

The cost of getting it wrong



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D Geddes (Contractors) Ltd v Neil Johnson Health & Safety Services Ltd

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To be covered



- Criminal/Regulatory
 - HSE investigations and prosecutions
 - Fines in the wake of the 2016 Sentencing Guidelines
 - Enforcement Notices
 - Fees For Intervention
 - Fatal Accident Inquiries

- Civil
 - Recovery actions
 - Third party notices
 - Fatal awards

HSE investigations



- Role of HSE
- Wide ranging powers under Section 20 of the Health and Safety at Work Act 1974
- Interviews
 - Section 20 statements
 - Voluntary statements
 - Under caution
- Report to the Procurator Fiscal if prosecution recommended
- Mandatory report if a death

The role of the Crown Office & Procurator Fiscal Service (COPFS)



- ❑ Specialist Health and Safety Division within COPFS
- ❑ Sole prosecuting authority in Scotland
- ❑ Not bound by HSE recommendations
- ❑ Can go beyond the report and instruct further investigations
- ❑ Increased focus on individuals being prosecuted
- ❑ Regime change – new Head of HSD; more changes afoot?

Section 3 of the Health and Safety at Work etc. Act 1974



- Duty of employer/self-employed person to **conduct his undertaking** in such a way as to ensure, so far as **reasonably practicable**, that **persons not in his employment** who may be affected thereby are **not** thereby **exposed to risks** to their health and safety
- Conduct of undertaking = providing health and safety consultancy services
- Relevant duty-holder under the Act
- See also Section 37 for individual directors/senior management – consent/connivance/neglect

Sentencing



- Summary Complaint
 - £20,000 maximum fine
 - 12 months imprisonment

- Indictment
 - Unlimited fine
 - 2 years imprisonment

- Health and Safety Sentencing Guidelines 2016 (E+W)
 - Applicable in Scotland as a 'cross check'
 - Increased fines

Enforcement Notices



- Improvement Notice
 - Breach of health and safety law
 - Remedial action to be taken within specified time period

- Prohibition Notice
 - Risk of serious personal injury
 - Work to stop immediately unless deferred for safety reasons

Implications of Enforcement Notices

- Prosecution if failure to comply
- Public Register of Enforcement Notices
 - 5 years
- Financial implications
- Reputational damage

- Appeal to an Employment Tribunal
 - Within 21 days of service of Notice
 - Strict procedure
 - ET can cancel, affirm or modify Enforcement Notice

Fees for Intervention

- Issued by HSE where material breach of health and safety law
- £129 per hour
- To be paid within 30 days
- Generally not covered by insurers

- Disputes Process – OLD
 - Query within 21 days
 - Dispute within 21 days after response to query
 - Dispute Panel – 2 out of 3 were HSE Inspectors
 - Lack of independence

Fees for Intervention (cont'd)

- Disputes Process – NEW
 - 1 September 2017
 - Query within 21 days
 - Dispute within 21 days after response to query
 - Dispute Panel:
 - Lawyer (Chair)
 - Two others with practical experience of H&S management
 - Information given to duty holder
 - 21 days to make further representations

Fatal Accident Inquiries



- ❑ Inquiries into Fatal Accidents and Sudden Deaths (S) Act 2016
- ❑ Mandatory FAI – death in the course of employment
- ❑ Investigated by SFIU – even if H&S aspects
- ❑ Participants to Inquiry
- ❑ Sheriff cannot make findings re guilt/fault, though can be inferred from findings made
- ❑ New power to make recommendations – written response required; publishable
- ❑ Reputational issues

Catastrophic injury claims

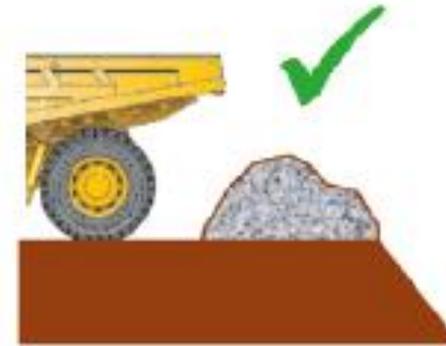
- Spinal injuries
- Brain injuries
- Severe orthopaedic injuries
- Psychiatric injuries
- Amputations
- Fatalities

