

# NORTH STAFFS AND SOUTH CHESHIRE DISTRICT (NSSC)

## NSSC District Branch Mock Trial Event

June 28<sup>th</sup> 2017

Council Chamber  
Municipal Buildings  
Earle Street  
Crewe, Cheshire  
CW1 2BJ

The NSSC district branch arranged a mock trial event with a purpose to give IOSH members and non-members the experience of what it would be like to attend a real life court case.

The aim of the mock trial was to see whether a “not guilty” plea could be successful in a health and safety case.

It is a fictional case based on the experience of prosecuting scaffolding cases and the charges to be brought against the scaffolding company were S3(1) of the Health and Safety at Work etc. Act 1974 (HSAWA) and Regulation 12(4) of the Work at Height Regulations 2005 (WAH).

The maximum fine available in a Magistrate’s court is £20,000 for the S3(1) HASAWA charge and £20,000 for the Regulation 12(4) charge.

The trial was acted out by NSSC Branch Committee members, a real Magistrate and a Defence Solicitor provided by the law firm Pinsent Masons. The roles were as follows:

- Magistrate – Mr Rod Hall
- *Defence Solicitor/Lawyer* – Mr Alex Hudson (Pinsent Masons LLP)
- *The Accused (Abraham Lincoln)* – Roy Jackson
- *Justices’ Clerk* – Liz Jackson
- *Prosecuting Inspector* – Neil Martin
- *HSE Civil Engineer / Expert Witness (Evelyn Armstrong)* – Douglas Leech
- *Scaffolding Foreman/Expert Witness (James Mysorsky)* - Ralph Stubbs
- Site Manager (Aaron Sheikh) – James Dean

The details and schedule were compiled by Neil Martin and can be found documented at the back of these event notes.

### Morning Session Feedback

Rulings & Sentences – The Magistrate, Mr Rod Hall ruled that based on the facts presented to him by the Defence and Prosecution, he found HMX guilty under S3(1) (HSAWA), had failed considerably and the court must take those failures into account.

With regards to the 12(4) WAH, the Magistrate ruled that the Duty Holder was responsible and therefore, HMX were to be found “not guilty” under WAH Regulations. DBB (Principal Contractor) were not charged and despite them failing to discharge their duties the Magistrate explained that the court only deals with the facts presented before it and hence any conviction would only apply to HMX in this instance.

HMX were fined £10,000 with costs of £7,500. The fines given today were based on the applicability of the new 2016 sentencing guidelines.

The Magistrate explained that HMX had no previous convictions and the culpability of the Defendant was low. If there had been fatalities involved then he would have committed the case to Crown Court as it would be considered a more serious crime so would need to be tried at a higher court.

# NORTH STAFFS AND SOUTH CHESHIRE DISTRICT (NSSC)

The sentencing guidelines are there for the courts to decide how much companies and individuals should be fined for health and safety offences and this is calculated by means of a Risk Analysis (High, Medium or Low) and a set of criteria based on:

- The harm/severity of injury foreseen – Yes there was a serious risk of death and he ruled that this fell under the Level A Category of harm (High). The size of the scaffolding was huge and there could have been children involved with multiple fatalities.
- The likelihood involved - The likelihood fell into the Low Category of 3. Although the seriousness of the collapse is not disputed, there was a low likelihood of it happening, considering factors like the inclement weather conditions and the time of day it occurred hence these were factored in.
- The company's financial income/turnover fell under the Small Category which sets the overall bracket of fines/costs at a minimum of £3,000 but with a range of between £700 and £14,000
- The scale of a High / Medium / Low allows fluctuation and a minimum starting point of £3,000.
- Other mitigating factors – In this case, no prior convictions, good overall health and safety record etc.

The audience raised several questions and an explanation was given on how a HSE Inspector will gather as much information as possible to decide what is the strongest evidence available in order to get a conviction and on this particular case the strongest was the HSAWA. The Act proved the Master and Servant relationship. The HSE will only aim at the strongest Legislation in order to secure a conviction and will not take a case on unless they know it will win.

## Afternoon Session Feedback

Rulings & Sentencing – This was the same as the morning session and the Magistrate fined the company £16,000 and £10,150 costs.

