] ECR I-11677 at paras 73 and 77: ‘[G]ains realised from insider dealing may constitute a relevant element for the purposes of determining a sanction which is effective, proportionate and dissuasive. The method of calculation of those economic gains and, in particular, the date or the period to be taken into account are to be determined by national law ... [I]f, in addition to the administrative sanctions laid down in that provision, a Member State has introduced the possibility of a criminal financial sanction, it is not necessary, for the purposes of assessing whether the administrative sanction is effective, proportionate and dissuasive, to take account of the possibility and/or the level of a criminal sanction which may subsequently be imposed.’
3.21 In summary, any sanction or penalty which is not aimed at achieving the same objective as the EU provision, or which is, in all the circumstances, either excessive or derisory, will therefore be incompatible with EU law. Although, in general terms, it is for the national court to consider and determine whether or not the penalties provided for by the legislation of the Member State are disproportionate to the nature of the offence committed such as to constitute by their severity an obstacle to the fundamental freedoms guaranteed under the Treaties, the Court of Justice has found in a number of cases that the penalty prescribed by national law in areas within the field of EU law was excessive and disproportionate.

3.22 It should be noted that the Court of Justice has allowed that in certain circumstances the imposition of strict liability in a criminal context will be compatible with the EU principles of proportionality in the application of punitive sanctions.

The Duty to Provide Adequate Compensation in Respect of Losses Caused by Breach of EU Law

Francovich damages against the State

3.23 In Francovich (No 1) ruled that, under EU law, an individual may claim reparation against a Member State for loss caused by its failure properly to implement EU law. The EU Treaties make no express provision for a Member State to be liable in damages for breaches of European Union law. However, in Francovich v Italy, the Court of Justice held that such liability was implicit in the scheme of the EC Treaty. Thus, in a case where an individual cannot rely directly upon a directive against a private party, and the national court refuses to give the directive indirect effect, the correct recourse is an action for reparation against the Member State for failure to implement the terms of the directive.

3.24 The relevant directive in Francovich was intended to protect employees in the event of their employer becoming insolvent, by providing for a guarantee fund to ensure that the employees


received back pay which was due to them under their contracts of employment. The Italian Government failed to implement this directive, even after a ruling against it by the Court of Justice in proceedings by the Commission under what is now Article 258 TFEU. Two Italian companies went into liquidation leaving substantial sums by way of unpaid wages due to their employees. Had the directive been implemented in Italy, this money would have been recoverable by the employees from a guarantee fund set up for precisely this situation. No such guarantee fund existed in Italy, however, and there was little chance of recovering any back-pay from the companies' liquidators. The ill-served employees accordingly brought actions against the Italian Government, claiming either the monies which would have been due to them had the directive been duly implemented or damages to compensate them for their losses resulting from the State’s failure to implement the directive. These actions were referred by the Italian courts to the Court of Justice. The Court of Justice held, first, that the directive in question was not sufficiently clear and precise to have direct effect, since it did not identify the national institution which was to be responsible for administering the guarantee fund. This was a matter which had been left to the discretion of the Member States. The Court of Justice went on to hold, however (at paragraph 36 of its judgment), that EU law itself contained a general principle to the effect that a Member State is obliged to make good the damage to individuals caused by a breach of EU law for which that Member State was responsible.

3.25 This obligation to make reparation was said to arise out of Article 10 EC (now Article 4(3) TEU) which places a general duty on Member States to take all appropriate measures to ensure fulfilment of their obligations under EU law. Having made its general statement of principle, the Court of Justice has in subsequent cases laid down more specific criteria for State liability to make reparation for breach of EU law. In particular, in Brasserie du Pêcheur/Factortame (No 3), the Court of Justice confirmed that the Member States incurred liability for loss and damage caused to individuals as a result of breaches of EU law (including Treaty Articles), whether or not the breach had been committed by national legislatures or by national administrations. Subsequently the Court of Justice has held that the possibility of a Francovich damages claim may arise in situation where the breach of EU law in question arises from a decision of the

31 Case 22/87 Commission v Italy [1989] ECR 143.
national court of last instance,\textsuperscript{33} even where the national court is engaged in interpreting provisions of national law or in assessing the facts and evidence led before it.\textsuperscript{34}

3.26 The Court of Justice has also held that where the EU law rule in question conferred individual rights, and the disregard of these rights had directly resulted in loss to those individuals, a Member State would incur liability to make good that loss only if the action of its national legislature which was contrary to EU law was sufficiently serious as to show a 'manifest and grave disregard of the limits of its discretion' in so legislating in a field also covered by EU law.\textsuperscript{35} This does not, however, mean that a Francovich action may arise only where there is shown to be intentional fault or serious misconduct (such as misfeasance in public office) on the part of the national authorities.\textsuperscript{36} The Court of Appeal considered the test of a 'sufficiently serious breach' in Byrne v Motor Insurers Bureau, and held that it was satisfied where it was shown that the United Kingdom had failed to alter its scheme for compensation for injuries caused by uninsured drivers to take account of clear guidance from the CJEU. The Court of Appeal accepted that the test was not one of bad faith, and also noted that:

The ‘sufficiently serious’ criterion laid down by the Court of Justice for Francovich liability is not a hard-edged test. It requires a value judgment by the national court, taking account of the various factors summarised by the court in Evans [the earlier decision which the UK had failed to comply with]. In the present case, the important points to my mind are three-fold: the relative precision of the requirement, following Evans; the serious consequences of failure to comply; and the clear warning given in Evans of the need to make the comparison.\textsuperscript{37}

3.27 In cases involving issues requiring the transposition of EU law into national law, any claimant for Francovich damages would have to show that the complained-of failure in transposition or implementation involved a 'manifest and grave disregard' for the limits imposed by EU law. On one view, these are subtly distinct concepts, 'manifest' referring to how obvious the breach should have been, and 'grave' to the seriousness for the applicant. However, the judicial tendency has been to subsume both elements into a single test. 'Sufficiently serious breach' is

\textsuperscript{33} Case C-224/01 Köbler v Austria [2003] ECR I-10239.

\textsuperscript{34} Case C-173/03 Traghetti del Mediterraneo [2006] ECR I-5177.

\textsuperscript{35} See, eg, Case C-278/05 Robins and Burnett v Secretary of State for Work and Pensions [2007] ECR I-1059 at paras 69–72.

\textsuperscript{36} Case C-173/03 Traghetti del Mediterraneo [2006] ECR I-5177.

\textsuperscript{37} Byrne v Motor Insurers Bureau [2009] QB 66 (CA) at para 45.
the standard translation now used by the Court of Justice itself, although in *Sweden v Stockholm Lindöpark*, Advocate General Jacobs observed:

In French, the Court has always used – originally with regard to liability incurred by the Community – the term ‘violation suffisamment caractérisée.’ This is now normally translated into English as ‘sufficiently serious breach.’ However, the underlying meaning of ‘caractérisé’, which gives rise to its inherent implication of seriousness, includes the notion that the breach (or other conduct) has been clearly established in accordance with its legal definition, in other words, that it is a definite clear-cut breach. This may help to explain why the term was previously translated as ‘sufficiently flagrant violation’ and may throw additional light on the choice of factors which the Court has indicated should be taken into consideration when deciding whether a breach is ‘sufficiently serious.’

3.28 In summary, potential liability under *Francovich* principles may be said to exist when three factors are present:

(i) the rule of EU law infringed must be intended to confer rights on individuals;

(ii) there must be a direct causal link between the breach of the obligation resting on the Member State and the damage suffered by the injured parties, with the onus of establishing such a nexus resting on the applicants;

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39 For a general survey of the case law in this area, see T Tridimas, ‘Liability for breach of Community law: growing up and mellowing down’ (2001) 38 CML Rev 301. See too *Spencer v Secretary of State for Work and Pensions* [2008] ICR 1359 (CA) per Waller LJ at 1364, para 3:

‘Under Community law it has been held that there are three conditions to be satisfied for a member state to incur liability to an individual under Community law: (1) the rule of law infringed is intended to confer rights on individuals; (2) the breach is sufficiently serious and, in particular, there was a manifest and grave disregard by the member state of its discretion; and (3) there is a direct causal link between the breach of the obligation resting on the member state and the damage sustained by the injured party: see *Francovich v Italian Republic* (Joined Cases C-6/90 and C-9/90) [1995] ICR 722, *Brasserie du Pêcheur SA v Federal Republic of Germany*; *R v Secretary of State for Transport, ex p Factortame Ltd ( No 4)* (Joined Cases C-46/93 and C-48/93) [1996] QB 404 and Sir Andrew Morritt V-C’s summary of the position in *Phonographic Performance Ltd v Department of Trade and Industry* [2004] 1 WLR 2893, para 11.’

40 See Case C-222/02 *Paul and others v Germany* [2004] ECR I-9425, where the Court held that the Banking Supervision Directive 94/19/EC was not such as to confer rights on individuals such as to entitle them to compensation in respect of the State’s failure to carry out its duties of supervision. See to like effect *Three Rivers District Council v Bank of England ( No 3)* [2003] AC 1 per Lord Hope of Craighead at 218–19.

41 See *R v Secretary of State for the Home Department, ex p Gallagher* [1996] 2 CMLR 951 (CA) for an unsuccessful attempt to show any causal link between a breach of EU law on free movement of persons and the loss claimed to have been suffered by the individual so affected.

(iii) the breach of EU law in question must be regarded as of sufficient seriousness to warrant an action for reparation.43

3.29 These three conditions are necessary and sufficient to found an EU right for parties to be able to claim damages against the relevant Member State authorities.44 In the case of incorrect transposition of an EU law obligation, there has to be shown to be a manifest and grave disregard by the Member State of the limits of its powers, having regard to, among other factors: the clarity and precision of the EU law rule breached;45 whether the infringement and the damage caused were intentional or involuntary; whether any error of law was excusable or inexcusable; and whether or not the position taken by an EU institution may have contributed towards the adoption or maintenance of national measures or practices contrary to EU law.46

3.30 A breach of EU law will be sufficiently serious if it has persisted despite a preliminary ruling from the Court of Justice from which it is clear that the conduct in question constituted an infringement.47 And in the case of a complete failure by a Member State to implement a directive by the due date, this would, in the absence of pre-existing laws reflecting the requirements of the directive, constitute a sufficiently serious disregard of EU law as to attract the possibility of claims for damages under Francovich principles. This is confirmed by the decision of the Court of Justice in Dillenkofer v Germany, in which the Court of Justice stated:

[F]ailure to take any measure to transpose a directive in order to achieve the result it prescribes in the period laid down for that purpose constitutes per se a serious breach of EU law and consequently gives rise to a right of reparation for individuals suffering injury if the result prescribed by the directive entails the grant to individuals of rights whose content is identifiable and a causal link exists between the breach of the State’s obligation and the loss and damage suffered.48

43 In R v Secretary of State for Transport, ex p Factortame (No 5) [2000] 1 AC 524, Lord Clyde observed (at 554): “No single factor is necessarily decisive. But one factor by itself might, where there was little or nothing to put into the scales on the other side, be sufficient to justify a conclusion of liability.”

44 See Case C-173/03 Traghetti del Mediterraneo [2006] ECR I-5177, paras 44 and 45.


47 See, eg, Case C-118/00 Larsy v INASTI [2001] ECR I-5063 at para 44.

3.31 In *Brasserie du Pêcheur/Factortame IV*, the Court of Justice confirmed that the Member States might incur liability for loss and damage caused to individuals as a result of breaches of EU law (including Treaty Articles), whether or not the breach had been committed by *national legislatures or as by national administrations*.

3.32 In *Haim v Kassenzahnärztliche Vereinigung Nordrhein*, the Court of Justice noted that as a matter of principle, where legislative or administrative tasks are devolved by the Member States to any public law body legally distinct from the State, EU law imposes a duty on that public law body, in addition to the Member State itself, to make reparation for loss and damage caused to individuals by national measures taken by it in breach of EU law. On the basis of this decision, then, *Francovich* actions might competently be raised, for example, against the Scottish Parliament and/or Scottish Executive in so far as their action or inaction contrary to the requirements of EU law has resulted in an individual suffering damage – but the devolved administrations may be in a position to challenge the validity of EU acts breach of which might impose such a liability on them. *Francovich* damages claims may in principle be directed also against individual officials responsible for the claimants suffering losses referable to lack of respect for their EU law rights.

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52 See Case T-37/04 *Região autónoma dos Açores v Council* [2008] ECR II-2153 at para 82: ‘In the Community legal order, it is for the authorities of the central State to represent any interests based on the defence of national legislation, regardless of the constitutional form or the territorial organisation of that State (order in Case T-417/04 *Regione Autonoma Friuli-Venezia Giulia v Commission* [2007] ECR II-641, paragraph 62). Admittedly, the Community judicature has accepted the right of regional authorities to challenge Community acts which either prevent them from adopting measures which they may legitimately adopt if there is no Community intervention or require them to withdraw those measures and to take certain action (see, to that effect, *Vlaamse Gewest v Commission*, cited in paragraph 79 above, paragraph 29; Joined Cases T-346/99 to T-348/99 *Diputación Foral de Álava and Others v Commission* [2002] ECR II-4259, paragraph 37; and Joined Cases T-366/03 and T-235/04 *Land Oberösterreich and Austria v Commission* [2005] ECR II-4005, paragraph 28).’

53 Case C-470/03 *AGM-COS MET Srl v Suomen valtion, Tarmo Lehtinen* [2007] ECR I-2749.
Francovich Damages against Private Parties

3.33 In his Opinion in *HJ Banks & Co v British Coal Corporation*,54 Advocate General van Gerven suggested that the *Francovich* action, as a general action to make reparation for breach of EU law, should also be available in principle against private parties and corporations; the point was not ruled upon by the Court of Justice, however. Clearly, there are certain forms of breach, including the non-implementation of directives, which can only be perpetrated by, and could only be actionable against, the State. Others, such as a breach of the Treaty Articles on competition law or equal pay, relate specifically to the activities of private parties, and raise important questions as to the future development of the *Francovich* damages action.

