

Title: Strict Liability in Health and Safety at Work Legislation IA No: Lead department or agency: Health and Safety Executive Other departments or agencies: N/A	Impact Assessment (IA)		
	Date: 11/06/2012		
	Stage: Final		
	Source of intervention: Domestic		
	Type of measure: Primary legislation		
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Summary: Intervention and Options			RPC Opinion: RPC Opinion Status

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as One-Out?
0*	0*	0*	Yes OUT

What is the problem under consideration? Why is government intervention necessary?

The Health and Safety at Work etc Act 1974 (HSWA) is underpinned by the principle of 'reasonable practicability'. In some health and safety regulations, including those arising from EU law, the duty imposed is a strict one and no defence of having done what was 'reasonably practicable' is available. In such cases this means an employer can be held liable to pay damages to an injured employee despite having taken all reasonable steps to protect them. In its response to the independent Löfstedt Report the Government recognised this unfairness and agreed to look at ways to redress the balance, in particular by preventing civil liability from attaching to breaches of strict liability provisions.

What are the policy objectives and the intended effects?

The policy objective is to address the unfairness which results when an employer, due to a strict liability duty, is found liable to pay damages to an employee despite having taken all reasonable steps to protect them. The aim is to redress the balance whilst ensuring employees continue to have the opportunity to claim for damages where an employer can be shown to be at fault. This policy makes an important contribution to the Government's wider reforms of the civil litigation system to tackle the perception of a compensation culture and the effect this has as a driver for over compliance with health and safety at work regulations.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

The current drafting of section 47(2) of HSWA confers a right of civil action for breaches of health and safety at work regulations (unless particular regulations provide otherwise) and therefore leaves no discretion to implement the policy other than by legislative means. Options considered: 1. to target strict liability duties and either qualify them with 'reasonably practicable' or prevent civil liability from attaching to them and 2. prevent civil liability from attaching to all duties under health and safety regulations by amending section 47 HSWA. Option 2 is preferred because identifying individual strict liability duties is complex and would require amending a large number of regulations. Option 2. is a single change to reverse the effect of an existing clause of HSWA which will be significantly easier for employers and other stakeholders to understand and is therefore likely to have more impact in changing perceptions of the 'compensation culture' and the behaviours which result in over compliance with health and safety at work regulations.

Will the policy be reviewed? It will not be reviewed**. If applicable, set review date: Month/Year

Does implementation go beyond minimum EU requirements?			No		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro Yes	< 20 Yes	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded: 0	Non-traded: 0	

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible Minister: _____

Date: _____

Summary: Analysis & Evidence

Policy Option 1

Description: Qualify strict duties with 'reasonably practicable' / prevent civil liability from attaching to them

FULL ECONOMIC ASSESSMENT

Price Base Year: N/A	PV Base Year: N/A	Time Period Years: N/A	Net Benefit (Present Value (PV)) (£m)			
			Low: 0*	High: 0*	Best Estimate: 0*	
COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)		Total Cost (Present Value)	
Low	0*		0*		0*	
High	0*		0*		0*	
Best Estimate	0*		0*		0*	
Description and scale of key monetised costs by 'main affected groups' The costs associated with this measure are not quantifiable.						
Other key non-monetised costs by 'main affected groups' Employers, personal injury lawyers and other stakeholders would have familiarisation costs. Lawyers may receive less revenue if the number of claims falls balanced against: a possible increase in certain cases legal costs where out of court settlements are 'displaced' into court, and; a likely surge in cases before the policy is implemented. Claimants may pursue fewer cases and receive less compensation.						
BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)		Total Benefit (Present Value)	
Low	0*		0*		0*	
High	0*		0*		0*	
Best Estimate	0*		0*		0*	
Description and scale of key monetised benefits by 'main affected groups' The benefits associated with this measure are not quantifiable.						
Other key non-monetised benefits by 'main affected groups' Proposed measure is expected to contribute to an improvement in perceptions around any 'compensation culture' and to redress the potential for unfair claims. As a result of any changes in perceptions, employers and other stakeholders may reduce overcompliance. Any reduction in overall legal costs will also benefit defendants, although the overall impact on legal costs is not known.						
Key assumptions/sensitivities/risks					Discount rate (%)	N/A
Uncertainties: unable to reliably predict effects on overall volume of claims. Uncertainty around the impact on overcompliance, impact on insurance premiums, direction and scale of impacts on legal costs. Case law will determine any long term redistribution of claims in terms of outcomes. OIOO impacts are likely to be small and are assessed as 'unquantified out' based on evidence (from Löfstedt's consultation) of support from business for measures to address strict liability claims.						

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: 0*	Benefits: 0*	Net: 0*	Yes	OUT

*All costs and benefits in the analysis are unquantified – see the evidence base below for further details and section 7 for an explanation of position with respect to 'one in one out'. **There is no plan to evaluate the policy separately at this stage. Professor Löfstedt's recommendation is part of a wider set of changes being implemented in response to the perception of a compensation culture.

Summary: Analysis & Evidence

Policy Option 2

Description:

FULL ECONOMIC ASSESSMENT

Price Base Year: N/A	PV Base Year: N/A	Time Period Years: N/A	Net Benefit (Present Value (PV)) (£m)			
			Low: 0*	High: 0*	Best Estimate: 0*	
COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)		Total Cost (Present Value)	
Low	0*		0*		0*	
High	0*		0*		0*	
Best Estimate	0*		0*		0*	
Description and scale of key monetised costs by 'main affected groups' The costs associated with this measure are not quantifiable.						
Other key non-monetised costs by 'main affected groups' Costs expected to be the same as option 1 except that familiarisation costs are likely to be lower for option 2.						
BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)		Total Benefit (Present Value)	
Low	0*		0*		0*	
High	0*		0*		0*	
Best Estimate	0*		0*		0*	
Description and scale of key monetised benefits by 'main affected groups' The benefits associated with this measure are not quantifiable.						
Other key non-monetised benefits by 'main affected groups' Expected to be largely the same as option 1, with potential to deliver impacts on perceptions around 'compensation culture' more effectively.						
Key assumptions/sensitivities/risks					Discount rate (%)	N/A
Assumption: evidence for statutory breach and negligence claims are in practice largely the same. Option 2 provides greater simplicity for employers, lawyers and advice professionals. Increased clarity, and simpler legal process, versus option 1, will result in more effective adjustment of perceptions of unfairness. OIOO impacts, are assessed as 'Out' on the same basis as described above under the summary of option 1.						

