

Legal Update

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HSE Statistics – 2015 /2016

- 144 fatal accidents - up by 7.
- 696 cases prosecuted by HSE and Procurator Fiscal with 95% success rate. Up 6% on 2014 /15. There is no reliable data for Local Authority Prosecutions
- 11,403 enforcement notices issued by HSE and EHO's down on previous year by 8%. Of that, Local Authority notices were down 12%
- HSE total fines amounted to £38.3 million up from £18.1 million in 2014/15 of which six fines were over £1 million
- See www.hse.gov.uk/statistics

Occupational Health

- Increasing emphasis on occupational health within regulators
- Health and Wellbeing high on the agenda
- HSE also take the view that employers have a misguided perception that health is more difficult to manage than safety

Personal & Corporate Liability

- As at 14th October 2016, (excluding driving offences and asbestos waste dumping), there have been 201 individuals who, since 1975 have received an immediate or suspended prison sentence for Health & Safety at Work offences
- Of those, 190 have occurred since May 2008, (15 within 6 months to 14th October 2016)
- Additional 57 for manslaughter, (this usually results in immediate imprisonment)

Corporate Criminal Liability Reform

- Consultation closes 24th March 2017
- Reason – “Identification doctrine” is ‘insurmountable obstacle to prosecution’
- Options –
 1. Amend doctrine to broaden those who could be directing mind
 2. Strict liability for actions of owners, employees agents etc
 3. Direct liability – for offences committed in their name
 4. Failure to prevent offences
 5. Sector by Sector reform
- Intention to make sure corporate liability is not an alternative to individual liability

Health and Wellbeing at Work

- The Regulatory Authorities are placing an increasing emphasis on occupational health issues
- During 2014 /15, HSE investigated 466 RIDDOR ill health incidents up from 258 in the previous year

Health & Wellbeing Concerns

- Musculoskeletal disorders - Most common cause of occupational ill health – 41%
- DSE compliance is necessary.
- Home / Agile working
- Causes 34% of working days lost
- Exposure to asbestos, carcinogens, fumes, dusts etc.
- Lifting and Shifting – Must train your people

Stress

- HSE's Management Standards for Stress website provides employers with a comprehensive risk assessment approach to identifying, exploring and tackling work related stress.
- Accounts for 37% of all work related ill health cases and 45% of all working days lost due to ill health

Stress

- Risk Assessment
- Engage Staff
- Policy and Procedures
- Can managers identify stress?
- Counselling Services

RECENT FINES UNDER THE NEW GUIDELINES

R-v- Watling Tyre Services – 1st June 2016

- Fatal accident, young employee repairing puncture to loading when tyre exploded
- Prosecution alleged he was not trained or competent to undertake the work. He was working alone with inadequate work equipment.
- Had pleaded guilty on 29th January but sentencing adjourned
- Turnover £20m. Fine imposed of £1m and ordered to pay £99.5k costs
- Appeal heard 25th October, principal issue was 10 year delay in bringing case to court. C of A dismissed appeal saying new guidelines applied and no provision to give larger reduction for delay

R -v- Merlin Entertainments – Alton Towers

- Accident on Smiler ride. Serious Injuries but not fatal
- Judge found Category one – high culpability and high risk of harm
- Moved fine up range because of four aggravating features – previous, lack of access, design, risk to public
- Did not go outside range despite £250 m turnover
- Defence failed in attempt to get economic damage accepted as a mitigating feature
- Fined £5m after judge gave one third reduction for early guilty plea and full co-operation

The Wilko Fines

- January 2016 just before new guidelines – Fatal accident
- Fined £200k
- January 2017 – Serious Injury victim left paraplegic
- Fined £2.2million

R-v- University of Northumbria – