

IOSH PSS Sector Legal Update

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Overview

- **The Last Year**
 - Brexit
 - Fee For Intervention
 - Early Guilty Plea Guidelines
 - Legal Privilege
- **What's Ahead?**
 - ISO 45001
 - Gross Negligence Manslaughter Guidelines
- **Case law update**



Legislation Update

The Street Works (Qualifications of Operatives and Supervisors) (England) Regulations 2016

- In force from 6 April 2017.
- Sets out the qualifications needed by operatives and supervisors carrying out work under the NRSWA 1991.
- An operative/supervisor is considered qualified for a particular type of work if they have:
 - a certificate of competence from an approved body; or
 - a certificate of recognition from a competent authority.

Legislation Update

The Street Works (Qualifications of Operatives and Supervisors) (England) Regulations 2016

- Must also be qualified in signing, lighting and guarding as well as locating and avoiding underground apparatus.
- Certificates must be registered subject to two-month grace period.
- Registration expires every 5 years (this will affect whether or not a supervisor/operative is considered qualified) but can be reregistered.

Legislation Update

The Health and Safety (Miscellaneous Amendments) Regulations 2017

- Effect from 6 April 2017.
- Introduces new defence to charge of possessing pesticides harmful to wildlife.
- Introduces exception to prohibition on entering or remaining in the safety zone established around an offshore installations (**NI only**).
- Updates to RIDDOR reporting for dangerous occurrences.

Legislation Update

The Health and Safety (Miscellaneous Amendments) Regulations 2017

- Updates to definitions and exceptions for the COMAH 2015.
- Clarifies that Dangerous Goods in the Harbour Areas Regulations 2016 apply to every harbour in GB and harbour areas within territorial seas adjacent to GB.



Legislation Update

The Fixed Penalty (Amendment) Order 2017

- Increases the fixed penalty fine for using a handheld mobile phone whilst driving from to £200 and 6 penalty points (previously £100).
- Applies to all offences committed after 1 March 2017.



Brexit – one year on!



Brexit – one year on!

- 23 June 2016 – 52% of UK voted to leave the EU.
- 29 March 2017 – Theresa May triggered Article 50.
- Uncertainty but businesses on notice that within 2 years UK will leave the EU – no changes in the short term.
- UK 'gold standard' founded in the HSWA 1974.
- Great Repeal Bill?
- The UK Government had committed anyway to reducing regulation via its 'Red Tape Challenge'.

Reduction in Sentence for a Guilty plea

- New Definitive Guideline applies to all cases where the first hearing was on or after 1 June 2017.
- Purpose – to encourage those who are going to plead guilty to do so at the earliest opportunity **not** to pressure defendants to plead guilty.
- Maximum reduction of 33% where a guilty plea is indicated **at the first stage of proceedings.**
- Afterwards, sliding scale from 25% to 10% (or even to 0% where a Guilty plea is entered during a trial).

Reduction in Sentence for a Guilty plea

- Exceptions?

“where the court is satisfied that there were particular circumstances which significantly reduced the defendant’s ability to understand what was alleged or otherwise made it unreasonable to expect the defendant to indicate a guilty plea sooner than was done, a reduction of one-third should still be made.”

- What does this mean in practice?

Fees For Intervention (FFI)

- New regulations came into force on 6 April 2016 - FFI now £129 per hour!
- HSE's Annual Report and Accounts 2015/16 – income from FF1 £14.7m but cost of recovery £17.5m!
- OCS Group UK Ltd - Judicial Review re dispute process. Current process – suspended – lack of independence, very difficult to challenge.
- New process - in force from 1 September 2017!
- Independent lawyer on the panel- yet to see the effect!

Legal Privilege

Litigation privilege

- High Courts decision in [SFO v ENRC \(2017\)](#)
- Dominant purpose of documents/communications produced during an investigation.
- Anticipated criminal investigation is not the same as anticipated criminal proceedings.

Legal advice privilege

- Important to agree who will be the “client”

Key message – be careful with accident investigations / communications

LOOKING AHEAD



ISO 45001 – watch this space!

- Aims to provide a framework to improve employee safety, reduce workplace risks and create better, safer working conditions all over the world.
- Designed for use by any organisation and to be integrated into existing H&S programmes.
- Further draft circulated mid April 2017. Can feedback via IOSH to the consultation.
- Committee responsible for drawing it up meeting again in Nov 2017 with a view to publication in Feb 2018.

Manslaughter by Gross Negligence

- New Sentencing Guidelines
- In consultation phase until 10 October!
- Estimate by the HSLA that individual sentences increase from average of 5 years to 8 years
- **Not** only applicable to H&S cases
- Aggravating features in the new guideline:
 - Length of time breach has persisted
 - Knowledge of breach
 - Likely to be present in many H&S cases if prosecuted
 - Potentially disproportionately higher fines impact

Manslaughter by Gross Negligence

Culpability			
A	B	C	D
Starting point 12 years' custody	Starting point 8 years' custody	Starting point 4 years' custody	Starting point 2 years' custody
Category range 10 – 18 years' custody	Category range 6 – 12 years' custody	Category range 3 – 7 years' custody	Category range 1 – 4 years' custody

Aggravating Features

- Previous convictions
- Others put at risk of harm
- Actions taken after the event
- Blame wrongly placed on other

Mitigating Features

- Good character
- Remorse

Sentencing



Impact of sentencing guidelines

- Huge increase in fines seen in the last year
- Fines over £1m now the norm for large companies
- Fines Total: **Feb 2015 - Feb 2016 = £30.3m**
- Fines total: **Feb 2016 - Feb 2017 = £54m**

Largest Fines

Headline	Company	Fine	Details
Joint largest fine	Tesco Stores Ltd	£5m for a health and safety offence and £3m for an environmental offence 16 June 2017	The company was fined following a fuel leak from one of its petrol stations in east Lancashire, which polluted waterways and sewers.
Joint largest fine	Merlin Attractions Operations Limited	£5m 27 September 2016	The company was fined after a number of people were severely injured when two rollercoaster carriages collided at Alton Towers.
Third largest fine	Network Rail Limited	£4m 21 September 2016	The company was fined following the death of a former film actress who was killed when she was hit by a train at Gypsy Lane level crossing in Needham Market, Suffolk.