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: 0*	Benefits: 0*	Net: 0*	Yes	OUT

*All costs and benefits in the analysis are unquantified – see the evidence base below for further details and section 7 for an explanation of position with respect to 'one in one out'.

Evidence base to support the impact assessment of the Löfstedt Review's strict liability recommendation

1. Background

1.1. What is the problem under consideration? Why is Government intervention necessary?

Löfstedt Report and Red Tape Challenge

1. In March 2011 the Minister for Employment asked Professor Ragnar Löfstedt, Director of the King's Centre for Risk Management at King's College London, to conduct an independent review of health and safety regulations to identify opportunities to simplify the rules. In November 2011 Professor Löfstedt published his report 'Reclaiming health and safety for all: An independent review of health and safety legislation'.
2. As part of his review Professor Löfstedt considered the role of health and safety law in the civil justice system. The 'compensation culture' (or the perception of it) in the UK has been the subject of several reviews over the last few years, but no clear evidence has been presented for its existence. However, there is evidence¹ to suggest the belief in a 'compensation culture' is still having a significant impact on the behaviour of business. This view was reinforced by a range of stakeholders who provided submissions to Professor Löfstedt. The proposition being that the belief in a 'compensation culture' has an impact in driving over-compliance with health and safety regulations.
3. A particular concern raised relates to where health and safety regulations impose a strict liability on employers, making them legally responsible for the damage and loss caused by their acts and omissions regardless of whether they had done all that was reasonable. Not only does this impact unfairly on employers, but it can also encourage them to go beyond what the regulations require in an effort to protect themselves from such claims.
4. On the basis of the representations made to him Professor Löfstedt recommended that health and safety regulatory provisions which impose strict liability should be reviewed by June 2013 and either qualified with 'reasonably practicable' where strict liability is not absolutely necessary or amended to prevent civil liability attaching to a breach of those provisions.
5. In its response to the Löfstedt Report in November 2011 the Government agreed this recommendation, recognising the unfairness which results from situations where strict liability exists, and committed to look at ways to prevent civil liability from attaching to a breach of such provisions.

¹ Better Regulation Task Force, Better Routes to Redress, 2004

6. In early 2012 as a result of the Health and Safety Red Tape Challenge Star Chamber it was agreed the timetable to implement this recommendation should be accelerated so that proposals could be introduced as part of the second session Enterprise and Regulatory Reform Bill.

Civil Liability and the Health and Safety at Work etc Act 1974

7. The Health and Safety at Work etc Act 1974 (HSWA) is underpinned by the principle of 'reasonable practicability', which weighs a risk against the trouble, time and money needed to control it. This allows employers to exercise judgement on the actions they should take to meet their responsibilities.
8. In some health and safety regulations, including those arising from EU law, the duty imposed is a strict one and no defence of having done what was 'reasonably practicable' is available. This creates a potentially unfair situation which means where regulations impose a strict liability duty on an employer they can be found liable to pay damages to an injured employee despite having taken all reasonable steps to protect their employees from harm.
9. By way of example in his report Professor Löfstedt cited the case of *Stark v The Post Office*. Mr Stark, a postman, was injured when the front brake of his bicycle, supplied by the Post Office, snapped and he was thrown over the handle bars. It was found that the defect that caused the brake to snap could not have been detected. The court was asked to consider whether the Post Office had breached its statutory duty under regulation 6 of the Provision and Use of Work Equipment Regulations 1992 that '*every employer shall ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair*'. The court found the duty had not been breached as the duty required a reasonable level of maintenance and the Post Office had done their best to maintain the bicycle and check for faults.
10. However, the Court of Appeal overturned this decision and ruled, in light of UK case law, that where an employer '*shall ensure*' the duty imposed is a strict one and since the brake snapped the employer was in breach and consequently liable to pay compensation.
11. Civil claims for personal injury in relation to health and safety law can be brought by two routes, common law duty of care, in which negligence (fault) has to be proved, and/or breach of statutory duty in which failure to meet the particular standard set out in law has to be proved. Strict liability duties impose a higher or absolute standard of responsibility than the employer's common law duty of care.
12. Typically, it is for the court to decide in any given case if a claim can be brought for a breach of statutory duty. In some instances whether a breach of statutory duty is actionable is determined by the express terms of the Act. This is unusual, but HSWA makes such a provision.

13. Section 47(2) of HSWA explicitly provides that a breach of '*health and safety regulations*' (a breach of statutory duty) is actionable where the breach causes damage, unless the particular regulations specifically exclude this right (currently very few regulations exclude civil liability). This is in contrast to the position for breach of the general duties under HSWA where section 47(1) makes clear that there is no right of action in any civil proceedings for breach of statutory duty.
14. '*Health and safety regulations*' are those regulations made under section 15 HSWA.

Employers' Liability (Compulsory Insurance) Act 1969

15. The Employers' Liability (Compulsory Insurance) Act 1969 requires employers in Great Britain (with certain specified exceptions) to insure against liability for injury or disease to their employees arising out of their employment. The Act requires that employers are insured for a minimum of £5 million but in practice, most insurers offer cover of at least £10 million.
16. The insurer must pay the full amount of any compensation agreed with the claimant or awarded to them by a court and cannot impose conditions which make the employer or the claimant pay part of any claim. However, if the insurer believes that the employer has failed to meet their legal responsibilities for the health and safety of their employees and that this has led to the claim, the policy may enable the insurer to sue the employer to reclaim the cost of the compensation.