Topics

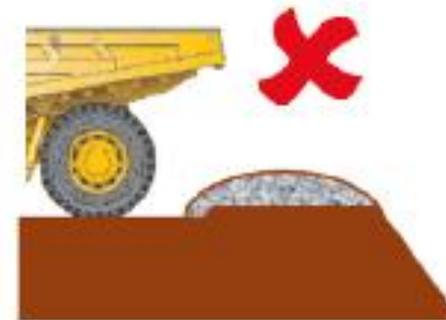
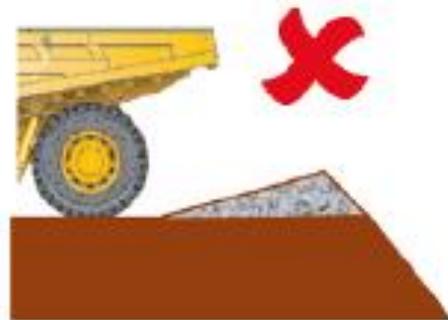


- Case overview
- Recoveries Action
- Third Party Notices
- Fatal claims

Case Overview



SUITABLE EDGE PROTECTION BERM PROFILE



UNSUITABLE EDGE PROTECTION BERM PROFILE

Case Overview



- Fatal Accident
- Lorry driver killed in the course of his employment
- Lorry tipped over the edge of a quarry
- HSE found that the accident occurred due to an ineffective stopping block, which suffered from:
 - Insufficient height
 - A build up of sand and gravel, creating a ramp
- Employers fined £200k for breaching The Quarries Regulations 1999

Civil implications



- Company engaged health and safety advisors for advice in relation to the operation of the quarry
- Health and safety advisors undertook regular inspections of the quarry and provided inspection reports
- Health and safety advisors did not pick up on the issues relating to the defective stopping block
- Company are now suing the health and safety advisors in an attempt to recover the £200k fine

The Recoveries Action

- Company are now suing their health and safety advisors in an attempt to recover from them the £200k fine, on the basis that:
 - An ordinarily competent health and safety advisor exercising ordinary skill and care would have advised that the stopping block was defective;
 - Had the advice been given, the company would have taken the necessary steps to rectify the defect and thus prevent the accident
 - In failing to provide such advice, the health and safety advisors were negligent

The Recoveries Action

- The health and safety advisors are defending the action
- They allege negligence on the part of the company for failing to take measures to address the build up of sand and gravel in front of the stopping block
- They also put forward a separate argument based on '*Ex turpi causa non oritur actio*'

The Recoveries Action



The Recoveries Action

- They say that the company are not entitled to recover as damages a penalty imposed upon it for its own criminal act
- They say the action is 'incompetent'

The Recoveries Action

- Debated the point in the Court of Session
- Could have resulted in the case being thrown out
- However, the Court held in favour of the company and allowed the matter to progress to Proof
- However, may have settled since?
- Economics of running a case v settling to take account of risks

What next?



What next?



- More recoveries actions
- Increased use of Third Party Notices in civil claims
- Make sure you have adequate insurance cover!

TEA
BREAK

Fatal Claims



- Damages (Scotland) Act 2011
- To provide compensation to certain defined classes of people following a fatal accident where liability rests with a person other than the deceased
- Act covers all fatal accidents – motor, EL and PL

Heads of Claim

- Distress, grief and loss of society

- Loss of Support

- Funeral Costs

- Solatium for pain and suffering prior to death

Loss of Society: Who can claim?

- ❑ The wife/husband/civil partner of the deceased
- ❑ Anyone living with the deceased as if they were married or in a civil partnership immediately prior to the death
- ❑ Any parent or person accepted as a parent
- ❑ Any child or person accepted a child (stepchildren, adopted children)
- ❑ Any brother or sister of the deceased or accepted as such
- ❑ Any grandparent or grandchild or accepted as such

Loss of Society

- The Act does not provide any guidance on the level of award
- No tariff based system in Scotland (unlike England)
- The level of award is decided with reference to previous case law if it is being decided by a judge
- Alternatively, the level of award is decided by a jury following judicial guidance on the appropriate level of award (Hamilton v Ferguson Transport)

Loss of Society: level of award

- In general, the factors have been taken into account by the court when considering the level of award to make for this head of claim:
 - Strength of the relationship
 - The duration of the relationship
 - The age and state of health of the deceased
 - The age and state of health of the relative
 - The circumstances surrounding the death
 - The degree to which the relative has been affected



Loss of Society: Jury Awards

Hamilton v Ferguson Transport (Spean Bridge) Ltd (16/2/11)	50 (woman)	£80,000	£120,000 - successfully appealed- too much			
Kelly v Upper Clyde Shipbuilders (30/6/12- post jury appeals)	82	£40,000 (range given to jury £40k - £80k)	£25,000 - adult son & daughter (range give to jury £15k -£35k)		£8,000 (aged 82) (range given £5,000 to £20,000)- NB. older brother accepted Tender of £7,100 during course of trial	£8,000 (age 19 and 18) , £4,000 (age 11) & £1,500 (age 6) (range given to jury £5,000 - £20,000)
Scott v Parkes (22/5/2014)	19			£86,000 (range given £45,000 to £80,000 - NB jury also told of sum sued for of £200,000)		
Henderson & Anor v Burntisland Shipping Co Ltd (26 June 2014)	78					NB JURY DID NOT CONSIDER THEY SATISFIED THE TERMS OF THE ACT AND NO AWARD MADE - Had they met the test, the Judge recommended awards between £9,000 and £15,000
Claire Anderson v Brigg Brae (Jury Trial) June 2015	33	£140,000 (NB special factor - wife had given birth to baby daughter weeks prior to death)	£80,000 (daughter weeks old)	£80,000 (father 56)		
Hamish Stanger & Others v Erland Flaws and Stephen Proctor - 17 June 2016	64	£120,000 to widow aged 72 at trial (Judge's range was £80k-£120k)	£50k each to adult sons aged 46 and 49 at trial (Judge's range was £30k-£70k)			£20k to grandchild aged 15 at trial (close relationship), £15k each to other grandchildren aged 15 and 13 at trial (normal relationship). Judge's range was £12k-£28k



Loss of Society: Judicial Awards

Catherine Foley McGee & Others v RJK Building Services Ltd (18/1/13)	71	£80,000 (January 2013)	2x adult daughters (44 & 37) - £35,000 each Adult son (37 but not as close r'ship) - £27,500			9 year old- £20,000 (close relationship) ; 17 year old- £25,000 (exceptionally close relationship) ; and 13 & 10 year olds- £12,000 (close relationship but fairly straightforward)
Danny Thomas Ryder v The Highland Council (13/6/2013)	36 (female)		17 year old Son £40,000 (had liability been established)			
Currie v Esure Services Limited (2014) CSOH 34	25			£42,000 (each parent)	£22,500 (brother)	
Gallagher v S C Cheadle Hume Ltd	70	£80,000	£35,000 each (3 daughters and one son aged 38, 45, 48 and 50 respectively)			£25,000 (grandson aged 17 with illness - dc'd was main role model) £25,000 (granddaughter aged 27 dc'd was father figure) £12,000 (2 x grandsons aged 12, 15 and 1 x granddaughter in USA aged 26) £2,500 (2 x grandsons aged 2 and 3 months)
ALDRIDGE WARD v AMANDA ELIZABETH CROUCHER (31/7/2014)	60					£18,000 (aged 5) £16,000 (aged 3) £14,000 (child born posthumously who was in utero at the time of the death)
Joseph McCarn & Ors v Secretary of State for Business, Innovation and Skills (5/8/2014)	69		£35,000 each (5 adult children age range obetween 35 and 40)			
Martha Young v Arthur MacVean (26/8/2014)	21			£80,000		

Loss of Society: scenario

- 76 year old killed in accident at work, survived by:
 - 64 year old wife
 - X 3 children in their 40s
 - X 4 siblings in their 60s and 70s
 - X 6 grandchildren (x 3 in their late teens, x 2 under the age of 10, x 1 in utero)

Loss of Support

- A loss of support is the extent to which the dependents relied on the deceased for financial or other support
- A dependent is only able to claim a proportion of the earnings or pension
- Under s 7, the deduction for the deceased's living expenses is presumed to be 25% of net salary
- This can be challenged to avoid a 'manifestly and materially unfair' result

Funeral Costs



- Reasonable Funeral Expenses can be claimed under the Act
- Any relative defined by the Act who has incurred funeral expenses can make a claim for these
- Alternatively, the Estate can make the claim
- Cost of the funeral itself, together with the cost of a headstone are reasonable

Solatum



- The deceased has entitlement to claim 'solatium' for any pain and suffering prior to death
- Such a claim can be made by the Estate of the deceased

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