Based on the current guidelines, the Magistrate found that HMX had failed in their duty, failed to follow standards and guidelines, in particular TG20:13 and as a scaffolding company they should have complied. They could have sheeted the 3<sup>rd</sup> lift and added additional through ties to the scaffolding. Overall, the project required more precautions as the risk was higher, knowing it was near a school and erected on a street where people resided.

In relation to Regulation 12(4) the Magistrate did not find HMX guilty as it was DBB's responsibility to ensure the inspection of the scaffold took place even though they weren't competent to carry out inspections they paid a weekly fee to HMX and had become complacent. Regardless of subcontracting the work out, DBB failed in their role as Principal Contractor to check that HMX had carried out the necessary weekly inspection.

The Defence Solicitor Alex Hudson explained that, if the HSE had put forward a prosecution using Regulation 12(5) opposed to 12(4) the Magistrate ruling would probably have been a guilty one.

Overall, this trial showed that a "not guilty" plea can be successful in the case of the HSAWA.

The NSSC District Branch Committee Members would like to thank Mr Rod Hall and Mr Alex Hudson (Pinsent Masons LLP) who gave up their time so generously. It was exciting, interesting and an informative insight as to how breaches involving health and safety offences are dealt with by the HSE, Magistrate Court, and Defence lawyers.

Thank you to all those involved and to the staff at the Municipal Buildings for making this event happen.

# NORTH STAFFS AND SOUTH CHESHIRE DISTRICT (NSSC)



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Event Minutes compiled and prepared by: Liz Jackson (Committee Member / Branch Secretary)

End of NSSC District Mock Trial Event 28<sup>th</sup> June 2017

# NORTH STAFFS AND SOUTH CHESHIRE DISTRICT (NSSC)

## Incident summary

There was a scaffold collapse in East Street, Anytown on 17<sup>th</sup> January, 2015 which resulted in a 120m length of scaffolding falling across the street and landing on parked cars on the other side of the street. The collapse happened at 18.20 pm during a winter storm when there were high winds of up to 90 miles per hour. Fortunately, nobody was in the street at the time and there were no injuries, although there was extensive damage to parked cars and street furniture.

## Background

Scorpio Sports Enterprises Ltd (SSE) had contracted Delightful Diamond Builders Ltd (DDB) to build a brand new gymnasium and sports complex on East Street. DDB had subcontracted erection, hire and inspection of the scaffolding for the whole site to HMX Scaffolding Services Ltd (HMX). HMX had erected the first lift of the scaffolding along the length of East Street in October 2014. They returned to erect the second lift of the scaffolding in November 2014 and the third lift of scaffolding on 3<sup>rd</sup> January 2015. The weekly inspection reports of the scaffolding were carried out by James Mysorsky, the supervisor from HMX, who was in charge of the job.

The gym construction is subject to the CDM Regulations 2007. Consequently, SSE have appointed a planning co-ordinator, Construction Planning Supervision Ltd (CPS) who have prepared the construction safety plan. In this plan, CPS have highlighted that East Street ends in a cul-de-sac which has the main entrance of St Clements Junior School, hence it is foreseeable that all of the school's pupils will be walking along East Street every weekday morning and afternoon. They also required all scaffolding to comply with standard industry guidance.

## Investigation

The investigation revealed that the scaffolding had not been tied onto the building. The scaffold was three lifts high (approximately 7m). The scaffold had green debris netting fitted to the outside of the scaffold facing the street, which was approximately 840 m<sup>2</sup> in area. This debris netting acted like a large sail in the high winds generating enough horizontal force to pull the scaffold over. The National Access & Scaffolding Confederation in their guidance TG20:13 (published 2013) recommend that scaffolds are always tied to the building by using "through ties" through windows or by using ring ties screwed into the brick work. The number of ties depends on both the height and length of the scaffold. They also depend on the height of the building as there needs to be sufficient walling in place to secure the scaffold. The building wall was constructed of concrete breeze block and was 5m high at the time of the scaffold collapse. It had unfinished windows in place every four metres at the ground and first floor levels, hence there were sixty window apertures available for "through ties". TG20:13 recommends that there is at least one "through tie" for every 16 m<sup>2</sup> of wall. The area of wall was 600 m<sup>2</sup>, hence the recommended number of ties would be roughly thirty-eight ties. **None were used.**

HMX used rakers to support the scaffolding against the hazard of it falling over. Rakers are scaffolding poles which project at 45° from the scaffold down to the street below and thus prop up the scaffold, so it cannot fall over. TG20:13 states that rakers are only acceptable up to the second lift of scaffolding. Any higher lifts require physical tying. Rakers were in place at appropriate intervals according to TG20:13 in this incident.