2. What are the policy objectives and the intended effects?

17. The policy objective is to address the unfairness which results when an employer, due to a strict liability duty, is found liable to pay damages to an injured employee despite having taken all reasonable steps to protect them. The aim is to redress the balance whilst ensuring employees continue to have the opportunity to bring claims for damages where an employer can be shown to be at fault.
18. This policy would make an important contribution to the Government's wider reforms of the civil litigation system, based on Lord Justice Jackson's Review² (the Jackson Review), to tackle the perception of a 'compensation culture' and the impact this has as a driver for over compliance with health and safety regulations.

3. What policy options have been considered, including alternatives to regulation?

19. The current drafting of section 47(2) of HSWA confers an explicit right of civil action for breaches of health and safety regulations (unless a particular set of regulations provide otherwise) and therefore leaves no discretion to implement the policy other than by legislative means.

² Lord Justice Jackson, 'Review of Civil Litigation Costs: Final Report 2010.

20. Options considered were:
- Option 1:** Target strict liability duties and either qualify them with 'reasonably practicable' or prevent civil liability from attaching to them, and;
 - Option 2:** Prevent civil liability from attaching to all duties under health and safety regulations by amending section 47 HSWA.
21. Option 1 would require reviewing all health and safety regulations to identify the strict liability duties in each set of regulations which are potentially actionable under civil law. A decision would then have to be made how each one should be amended.
22. The possibility of adding a qualification of 'reasonably practicable' would have to be assessed against the purpose and intent of the particular provision in criminal law and whether the addition of such a qualification could be justified in this context. Because many *health and safety regulations* implement EU Directives the particular wording of the relevant Articles of each Directive would also have to be considered to determine whether the addition of such a qualification was legally possible.
23. The ability to use the qualification 'reasonably practicable' will have been considered when strict liability duties were originally drafted. As an underpinning principle of UK health and safety legislation the qualification will have been applied to particular duties where possible. It is therefore unlikely that there would be many instances where it could now be inserted. Therefore the majority of strict liability duties would have to be amended to prevent civil liability from attaching to them.
24. The necessary amendments could either be made by amending each set of regulations as appropriate or by using a single set of amending regulations listing all of the necessary changes, provided the necessary changes all fell under the vires of HSWA.
25. Option 2 would reverse the existing position in section 47(2) HSWA so that a claim for breach of statutory duty could not be made as a result of a breach of '*health and safety regulations*', unless specific regulations provide that such a claim can be made. This would apply to all duties under '*health and safety regulations*', whether they impose strict liability or are qualified by 'reasonably practicable'.
26. The change would mean claims for compensation for breaches of *health and safety regulations* could only be brought in relation to a breach of common law duty of care in which negligence (fault) on the part of the employer has to be proved (unless the regulations specified otherwise). This is currently the case for claims brought for breaches of the general duties of HSWA. The amendment to section 47(2) therefore, would result in a consistent position in respect of civil law for both duties in the Act and in the regulations made under it.

27. As described above the amendment to section 47(2) would only apply to *'health and safety regulations'* made under section 15 HSWA. However, there are other types of primary and secondary legislation which concern health and safety at work which may also give rise to claims for breach of statutory duty against employers. The scope of the amendment will therefore also include, health and safety at work regulations which rely on section 15 HSWA and partially on other powers, so called *'hybrid'* regulations, and provisions which concern health and safety at work but which predated HSWA known as *'existing statutory provisions'* which are specified in Schedule 1 HSWA.
28. The preferred option is 2 to amend section 47 HSWA for the following reasons:
- i) Option 1 is complex, as it would require a large number of changes to potentially over 200 sets of existing *'health and safety regulations'*. The position on civil liability for breach of statutory duty would vary for different duties within the same set of regulations and from one set of regulations to another;
 - ii) Option 2 is a single change to reverse the effect of an existing clause in HSWA. The change would mean all duties under *'health and safety regulations'* (and *'hybrid'* regulations and *'relevant statutory provisions'*) would be treated in the same way with respect to civil liability and the approach to exclude civil liability would be consistent with that for the general duties under the Act.
 - iii) As a result option 2 will be significantly easier for employers and other stakeholders to understand and is therefore more likely to have a better impact in changing perceptions about the *'compensation culture'* and the behaviours which result in employers over complying with health and safety regulations.

4. Risks and assumptions

29. The choice of preferred option relies on the assumption that option 2 provides greater simplicity for employers, lawyers and advice professionals who will spend time familiarising with the changes and adapt their approaches/advice where necessary. We assume that option 1 introduces additional complexity to the regulatory landscape and the potential for more confusion and considerable effort in understanding and familiarising with the changes.
30. There is considerable uncertainty around the overall volume of cases that would be affected by the policy changes being considered. Following discussion with Government lawyers, we assume that the number of claims brought which rely on a breach of a strict liability duty alone (as opposed to relying on negligence also) is likely to be small. Consequently, the reduction in the volume of claims brought as a direct result of the removal of the strict liability route, as set out in option 1, is likely to be small.

31. On the basis of Government lawyers' advice we assume that most claims are currently brought in respect of both breach of statutory duty and negligence. Under option 2, where the possibility of bringing a claim for breach of statutory duty is removed and only a claim for negligence is available, we assume most claims would continue to be brought in respect of negligence. However, we anticipate a greater reduction in the number of cases brought than for option 1, because some claimants will be advised that their claim is very unlikely to succeed where negligence, rather than breach of statutory duty, has to be proved.
32. The development of case law will determine the long term redistribution of breach of statutory duty cases, including those relying on strict liability duties, to the negligence route. This cannot be reliably predicted ex-ante as it depends upon future cases. One scenario is that as the law of negligence develops to deal with situations and legal issues previously dealt with under statutory breach, more claims may be defended, rather than settled by negotiation at an earlier stage, incurring greater costs until the state of the law becomes clearer and is more settled. This might happen for example if the rate of claims does not adjust quickly enough to any increase in unsuccessful claims, i.e. the disincentive effect takes a longer time to filter through to new claimants' expectations.
33. We are advised that cases brought solely in negligence may require more evidence gathering and investigation than statutory breach claims and therefore could incur greater costs. We assume this will act as a disincentive for some potential claimants, particularly where legal advice is that the likelihood of success is low, and will have an impact on reducing the overall number of claims brought. This assumption is based on the argument that a higher proportion of unsuccessful claims (as might be expected where claimants are required to demonstrate negligence) result over time in a disincentive to claim.
34. We assume in the absence of robust evidence that the existence of strict liability duties may contribute towards any over-compliance that exists as a result of the general perception of a 'compensation culture'. We are however also aware that the network of influences on attitudes and behaviour towards risk is complex. The Risk and Regulation Advisory Council (RRAC) produced a broader 'risk landscape' showing the many different actors on health and safety risk in small organisations. This is reproduced in APPENDIX 3 and whilst it is a high level summary of the network of influences acting on small employers, it illustrates that employers are seeking to satisfy the demands of a range of stakeholders with respect to risk and risk control. The threat of litigation, and "compensation culture" are both part (but only part) of the landscape.