3.34 In *Crehan v Courage Ltd*,55 the Court of Justice held that Article 101 TFEU precludes a rule of national law barring a party to an anti-competitive agreement from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract,56 and ruled that such a breach of EU competition law could give rise to a claim by the economically weaker party to the offending agreement against the economically stronger for damages resulting from the performance of the unlawful contract.57 ‘Economic weakness’ is defined in terms of the serious compromise or complete elimination of one party’s:

a) freedom to negotiate the terms of the contract; and

b) capacity to avoid the loss or reduce its extent by, for example, availing himself in good time of all the legal remedies available to him.

Where it is established that a party bears significant responsibility for the distortion of competition, however, it is open to the national court to bar any such damages claim by him.


56 This was a rule of English law set out in *Gibbs Mew plc v Gemmell* [1998] European Law Reports 588 (CA).

57 In *Crehan v Intreprenueur Pub Co* [2007] 1 AC 533, the House of Lords confirmed the decision of the national court at first instance that on the facts it had not been shown that Art 101(1) TFEU applied and had been breached such as to sustain the claimants’ claim for damages.
3.35 It is plain, then, not only that a damages action might lie against the State or a public law body within it, but also that damages might be available, in principle, against private parties for their breach of their (direct horizontal) obligations under EU law.  

3.36 It has been held in the national context that where an undertaking has received unlawful State aid, the wrongdoer is the State party granting this aid rather than the recipient of the aid, and so no damages may be claimed against the beneficiary of this State aid by a competing undertaking whose business has suffered loss in the conditions of unfair competition created thereby. By contrast, in Antonio Muñoz y Cia SA v Frumar Ltd, a Grand Chamber of the Court of Justice held that it must be possible to enforce obligations contained in a directly applicable EU Regulation by means of civil proceedings for damages instituted by a trader against a competitor.

Effective remedy and the quantification of damages

3.37 The general principle requiring any remedy to be 'effective' impacts on questions relating to the quantification of damages which might be claimed in the national courts in respect of an actionable breach of EU law. While it remain in principle for the domestic legal system of each Member State to set the criteria for determining the extent of compensation, the usual principles of equivalence apply, which is to say that the approach to quantification cannot be less favourable than that applying to similar claims or actions based on domestic law. Further

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58 See Joined Cases C-295–298/04 Manfredi and others [2006] ECR I-6619, where the Court expressly allowed that an action for damages in respect of loss occasioned by the operation of an insurance company cartel might include not only actual past losses (damnum emergens) but also loss of anticipated profits (lucrum cessans).

59 See Betws Anthracite Ltd v DSK Anthrazit [2004] 1 EMLR 12, [2004] European Law Reports 241 (ChD). Compare, however, with Case C-368/04 Transalpine Ölleitung in Österreich [2006] ECR I-9957 at para 56, reiterating that a national court may be required to rule on an application for damage caused to a trading undertaking by reason of the unlawful grant of State aid. See to like effect Case C-199/06 Ministère de la Culture et de la Communication v Société internationale de diffusion et d’édition [2008] ECR I-469, noting at paras 51–53 that a business in receipt of unlawful State would be placed in a situation of ‘undue advantage [which] will have consisted, first, in the non-payment of the interest which it would have paid on the amount in question of the compatible aid, had it had to borrow that amount on the market pending the Commission’s decision, and, second, in the improvement of its competitive position as against the other operators in the market while the unlawfulness lasts. … In a situation such as that in the main proceedings, the national court must therefore, applying Community law, order the aid recipient to pay interest in respect of the period of unlawfulness. … Within the framework of its domestic law, it may, if appropriate, also order the recovery of the unlawful aid, without prejudice to the Member State’s right to re-implement it, subsequently. It may also be required to uphold claims for compensation for damage caused by reason of the unlawful nature of the aid.’

60 Case C-253/00 Antonio Muñoz y Cia SA v Frumar Ltd [2002] ECR I-7289.
and in any event, as we have seen, there should be no limitations on quantification or recovery such as to make it in practice 'impossible or excessively difficult' to obtain full redress.

3.38 Member States’ discretion in setting caps on compensation which might be recoverable was narrowed further by the judgment of the Court of Justice in Marshall (No 2).\(^{61}\) The House of Lords referred questions as to the validity under EU law of provisions of the Sex Discrimination Act 1975 which placed a ceiling on the amount of damages available in the event of discriminatory treatment and did not provide for an award of interest. The Court of Justice held that, with respect to the EU right to equal treatment embodied in the Equal Treatment Directive, effective protection entailed that Member States should provide for measures designed to restore such equality when it had not been observed. In the case of an act of discrimination which expressed itself in dismissal from employment, the appropriate measures would either be an order for reinstatement to employment or an award of compensation for the full loss and damage actually sustained as a result of the discriminatory dismissal. In addition, an award of interest on the capital sum awarded by way of compensation was held to be required in order to make the remedy a truly effective one. This right to full compensation with interest was found to flow from or be implicit within the terms of Article 6 of the Directive,\(^{62}\) which provided that

“Member States shall introduce into their legal systems such measures as are necessary to enable all persons who consider themselves wronged by a failure to apply to them the principle of equal treatment ... to pursue their claims by judicial process after possible recourse to other competent authorities.”

3.39 This provision appears to be no more than an expression of the general principle of effective protection in the particular context of equal treatment. However, Article 6 of the Directive was found by the Court of Justice to be sufficiently precise and unconditional to have direct effect when read in the context of the whole Directive. Accordingly, the House of Lords was required, as a matter of EU law, to override those provisions of the Sex Discrimination Act 1975 which imposed a maximum limit on compensation and which did not provide for an award of interest to run thereon.

\(^{61}\) Case C-271/91 Marshall v Southampton and SW Hampshire Area Health Authority (No 2) [1993] ECR I-4367.

3.40 The Court of Justice has also held that the compensation which Member States are obliged to provide for loss or damage which they have caused to individuals by breaches of EU law must be commensurate with the loss or damage actually sustained, regardless of questions as to the foreseeability of this loss. And it has held that any national rule cannot be maintained which totally excludes considerations of loss of profit or other pure economic loss as a head of damage for which compensation may be awarded in the case of a breach of EU law. Further, interest on sums improperly withheld or levied contrary to EU law should, in principle, also be recoverable.

3.41 Questions relating to the precise elements and amount of restitution claimed under EU law will remain unanswered unless and until the Court of Justice is asked to rule on these matter: the more Article 267 TFEU preliminary references submitted to the CJEU on questions of quantification, the more it is possible to foresee ever-greater general EU harmonisation in this area.

4. Conclusion

4.1 It would appear that the Government has introduced this proposal to remove the possibility of civil liability accruing to all and any duties imposed under health and safety regulations in breach of its common law duties of proper consultation. Were it not for the fact that the measure is before Parliament and will be introduced as primary legislation it would most certainly be subject to judicial review and there would be a high probability of success in declaring the proposal unlawful for want of proper consultation. The November 2011 Löfstedt report Reclaiming health and safety for all: An independent review of health and legislation cannot be relied upon in this regard as its proposal for a review of each individual health and safety duty imposing imposes strict liability as a matter of UK criminal law has been rejected by the Government.

4.2 Although – because it is now before Parliament - this proposal cannot be challenged because of the lack of proper consultation preceding its introduction before Parliament, the failure properly to consult on the measure is obvious from the wholly unconvincing justifications now being

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64 Case C-470/03 AGM-COSMET Srl v Suomen valtio, Tarmo Lehtinen [2007] ECR I-2749 at paras 94–95.
65 Case C-397/98 Metalgesellschaft and others v Inland Revenue [2001] ECR I-1727. In Sempra Metals (formerly Metalgesellschaft) v Inland Revenue [2008] 1 AC 561 (HL), the House of Lords recognised that this should be a right to compound rather than simple interest.
proffered by the Government for their introduction of a blanket removal of civil liability, as anything else being too complex and requiring too much time. This appears to be a measure proposed in haste and, given the clear clash with the requirements of EU law, one that the Government will doubtless repent of at leisure when the matter comes for challenge for its EU law incompatibility before the courts, post-enactment.

4.3 If a successful challenge to the EU law compatibility of this measure to remove civil liability is made before the courts, then the measure would fall to be disapplied by the courts in accordance with the principles of the primacy and effectiveness (effet utile) of EU law. The principles of the primacy and effectiveness of EU law create a procedural duty on the national court which must, where it might otherwise apply a national rule in the specific case before it, suspend and refuse to apply in the case before it that rule to the extent that it is incompatible with the effective respect and protection of the EU law rights of the parties to the litigation.66

4.4 Given that EU law largely occupies the field of workplace health and safety law in the United Kingdom it is of particular (indeed shocking significance) that this proposal from the UK Government is not one in relation to which the European Commission has been consulted. It is of course open to any interested parties to draw this matter to the attention of the European Commission whether informally or by way of formal complaint procedures which may result in the initiation of enforcement action by the Commission directly against the United Kingdom before the CJEU under and in terms of Article 258 TFEU.

4.5 But even in the absence of such direct enforcement action under and in terms of Article 258 TFEU, this measure if passed by Parliament may still be subject to challenge before the national courts of the United Kingdom. Among the possible bases of challenge are these:

(1) the proposed amendment of Section 47 of the Health and Safety at Work etc. Act 1974 (by removing civil liability) purports to reduce the protection of the EU law derived rights to a safe and health working environment previously afforded workers under UK national law. As such it is EU law incompatible because contrary to the principles set out in Article 151 TFEU and enunciated in Protocols 4 and 5 of Directive 89/391/EEC and to the plain terms of, inter alia, Article 1(3) of Directive 89/391

the proposed amendment of Section 47 of the Health and Safety at Work etc. Act 1974 (by removing civil liability) contravenes the provision of Article 5 of Directive 89/391 in excluding or limiting the employer’s responsibility to ensure the observance of these health and safety provisions

the proposed amendment of Section 47 of the Health and Safety at Work etc. Act 1974 (by removing civil liability) contravenes the duty of Member States under and in terms of Article 19(1) TEU and separately Article 47(1) of the Charter of Fundamental Rights CFR to provide remedies sufficient to ensure effective legal protection in the fields covered by EU health and safety law

the proposed amendment of Section 47 of the Health and Safety at Work etc. Act 1974 (by removing civil liability) contravenes the duty to ensure the existence of effective proportionate and dissuasive sanctions in respect of breach of EU law derived rights

the proposed amendment of Section 47 of the Health and Safety at Work etc. Act 1974 (by removing civil liability) contravenes the duty on Member States under EU law to make provisions for full compensation in respect of losses caused to individuals by breach of EU health and safety laws

the proposed amendment of Section 47 of the Health and Safety at Work etc. Act 1974 (by removing civil liability) opens up the UK Government to the possibility of claims for Francovich damages by individuals who have suffered loss as a result of their removal of civil liability against their private sector employers

Once again, my apologies for having written at such length on these matters. I trust that the foregoing is sufficient at this stage for the purposes of my instructing solicitor. I have nothing more to add at this stage. My instructing solicitor should not hesitate to revert to me if there is anything arising from this note on which I might usefully further advise.

25 February 2013
Matrix Chambers
Gray’s Inn
on the legal competence of the Scottish Parliament to amend, repeal or disapply within Scotland, Section 69 of the Enterprise and Regulatory Reform Act 2013

ADVICE

June 2013

1. **INTRODUCTION**

1.1 I refer to my instructing solicitor’s letter of instruction of 16 May 2013 and to our Consultations on 13 May and 31 May 2013. I am asked to consider the issue of whether or not it would be within the powers devolved to the Scottish Parliament to pass legislation intended to avoid or reverse the effect, in Scotland, of Section 69 of the Enterprise and Regulatory Reform Act 2013.

1.2 Section 69 of the 2013 Act purports to introduce a fundamental change to the existing law across the United Kingdom in relation to civil liability of employers and others to workers for breach of statutory health and safety duties. Section 69 of the 2013 Act amends Section 47 in Part I of the Health and Safety at Work etc. Act 1974. The effect (and intent) of this amendment to Section 47 of the 1974 Act is to reverse case law established since the late 19th century by removing the general civil liability of employers for breach of statutory health and
safety regulations (and thereby to do away with the right of workers to obtain damages when injured consequent to such breaches of statutory duty).

1.3 Immediately prior to the enactment of the 2013 Act, Section 47 of the Health and Safety at Work etc. Act 1974 read as follows (emphasis added):

“47.— Civil liability.

(1) Nothing in this Part shall be construed—

(a) as conferring a right of action in any civil proceedings in respect of any failure to comply with any duty imposed by sections 2 to 7 or any contravention of section 8; or

(b) as affecting the extent (if any) to which breach of a duty imposed by any of the existing statutory provisions is actionable; or

(c) as affecting the operation of section 12 of the Nuclear Installations Act 1965 (right to compensation by virtue of certain provisions of that Act).

(2) 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.

(3) No provision made by virtue of section 15(6)(b) shall afford a defence in any civil proceedings, whether brought by virtue of subsection (2) above or not; but as regards any duty imposed as mentioned in subsection (2) above health and safety regulations may provide for any defence specified in the regulations to be available in any action for breach of that duty.

(4) Subsections (1)(a) and (2) above are without prejudice to any right of action which exists apart from the provisions of this Act, and subsection (3) above is without prejudice to any defence which may be available apart from the provisions of the regulations there mentioned.

(5) Any term of an agreement which purports to exclude or restrict the operation of subsection (2) above, or any liability arising by virtue of that subsection shall be void, except in so far as health and safety regulations provide otherwise.

(6) In this section “damage” includes the death of, or injury to, any person (including any disease and any impairment of a person’s physical or mental condition)

1.4 When and if Section 69 of the 2013 Act is brought into force, the amended Section 47 will read as follows (emphasis added)

“47.— Civil liability.

(1) Nothing in this Part shall be construed—

(a) as conferring a right of action in any civil proceedings in respect of any failure to comply with any duty imposed by sections 2 to 7 or any contravention of section 8; or

(b) …
(c) as affecting the operation of section 12 of the Nuclear Installations Act 1965 (right to compensation by virtue of certain provisions of that Act).

(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).**

(2B) Regulations under this section may include provision for—

   (a) a defence to be available in any action for breach of the duty mentioned in subsection (2) or (2A);

   (b) any term of an agreement which purports to exclude or restrict any liability for such a breach to be void.

(3) No provision made by virtue of section 15(6)(b) shall afford a defence in any civil proceedings.

(4) Subsections (1)(a), (2) and (2A) above are without prejudice to any right of action which exists apart from the provisions of this Act, and subsection (2B)(a) above is without prejudice to any defence which may be available apart from the provisions of the regulations there mentioned.

(5) …

(6) …

(7) The power to make regulations under this section shall be exercisable by the Secretary of State.”

1.5 The effect of the amendments wrought by Section 69 of the 2013 Act is to reverse the presumption that breach of a statutory workplace health and safety duty will give rise to the possibility of civil liability. Section 69 leave open the possibility of enforcement of these statutory duties by civil action, but there will be such civil liability for any such statutory breach only if express provision is made to this effect in regulations made by the Secretary of State in terms of the powers granted Ministers under the 1974 Act.

2. **THE EXISTING LAW ON THE CIVIL ACTIONABILITY OF BREACH OF STATUTORY DUTY**

2.1 The common law in Scotland is to the effect that a breach of a duty imposed by health and safety regulations shall, so far as it causes damage, be civilly actionable in Scotland on the part of a person injured as a consequence of that breach. That this is the position at common law in Scotland was established, at the latest, by the decision in 1912 in the Scottish appeal, *Black v.*
Fife Coal Company, where the Appellate Committee of the House of Lords confirmed that that when a duty of protection is imposed by health and safety regulations on employers for the benefit of particular persons, there arises, at common law, a correlative right of action in those persons who may be injured by the contravention.

2.2 Relying on the Scots law general constitutional principle ubi ius, ibi remedium, Lord Shaw of Dunfermline stated that:

“The commanding principle in the construction of a statute passed to remedy the evils and to protect against the dangers which confront or threaten persons or classes of His Majesty's subjects is that, consistently with the actual language employed, the Act shall be interpreted in the sense favourable to making the remedy effective and the protection secure. This principle is sound and undeniable.” 67

2.3 And Lord Kinnear observed:

“There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. ... We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention. Therefore I think it is quite impossible to hold that the penalty clause detracts in any way from the prima facie right of the persons for whose benefit the statutory enactment has been passed to enforce the civil liability. I think this has been found both in England and Scotland in cases in which the point was directly raised, the case of Groves v. Lord Wimborne [1898] 2 QB 402 in England, and Kelly v. Glebe Sugar Refining Co. (1893) 20 R. 833, IH 68 in Scotland.” 69

2.4 But once Section 69 of the 2013 Act is brought into force, if workers are to obtain damages for injuries received as a result of workplace accidents they may only do so if the injured workers

67 Black v. Fife Coal Company [1912] AC 149; 1912 SC (HL) 33 per Lord Shaw of Dunfermline at 54

68 See, in particular, the judgment of Lord Adam at 835

“[T]he protection of the [Factories and Workshops] Acts [1878 to 1891] extended to every person employed in the factory, and ... it was not necessary that at the time of the accident he should be actually engaged in the performance of his duty. Workmen may get into danger although they are not actually employed in the execution of their work at the time, and I am not aware that there is anything in the Factory Acts which should exclude them from the statutory protection. If then that is the sound view of the law, what is the result ? The result is that the owners of the factory are in fault for not having this shaft securely fenced, and are prima facie liable in damages for the consequences of that fault, for I cannot adopt the view that their liability is limited to the penalty imposed by the statute for the neglect of its provisions. I think that the neglect of the statutory provisions creates a prima facie case of fault against the factory owners which will render them liable in damages to their employees who may have been injured through that fault.”

69 Black v. Fife Coal Company [1912] AC 149; 1912 SC (HL) 33 per Lord Kinnear at 45
can show that their employers have been negligent and have failed in their duties of reasonable care by exposing their workers to foreseeable and avoidable risks.

2.5 This change involves a lowering of the standard of health and safety protection previously afforded to workers by the law. This is plain from the judgment of Lord Kinnear in Black v. Fife Coal Company where he observes:

“[W]hen an action had been brought for an injury caused by a contravention of the rules, the question as between the plaintiff and the mine owners was whether the contravention had happened notwithstanding that the mine owner had done all in his power to prevent its happening, and that the burden of proving that he had performed that duty, which was cast upon him for the safety of his workmen, lay upon the mine owner.

It is evident in the first place that the learned judges [in the court below] treated the case as an ordinary action for negligence, which it was for the pursuers to prove the negligence that they alleged. And, since the injury was due to the fault of fellow servants, the Court held that this could only be done by shewing that the master had failed to use due care and diligence in the selection of competent persons to superintend and carry on the work. That is the meaning of the judgment. This is clearly brought out in the opinion of the Lord Justice Clerk, where he says, ‘On a consideration of the evidence in this case I am not satisfied that the defenders have been proved to have been negligent in making the appointment.’ This is not the point of view which the statute requires to be taken.” 70

2.6 To similar effect, A. L. Smith LJ noted in Groves v. Lord Wimborne

“In the present case, which is an action founded on the statute, there is no resort to negligence on the part of a fellow servant or of anyone else. There being an unqualified statutory obligation imposed upon the defendant, what answer can it be to an action for breach of that duty to say that his servant was guilty of negligence, and therefore he was not liable? The defendant cannot shift his responsibility for the performance of his statutory duty on to the shoulders of another person.” 71

And Rigby L.J. observed in the same case:

“There has been a failure in the performance of an absolute statutory duty, and there is no need for the plaintiff to allege or prove negligence on the part of any one in order to make out his cause of action.” 72

3. EFFECTIVE REMEDY AND EU LAW

3.1 This Section 69 lowering of workers’ protection from previously established levels of protection – by, on Lord Shaw’s analysis, the removal of an effective remedy previously available to workers

70 Black v. Fife Coal Company [1912] AC 149; 1912 SC (HL) 33 per Lord Kinnear at 45-6

71 Groves v. Lord Wimborne [1898] 2 QB 402 per A. L. Smith LJ at 410

72 Groves v. Lord Wimborne [1898] 2 QB 402 per Rigby LJ at 413
is occurring in an area (workplace health and safety) which now falls within the ambit of EU law.  

3.2 It should be noted that the principle *ubi ius, ibi remedium* which was relied upon by Lord Shaw of Dunfermline in *Black v. Fife Coal Company* is also a general principle of EU law. Article 19(1) of the Treaty on European Union (“TEU”) provides that:

“Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”

3.3 In *DEB Deutsche Energiehandels* the Court of Justice of the European Union (“CJEU”) confirmed that the principle of effective judicial protection is a general principle of EU law.  

Consistently with this, Article 47(1) of the EU Charter of Fundamental Rights (“CFR”) states that:

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.”

3.4 The Explanations relating to the CFR – to which the courts are directed to have “due regard” by Article 52(7) CFR – provides as follows in respect of Article 47 CFR:

Article 47 applies to the institutions of the Union and of Member States when they are implementing Union law and does so for all rights guaranteed by Union law.”

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73 See *Smith v Northamptonshire County Council* [2009] ICR 734, HL and *Fytche v Wincanton Logistics Plc* [2004] ICR 974, HL (notably the opinions of the two dissenting judges in both cases, Lord Hope and Baroness Hale).

74 Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Germany* [2010] ECR I-13849 at §29

75 The Explanations to Article 47 CFR state further

“The first paragraph is based on Article 13 of the ECHR:

‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’

However, in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court. The Court of Justice enshrined that right in its judgment of 15 May 1986 as a general principle of Union law (Case 222/84 *Johnston* [1986] ECR 1651; see also judgment of 15 October 1987, Case 222/86 *Heylens* [1987] ECR 4097 and judgment of 3 December 1992, Case C-97/91 *Borelli* [1992] ECR I-6313). According to the Court, that general principle of Union law also applies to the Member States when they are implementing Union law.

The inclusion of this precedent in the Charter has not been intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to admissibility for direct actions before the Court of Justice of the European Union. The European Convention has considered the Union’s system of judicial review including the rules on admissibility, and confirmed them while
3.5 In Åkerberg Fransson the CJEU Grand Chamber confirmed that the provisions of the CFR also apply where a national measure is connected in any other way with EU law, noting (footnotes in the original):

19 The Court’s settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. …

20 That definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it. According to those explanations, ‘the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law’.

21 Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.” (Emphasis added) 76

3.6 Against that background, the central issue for determination therefore is whether - notwithstanding the enactment and anticipated bringing into force of Section 69 of the 2013 Act - it remains open to the Scottish Parliament (if so advised) to enact legislation with the purpose of maintaining the existing common law position in Scotland for the better protection of workers by the provision to them of an effective remedy in damages for breach by their employers of the statutory duties intended for workers’ protection.

4. The powers of the devolved institutions under the Scotland Act

4.1 The Scottish Parliament has been afforded extensive powers to pass legislation in and for Scotland. These are general legislative powers over the whole of Scots law, subject only to the limitations specifically imposed by law. In principle, the approach taken under the Scotland Act is to the effect that that which has not been expressly reserved to the Westminster Parliament and/or to UK Ministers of the Crown, has been devolved, so far as concerns Scotland, to the Scottish Parliament and/or the Scottish Government.

amending them as to certain aspects, as reflected in Articles 251 to 281 of the Treaty on the Functioning of the European Union, and in particular in the fourth paragraph of Article 263.

76 Case C-617/10 Åkerberg Fransson 26 February [2013] ECR I-nyr at paragraphs 19-21
3.1 As was noted by Lord Reed in *Axa*:

146. As a result of the Scotland Act 1998, there are thus two institutions with the power to make laws for Scotland: the Scottish Parliament and, as is recognised in section 28(7) SA, the Parliament of the United Kingdom. The Scottish Parliament is subordinate to the United Kingdom Parliament: its powers can be modified, extended or revoked by an Act of the United Kingdom Parliament. Since its powers are limited, it is also subject to the jurisdiction of the courts. Within the limits set by section 29(2) SA, however, its power to legislate is as ample as it could possibly be: there is no indication in the Scotland Act of any specific purposes which are to guide it in its law-making or of any specific matters to which it is to have regard. Even if it might be said, at the highest level of generality, that the Scottish Parliament’s powers had been conferred upon it for the purpose of the good government of Scotland, that would not limit its powers. 77 The Scotland Act leaves it to the Scottish Parliament itself, as a democratically elected legislature, to determine its own policy goals. It has to decide for itself the purposes for which its legislative powers should be used, and the political and other considerations which are relevant to its exercise of those powers.

147. In these circumstances, it appears to me that it must have been [the Westminster] Parliament’s intention, when it established the Scottish Parliament, that that institution should have plenary powers within the limits upon its legislative competence which were created by section 29(2). Since its powers are plenary, they do not require to be exercised for any specific purpose or with regard to any specific considerations.” 78

And to similar effect by Lord Hope in *Imperial Tobacco*:

“[O]ne of the purposes of the purposes of the Scotland Act 1998 was to enable the [Scottish] Parliament to make such laws within the powers given to it by section 28 as it thought fit. It was intended, within carefully defined limits, to be a generous settlement of legislative authority.” 79

4.2 The Westminster Parliament has set specific (legally enforceable) limits on the power of the Scottish Parliament by providing in Section 29 of the Scotland Act 1998 (“SA”) as follows

“29.— **Legislative competence**

(1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.

(2) A provision is outside that competence so far as any of the following paragraphs apply—

(a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,

(b) it relates to reserved matters

(c) it is in breach of the restrictions in Schedule 4,

(d) it is incompatible with any of the Convention rights or with EU law,

77 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] AC 453, paragraphs 50-51 per Lord Hoffmann, paragraphs 107-109 per Lord Rodger of Earlsferry, paragraphs 128-130 per Lord Carswell

78 *AXA General Insurance v. Lord Advocate*, 2012 (UKSC) 122 per Lord Reed at paragraphs 146-7

79 *Imperial Tobacco v. Lord Advocate*, 2013 SLT 2, UKSC per Lord Hope at paragraph 15
(e) it would remove the Lord Advocate from his position as head of the systems of
criminal prosecution and investigation of deaths in Scotland. 80

(3) For the purposes of this section, the question whether a provision of an Act of the Scottish
Parliament relates to a reserved matter is to be determined, subject to subsection (4), by
reference to the purpose of the provision, having regard (among other things) to its effect
in all the circumstances.

(4) A provision which—
(a) would otherwise not relate to reserved matters, but
(b) makes modifications of Scots private law, or Scots criminal law, as it applies to
reserved matters,
is to be treated as relating to reserved matters unless the purpose of the provision is to make
the law in question apply consistently to reserved matters and otherwise.

4.3 Section 53 SA provides for a general transfer of functions, so far as they are exercisable within
devolved competence, to be exercisable by the Scottish Government instead of by a Minister of
the Crown. These include statutory functions, executive function, and functions derived from
the Royal Prerogative. Paralleling the restrictions on the legislative competence of the Scottish
Parliament, Section 54(2) of the Scotland Act 1998 provides that it is outside the “devolved
competence” of the Scottish Government

(a) “to make any provision by subordinate legislation which would be outside the legislative
competence of the Parliament if it were included in an Act of the Scottish Parliament, or
(b) to confirm or approve any subordinate legislation containing such provision.” 81

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80 Imperial Tobacco v. Scottish Ministers, 2012 SC 297, IH per Lord Brodie at paragraph 164:
“164. .. Section 29 [of the Scotland Act 1998] defines the scope of the devolved power. It does so by
identifying the characteristics of a provision which place it outside the legislative competence of the
[Scottish] Parliament. The scheme whereby legislative competence is conferred on the Scottish Parliament
is one where what is not specifically identified as being outside competence is devolved, albeit that in
terms of section 28(7), the Parliament of the United Kingdom, consistent with its sovereign character,
retains all of its pre-Akt power to make law for Scotland (this is qualified in practice by the ‘Sewel
Convention’ in terms of which the Parliament of the United Kingdom will not legislate with regard to
devolved matters without the consent of the Scottish Parliament).

81 See Somerville v. Scottish Ministers, 2008 SC (HL) 45 per Lord Rodger or Earlsferry at paragraph 96:
“Before devolution the existing statutory functions of Ministers of the Crown in relation to Scotland
were imposed, according to the usual formula, on ‘the Secretary of State’. On devolution, those
functions, so far as within devolved competence, became exercisable by the Scottish Ministers (sec
53(1)(c)). In terms of sec 54(3), the restriction ‘so far as they are exercisable within devolved
competence’ has the effect that the Ministers cannot exercise the function conferred by any pre-
commencement statute (or exercise it in any way) so far as a provision of an Act of the Scottish
Parliament conferring the function, or conferring it so as to be exercisable in that way, would be
outside the legislative competence of the Scottish Parliament.”
4.4 It follows from this that it falls outside the Scottish Government’ devolved competence to confirm, approve, make or maintain any provision by subordinate legislation which would be beyond the legislative competence of the Scottish Parliament.

4.5 These provisions of the Scotland Act allow challenges to be made before the court as to the validity of all and legislation passed by the Scottish Parliament or made by the Scottish Government (and indeed any acts having legal effect). Though as Lord Hope reiterated in *Axa:*

“45. … Section 29 [of the Scotland Act] does not, however, bear to be a complete or comprehensive statement of limitations on the powers of the [Scottish] Parliament. The Act as a whole has not adopted that approach: see Somerville v Scottish Government (HM Advocate General for Scotland intervening) [2007] 1 WLR 2734, paragraph 28.

…

47…. [A]s there is no provision in the Scotland Act which excludes this possibility, I think that it must follow that in principle Acts of the Scottish Parliament are amenable to the supervisory jurisdiction of the Court of Session at common law.” 82

And Lord Reed at paragraph 136:

“The language of section 29 does not imply that the matters listed there are necessarily exhaustive of the grounds on which Acts of the Scottish Parliament may be challenged.”

5. SCOTS LAW ON ACTIONABILITY OF CIVIL WRONGS WITHIN COMPETENCE OF SCOTTISH PARLIAMENT

5.1 There is no doubt that the substantive and procedural concerning (the definition of) actionable civil wrongs falls within the competence of the Scottish Parliament. In principle, then, the Scottish Parliament has the power to decide whether or not a breach of any particular statutory duty in Scotland should give rise to the possibility of a civil law claim for damages for injury resulting.

5.2 As Lord Hope of Craighead observed in *Davidson v. Scottish Ministers (No. 2):*

[43] The areas of the civil law of Scotland that fall within the expression ‘Scots private law’ for the purposes of sec 29(1) of and paragraph 2(3) of Schedule 4 to the Scotland Act 1998 are set out in sec 126(4) of that Act. This provision stops short of providing a statutory definition of the expression. But the general structure which it adopts has been familiar since the time of the institutional writers, and it provides us with a useful base from which to work for present purposes. Section 126(4) provides:

82 *AXA General Insurance v. Lord Advocate*, 2012 (UKSC) 122 per Lord Hope at paragraphs 45, 47
‘References in this Act to Scots private law are to the following areas of the civil law of Scotland—

(a) the general principles of private law (including private international law),
(b) the law of persons (including natural persons, legal persons and unincorporated bodies),
(c) the law of obligations (including obligations arising from contract, unilateral promise, delict, unjustified enrichment and negotiorum gestion),
(d) the law of property (including heritable and moveable property, trusts and succession), and
(e) the law of actions (including jurisdiction, remedies, evidence, procedure, diligence, recognition and enforcement of court orders, limitation of actions and arbitration), and include references to judicial review of administrative action.’

The inclusion of judicial review of administrative action was no doubt intended to ensure that all aspects of procedural law embracing in the law of actions (see paragraph (e) of the subsection) were brought within the legislative competence of the Scottish Parliament.” 83

5.3 In Imperial Tobacco, Lord Hope reiterated that:

“Responsibility for Scots private law, including the law of obligations arising from contract, belongs to the Scottish Parliament. This is made clear by s.29(4) which deals with modifications to Scots private law as it applies to reserved matters but leaves Scots private law otherwise untouched, and by the definition of what references to Scots private law are to be taken to mean in s.126(4).” 84

5.4 And the decision of the UK Supreme Court in Axa v. Lord Advocate upholding the validity of Damages (Asbestos-related Conditions) (Scotland) Act 2009 (which provided that asymptomatic pleural plaques, pleural thickening and asbestosis shall constitute, and shall be treated as always having constituted, actionable harm for the purposes of an action of damages for personal injury) makes it plain beyond peradventure that it lies within the competence of the Scottish Parliament to legislate on matters concerning the conditions for liability for damages within the sphere of workplace health and safety, even to the extent of reversing House of Lords decisions on these matter. 85

83 Davidson v. Scottish Ministers (No. 2), 2006 SC (HL) 41 per Lord Hope at paragraph 43
84 Imperial Tobacco v. Lord Advocate, 2013 SLT 2, UKSC per Lord Hope at paragraph 28
85 Axa v. Lord Advocate, [2012] 1 AC 868, 2012 SC (UKSC) 122 per Lord Hope at paragraph 2:

“It is no secret that the purpose of the 2009 Act was to reverse the decision of the House of Lords in Rothwell v Chemical & Insulating Co Ltd [2007] UKHL 39, [2008] AC 281 (“Rothwell”). In that case it was held that, as pleural plaques caused no symptoms, did not increase susceptibility to other asbestos-related diseases or shorten life expectancy, their mere presence in the claimants’ lungs did not constitute an injury which was capable of giving rise to a claim for damages. It was anticipated that, while that decision was not binding on the Scottish courts, it would almost certainly be followed in Scotland as there is no material difference between the law of England and Wales and Scots law on this branch of the law.”
6. **SPECIFIC RESERVATION IN THE SCOTLAND ACT OF CERTAIN HEALTH AND SAFETY MATTERS**

6.1 Paragraphs 1 to 3 of Section II “Specific Reservations” of Schedule 5 SA state:

“1. The matters to which any of the Sections in this Part apply are reserved matters for the purposes of this Act.

2. A Section applies to any matter described or referred to in it when read with any illustrations, exceptions or interpretation provisions in that Section.

3. Any illustrations, exceptions or interpretation provisions in a Section relate only to that Section (so that an entry under the heading “exceptions” does not affect any other Section).”

6.2 Under the title “Head H – Employment”, Section H2 provides as follows

“**H2. Health and safety**

The subject-matter of Part I of the Health and Safety at Work etc. Act 1974

The Health and Safety Executive and the Employment Medical Advisory Service.

*Interpretation*

For the purposes of the reservation of the subject-matter of Part I of the Health and Safety at Work etc. Act 1974—

(a) “work” and “at work” in that Part are to be taken to have the meaning they have on the principal appointed day;

(b) that subject-matter includes—

(i) process fire precautions;

(ii) fire precautions in relation to petroleum and petroleum spirit; and

(iii) fire safety on ships and hovercraft, in mines and on offshore installations;

but does not include any other aspect of fire safety.”

See, too, Lord Reed at paragraphs 125, 129:

“For a period of about 20 years prior to Rothwell, compensation was paid by insurers to persons who had sustained pleural plaques as a result of the fault of their employers. Against that background, the Scottish Parliament considered it appropriate, as a matter of social policy, to legislate to reverse the Rothwell decision, so as to ensure that compensation continued to be paid to persons in that position. It cannot be said by a court that the Parliament’s judgment that that was in the public interest was manifestly unreasonable. ... The 2009 Act ... can be regarded as preserving the status quo which existed before a correct understanding of the legal position was established as a result of the Rothwell litigation.”
6.3 Part I of the 1974 Act is headed “Health, Safety and Welfare in connection with Work, and Control of Dangerous Substances and Certain Emissions into the Atmosphere” and commences in Section 1 with the following provisions:

1.— Preliminary.

(1) The provisions of this Part shall have effect with a view to—

(a) securing the health, safety and welfare of persons at work;

(b) protecting persons other than persons at work against risks to health or safety arising out of or in connection with the activities of persons at work;

(c) controlling the keeping and use of explosive or highly flammable or otherwise dangerous substances, and generally preventing the unlawful acquisition, possession and use of such substances

....

(4) References in this Part to the general purposes of this Part are references to the purposes mentioned in subsection (1) above.”

6.4 The self-styled “explanatory notes” relating to the Scotland Act 1998 which were prepared the Scotland Office, subsequent to the passing of the 1998 Act, “in order to assist the reader of the Act” and which “have not been endorsed by Parliament” makes the following observations in relation to the health and safety reservation as set out in Section H2.

“Section H2: Health and Safety
Purpose and Effect
This Section reserves health and safety at work. It was largely replaced by article 6 of the Scotland Act 1998 (Modifications of Schedules 4 and 5) Order 1999 (SI 1999/1749).

General
This Section is part of Head H which reserves a number of matters relating to employment.

Details of Provisions
Reservation
The reserved matters are:
(a) the subject-matter of Part I of the Health & Safety at Work etc. Act 1974.
That Part makes provision for the general purposes of securing the health, safety and welfare of persons at work, protecting persons other than persons at work against risks to health or safety arising out of or in connection with the activities of persons at work, and controlling the keeping and use of explosive or highly flammable or otherwise dangerous substances, and generally preventing the lawful acquisition, possession and use of such substances; and

(b) the Health and Safety Commission (HSC), the Health and Safety Executive (HSE) and the Employment Medical Advisory Service (EMAS).
By virtue of paragraph 3 of Part III of Schedule 5, this has the effect of reserving the constitutions of these bodies, the conferral or removal of their functions, and the conferral or removal of any functions specifically exercisable in relation to them. HSC and HSE are primarily concerned with matters which are reserved as part of the subject-matter of Part I of the 1974 Act. However, they have certain functions which are exercisable in relation to matters which are not otherwise reserved. For example, the Commission has powers to direct investigations into fires. The reservation of the Commission by name has the effect of preventing the Scottish Parliament from modifying that function, but not from legislating about general fire safety. EMAS is established by Part II of the 1974 Act. It has functions of advising Ministers, the HSC, employers and employees on health in relation to employment. The effect of its reservation by name is that the Scottish Parliament is not able to legislate about EMAS's functions, but may, for example, legislate about promoting health in the workplace.

**Interpretation**

The interpretation provisions provide that:

(a) the expressions “work” and “at work” in Part I of the 1974 Act are to be taken to have the meanings they have on the principal appointed day (1 July 1999). This is consistent with paragraph 5(1) of Part III of Schedule 5 which provides that references to the subject matter of an enactment are to be read as references to the subject matter of that enactment as it has effect on the principal appointed day. However the subject-matter of Part I of the 1974 Act is not fixed because it includes a power for the Secretary of State to extend the definition of “work” for the purposes of health and safety regulations. This interpretation provision ensures that this power cannot be used to extend the scope of the reservation beyond that which it had on the principal appointed day; and

(b) the subject matter of Part I of the 1974 Act includes certain specified aspects of fire safety but not any other aspects of fire safety. Those specified aspects are those which are, in practice, regulated under health and safety legislation.

**Agency arrangements**

Article 6(2) of S.I. 1999/1749 provides for certain references in section 13 of the 1974 Act to Ministers to include a reference to the Scottish Ministers. This allows the HSC and the Scottish Ministers to make arrangements for the HSC to perform functions on behalf of the Scottish Ministers (provided that the Secretary of State considers that they can appropriately be performed by the HSC). In that section, “functions” does not include the making of regulations or legislative instruments.”

6.5 Care has to be taken with these “explanatory notes”. In *Imperial Tobacco*, Lord Hope observed as follows:

[33] The Lord President set out … passages from explanatory notes dealing with para.C7 that were prepared and published by the Scotland Office in 2004, some time after the 1998 Act was enacted. … It seems to me however, with respect, that it would be wrong to pay any regard to explanatory notes, as they do not form any part of the contextual scene of the statute. They are no doubt useful as they provide guidance, but unlike the notes on clauses
they have no more weight than any other post-enactment commentary as to the meaning of
the statute.”  

6.6 The question which has to be considered in the present context is whether legislation by the
Scottish Parliament concerning the conditions for actionability in Scots law of civil law claims for
damages for breach of statutory duties (including statutory duties within the sphere of

6.7 Given, however, that workplace health and safety is an area falling within the ambit or scope of
EU law, we must first consider the relationship between the Scottish Parliament and obligations
imposed by EU law on “emanations of the State” in the UK

7. THE SCOTLAND ACT AND THE DUTY TO OBSERVE AND IMPLEMENT EU LAW OBLIGATIONS

7.1 Although in principle Section 63 SA, for example, appears to envisage that the Scottish
Ministers may have powers transferred to them which are beyond the legislative competence of
the Scottish Parliament (and hence outwith the Scottish Government’s “devolved competence”) as
that term is defined in Section 54 SA), Section 57 SA sets out a “washing provision” which

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86 Imperial Tobacco v. Lord Advocate, 2013 SLT 2, UKSC per Lord Hope at paragraph 33

87 63.— Power to transfer functions

(1) Her Majesty may by Order in Council provide for any functions, so far as they are exercisable by a
Minister of the Crown in or as regards Scotland, to be exercisable—

(a) by the Scottish Ministers instead of by the Minister of the Crown,

(b) by the Scottish Ministers concurrently with the Minister of the Crown, or

(c) by the Minister of the Crown only with the agreement of, or after consultation with, the
Scottish Ministers.

(2) Where an Order is made under subsection (1)(a) or (b) in relation to a function of a Minister of the
Crown which is exercisable only with the agreement of, or after consultation with, another Minister of
the Crown, the function shall, unless the Order provides otherwise, be exercisable by the Scottish
Ministers free from any such requirement.

(3) An Order under this section may, in particular, provide for any function exercisable by the Scottish
Ministers by virtue of an Order under subsection (1)(a) or (b) to be exercisable subject to a requirement
for the function to be exercised with the agreement of, or after consultation with, a Minister of the
Crown or other person.
prevent any possible transfer to the Scottish Government of powers allowing them to act in a manner which is incompatible either with EU law or with Convention rights by stating as follows

(1) Despite the transfer to the Scottish Government by virtue of section 53 of functions in relation to observing and implementing obligations under EU law, any function of a Minister of the Crown in relation to any matter shall continue to be exercisable by him as regards Scotland for the purposes specified in section 2(2) of the European Communities Act 1972.

(2) A member of the Scottish Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with EU law.”

7.2 More detailed provisions can be found in a Memorandum of Understanding between the UK Government and the devolved authorities and in supplementary agreements thereto, in particular the March 2010 “Concordat on co-ordination of European Union policy issues”. This documents observes as follows:

**International and EU Relations**

18. As a matter of law, international relations and relations with the European Union remain the responsibility of the United Kingdom Government and the UK Parliament. However, the UK Government recognises that the devolved administrations will have an interest in international and European policy making in relation to devolved matters, notably where implementing action by the devolved administrations may be required. They will have a particular interest in those many aspects of European Union business which affect devolved areas, and a significant role to play in them.

21. The devolved administrations are responsible for observing and implementing international, European Court of Human Rights and European Union obligations which concern devolved matters. In law, UK Ministers have powers to intervene in order to ensure the implementation of these obligations. If the devolved administrations wish, it is open to them to ask the UK Government to extend UK legislation to cover their EU obligations. The devolved administrations are directly accountable through the domestic courts, in the same way as the UK Government is, for shortcomings in their implementation or application of EC law. It is agreed by all four administrations that, to the extent that financial penalties are imposed on the UK as a result of any failure of implementation or enforcement, or any damages or costs arise as a result, responsibility for meeting them will be borne by the administration(s) responsible for the failure.

7.3 While Section 57 SA sets out an obligation on the part of the Scottish Government not to breach EU law, the Scottish devolved institutions can look to Paragraph 7(2)(a) of Schedule 5 SA as confirmation that it is within their legal powers, to observe and implement “obligations under EU law”.
7.4 The CJEU is clear that a Member State may not rely on provisions, practices or situations of its internal legal order in order to justify non-compliance with its obligations under EU law. The internal allocation of competences within a Member State, such as between central, regional or local authorities, cannot, for example, release that Member State from its obligation to fulfil its obligations under EU law. \(^{88}\) In its decision in *Carmen Media Group Ltd.* the CJEU Grand Chamber has gone so far as to say that whilst EU law does not preclude an internal allocation of competences whereby certain legal issues are a matter for devolved authorities others for the national authority in such a case the devolved authorities (in our case the Scottish Parliament and the Scottish Government) and the national authorities (the UK Parliament and the UK Government) are “jointly required” as a matter of EU law to fulfil the EU law obligations placed on the United Kingdom and that accordingly

“in the full measure to which compliance with that obligation requires it, those various authorities are bound, for that purpose, to co-ordinate the exercise of their respective competences.” \(^{89}\)

7.5 In *Horvath* \(^{90}\) the CJEU was faced with a case concerning the differential implementation within the United Kingdom of an EU regulation laying down rules on income support for farmers in the framework of the EU’s Common Agricultural Policy. \(^{91}\) In the UK, the common agricultural policy is among the devolved matters which fall within the responsibility of each devolved administrations. Accordingly, each of the devolved administrations adopted different rules to implement the EU Regulation concerned. The rules adopted by the United Kingdom government as regards England, laid down stricter minimum requirements for good agricultural and environmental conditions than those adopted by the devolved administrations of Scotland, Wales and Northern Ireland. The applicant in the case, a farmer entitled to income support under the EU rules, argued that this situation amounted to unlawful discrimination under EU law. The CJEU rejected this claim referring to and applying to the situation of the relationship between regional authorities its past case law to the effect that “the prohibition on

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88 See for example, Case C-417/99 *Commission v Spain* [2001] ECR I-6015 at paragraph 37

89 *Case C-46/08 Carmen Media Group Ltd. v. Land Schleswig-Holstein* [2010] ECR I-8149 at paragraph 70

90 *Case C-428/07 R. (on the application of Horvath) v Secretary of State for the Environment, Food and Rural Affairs* [2009] ECR I-6355

91 Regulation 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers
discrimination is not concerned with any disparities in treatment which may result, between the Member States, from divergences existing between the legislation of the various Member States so long as that legislation affects equally all persons subject to it". Accordingly, the appropriate reference framework to assess discrimination in Horvath was not the United Kingdom as a whole, but rather the territories of the different devolved administrations. The effect of this decision is that in areas in which such regional or devolved authorities of the Member States are autonomously competent to adopt rules implementing EU law they will, from the viewpoint of EU law, be equated with Member States.

7.6 In his Opinion in Fratelli Costanzo v. Milan City Council, Advocate General Lenz reaffirmed the following three basic provisions of EU law:

1. EU law forms an integral part of the national legal systems of the Member States;
2. EU law takes precedence over the law of the Member States; and
3. all authorities of the Member States are, as a matter of principle, obliged to conduct themselves in accordance with the requirements of EU law.

7.7 More recently the Grand Chamber CJEU has reiterated that in any situation falling within the ambit of EU law, national authorities (including the courts) are obliged to act and exercise their powers under national law in such a way as to ensure that the primacy, unity and effectiveness of European Union law are not thereby compromised.

7.8 It is certainly absolutely clear from the case law of the Court of Justice of the European Union ("CJEU") that the duties set out in Article 4(3) of the Treaty on European Union ("TEU") to promote the objectives of the EU apply to all public institutions and authorities within the Member State. In its judgment in Fratelli Costanzo, for example, the Court of Justice held

92 See in this regard Joined Case 185/78-204/78 Firma J van dem en Zonen [1979] ECR 2345 at paragraph 10; Case C-177/94 Perfilli [1996] ECR I-161 at paragraph 17; and Case Schempp v Finanzamt Munchen V [2005] ECR I-6421 at paragraph 34

93 Koen Lenaerts and Nathan Cambien “Regions and the European Court: giving shape to the regional dimension of the Member States (2010) European Law Review 609 at 633-4


95 Case C-399/11 Melloni 26 February [2013] ECR I-nyr, § 60

96 See, for example, Case C-341/08 Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe [2010] ECR I-47 at paragraphs 80-81:
that the municipal and regional authorities of a Member State (in that case Milan City Council) were bound to apply the clear, precise and unconditional provisions of a directive notwithstanding the fact that the directive had not been properly implemented into national law by the Italian central government 98 and the Milan City Council had, as a matter of Italian constitutional law, no institutional competence to implement the Directive, but was nonetheless bound by to give effect to it in its commercial relations and legal dealings with third parties.

7.9 Although the Concordat on EU policy issues speaks of the devolved administrations having a duty to observe and implement EU law only in relation to “devolved matters”, the terms of Paragraph 7(2)(a) of Schedule 5 SA make no reference to any such limitation. What is clear, in any event, is that national courts have to interpret and apply the Scotland Act 1998 – including its provisions on devolved and reserved matters – in a manner which is consistent with the express requirements, and general principles, of EU law. These principle include the principle of effectiveness, effet utile, of EU law. As the Grand Chamber has noted:

“80. The Court has held that all administrative bodies are subject to the obligation to respect the primacy of Community law (see, inter alia, Case 103/88 Costanzo [1989] ECR 1839, paragraph 32, and Case C-224/97 Ciola [1999] ECR I-2517, paragraph 30). That applies to an administrative body such as the Admissions board for dentists for the district of Westphalia and Lippe. The fact that the national provisions at issue in the main proceedings were already in existence before the entry into force of the Directive is immaterial. It is also immaterial that those provisions did not make provision for the national court to disapply them in the event of their incompatibility with Community law.

81 Consequently, the answer to the third question is that, if legislation such as that at issue in the main proceedings, having regard to its objective, were contrary to the Directive, it would be for the national court hearing a dispute between an individual and an administrative body such as the Dentists Admissions Board for Westphalia and Lippe Districts to decline to apply that legislation, even if it were prior to the Directive and national law made no provision for disapplying it.”

97 Case 103/88 Fratelli Costanzo v Comune di Milano [1989] ECR 1839 at paragraphs 30-1:

“30 …. [T]he reason for which an individual may, in the circumstances described above, rely on the provisions of a directive in proceedings before the national courts is that the obligations arising under those provisions are binding upon all the authorities of the member-States.

31. It would, moreover, be contradictory to rule that an individual may rely upon the provisions of a directive which fulfil the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them. It follows that when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralised authorities such as municipalities. are obliged to apply those provisions.”

“67 ... [I]t is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the detailed procedural rules governing actions at law intended to safeguard the rights which individuals derive from Community law, provided, first, that those rules are not less favourable than those governing rights which originate in domestic law (principle of equivalence) and, second, that they do not render impossible or excessively difficult in practice the exercise of rights conferred by the Community legal order (principle of effectiveness) (see, in particular, Case C-443/03 Leffler [2005] ECR I-9611, paragraphs 49 and 50).”

7.10 As we have seen, under the Scotland Act 1998, issues concerning conditions of liability and appropriate remedies for civil wrongs/breaches of individual rights are devolved to the Scottish Parliament, while the “the subject-matter of Part I of the Health & Safety at Work etc. Act 1974” is reserved to the UK Parliament. Insofar as the interpretation and application of these reserved/devolved provisions of the Scotland Act might impact upon the effective protection of EU law based rights, then these provisions have to be interpreted in a manner, so far as possible, that is consistent with the specific requirements and general principles of EU law. These role of national courts in this regard is spoken to by the Full Court CJEU in Re a draft Agreement on the European and Community Patents Court:

“65 It is apparent from the Court’s settled case law that the founding treaties of the European Union, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the EU legal order thus constituted are in particular its primacy over the laws of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.

66 As is evident from art.19(1) TEU, the guardians of that legal order and the judicial system of the European Union are the Court of Justice and the courts and tribunals of the Member States.

67 Moreover, it is for the Court to ensure respect for the autonomy of the EU legal order thus created by the Treaties.


101 See Opinion 1/91 Re Draft Treaty on a European Economic Area (No.1) [1991] ECR I-6079 at paragraph 21

102 See Opinion 1/91 Re Draft Treaty on a European Economic Area (No.1) [1991] ECR I-6079 at paragraph 35
It should also be observed that the Member States are obliged, by reason, inter alia, of the principle of sincere co-operation, set out in the first subparagraph of art.4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law. Further, pursuant to the second subparagraph of art.4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual’s rights under that law.

The national court, in collaboration with the Court of Justice, fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed.

It may therefore be that the effect of Paragraph 7(2)(a) of Schedule 5 SA is to expand the powers of the devolved institutions even into areas which otherwise have looked to be reserved to the UK Parliament.

What is clear is that as a matter of EU law institutions such as the Scottish Parliament may be found liable for damages if and insofar as they have failed to make adequate provision for the effective judicial protection of EU law derived rights, to the standards required under EU law. In Haim v. Kassenzahnärztliche Vereinigung Nordrhein the Court of Justice also ruled that, as a matter of principle where legislative or administrative tasks are devolved by the Member States to any public-law body legally distinct from the State, EU law imposes a duty on that public law body, in addition to the Member State itself, to make reparation for loss and damage caused to individuals by national measures taken by it in breach of EU law by a public-law body.

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103 See, to that effect, Case C-296/96 Oelmühle Hamburg AG and Jb. Schmidt Söhne GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung [1998] ECR I-4767 at paragraph 23

104 See, to that effect, Case C-432/05 Unibet (London) Ltd v Justitiekanslern [2007] ECR I-2271 at paragraph 35 and case law cited


106 Opinion 1/09 Re a draft Agreement on the European and Community Patents Court [2011] ECR I-1147 (CJEU Full Court) at paragraphs 66-9


108 See Case C-302/97 Konle v Austria [1999] ECR I-3099 at paragraph 62
7.13 On the basis of this decision, then, Francovich actions might competently be raised, for example, against the Scottish Parliament and/or Scottish Executive insofar as their action or inaction contrary to the requirements of EU law has resulted in an individual suffering damage. If it is indeed required as a matter of EU law that breaches of EU health and safety regulations should sound in damages to compensate those individual workers injured as a result of such breach, then the failure on the part of the Scottish Parliament to comply with its positive duties under EU law make such (or to ensure continued) provision, may result in Francovich damages actions being taken against it. 109

8. “RELATES TO …RESERVED MATTERS”

Section 29(2) SA

8.1 As we have noted above, Section 29(2)(b) SA provides that the Scottish Parliament may not pass an ASP which contains provisions which “relate to” those matters specified in Schedule 5 SA as being reserved to the Westminster Parliament.

8.2 What properly constitutes the boundary between reserved and devolved matters under the Scotland Act is not, however, the simple and straightforward matter which a glance at the terms of paragraph H2 Schedule 5 SA and Section 29(2)(b) might imply. A number of provisions in the Scotland Act constrain the courts to adopt an *intra vires* reading of an Act of the Scottish Parliament (“ASP”) if such a reading is possible. We shall consider these in turn.

Section 29(3) SA

8.3 Section 29 SA continues:

“(3) For the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.

8.4 The already noted Scotland Office annotations to the Scotland Act advise that the “purpose” test contained in section 29(3) SA was introduced at committee stage in the House of Lords. The

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109 See *R. v Secretary of State for Transport Ex p. Factortame Ltd (No.5)* [2000] 1 AC 524, HL for an example of a successful damages action against the UK Parliament in respect of its enactment of the Merchant Shipping Act 1998 which had the intention and effect of excluding Spanish trawlers from fishing in British waters, contrary to EU law prohibition on nationality discrimination among EU nationals and the principle of free movement of establishment and of services across the EU.
authors of the annotations to the Scotland Act cite a dictum of Lord Atkin in *Gallagher v Lynn* (which was itself quoted by Lord Sewel when introducing the provision in the House of Lords):

“It is well established that you are to look at the ‘true nature and character of the legislation’ … the ‘pith and substance of the legislation’. If, on the view of the statute as a whole, you find the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorised field.” 110

8.5 This would seem to indicate that a degree of trespass into the field of reserved matters might not be held to invalidate a provision of an ASP provided that the “pith and substance” of the ASP (to be identified by reference to its purpose and effects in all the circumstances) concerns a devolved matter.