Mr Mysorsky states that, in his opinion, the blockwork was too "green" to use for through ties, as the cement pointing had not hardened sufficiently to support the scaffold and take any horizontal forces.

# NORTH STAFFS AND SOUTH CHESHIRE DISTRICT (NSSC)

He holds a basic scaffolders card and has over 10 years' experience. He also disputes the need to provide any through ties for the first and second lifts, as rakers had been provided. He argues that if any through ties were needed, it would be for the third lift only, as it is only at that point that the scaffold base to height ratio becomes unstable enough to require tying to a building and the rakers are insufficient. Neither Mr Mysorsky nor any other HMX representative had carried out any weekly inspections between 4<sup>th</sup> January and 17<sup>th</sup> January, despite HMX being contracted by DDB to do this. HMX had carried out all weekly inspections up to 3<sup>rd</sup> January. If the weekly inspections had been carried out in January, then it may have been realised that the scaffold needed tying in to the building.

## Breaches of Legislation

### **Section 3 (1) Health and Safety at Work Act 1974,**

This section places a duty on undertakings to take all reasonably practicable measures to reduce the risk of harm from their activities to non-employees to as low as reasonably practicable. The failure to ensure the scaffold was tied securely to the building was a breach of this duty by HMX.

### **Regulation 12 (4) Work at Height Regulations 2005**

This regulation places a duty on the duty holder to ensure that any scaffold used as a working platform for construction work is inspected weekly. The failure to carry out weekly inspections between the 3<sup>rd</sup> and 17<sup>th</sup> of January was a breach of this duty by HMX.

## Potential Defences

### **Section 3 (1) Health and Safety at Work Act 1974**

HMX may argue the following defences to this charge:

- 1) It was not foreseeable that the debris netting, which is a light plastic fishing net type of material with 1 cm<sup>2</sup> square holes in it, would be caught by the wind to the extent of pulling the scaffold over into the street. The rakers fitted to the scaffold would prevent this from happening in all foreseeable circumstances.
- 2) It was not foreseeable that a storm would generate a sufficiently strong wind to cause the scaffold to fall over. The wind exceeded the design standards of the scaffold, which was constructed in compliance with standard industry practice with the use of rakers to prop it up. The application of this standard industry practice was all that was required to meet the legal requirement to reduce the risk to as low as reasonably practicable.
- 3) It was not physically practicable to tie the scaffold to the building as the cement blockwork was too green to take the force of the ties and could not provide sufficient resistance to the scaffold being blown over. It would actually have created the danger of a collapsing scaffold pulling the cement blocks from the wall as the scaffold fell over.

# NORTH STAFFS AND SOUTH CHESHIRE DISTRICT (NSSC)

## **Regulation 12 (4) Work at Height Regulations 2005**

HMX can argue the following defence to this charge:

- 1) Although the civil contractual duty lay with HMX to carry out the inspections, they do not have the criminal liability as they were not the employer in charge of the workplace when the scaffold was in use. The employer was DDB as they were employing cement block layers on the scaffold, hence DDB was the duty holder under the Work at Height Regulations to carry out the inspections. DDB continued building work on the scaffold when the inspections were not done weekly and should have known the inspections were not done; hence DDB are in criminal breach of their duties and should have been prosecuted, not HMX.

# NORTH STAFFS AND SOUTH CHESHIRE DISTRICT (NSSC)

## SCHEDULE OF PROCEEDINGS ON THE DAY OF THE MOCK TRIAL

### 1. CHARGES READ TO DEFEENDANT

The Justices' Clerk reads out the charges on the charge sheets. This gives the alleged legal breaches of the law, the details of where and when these alleged breaches occurred, together with the penalties prescribed by the Health and Safety at Work Act 1974.

### 2. DEFENDANT'S PLEA TO CHARGES

The Justices' Clerk then asks the defendant on how he pleads to the charges. The accused pleads either guilty or not guilty to the charges. In this case, it will be a "not guilty" plea to both charges.

### 3. VENUE FOR CASE

The first decision by the Magistrate is whether the case will be tried in the Magistrates' or Crown Court. The Justices' Clerk will ask the defence whether they are content to have the case heard by the Magistrate. The defence will always try to have it heard in the Magistrates Court as the penalties are lower in this court. In this case, the prosecution will not object to the case being decided by Magistrate, as the Magistrate has sufficient penalties available. The Magistrate will decide that they can hear the case immediately, whilst explaining that normally there would be an adjournment of six weeks to allow both sides to prepare for trial.

### 4. PROSECUTION OUTLINE OF CASE

The prosecutor gives a speech that outlines what happened and why the defendant has breached the law. The basis of this speech is given in the **prosecution report**. This is gives the prosecution's case and it also gives the potential defences which may bring about a not guilty verdict. The standard of proof in criminal cases is beyond reasonable doubt, which the defence can use to confuse and destroy the prosecution case by introducing doubt.

### 5. WITNESS EVIDENCE FOR PROSECUTION (not guilty plea)

The prosecution calls the prosecution witnesses to give their evidence. In this case, the Justice's Clerk will read out the statements of witnesses whose evidence is not contested by either side. If a witness's evidence is contested, then they will need to read out their statements and answer questions from the defence or the prosecution. The contested witness evidence will be given under oath, which the Justices' Clerk will administer the oath to the witness.

#### **Prosecution Witnesses:**

- a. Justin McRandall, scaffolder for HMX (not contested, hence read out by the Justices' clerk).
- b. Quentin McRandall, scaffolder for HMX (not contested, hence read out by the Justices' clerk).
- c. Neville May - O'Doloran, HM Inspector of Health and Safety (not contested, hence read out by the Justices' clerk).
- d. Davey McArdle, Planning supervisor for CPS (not contested, hence read out by the Justices' clerk)
- e. Janie Humptonthwaite, Resident in East Street (not contested, hence read out by the Justices' clerk)
- f. Manson Devizes, Resident in East Street (not contested, hence read out by the Justices' clerk)
- g. Evelyn Armstrong, HM Specialist Inspector of Construction Health and Safety (Contested by the defence, hence Doug Leech should play this role)

Each contested prosecution witness will undergo:

- a. Administration of oath
- b. Examination by prosecution
- c. Cross-Examination by defence (if defence decides to do this)
- d. Re-examination by prosecution (if prosecution decides to do this)

# NORTH STAFFS AND SOUTH CHESHIRE DISTRICT (NSSC)

## 6. NO CASE TO ANSWER ARGUMENT BY THE DEFENCE

This is an argument where the defence argue that the prosecution have failed to give sufficient prosecution evidence to prove their case. The defence make this argument where a vital piece of evidence is missing or the prosecution have made a legal mistake etc. They will do this for the S 3(1) HASAWA charge for this trial. The magistrate has to make a ruling on whether the case should be dismissed for lack of evidence.

## 7. WITNESS EVIDENCE FOR THE DEFENCE

The defence calls the defence witnesses to give their evidence. In this case, both defence witnesses' evidence is contested, so they will need to read out their statements and answer questions from the defence or the prosecution. The contested witness evidence will be given under oath, which the Justices' Clerk will administer to the witness.

### Defence Witnesses:

- a. James Mysorsky, supervisor for HMX (Contested by the prosecution, hence Ralph Stubbs should play this role).
- b. Aaron Sheikh, Site Manager for DDB (Contested by the defence, hence James Dean should play this role: he will admit under defence examination that DDB labourers were working on the uninspected scaffold. DDB was not aware that the scaffold was uninspected).

Each contested defence witness will undergo:

- a. Administration of oath
- b. Examination by defence
- c. Cross-Examination by prosecution
- d. Re-examination by defence

## 8. PROSECUTION CLOSING SPEECH

A summation of the prosecution's case with rebuttal of the defence case and supporting arguments for the prosecution.

## 9. DEFENCE CLOSING SPEECH

A summation of the defence's case with rebuttal of the prosecution case and supporting arguments for the defence.

## 10. VERDICT AND SENTENCE (if found guilty)

Magistrate gives his verdict and passes sentence, if found guilty.