35. The risk landscape illustrates the complexity of disentangling the relative weight of different influences on risk attitudes and behaviour (including over-compliance). HSE recently published research (HSE, 2012³) on the challenge of linking health and safety intervention to physical outcomes, which explains the main issues around quantifying impacts on health and injury outcomes.
36. Further, as adequate records are a pre-requisite for defending a claim, it is reasonable to assume that efforts to generate such records are not particularly associated with any one type of legal breach. For example, it is possible that proving adequate and appropriate procedures were taken is equally relevant to the threat of a claim of negligence. For these reasons, there is insufficient empirical evidence to demonstrate that strict liability independently plays role in increasing businesses' incentives to over-comply over and above a general threat of litigation.

5. Description of baseline conditions

5.1 Categorising 'strict liability' claims

37. Most cases are initially brought under both statutory breach and negligence. The claim in negligence is generally included as an alternative to the breach of statutory duty as the latter is normally considered easier to prove. Where there is a breach of a strict liability provision the claim is more likely to be settled quickly either during pre-proceedings or shortly after proceedings are begun. This is because it is much more difficult to mount a successful defence for a strict liability claim and settling earlier minimises the legal costs for both parties.

5.2 Estimating the volume of strict employer liability claims

38. Without disproportionate effort, it is not currently possible to estimate what proportion of claims relies upon proving a statutory breach, and more specifically a breach of a strict liability duty. Discussions with Government lawyers suggest that based on their experience and a small sample of cases, the numbers of claims resting on a strict liability duty alone is likely to be small.
39. One method of building the evidence would be to consult a large enough sample of individual case files to build a picture of the distribution of claims by type of liability proven. This is not feasible in the time available for the analysis.

³ <http://www.hse.gov.uk/research/rrhtm/rr913.htm>

5.3 DWP data on overall numbers of employer liability claims

40. Whilst there are no definitive data on claims by specific liability proven (or not), data on all registered claims against employer liability are available from DWP's compensation recovery unit (CRU). It is not, however, possible to break down the data into different legal routes, or whether particular types of breach have been instrumental in settling/winning the claim.
41. The following data were collected from DWP's compensation recovery unit (CRU) for the years 2008/09 to 2011/12:
 - Claims registered
 - Settlements recorded (all of which have to be recorded with CRU)
 - Recoveries received by the CRU⁴
 - Average settlement time (years) relating to all, and employer liability, claims registered by the CRU
42. More information on the CRU data and a full breakdown of employer liability claims registered with the CRU between 2008/09 and 2011/12 by injury/illness type is provided in APPENDIX 1.
43. In order to conduct a quantitative impact assessment it would be necessary to develop an improved baseline estimate of claims concluding (or admitting) a) a breach of a strict duty, and b) a breach of any statutory duty.
44. The Ministry of Justice (MoJ) was consulted but no data provided such a breakdown. The conclusion of enquiries to the MoJ and the CRU was that it would require manual examination of a large enough sample of CRU registered cases to estimate the proportion of cases relating to strict liability / breach of statutory duty. This would require attending county courts and manually examining a large number of case files in order to extract details. This is not feasible in the time available for the analysis.

5.4 Volume of claims handled by insurers.

45. In broad terms, the market value of Employer Liability insurance business (total premiums) is estimated to be around £800 million in the UK in 2010 (ABI, 2011). To put this in context, it is estimated that the general insurance premiums generated within the UK are approximately £30 billion per annum (ABI, 2011).

⁴ The CRU recovers social security benefits paid as a result of an accident, injury or disease, where a compensation payment has been made and costs incurred by NHS hospitals and Ambulance Trusts for treatment from injuries from road traffic accidents and personal injury claims.

5.5 Current employer burdens associated with strict liability duties

46. Consultation responses received during the Löfstedt review referenced existing issues relating to strict liability around two main themes:

Administrative costs due to excessive paperwork

47. Evidence on excessive administrative costs is anecdotal but quite consistent across the limited number of respondents that commented substantively on it.
48. Some respondents noted that as regulations impose strict liability on the employer whilst others are qualified by reasonable practicability, this “inconsistency” can be a cause of “confusion, misunderstanding and reliance on a paper trail and tick box mentality, which itself has a negative effect on health and safety”. The implication being that administrative work may be being carried out without necessarily producing any reduction in risk. The main driver for this is that “imperfect documentation may represent a technical breach of regulations, but does not necessarily imply that the risks were not adequately controlled”.
49. There was some agreement among a small number of respondents who commented on civil liability that ‘box ticking’ can lead to poor quality risk assessment, by virtue of not being properly thought out, with proper ‘sense checks’: “it is tempting for employers to seek comfort in a ten page risk assessment”. The implication is that additional risk assessment, instead of being a means to identifying and controlling risks properly becomes ‘back covering’ which may actually have low relevance to control of risk. Certain stakeholders suggested (in response to Löfstedt’s consultation) that the production of list of signed and dated records is being considered a “pre-requisite to defending a claim”. However, the extent to which this is happening and the time involved with it is unknown.