Tesco Stores Limited

- Over a 29 hour period 23,500 litres of petrol leaked from a filling tank at the company's petrol station into the sewer system and watercourse.
- Local residents required medical attention and leak had serious impact on the nearby environment.
- Joint prosecution by Environment Agency and Lancashire County Council
- **Turnover:** £39.8bn

Tesco Stores Limited

- **Sentence:** £8m fine (£5m for the breach of DSEAR 2002 and £3m for environmental offence) plus £57,434.30 costs.
- **Commentary:**
 - Suggests high culpability, harm category 1.
 - Significant fine for non-fatality case.
 - The number of people exposed to a risk of harm is also likely to have been significant feature in this case.
 - Very Large Organisation?

Network Rail Limited

- Brenda McFarland was killed when she was hit by a train travelling nearly 100mph at the Gipsy Lane crossing in Needham Market, Suffolk.
- Pedestrians had only a five-second visual warning of a Norwich-bound train approaching.
- The crossing had been judged high-risk and a temporary speed limit suggested but nothing was done.
- **Turnover:** £6bn

Network Rail Limited

- **Sentencing remarks**

- Decision to impose speed limit should have been made there and then as one was imposed immediately after the death.
- Fine would have been £6m but for the company pleading guilty at the first opportunity = **£4m**

- **Commentary**

- *“NR’s safety management fell below the standards required putting members of the public in unnecessary danger.”*
- Network Rail has closed over 1,000 crossings since 2009/10.



Sentencing Guidelines – Appeals

London Borough of Havering Council

- A road worker suffered a serious injury while cutting trees when the saw's dart rotary blade became stuck. As he pulled it free the blade ran across the top of his knee causing ligament and cartilage damage.
- Guilty plea to breaching reg. 4(2) and reg. 4(3) of the Provision and Use of Work Equipment Regulations 1998
- Sentence: £500,000 fine plus costs £8,240

Sentencing Guidelines – Appeals

London Borough of Havering Council

- Guideline: “where the fine falls on public or charitable bodies, it should normally be substantially reduced if the offending organisation is able to demonstrate that the proposed fine would have a significant impact on the provision of its services.”
- Council argued “substantial” reduction = at least 50%.
- Court of Appeal rejected that argument and upheld the fine.

Sentencing Guidelines – Appeals

Norfolk and Suffolk NHS Foundation

- Patient admitted to mental health ward. Observations per hour reduced from six to one without risk assessment.
- Less than one month after being admitted, the patient was found drowned in a bath.
- Guilty plea to breach of Section 3 HSWA 1974.
- Starting point £1.1m reduced to £550,000 because public organisation and full credit for guilty plea = **£366,000 fine.**

Sentencing Guidelines – Appeals

Norfolk and Suffolk NHS Foundation

- Appealed on basis that the Judge had:
 - Failed to give credit for mitigating factors;
 - Failed to specifically address the defendant’s ability to pay the fine.
- **Decision:**
 - Judge could have been clearer but fine was not ‘*manifestly excessive*’ and had been ‘*extremely reasonable*’ in the circumstances.



Latest Corporate Manslaughter cases

Martinisation (London) Limited

- Two workers died after fall from height in 2014.
- Lifting operation performed without supervision, training, method statement or risk assessment.
- Advice from lifting company ignored.
- **Turnover:** £9.7m ('small' organisation)
- **Pre-tax profit:** £2,400

Latest Corporate Manslaughter cases

Martinisation (London) Limited

- 19 May 2017: found guilty following a trial of two counts of Corporate Manslaughter and H&S offences. Director Martin Gutaj also found guilty of H&S offences.
- Sentence: £1.2m fine (CM) plus £650,000 (H&S) and costs £71,923.
- Director also sentenced to 14 months' imprisonment and disqualified from being a director.
- Company already in liquidation.



Latest Corporate Manslaughter cases

JTF Wholesale Limited

- Three members of the public died from Legionella in 2012 allegedly contracted from a hot tub at the company's warehouse and 18 others required hospital treatment.
- Charged with two counts of CM as there was insufficient evidence regarding one of the deaths.
- **Turnover:** £73m ('large' organisation).
- **Pre-tax profit:** £856,000.

Latest Corporate Manslaughter cases

JTF Wholesale Limited

- Trial was expected to begin on 19 June 2017.
- Company instead pleaded guilty to one H&S offence.
- Fined £1m plus prosecution costs of £85,000

	Starting point	Category range
Very high culpability		
Harm category 1	£4,000,000	£2,600,000 – £10,000,000
Harm category 2	£2,000,000	£1,000,000 – £5,250,000
Harm category 3	£1,000,000	£500,000 – £2,700,000
Harm category 4	£500,000	£240,000 – £1,300,000
High culpability		
Harm category 1	£2,400,000	£1,500,000 – £6,000,000

Questions?



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