8.6 One can readily anticipate that, in the present case, the Scottish Government would argue that the “pith and substance” of any legislation intended to reverse or restrict Section 69 of the 2013 Act is concerned with ensuring the effective protection in Scotland for EU law derived rights and that any effect its provisions may have on the subject matter of Part 1 of the Health and Safety etc. Act 1974 is incidental and ancillary to this over-riding purpose.

8.7 It is clear that, in introducing the “purpose” test into the Scotland Act, the UK government intended to prevent a literal or mechanistic approach being taken to the question whether a provision of an ASP “relates to” reserved matters. Leaving aside, for the moment, the question whether in the present circumstances it would be permissible to have regard to *Hansard* at all as an aid to the construction of the Scotland Act, we would refer to the following remarks of Lord Sewel (*Hansard*, HL Vol 592, cols 819 – 820 on 21 July 1998):

“In the absence of such a provision [as section 29(3) SA], it is possible that the courts would apply a literal approach and hold that a provision ‘relates to’ a reserved matter merely if it affects it. If the courts were to adopt this approach, this would severely fetter the Scottish parliament’s ability to legislate about subjects which are, in terms of the White Paper, to be devolved. For example, the White Paper intended that pollution control should be devolved. However, an Act of the Scottish Parliament containing provisions about water pollution from coal mines or dust from open-cast coal mining would affect the reserved matter of coal-mining. If the courts were to apply a literal approach, they could hold that these provisions related to the reserved matter and would therefore be beyond the legislative competence of the Scottish Parliament. This would make a nonsense of the devolution of pollution control. The same point applies, for example, to planning or local government or even the courts and the administration of justice.

110 *Gallagher v Lynn* [1937] AC 863 at 870
Amendment No. 153 is designed to solve this problem by providing expressly that any question as to whether a provision in an Act of the Scottish Parliament ‘relates to’ a reserved matter is to be determined by reference to its purpose. The courts can determine that a provision is for a permitted purpose, even if, as an ancillary matter, it affects reserved matters.

In ascertaining the purpose of the provision, the courts are required to have regard, among other things, to its effect in all the circumstances. In my example of pollution control, the courts would take into account that the pollution control provision had an effect upon the reserved matter of coal mining but may nevertheless consider that its purpose was about pollution control and not about coal mining. *In the vast majority of cases the ancillary effects of such provisions upon reserved matters are likely to be minor but in some cases they could be significant.*

8.8 The decision of the Judicial Committee of the Privy Council in *Gallagher v Lynn* is instructive in connection with Lord Sewel’s final observation. The appellant was a dairy farmer in Donegal, then a county in the Irish Free State. He had for many years sold his milk across the border in London/Derry. The Milk and Milk Products (Northern Ireland) Act 1934, passed by the Northern Irish Parliament, prohibited the sale of milk of specified grades by any person not holding a licence granted by the Ministry of Agriculture. The appellant’s application for a licence was refused on the grounds that licences under the 1934 Act could only be granted to persons whose dairies were situated in Northern Ireland. The appellant continued to sell milk in Derry and was, in due course, convicted of an offence. He appealed against his conviction on the grounds that the 1934 Act was *ultra vires* as being an undue interference with trade and so in violation of section 4 of the Government of Ireland Act 1920, which provides:

> “Subject to the provisions of this Act ... the Parliament of Northern Ireland shall ... have power to make laws for the peace, order, and good government of Northern Ireland with the following limitations, namely, that they shall not have power to make laws except in respect of matters exclusively relating to the portion of Ireland within their jurisdiction, or some part thereof, and (without prejudice to that general limitation) that they shall not have power to make laws in respect of the following matters in particular, namely ...

(7) Trade with any place out of the part of Ireland within their jurisdiction, except so far as trade may be affected by the exercise of the powers of taxation given to the said Parliaments, or by regulations made for the sole purpose of preventing contagious disease, or by steps taken by means of inquiries or agencies out of the part of Ireland within their jurisdiction for the improvement of the trade of that part or for the protection of traders of that part from fraud.”

8.9 Lord Atkin held as follows:
“It is said that the provisions of the Milk Act interfere with, indeed, put an end to, the trade in milk between the farmers of Donegal and customers in Derry; and that therefore they offend against the express limitations imposed by section 4(7).

My Lords, the short answer to this is that this Milk Act is not a law ‘in respect of’ trade; but is a law for the peace, order and good government of Northern Ireland ‘in respect of’ precautions taken to secure the health of the inhabitants of Northern Ireland by protecting them from the dangers of an unregulated supply of milk.

These questions affecting limitation on the legislative powers of subordinate parliaments or the distribution of powers between parliaments in a federal system are now familiar, and I do not propose to cite the whole range of authority which has largely arisen in discussion of the powers of Canadian Parliaments. [His Lordship then cited the passage quoted above under reference to Russell v R (1882) 7 App Cas 829].

The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field. Nor are you to look only at the object of the legislator. An Act may have a perfectly lawful object, e.g., to promote the health of the inhabitants, but may seek to achieve that object by invalid methods, e.g., a direct prohibition of any trade with a foreign country. In other words, you may certainly consider the clauses of an Act to see whether they are passed ‘in respect of’ the forbidden subject.

In the present case any suggestion of an indirect attack upon trade is disclaimed by the appellant. There could be no foundation for it. The true nature and character of the Act, its pith and substance, is that it is an Act to protect the health of the inhabitants of Northern Ireland; and in those circumstances, though it may incidentally affect trade with County Donegal, it is not passed ‘in respect of’ trade, and is therefore not subject to attack on that ground.” 111

8.10 While it appears from this that the ancillary effects of a measure on reserved or prohibited matters may indeed be substantial and yet not invalidate the measure, it is also clear that the object of a measure as stated by the legislator is not conclusive, if “invalid methods” are adopted to pursue an object which would otherwise be within competence.

8.11 Yet although it was apparently intended by the Westminster Parliament that Section 29(3) SA should reflect the “respection doctrine” which had been developed by the courts in dealing with cases arising from Commonwealth constitutions and with cases brought under the Government of Ireland Act 1920, in Martin v. Most 112 (the first of

111 Gallagher v Lynn [1937] AC 863 per Lord Atkin at 869 – 870

112 Martin v. Most, 2010 SC (UKSC) 40
only two cases to date before the UK Supreme Court in which the Scotland Act issues of the boundary between reserved and devolved competence has been raised) the Justices have appeared less keen to apply past Commonwealth and Northern Irish precedent. As has been noted:

“What should be made of the injunction - derived from the jurisprudence of the Judicial Committee of the Privy Council in cases on the British North America Act 1867, its deployment by the House of Lords in *Gallagher v Lynn*, and the explicit reference to it in the speech of Lord Sewel in the House of Lords - to take account of the “pith and substance” of the legislative measure under review? Lord Hope pays a degree of respect to the idea in *Martin v. Most* before doubting its relevance. Lord Walker is much more sceptical. Despite the constitutional pedigree of “pith and substance”, it does seem preferable, in the interpretation of the Scotland Act, to start instead from that Act's own architecture and terms.”

8.12 Similarly cautious are Lord Reed’s remarks in the decision of the First Division in *Imperial Tobacco* that:

“Lord Sewel's statement does not appear to me to provide much assistance in construing the provisions of the Scotland Act. Equally, as it appears to me, the Imperial, Commonwealth and Northern Irish case law is of limited assistance. Great care must be taken when considering, in relation to the Scotland Act, approaches which have been developed in respect of constitutions which not only employ different language and different legal structures, but which are rooted in a different historical and political context. That is not to say that some of the discussion in that case law may not be relevant and illuminating; but it cannot be applied indiscriminately.”

Section 29(4) SA

8.13 Section 29(4) SA states:

“(4) A provision which—

(a) would otherwise not relate to reserved matters, but

(b) makes modifications of Scots private law, or Scots criminal law, as it applies to reserved matters,

is to be treated as relating to reserved matters unless the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise.”

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114 *Imperial Tobacco v. Scottish Ministers*, 2012 SC 297, IH per Lord Reed at paragraph 105.
8.14 The aim behind Section 29(4) SA would appear to be to allow the Scottish Parliament to pass what might be termed “harmonisation measures” - namely provisions which make incidental and proportionate modifications of Scots private law, or to Scots criminal law, as it applies to reserved matters, provided that the purpose of these amendments is to ensure consistency in the application of law as between reserved and non-reserved matters (see sections 29(2)(b) and 29(4) SA).

8.15 This may potentially have an application to the circumstances of the present case since it may be that any legislation from the Scottish Parliament to re-affirm in general (in line with the approach taken by the House of Lords in Black v. Fife Coal Company) that breach of all and any statutory duty passed to benefit a particular class of persons creates a civil cause of action in damages for that protected class of persons, thereby ensuring that the private law of delict/actionability of civil wrongs in Scotland applies consistently to reserved matters (workplace health and safety regulation) as to other regulations made within devolved competence.

Paragraphs 2 and 3 of Schedule 4 SA

8.16 Paragraph 2 of Schedule 4 SA confirms that:

“(1) An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, the law on reserved matters.

(2) In this paragraph, “the law on reserved matters” means —

(a) any enactment the subject-matter of which is a reserved matter and which is comprised in an Act of Parliament or subordinate legislation under an Act of Parliament, and

(b) any rule of law which is not contained in an enactment and the subject-matter of which is a reserved matter,

and in this sub-paragraph “Act of Parliament” does not include this Act.

(3) Sub-paragraph (1) applies in relation to a rule of Scots private law or Scots criminal law (whether or not contained in an enactment) only to the extent that the rule in question is special to a reserved matter or the subject-matter of the rule is—

(a) interest on sums due in respect of taxes or excise duties and refunds of such taxes or duties …”

8.17 At first sight, paragraph 2 of Schedule 4 SA appears to confirm what is already known from Section 29(2)(b) SA that an ASP cannot modify the law on reserved matters, but this would
appear not to be the case, and instead it introduces a distinct reserved/devolved test. As one commentator has noted:

“Section 29(2)(b) renders incompetent a provision which relates to reserved matters, as defined by the purpose tests in subsections (3) and (4). Schedule 4, on the other hand, simply prevents the modification of the law on reserved matters. Clearly the two competence hurdles are somewhat related. What divided the Court [in Martin and Most] was how far the principles according to which the section 29 tests are applied may or may not inform the interpretation of Schedule 4.” 115

8.18 Paragraph 3 of Schedule 4 SA carves out an exception to the above provision by providing that:

“(1) Paragraph 2 does not apply to modifications which—

(a) are incidental to, or consequential on, provision made (whether by virtue of the Act in question or another enactment) which does not relate to reserved matters, and

(b) do not have a greater effect on reserved matters than is necessary to give effect to the purpose of the provision.

(2) In determining for the purposes of sub-paragraph (1)(b) what is necessary to give effect to the purpose of a provision, any power to make laws other than the power of the Parliament is to be disregarded.”

8.19 Paragraph 3(1)(b) of Schedule 4 SA would appear to allow the Scottish Parliament to effect such modifications to reserved matters as are “incidental to, or consequential upon, provision made ... which does not relate to reserved matters; and which does not have a greater effect on reserved matters than is necessary to give effect to the purpose of the provision”. This effectively imports into the analysis a “least restrictive alternative test” familiar from CJEU cases on proportionality. If there can be said to be other measures which might achieve the same objectives as is sought by the proposed Scottish legislation modifying the effect in Scotland of Section 69 of the 2013 Act and which clearly fall within the powers of the devolved institutions then arguably these measures should be adopted by the Scottish devolved institutions in preference to their encroachment on reserved matters.

8.20 In the present case however it is difficult to see in what sense the proposed legislation seeking to ensure the existence of an effective remedy for EU law derived rights for individuals and separately seeking to ensure a consistency of approach across Scots private law relating to the actionability in civil courts of actions for damages based on breach of statutory duties can be achieved by any less restrictive measures. Accordingly this does not seem to be a situation in which paragraph 3 of Schedule 4 may be said to be is engaged in the present case.

The algorithmic analysis of the reserved devolved interface

8.21 It appears from the foregoing provisions that what is meant by “relate to” means, in effect, substantive modification or amendment rather than simple re-statement of the reserved enactments in question. The provisions on the reserved/devolved interface are undoubtedly overly complex, and perhaps no way to write a constitution. But their effect seems to be that, in order to establish whether or not the devolved/reserved boundary has been impermissibly crossed by a provision in an Act of the Scottish Parliament ("ASP"), the Scotland Act requires the Scottish Parliament (and in the event of legal challenge, the courts) to go through a somewhat complicated algorithm which might be represented in the following series of questions:

(1) What is the purpose of the provision at issue ? (Section 29(3) SA)
(2) What is the effect of this provision in all the circumstances ? (Section 29(3) SA)
(3) Having regard, inter alia, to its identified purpose and effect, can it be said that the provision at issue “relate to” matters specified in Schedule 5 to the Act as being “reserved” to the Westminster Parliament (Section 29(2)(b) SA) ? If yes then the provision is ultra vires. If no
(4) Does the provision make modifications to Scots private law as it applies to reserved matters ? (Section 29(4)(b) SA). If no, then the provision is intra vires. If yes,
(5) Is the purpose of the provision to make Scots private law apply consistently to reserved matters and otherwise ? If no, then the provision is ultra vires. (Section 29(4)(b) SA). If yes, then
(6) Are the modifications incidental to, or consequential on, provision made (whether in the ASP in question or another enactment) which does not relate to reserved matters. (Paragraph 3(1)(a) of Schedule 4 SA). If no then skip to question (8). If yes then
(7) In the context of the Scottish Parliament’s power to make laws (Paragraph 3(2) of Schedule 4 SA), do the provisions have no greater effect on reserved matters than is necessary to give effect to the purpose of the provision in question? (Paragraph 3(1)(b) of Schedule 4 SA) If yes, then the provision is intra vires. If no then

(8) Does the provision in question modify - or confer power by subordinate legislation to modify – a rule of Scots private law which is “special to a reserved matter” \(^{116}\) (Paragraph 2(3) of Schedule 4 SA). If no then the provision is intra vires. If yes then the provision is ultra vires (Paragraph 2(1) of Schedule 4 and Section 29(4)(c) SA).