Legal costs

50. Some responses also cite examples of excessive cost relating to strict liability due to the legal cost associated with “interpretation of legislation, particularly through the courts”. It is further claimed that the cost of “Frivolous litigation creates a greater burden on the sector than the volume of health and safety regulations”. The cost of such litigation may also be exaggerated by inconsistency across regulations.
51. Average legal costs are also considerable in comparison with the compensation payments. Insurance industry representatives noted in a response to the Löfstedt Review consultation that “for employer and public liability claims under £5000, on average 93 pence is paid in legal costs in addition to every £1 of compensation paid”. Research for the Association of British Insurers (by Frontier Economics, 2006) supports this general point, but shows that the ratio of legal costs to compensation is larger as compensation gets smaller.

52. Anecdotal evidence from a small number of respondents does not provide HSE with sufficient information to make robust estimates of the overall scale and amounts of legal, administrative and other costs associated with 'statutory breach' or 'strict liability' claims.

Insurance-related costs

53. Insurers, faced with the risk that a customer is instructed to pay compensation, may seek to ensure that the liability is as small as possible. This could translate to two elements of cost for employers.
54. **Firstly** any cost associated with complying with conditions that insurance companies may place upon clients to mitigate their financial liability associated with the risk of claims resting on a strict duty.
55. **Secondly**, any inflation of premiums to cover residual liability associated with potential claims against a strict duty. In some cases, these demands may go beyond what is required to prevent a breach of a civil duty of care or statutory requirement. For example, requirements to hold certain records longer than required by regulation.
56. The premium charged by an insurer will depend on a number of factors, such as the nature of the business and insurers' experience of the sector. For most small to medium-size risks, the insurer will use a 'book rate', or average rate, which is based on the claims they have paid out to similar businesses. The insurer will use this rate to calculate the premium using a factor that reflects the amount of activity undertaken by the business. For employers' liability insurance, payroll is usually used to reflect the amount of activity. For public and product liability insurance, turnover is usually used.
57. For larger businesses the insurer may calculate the premium based on businesses' experience, management of risk or claims record over a number of years
58. Some businesses use brokers who may encourage them to take measures which could reduce their insurer's premium.
59. The sensitivity of premiums to the rate of civil cases has not been discussed with the insurance industry due to time constraints.

6. Costs and benefits of policy options

6.1 Option 0: do nothing

60. This option is included for comparison purposes. The Government's response to the Löfstedt Review accepted all recommendations and therefore provides a mandate to make legislative changes. Therefore 'do nothing' is not a viable implementation option.

61. Under 'do nothing', no legislative changes would be made and it would remain possible to succeed in a legal claim where it is possible to demonstrate a breach of a strict duty. Defendants would not be able to defend such claims on the basis of having done what was 'reasonably practicable' and could therefore be held liable to pay damages to an injured employee despite having taken all reasonable steps to protect them.
62. As this option is for comparison only, its costs and benefits (when compared against itself) are taken as zero.

6.2 Option 1: target strict liability duties and either qualify them with 'reasonably practicable' or prevent civil liability from attaching to them

Impacts on overall volume of claims

63. As liability could no longer be proven on the basis of a strict duty, it may be expected that the overall number of claims would drop to some extent versus the baseline. The opinions of a small number of lawyers consulted for this analysis were generally that as evidence on the number of claims relying on the proof of a strict duty was not available, and based on a small sample of cases it did not feature at all, the extent of claims which could be affected is likely to be small but uncertain.
64. Secondly, due to the measures in option 1, claims which previously appeared favourable for the claimant due to the existence of strict duties may now look less favourable. This does not however necessarily prevent such claims from progressing via an alternative route, such as negligence.
65. As a result, how these claims fare in court will be determined over the longer term by developing precedent in case law. This is dynamic and any conclusion on the effect could take a number of years to emerge. As a result, any redistribution of claims, towards the 'negligence or fault' or 'other statutory breach' routes will occur over the longer term and is not possible to reliably predict ex-ante.
66. If the overall number of claims ultimately relying on strict duties is low, as expected, then any effects will be small. However it is expected that if the policy change is anticipated it is likely to create a short term 'surge' in claims seeking to enact a claim whilst the 'strict liability' route is still available. This is likely to result in a short term increase in compensation and legal costs.
67. Over the longer term, possible effects of removing the 'strict liability' route include:
 - Fewer 'frivolous' claims where defendants are more likely to be able to demonstrate they acted reasonably. This effect could be supported where lawyers advise more often that claims are less likely to be successful.

- Fewer defendants agree to settle out of court, realising (or being advised) that claims will not be able to rely on the existence of a strict duty. This could lead to more defendants resisting out of court settlements. However, factors affecting defendants' decision to settle out of court or fight are various and include motives relating to reputational risks (visibility of court cases) and conversely the risk of encouraging similar claims.
- Relating to the previous point, in cases where defendants do not settle out of court as a result of the removal of a 'strict liability' outcome they then risk additional legal costs combined with a similar level of compensation payment if they go on to lose the case in court.

Costs to workers

68. If the volume of claims (or successful claims) reduces as a result of the policy change, then this is intended to reduce the scope for compensation where employers have behaved reasonably in managing risk. Any reduction in volume of claims, or the proportion of claims that are successful, will clearly affect total compensation payments.
69. Consultation with lawyers has confirmed that, where awarded, compensation amounts would not differ as a result of the changes. This is because levels of damages are set by reference to the Judicial Studies Board Guidelines and relevant precedents so are not affected by the route by which the claim is made.
70. With the removal of strict liability duties where a worker does decide to pursue a claim there is a possibility that the legal costs they incur could be higher. This is because an employer may be less inclined to settle at an early stage as they potentially have more grounds on which to mount a defence in relation to a claim brought either for breach of a statutory duty which is not strict or for negligence.

Business costs and cost savings

Cost savings – reduction of administrative burdens relating to strict duties

71. Where a strict duty previously applied, with the associated threat of compensation claims, employers and other affected parties may benefit from reassurance that a successful claim is less likely where they have managed risk to as low as reasonably practicable (ALARP). There is also likely to be an easing of any perception that defendants can help to pay compensation where they have not had the opportunity to defend on the basis of their actual performance or behaviour.
72. As discussed in the baseline description, it has not been possible to quantify the extent of effort expended in going beyond reasonably practicable levels of protection under strict duties, or the extent of administrative effort (e.g. record keeping) required as a result of liability associated with strict duties.

73. The extent to which any such activity would change after a policy change will depend on the extent to which strict liability duties are direct drivers of it. ABI's response to the Löfstedt Review consultation claims that "changes to health and safety legislation will not in themselves deal with this issue. We believe that what is needed is wholesale reform of the civil litigation system". Similarly, consultation with Treasury Solicitors litigation lawyers suggests that the requirement to hold records to demonstrate that appropriate activities were undertaken may well be driven by general fear of civil litigation including claims resting on negligence.
74. It is therefore expected to be unlikely that following either policy change, in isolation, employers would significantly relax measures designed to protect themselves against civil liability in general. However, a positive impact on business behaviour to reduce over-compliance with health and safety regulation is anticipated when this policy is applied in combination with the other Government reforms of the civil litigation system.

Familiarisation/uncertainty costs

75. As most employers receive advice from lawyers and professional advisors on legal changes, we do not expect that they will incur significant familiarisation costs. Under option 1 where existing strict liability duties are newly qualified by 'reasonably practicable', employers may spend time and effort considering whether to reduce their activity where it is seen to go beyond ALARP due to application of a strict liability duty. This could generate some short term costs for employers and possibly their lawyers.

Impacts on Employers' insurance premiums and insurers' profits

76. Market analysis suggests that the cost of insurance is influenced by changes in the volume or type of claims, along with other factors: "A worsening claims experience, falls in insurer asset values and declining investment income can push the cost of insurance upwards." (British Insurance Brokers' Association, 2008). Therefore, if volumes of claims reduce, all else being equal, it might be reasonable to expect to see reductions in insurance premiums over time versus the baseline. In the time available to complete this impact assessment it has not been possible to explore this with representatives of the insurance industry.
77. With respect to insurance premiums, 'claims experience' influences insurance premiums. Should a policy change result in significant reduction in claims against employers, then this should influence premiums in the medium term. However, the extent to which it will depend again on the volume of claims avoided.

78. ABI data (ABI, 2011) shows that total employer liability insurance premiums generally have made a loss for some years, after accounting for related expenses and commissions. This reflects a highly competitive market in which employer liability is often packaged with other liabilities, where compensation payments are accompanied by substantial legal costs and where in the case of occupational illness claims can relate to historical events, for example occupational cancers can take 40 years to develop. According to industry representatives it can therefore be difficult to set premiums accurately. It is therefore difficult to predict with any accuracy how premiums might respond and therefore whether it will have a positive effect on reduction of losses.

Legal costs associated with claims against a strict liability duty

79. As already mentioned, legal costs can be a significant proportion of claims, particular smaller claims.
80. Should the policy change affect the volume or legal route of claims, this could impact on legal costs. For example:
- An overall reduction in claims brought against defendants could reduce overall legal costs, assuming the policy change has a significant effect on claims pursued through the courts;
 - However, with the removal of strict liability, where claims are brought in negligence only, they are less likely to be settled at an early stage and additional legal costs may be incurred by both workers and employers.
81. As impacts on volume and redistribution of claims between different outcomes is not known at this stage, it is also not possible to produce any reliable estimate of impacts on legal costs. Given the expectation that any reduction in total volume of claims is likely to be small. The impact on legal cost is difficult to assess as there will be a reduction of cases on the one hand but on the other a possible increase in costs for the cases that are pursued. Any reduction will reinforce efforts being made in other policy areas to reduce high costs associated with personal litigation⁵.

Costs to Lawyers

Familiarisation cost

82. We are advised by Government lawyers that personal injury lawyers can be expected to familiarise themselves with legislative changes. Option 1 requires amendment of each incidence of strict liability duties across the body of health and safety regulations. It is expected that one-off familiarisation with the detail of these changes would be largely confined to lawyers and registered consultants. Any ongoing familiarisation is not expected to be additional versus normal ongoing maintenance of up to date knowledge of the regulations amongst relevant professionals.

Impact on revenues

⁵ For example, see impact assessment number MoJ 105 on Referral Fees in Personal Injury Claims.

83. Any reduction in the volume of claims that go to court could result in lower volumes of business for lawyers, where cases go to court. However as the vast majority of claims do not go to court, this effect may not be significant. Secondly, as we expect any reduction in volume to be small, loss of revenue is unlikely to be significant. Implicit in this is the assumption that there are no personal injury lawyers specialising exclusively in 'strict liability' claims with little flexibility to easily transfer their knowledge into another type of personal injury claim.
84. As explained in the above section on impacts on total volumes, a temporary initial surge in claims can be expected whilst 'strict liability' is still in place.

Costs to government

85. The legislative changes required under option i) would present a short term burden for HSE and Government lawyers. In relation to another impact assessment⁶, the Regulatory Policy Committee recently advised HSE not to include the opportunity cost of civil servants' time spent amending regulation. Therefore whilst costs to HSE may differ between the options any costs associated with civil servants' time are not included in the analysis.

Wider benefits of option 1

86. The primary benefits from the proposed policy change relate to removing the possibility for unfair outcomes from civil claims where strict liability exists. This is intended to tackle the perception of a 'compensation culture' and the impact this has as a driver for over compliance with health and safety regulations. The policy is complementary to the wider aims of reform focused on addressing perceptions of 'compensation culture' and therefore is expected to contribute to any wider shift in perceptions.

6.3 Option 2: prevent civil liability from attaching to all duties under health and safety regulations by amending section 47 HSWA

Differences versus option 1

87. As set out in the description of options, option 2 removes the possibility of bringing a claim for breach of statutory duty, whether the duty is strict or qualified by 'reasonably practicable'. This means under option 2 claims for compensation in relation to health and safety regulations could only be brought for a breach of common law duty of care in which negligence (fault) on the part of the employer has to be proved (unless the regulations specified otherwise).

⁶ Impact assessment on the removal of Adventure Activities Licensing in the UK.

88. Having discussed with lawyers the legal routes which claims can currently take, advice is that the evidence gathering requirements at the initial stage for both statutory breach and negligence are the same. However, for claims in negligence, it is possible, depending on the details of the case that more investigation and evidence gathering may be required and consequently costs could be higher.
89. Option 2 will result in a redistribution of claims from the breach of statutory duty route to the breach of negligence route; however an assessment of the volume of cases that would be brought for negligence and the associated costs is complicated by a number of factors.
90. A claim for negligence is likely to be more difficult to prove because the concept is more nebulous and there are various issues which are more open to debate. This may mean fewer cases are brought because legal advice is that success is less certain and /or claimants are deterred because of the potentially higher legal costs. Compared to option 1, option 2 may therefore result in fewer cases being brought and, in particular, have more effect in discouraging so called 'frivolous' claims where negligence (fault) cannot or is very unlikely to be proved .
91. Where claims are pursued whether an employer chooses to defend will also depend on the legal advice given and the level of financial and reputation risk the employer is prepared to take. As a result the relative impact on the distribution between 'out of court' and 'in court' settlements is not possible to estimate reliably.
92. As described in the explanation of the preferred option, option 2 is expected to be simpler for employers and other stakeholders to understand. We expect that it is therefore more likely to impact more quickly and potentially more effectively on perceptions about the 'compensation culture' and any behaviours which currently result in employers over complying with health and safety regulations.

Differences in familiarisation costs

93. As with option 1, there will be some additional familiarisation costs associated with legislative changes.
94. However, relative to option 1, option 2 could reduce the time spent by lawyers and advisors with an interest in health and safety familiarising with the changes in order to adapt their professional advice to clients. As we do not have data on the numbers of lawyers working on personal injury, we are unable to quantify this cost difference.

Differences in benefits – increased ‘perception of fairness’

95. It is assumed that option 2 most directly and effectively addresses the issue of a perception of a ‘compensation culture’. As a result we assume that the increased clarity of option 2 versus option 1, will result in more effective adjustment of perceptions of unfairness. Any benefit employers and other stakeholders get from reassurance that they are less likely to face unfair claims is therefore expected to be greater under option 2. Likewise if option 1 or 2 result in fewer claims where employers have taken reasonable actions and/or less unnecessary over-compliance we would expect these effects to be stronger (or quicker) under option 2.

7. Summary of impacts and one in one out implications

96. The above discussion of impacts reflects high levels of uncertainty around the potential for reduction in costs to business related to cases where no fault or negligence can be proven, specifically:
- compensation payments
 - associated legal costs
 - any reduction in over-compliance and associated costs of effort
97. The analysis acknowledges considerable uncertainty around the extent to which the overall volume of claims will change. The opinion of expert lawyers is that a small number of cases currently rely on a breach of a strict liability statutory duty, so the effect of option 1 on the number of cases brought will be small. However, the removal under option 2 of the statutory breach route completely to leave only the possibility of bringing claims for negligence is likely to have a greater impact on reducing the number of claims brought.
98. Our best estimate is that the likely decrease in claims can be expected in the short to medium term to be broadly balanced against:
- A temporary surge of cases before the ‘strict liability’ option is removed. It is possible that some of these cases may not have been brought otherwise.
 - Uncertainty around redistribution of claims between claims settled out of court (some of which are likely to have been decided on the basis of strict liability) versus those which are fought in court. An increase in the proportion of claims being fought may result in greater average legal costs. It could also affect average damages paid to defendants as ‘out of court’ damages will tend to be less than damages paid after a court case.
 - Longer term changes in compensation awards will be determined over time by case law, the extent to which overall compensation levels will reduce cannot be predicted with any reliability.

99. Therefore in the context of expected overall reduction in claims, and considerable uncertainty around the extent to which legal costs and compensation awards will be impacted, and in which direction, the overall One in One Out impact is expected to be small and it is in fact uncertain whether net impact will represent an 'in' or an 'out'. However on the basis of the Löfstedt Review's consultation evidence of business' discontent with the threat of 'unfair' civil claims (see section 5.5 for a summary of evidence), it is reasonable to assume that the proposed policy change will help towards alleviating some of the uncertainty and anxiety around 'unfair' claims. Whilst costs and benefits to business are not quantified, we therefore classify the policy change as an unquantified 'out'.
100. For ease of comparison Table 1 sets out a high level summary of costs and cost savings and their potential scale based on the information presented above. Where not otherwise stated, comments relate to both options 1 and 2.

Table 1: Type and size of cost and cost savings

Stakeholder affected	Type of impact	Time scale	Description of impact	Potential scale
Employers and other stakeholders	Benefit	Ongoing	Contributes to wider reforms on reducing the perception of a 'compensation culture'.	Unquantifiable.
Employers and other stakeholders	Benefit	Ongoing	A possible reduction in over-compliance with health and safety regulation is anticipated when this policy is applied in combination with the other Government reforms of the civil litigation system.	Small contribution /reinforcement of any cost savings due to overall reforms.
Employers and other insurance holders	Benefit	Ongoing	Potential positive effects (reduction) on insurance premiums cannot be reliably predicted.	Unknown, but likely to be small.
Claimants	Cost	Ongoing	Claimants may pursue less cases and therefore receive less total compensation	Likely to be an overall reduction total claims.
Lawyers and other stakeholders	Cost	One off	Both options are likely to create some one-off familiarisation costs, mainly for lawyers and those advising employers.	Uncertain, but likely to be smaller under option 2 as option 1 involves a greater number of changes.
Insurers / insurance holders / claimants	Cost or benefit	Ongoing	The impact on legal cost is difficult to assess as there will be a reduction of cases on the one hand but on the other a possible increase in costs for the cases that are pursued.	Unknown..
Personal injury lawyers	Cost or benefit	One off	Impact on revenues. An initial surge in revenues expected before changes are implemented. Ongoing impact is unknown.	Unknown.