8.22 Applying the questions set out in the “reserved matters” algorithm to the provisions of possible Scottish legislation modifying or disapplying in Scotland the provisions of Section 69 of the Enterprise and Regulatory Reform Act 2013 we reach the following conclusions

_Purpose of the provision_

(1) What is the purpose of the provision at issue? (Section 29(3) SA)

- to ensure the continued availability in Scots of an effective remedy for breaches of EU law derived rights and separately to ensure a consistency of approach to the availability of civil claims for damages in Scotland in respect of breaches of statutory duty

8.23 In that connection, it is relevant in our view to notice that there appear to be no other means of ensuring effective remedies in respect of workplace health and safety which are within the competence of the Scottish Parliament (such as substantially increasing funding to the Health and Safety Executive and inspectorate to ensure that breaches of statutory health and safety duty in the workplace restrictions are identified and prosecuted.). To paraphrase Lord Atkin, the question is whether the provisions of the 2012 Bill constitute (at least) an “indirect attack” on the proper regulation of health and

\(^{116}\) See _Martin v. Most_, 2010 SC (UKSC) 40 per Lord Rodger of Earlsferry (dissenting) at paras 139, 149:

“In my view a statutory rule of law is ‘special to a reserved matter’ if it has been specially, specifically, enacted to apply to the reserved matter in question - as opposed to being a general rule of Scots private or criminal law which applies to, inter alia, a reserved matter.

... Until now, judges, lawyers and law students have had to try to work out what Parliament meant by a rule of Scots criminal law that is “special to a reserved matter”. That is, on any view, a difficult enough problem. Now, however, they must also try to work out what the Supreme Court means by these words. It is a new and intriguing mystery.”
safety across the UK. If not, it would follow that they represent an valid method of achieving the Scottish Parliament’s stated objective and an ASP to this effect would be valid law passed within the four corners of the Scottish Parliament’s existing legal competences

Effect of the provision

(2) What is the effect of this provision in all the circumstances? (Section 29(3) SA)

- the question as to whether or not the minimum pricing actually results in effective remedies for EU law derived workers health and safety provisions is, in principle, a matter of fact. It could, one suppose be determined by the court on the basis of the evidence of the effectiveness solely of criminal prosecution enforcement by the HSE compared to private enforcement of these measures to date by civil actions for damages.

8.24 It seems clear that the purpose of a measure can never properly be identified or elucidated by reference only to the ipse dixit of the legislator: its effects, actual or intended, are plainly relevant to the question. The purpose of the proposed legislation would be determined in part from its primary and immediate effects.

8.25 The constitutional scholars Walters and Craig set out in their article “The courts, devolution and judicial review” a useful digest (as at 1999) of the case law arising under the British North America Act 1867, the Commonwealth of Australia Constitution Act 1900, the South Africa Act 1909 and the Government of Ireland Act 1920. It is not suggested that any of this case law is directly applicable to the resolution of disputes arising under the Scotland Act; the authors’ argument, rather, is that “an appreciation of the judicial experiences in other systems is critical to the development of an appropriate normative framework for the interpretation of the concept of ‘legislative competence’ under the ... Scotland Act.” These authors note, under reference to Attorney General for Alberta v Attorney General for Canada (Alberta Bank Taxation

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that while, in determining the effect of a statute, the court may require to be informed by evidence as to what its effect will be, it may equally be able to take judicial notice of “any public general knowledge” bearing on the matter.

Having regard to its purpose and effect, does the provision relate to a reserved matter

(3) Having regard, inter alia, to its identified purpose and effect, can it be said that the provision at issue “relate to” matters specified in Schedule 5 to the Act as being “reserved” to the Westminster Parliament (Section 29(2)(b) SA)?

- given that the measure does not seek to modify in any way the content or scope of the existing duties laid on employers by workplace health and safety regulation but only to ensure their proper and better enforcement (rather than simply relying upon a criminal prosecution and penalty regime) this measure would seem not to “relate to” the subject matter of Part I of the 1974 Act, particularly when considered against the fact that the effect of the Section 69 modification of the 1974 Act is not to avoid altogether the possibility of civil liability for health and safety regulation but rather to make that possibility subject to specific regulation to the effect by the Secretary of State. Continued civil liability for health and safety regulation may therefore be said to go with the grain, even of Section 69 of the 2013 Act.

8.26 In R (on the application of Hume) v Londonderry Justices the Parliament of Northern Ireland, in exercise of its powers under Section 4 of the Government of Ireland Act 1920 to make laws for the “peace, order and good government” of Northern Ireland, had purported (by a regulation made in a statutory rule and order by the Minister of Home Affairs) to authorise certain members of Her Majesty’s forces to require an assembly of persons to disperse if a breach of the peace was apprehended. The Divisional Court held that the regulation was made in breach of sec 4(3) of the 1920 Act which forbade the making of laws by the Northern Ireland Parliament “in respect of” Her Majesty’s forces. It had been argued on behalf of the respondent that the “pith and substance” of the regulation was the peace, order and good government of Northern Ireland and that the conferring of powers on members of the armed forces was merely incidental. This argument was rejected, Lowry LCJ observing (p 111) that

118 Attorney General for Alberta v Attorney General for Canada (Alberta Bank Taxation case) [1939] AC 117

119 R (on the application of Hume) v Londonderry Justices [1972] NI 91
both the object and the method of achieving it must be valid. Since the method in that case
had been expressly forbidden, the regulation could not be rescued from its invalidity because it
was for a permitted object.”

9 Applying a similar analysis to the proposed legislation it would appear that the permitted end
(effective remedy in respect of EU law rights and separately consistency of approach in Scots
private law to civil liability for breach of statutory duty) can justify the means
(reversal/disapplication of Section 69 of the 2013 Act)

10 CONCLUSION

10.1 I would conclude that good arguments can be made that it is within the competence of the
Scottish Parliament to make legislation which has the effect of maintaining the existing
common law rules in Scotland allowing for the possibility of civil liability in respect of breach of
a statutory duty. It would also be within the devolved competence of the Scottish Ministers to
make any regulations on this matter.

10.2 For all of the foregoing reasons, I consider that there are good (though not guaranteed)
prospects of success for the Scottish Government in the fact of any legal challenge (whether
brought by the UK Government or other affected parties) to the competency of any such
Scottish legislation I trust the foregoing is of use to this instructing me.

17 June 2013

Advocates Library
Parliament House
Edinburgh EH1 1RF AIDAN O’NEILL QC
RE: THE ENTERPRISE AND REGULATORY REFORM ACT 2013 AND THE SCOTTISH PARLIAMENT

on the legal competence of the Scottish Parliament to amend, repeal or disapply within Scotland, Section 69 of the Enterprise and Regulatory Reform Act 2013

FURTHER ADVICE

January 2014

1. INTRODUCTION

1.1 I refer to my instructing solicitor’s E-mail of 20 January 2014. Further to my Advice of 14 June 2013, and following on discussions between my instructing solicitor and members of the Scottish Parliament, I am asked to advise on the best approach which might be taken to producing a Bill within the competence of the Scottish Parliament which would have the intent and effect, notwithstanding Section 69 of the Enterprise and Regulatory Reform Act 2013, of ensuring or restoring civil liability in Scotland for breaches of national health and safety regulations which have been made in implementation EU law.

1.2 My instructing solicitor note that there are currently three options under consideration:

(1) A Bill to reverse Section 69 specifically (whether that is on the basis that the Scottish Parliament has an intrinsic right to remedy UK breaches of EU law obligations as far as that applies to Scottish people; the “subject matter” of Part 1 of the Health and Safety at Work etc. Act 1974 is not compensation or compensation related issues; a pleural plaques type
distinction between health and safety at law and remedies for civil wrongs; or any other analysis)

(2) A Bill to codify and consolidate the law on breaches of statutory duty and civil liability in relation to the whole law of delict with a view to falling within the ambit of Section 29(4) of the Scotland Act 1998 (“SA”) which allows for the possibility of the Scottish Parliament making modification of Scots private law even as it applies to reserved matters if the purposes of the Scottish legislative provision at issue is to make the law in question apply consistently to reserved matters and otherwise

(3) A Bill to allow workers in Scotland, whether employed in the public or the private sector, the right to rely before the courts in Scotland upon their rights as protected in those EU directives which are intended to make provision for workers’ protection in the workplace.

1.3 As my instructing solicitor notes, the second approach was the one which James Wolfe QC, Senior Counsel acting for the Association of Personal Injury Lawyers, advised in the course of our meeting with him might be most likely successfully to avoid an attack on legislative competence. I, however, agree with my instructing solicitor that, Section 29(4) SA, a Bill framed in this way could be very complex and have unforeseen consequences. With my instructing solicitor, I am of the view that any such Bill has the potential to be attacked by pressure groups with interests in relation to entirely different fields of law (for example occupiers liability which is currently regulated by the Occupier’s Liability (Scotland) Act 1960 and which has an important impact upon, among others, local authorities, landlord groups and indeed household insurers). In agreement with my instructing solicitor I think that that this route is to be avoided if at all possible, particularly given how under-developed the case law is in relation to Section 29(4) SA.

1.4 In these circumstances I am asked to give further advice on the following issues:

(a) whether or not a Bill based on option (3) may be said to fall within the Scottish Parliament’s legislative competence; if so

(b) which between Options (1) and (3) might be considered the stronger from the point of view of withstanding possible challenges that the Scottish Parliament would be overstepping the boundaries of its legislative competence in passing such a measure.
Article 4(3) TEU and the duty of sincere co-operation

2.1 Article 4(3) of the Treaty on European Union ("TEU") is in the following terms:

“3. Pursuant to the principle of sincere co-operation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.”

2.2 Article 4(3) TEU sets out general duties on the Member States authorities to show loyalty and good faith in their dealings with the EU and to co-operate with EU institutions in ensuring the achievement of EU objectives. It applies directly to the courts of the Member States as well as to the administrative/legislative authorities within the Member States. Member State authorities accordingly who have an obligation, as a matter of EU law to exercise their powers where possible and necessary to ensure that the requirements of EU law are respected in those areas falling within their jurisdictions.

120 See Opinion 1/09 Re a draft Agreement on the European and Community Patents Court [2011] ECR I - 1147 [2011] 3 CMLR 4 at para 68: “Member States are obliged, by reason, inter alia, of the principle of sincere co-operation, set out in the first subparagraph of art.4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law (see, to that effect, Oelmühle Hamburg AG and Jb. Schmidt Söhne GmbH & Co. KG v Bundesaanstalt für Landwirtschaft und Ernährung (C-298/96) [1998] ECR I-4767; [1999] 2 CMLR 492 at [23]). Further, pursuant to the second subparagraph of art.4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual’s rights under that law (see, to that effect, Unibet (London) Ltd v Justitiekanslern (C-432/05) [2007] ECR I-2271; [2007] 2 CMLR 30 at [38] and case law cited).”

121 See Joined Cases C-444/09 and C-456/09 Gavieiro Gavieiro and another v. Consellería de Educación e Ordination Universitaria de la Xunta de Galicia [2010] I-14031 at paragraphs 72:

“72 The Member States’ obligation, arising from a directive, to achieve the result envisaged by that directive and their duty under Article 4(3) TEU to take all appropriate measures, whether general or particular, to ensure the fulfillment of that obligation is binding on all the authorities of the Member States including, for matters within their jurisdiction, the courts.
2.3 In principle, then, the duties imposed under Article 4(3) TEU apply as a matter of EU law to the Scottish Parliament. The terms of Paragraph 7(2)(a) of Schedule 5 to the Scotland Act 1998 make it clear that, as a matter of national law, it is within the legislative competence of the Scottish Parliament, and the general competence of the Scottish Government, to observe and implement “international obligations, obligations under the Human Rights Convention and obligations under EU law”.  

Direct effect and the primacy of EU law and the EU law duty to disapply incompatible national law

2.4 EU law, of course, also imposes obligations and rights directly upon individuals. These rights arise not only where they are expressly granted by the Treaties (and the secondary EU legislation, such as Directive and EU regulations, made thereunder) but also by virtue of obligations which EU law impose in a clearly defined manner both on individuals and on the Member States and the EU institutions. The essential characteristics of the EU legal order thus constituted are in particular its primacy over the laws of the Member States, and the direct

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122 Scotland Act 1998 Schedule 5 Reserved matters (Section 30): Part 1 “General Reservations

Foreign affairs etc.

7.—

(1) International relations, including relations with territories outside the United Kingdom, the European Communities (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters.

(2) Sub-paragraph (1) does not reserve—

(a) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under EU law.

(b) assisting Ministers of the Crown in relation to any matter to which that sub-paragraph applies.

effect of a whole series of clear precise and unconditional legal provisions which are applicable to their nationals and to the Member States themselves. 124

2.5 As the Court of Justice has emphasised any suitably clear, unconditional and precise provision of EU law may have “direct effect”. This means that, combined with the principle of the primacy of EU law, a directly effective EU law provision is “binding on all the authorities of the Member States, that is to say, not merely the national courts but also all administrative bodies, including decentralised authorities such as Länder, cities and towns or communes, and those authorities are required to apply it”, 125 regardless of the position in national law. Thus, where the authorities are unable to interpret and apply national law in compliance with the requirements of EU law, the administrative/legislative bodies of the Member State, just as much as for the national courts, are obliged as a matter of EU Treaty law to apply EU law in its entirety, and to protect the rights which it confers on individuals, disapplying, if necessary, any contrary provision of domestic law. 126

National remedies and the principle of effective legal protection of EU law rights

2.6 Article 19 TEU imposes an obligation on the (judicial, legislative and administrative authorities within a) Member State to

“provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”

2.7 Advocate General Jääskinen has suggested that the implications of Article 19(1) TEU are not only that remedies provided for under EU should be at least equivalent to those provided for analogous claims pursued purely under national law, but that these national remedies within the context of the due protection of EU law derived rights must also be “accessible, prompt, and reasonably cost effective”. 127


125 Case C-243/09 Fuß v. The City of Halle [2010] ECR I-9849, paragraph 61

126 Case 103/88 Costanzo v. Milan City Council [1989] ECR 1839, paragraph 33

2.8 Separately, Article 6(1) TEU states that:

"1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

2.9 Article 47(1) of the EU Charter of Fundamental Rights ("CFR") provides as follows:

**Right to an effective remedy and to a fair trial**

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

2.10 Article 47 CFR embodies the right to effective national judicial protection of EU law based rights. The Court of Justice has held that EU law also obliges Member States authorities to ensure that national legislation does not “undermine” the right to such effective judicial protection. In the light of the CJEU’s case law on Article 47 CFR – notably the decision in **DEB**


“47 ... [A]ccording to settled case law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in arts 6 and 13 of the ECHR and which has also been reaffirmed by art.47 of the Charter of fundamental rights of the European Union, proclaimed on December 7, 2000 in Nice [2000] OJ C364/1 (see, in particular, C-432/05 Unibet (London) Ltd v Justitiekanslern [2007] ECR I-2271; [2007] 2 CMLR 30 at [37], and Joined Cases C-402/05 P & C-415/05 P Kadi v Council of the European Union [2008] ECR I-6351; [2008] 3 CMLR 41 at [335]).

48. Moreover, the Court has consistently held that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law but the Member States, however, are responsible for ensuring that those rights are effectively protected in each case (Case C-268/06 Impact v Minister for Agriculture and Food [2008] ECR I-2483; [2008] 2 CMLR 47 at [44] and [45] and the case law cited therein).

49. Thus, whilst it is, in principle, for national law to determine an individual’s standing and legal interest in bringing proceedings, Community law nevertheless requires, in addition to observance of the principles of equivalence and effectiveness, that the national legislation does not undermine the right to effective judicial protection (see, to that effect, Joined Cases C-87/90 to C-89/90 Verholen v
It is clear that national authorities, such as the Scottish Parliament, have an obligation as a matter of EU law to guarantee within their jurisdiction that there is available to individuals in Scotland legal remedies which ensure the effective judicial protection of the rights which these individuals derive from EU law.

2.11 This right to an effective remedy has, in any event, been already found by the courts to be sufficiently precise and unconditional in its terms to have direct effect such that it might be prayed in aid against contrary provisions of national law which would make the available remedy less than “effective” for the purposes of EU law. Thus in *Benkharbouche v Embassy of Sudan; Janah v Libya* Langstaff J chairing an the Employment Appeal Tribunal disapplyed the provisions of Section 4 and 16 of the State Immunity Act 1978 insofar as they prevented individual employees from raising claims based on EU law provisions such as the Working Time Directive 2003/88 and separately the Race Discrimination Directive 2003/43 against their foreign embassy employers (who were private parties for the purposes of EU law, not being emanations of a Member State) Because the provisions of the 1978 Act (which could not be read down in a Convention compatible manner) conflicted with employees’ rights to an effective remedy and a fair trial under the Article 47 CFR the EAT held that the statute had to be disapplyed insofar as the employees’ claims were within the material scope of EU law.

**Conclusion on effective remedy and the Scottish Parliament**

2.12 The following propositions can be said to follow frim the above noted provisions:

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129 In *C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Germany* [2010] ECR I-13849 the CJEU held that a national rule requiring an advance payment of costs before the institution of an EU state liability Francovich claim for damages, when legal aid was not available, could breach the right of access to a court. The assessment of whether this occurred on the facts was left to the national court.

130 See for example *Test Claimants in the FII Group Litigation v Revenue and Customs Comrs (formerly Inland Revenue Comrs)* [2012] UKSC 19 [2012] 2 AC 337 and the decision of the CJEU replying to the UKSC reference in Case C-362/12 *Test Claimants in the FII Group Litigation v Revenue and Customs Comrs (formerly Inland Revenue Comrs)* 12 December [2013] ECR I-nyr

131 *Benkharbouche v Embassy of Sudan; Janah v Libya* [2013] IRLR 918, EAT
(1) There exists an obligation as a matter of EU law on the authorities of the Member States so to act within their jurisdiction to ensure that remedies sufficient to ensure effective legal protection in the fields covered by Union law are available to all individuals.

(2) As a matter of national law, the Scotland Act gives the Scottish Parliament the power and legislative competence to implement obligations imposed on Member States under EU law, including the obligation to provide remedies to ensure effective legal protection of EU law rights.

2.13 If the Scottish Parliament takes the view that the effective legal protection in Scotland of individuals’ EU law rights to “working conditions which respect his or her health, safety and dignity” requires the imposition of civil liability in respect of breaches by employers of their health and safety obligations imposed as a matter of EU law, that would be a judgment, in principle, which lies within the legal, political and democratic/constitutional competence of the Scottish Parliament. As such, it would be difficult to persuade a court to set aside or strike down an Act of the Scottish Parliament which embodies that judgment, since the issues involve questions of social or economic policy in which the courts, on democratic grounds, will feel more...

132 See Article 31(1) CFR

133 See mutatis mutandis the decision in R (United Road Transport Union) v The Secretary of State for Transport [2013] EWCA Civ 962 (29 July 2013) a judicial review of the Government’s refuse to introduce secondary legislation to provide commercial road transport workers - in line with the access to a tribunal which is available for the generality of other workers in a comparable situation - a civil remedy (in particular in the form of access to an employment tribunal) if they were required to work in contravention of regulations providing for breaks and rest periods, per Davies LJ at paras 50-2:

“50 ... In the present situation, Parliament has elected to provide for criminal penalties (potentially applicable to both drivers and employers) and has further bestowed on VOSA wide powers of enforcement in that regard.

51 Any employee has access to VOSA to make any relevant complaint. If he is threatened with dismissal, he further may rely on the protected disclosure provisions of the employment legislation. He also, I might add, if instructed to act in breach of the Regulations, would have a potential civil claim against his employer for breach of implied duty in the contract of employment.

52 All this tells strongly against the principle of effectiveness being infringed. The solution devised by Parliament was a proper one. That others may (entirely understandably) think – as apparently the previous government did think and as the claimant does think – that the position could be improved upon by bringing it more in line with the position relating to general workers is, ultimately, nothing to the point”.
constrained to respect “the considered opinion of the elected body by which these choices are made.” For, as Lord Hope continued in AXA:;

“The Scottish Parliament takes its place under our constitutional arrangements as a self-standing democratically elected legislature. Its democratic mandate to make laws for the people of Scotland is beyond question. Acts that the Scottish Parliament enacts which are within its legislative competence enjoy, in that respect, the highest legal authority.

…

49. The dominant characteristic of the Scottish Parliament is its firm rooting in the traditions of a universal democracy. It draws its strength from the electorate. While the judges, who are not elected, are best placed to protect the rights of the individual, including those who are ignored or despised by the majority, the elected members of a legislature of this kind are best placed to judge what is in the country’s best interests as a whole. A sovereign Parliament is, according to the traditional view, immune from judicial scrutiny because it is protected by the principle of sovereignty. But it shares with the devolved legislatures, which are not sovereign, the advantages that flow from the depth and width of the experience of its elected members and the mandate that has been given to them by the electorate. This suggests that the judges should intervene, if at all, only in the most exceptional circumstances. As Lord Bingham of Cornhill said in R (Countryside Alliance) v Attorney General [2007] UKHL 52, [2008] AC 719, para 45, the democratic process is liable to be subverted if, on a question of political or moral judgment, opponents of an Act achieve through the courts what they could not achieve through Parliament.”

2.14 In its recent decision in R (HS2 Action Alliance Limited) v Secretary of State for Transport and another the UK Supreme Court has asserted that EU law provisions may not be interpreted or applied by the courts in the UK in a manner which would run contrary to the UK’s fundamental common law constitutional provisions – in that case, the prohibition set out in Article 9 of the English Bill of Rights 1689 that the courts cannot question, examine or interfere in the internal workings of the UK Parliament. Lord Reed noted as follows:

“78. … [T]he appellants’ contentions potentially raise a question as to the extent, if any, to which these principles may have been implicitly qualified or abrogated by the European Communities Act 1972.

79. Contrary to the submission made on behalf of the appellants, that question cannot be resolved simply by applying the doctrine developed by the Court of Justice of the supremacy of EU law, since the application of that doctrine in our law itself depends upon the 1972 Act. If there is a conflict between a constitutional principle, such as that embodied in article 9 of


135 AXA General Insurance v. Lord Advocate [2012] 1 AC 868, 2012 SC (UKSC) 122 per Lord Hope at paras 46, 49

136 R (HS2 Action Alliance Limited) v The Secretary of State for Transport and another [2014] UKSC 3
the Bill of Rights, and EU law, that conflict has to be resolved by our courts as an issue arising under the constitutional law of the United Kingdom. Nor can the issue be resolved, as was also suggested, by following the decision in *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2)* [1991] 1 AC 603, since that case was not concerned with the compatibility with EU law of the process by which legislation is enacted in Parliament.”

In the jointly authored opinion of Lord Neuberger and Lord Mance in the same case the following observations are made:

“206. Under the European Communities Act 1972, United Kingdom courts have also acknowledged that European law requires them to treat domestic statutes, whether passed before or after the 1972 Act, as invalid if and to the extent that they cannot be interpreted consistently with European law: *R v Secretary of State, Ex p Factortame Ltd (No 2)* [1991] 1 AC 603. That was a significant development, recognising the special status of the 1972 Act and of European law and the importance attaching to the United Kingdom and its courts fulfilling the commitment to give loyal effect to European law. But it is difficult to see how an English court could fully comply with the approach suggested by the two Advocates General 137 without addressing its apparent conflict with other principles hitherto also regarded as fundamental and enshrined in the Bill of Rights. Scrutiny of the workings of Parliament and whether they satisfy externally imposed criteria clearly involves questioning and potentially impeaching (i.e. condemning) Parliament’s internal proceedings, and would go a considerable step further than any United Kingdom court has ever gone.

207. The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognises certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.

208. We are not expressing any view on whether or how far article 9 of the Bill of Rights would count among these, but the point is too important to pass without mention. …. Important insights into potential issues in this area are to be found in their penetrating discussion by Laws LJ in the Divisional Court in *Thoburn v Sunderland City Council* [2002]

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137 This is a reference to AG Sharpston and AG Kokott in their respective Opinions in Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus and others* [2011] ECR I-9711 [2012] Env LR 320 and Case C-43/10 *Nomarchiaki Aftodiokisi Aitolakarmanias v Ipourgos Perivallontos, Khorotaxias kai Dimision Ergon* 11 September [2012] ECR I-nyr [2013] Env LR 453 (Grand Chamber), in which both suggested the need for close scrutiny by national judges of the legislative process to see whether “the people’s elected representatives” had been able “properly” to examine and debate the proposal or had “perform[ed] their democratic function correctly and effectively”.
ewhc 195 (admin), [2003] qb 151, (the metric martyrs case), especially paras 58-70, although the focus there was the possibility of conflict between an earlier “constitutional” and later “ordinary” statute, rather than, as here, between two constitutional instruments, which raises yet further considerations.”

2.15 It cannot be said that legislation by the scottish parliament to ensure effective legal protection of the eu law based rights of individual workers to safe and health working environment contravenes any particular fundamental constitutional provisions within the united kingdom. the uk has already accepted in principle that eu law – which in any event, at least on the issue of health and safety in the workplace, sets minimum substantive standards of protection rather than prescribes complete harmonisation of uniformly across the eu of requirements in terms of possible judicial remedies 138 – may be implemented in differential way across the uk. 139

2.16 In my advice of 14 june 2013 I set out the arguments as to why a scottish bill restoring civil liability for breach of health and safety regulations made in implementation of eu law could nonetheless be said not to relate to “the subject matter of the health and safety at work etc. act 1974” which is reserved to westminster by head h2 of part ii of schedule 5 sa. this health and safety reservation provision has, in any event, itself to be read narrowly to ensure compatibility with the requirements and general principles of eu law including the principle of effective legal protection of eu law based rights.

3. Conclusion

3.1 In the whole circumstances I consider that it would be within the powers devolved to the scottish parliament to enact legislation providing for civil liability in respect of breach of health and safety provisions derived from eu law in order to ensure the effective and consistent legal protection of the eu law rights provided therein to all workers, whether those workers are employed by emanations of the state (against whom the clear precise and unconditional provisions of eu directives can be prayed in aid directly before the courts) or by wholly private employers.

138 See Case C-127/05 Commission v UK [2007] ECR I-4619

139 Case C-428/07 R. (on the application of horvath) v Secretary of State for the Environment, Food and Rural Affairs [2009] ECR I-6355
3.2 Such a provision may be thought to be effectively repealing Section 69 of the Enterprise and Regulatory Reform Act 2013, but while that may be its effect that is not its intent. The intent of the Bill is to ensure that the Scottish Parliament duly and properly carries out its obligations under EU law to ensure that workers’ health and safety (or, indeed, other workplace rights) are given, in the judgment of the Scottish Parliament, effective legal protection which is the standard required of it under and by EU law.

3.3 I think a Bill which is drafted along the lines of ensuring the Article 19 TEU standard of effective legal protection for the EU law workplace protection rights of all workers in Scotland would have a stronger chance of success than any Bill which in terms directly and explicitly seeks to and only to reverse or repeal Section 69 of the Enterprise and Regulatory Reform Act 2013. The latter option would face the courts and the Parliament squarely and unavoidably with precisely what the extent and meaning of Head H2 of Part II of Schedule 5 SA with its reference to “the subject matter of Part I of the Health and Safety at Work etc. Act 1974” being a reserved matter, whereas a Bill drafted in terms of EU law obligations of effective judicial protection focuses instead on the judgment of the Scottish Parliament of what is required for “effective judicial protection”. A Bill expressly based on EU law obligations of the Scottish Parliament also brings in the possibility of a conforming narrow (Litster/Marleasing) interpretation (or conceivably and more ambitiously the Simmenthal/Factortame disapplication) of Head H2 so as to allow that workers falling within the legislative ambit of the Scottish Parliament (whether because they are employed in Scotland, or Scots law is the applicable governing law of their employment relationship) receive the level of protection which the Scottish Parliament judges is required of them under and in terms of EU law.

3.4 I trust that the foregoing is sufficient at this stage for the purposes of my instructing solicitor. I have nothing more to add at this stage. My instructing solicitor should not hesitate to revert to me if there is anything arising from this note on which I might usefully further advise.

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