8. Wider impacts

101. In accordance with the Impact Assessment Toolkit guidance the wider economic/financial, social and environmental impacts have been considered and the following tests identified as relevant.

Small firms impact test

102. The distribution of claims across 'business by size' is not available. Statistics on injury rates⁷ and for ill health⁸ indicate that based on the Labour Force Survey data, injury and illness rates are higher for larger enterprises. However no robust claim can be made that this results in higher rate of claims for larger enterprises.
103. As compensation is standardised, and legal costs are likely also to be similar whether or not the defendant is a small company, a large claim could be expected to be of more concern to a small firm. Therefore any reduction in frivolous claims could provide particular benefits to small firms.
104. Anecdotally we are informed that the reputational costs of settling out of court (appearing to admit fault) can be an incentive to fight the claim in court. We do not have evidence on whether size impacts on firms' preferences for settlement out of court or not. It is therefore not clear whether this effect is greater for small firms.

Competition impact test

105. We have considered whether the legislative changes could:
- Directly limit the number or range of suppliers
 - Indirectly limit the number or range of suppliers
 - Limits the ability of suppliers to compete
 - Limits suppliers' incentives to compete vigorously
106. It is not expected that the changes will have significant competitiveness effects in any of the above areas.

Justice Impact Test

107. The potential impacts on the Justice System are considered in the main body of the impact assessment.

⁷ Over three day reportable injuries. Incidence relating to current or most recent job in last 12 months for data from 2008/09 - 10/11.

⁸ Illness survey data by Workplace size, filtered by Disorder Type (Illness), Estimate Type (Prevalence), Year (2010/11) and Job Type (Current or most recent in last 12 months).

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APPENDIX 1: DWP Compensation Recovery Unit data

CRU recovers benefits/lump sum payments that have been paid because of an accident, injury or disease from compensation awarded for the same accident, injury or disease. All claims for compensation relating to employer liability have to be registered with CRU, regardless of whichever legal route that they have taken. Compensation awards may be made in court or negotiated between the parties prior to any formal court action or judgement. The CRU has confirmed that there is no way of discerning what legal route was taken.

Settlement data are available split by accidents and illness types; as with registrations data, it is not possible to get a breakdown which reflects whether it was in or out of court, or the outcome of any legal verdict on breach of duty/negligence.

Figure 1 sets out the number of claims registered to CRU between 2008/09 to 2011/12. There were around 80,000 claims in 2011/12, of which around 72,000 related to accidents and the remainder to illnesses. Figure 1 shows that whilst accident related claims have gradually fallen over the period, illness related claims have slightly risen.

Figure 1: Employer liability claims registered by accident/illness (UK, 2008/09 to 2011/12)



Trends in settlements

Data obtained from DWP's CRU provide settlements recorded with CRU shows that the number of overall settlements recorded has fallen considerably over 2009-10 to 2011-12 mainly consisting of a fall in injuries settlements. The ratio of unsuccessful claims to successful ones has risen steadily over the period represented in Table 2.

Table 2: Number of employer liability settlements recorded by the Compensation Recovery Unit

	2008-09	2009-10	2010-11	2011-2012
Successful - injury	56,712	59,874	55,126	49,475
Successful - ill health	7,746	9,380	8,286	7,855
Successful - total	64,458	69,254	63,412	57,330
Withdrawn/Unsuccessful - injury	15,586	17,992	15,975	15,624
Withdrawn/Unsuccessful - ill health	6,377	6,457	7,360	5,558
Unsuccessful - total	21,963	24,449	23,335	21,182
Ratio unsuccessful to successful	0.34	0.35	0.37	0.37

Source: DWP Compensation Recovery Unit data

Employer liability claims registered by accident/illness type UK (2008/09 to 2011/12)

Claims by illness UK:	2008/09	2009/10	2010/11	2011/12
Accident Claims	72,334	65,424	66255	62273
Occupational Deafness	3017	3,780	6027	8282
Mesothelioma	2172	2,099	2286	2233
Vibration White Finger/Raynauds disease/HAVS	2322	2,231	1914	1802
Asbestosis	1253	1,136	1390	1291
Non Coded disease	582	600	677	630
Repetitive Strain Injury	683	493	493	489
Pleural Plaques	108	347	246	429
Bilateral Pleural Thickening	370	387	340	409
Work Related Upper Limb Disorder(WRULD)	577	517	446	312
Carpal Tunnel Syndrome/Tenosynovitis	300	253	285	282
Occupational Stress/Depression/Anxiety	304	254	270	254
Cancer	200	158	237	224
Asthma	230	210	205	160
Dermatitis	233	200	176	154
Pneumoconiosis	333	183	175	110
Bronchitis/Emphysema	507	440	150	55
Chest/Lung Condition (inc.Chr.Obstructive Airways)	22	44	72	37
Poisoning	23	14	21	28
Osteo-Arthritis/Arthritis	7	14	22	12
Eczema/Skin disease	17	9	6	7
Mucous Membrane/Rhinitis	7	5	7	6
Degenerative Disc Condition	5	11	5	4
Viral Hepatitis	...	1	1	3
Multiple Disease	1	8	2	2
Physical Abuse	1	1	5	1
Sexual Abuse	3	6	3	1
Anthrax	1
Lyme disease	...	1	...	1
Occupational disease not known	2	...	1	...
Byssionosis	...	1
Total	85613	78,827	81717	79492

APPENDIX 2: Compensation Recovery Unit data on average settlement time for employer liability claims.

Average Settlement Time in Years	Financial Year			
	2008 - 2009	2009 - 2010	2010 - 2011	2011 - 2012
England	1.69	1.72	1.70	1.60
Scotland	1.72	1.76	1.78	1.68
Wales	1.69	1.80	1.73	Not Applicable
Northern Ireland	2.38	1.00	1.77	1.30
Republic of Ireland	1.97	1.81	2.14	1.88
Channel Islands	1.79	2.03	1.55	1.28
Isle of Man	Not Applicable	Not Applicable	Not Applicable	2.72
Region not known	2.21	2.40	2.20	1.87
Overall Average Settlement Time	1.70	1.73	1.71	1.61

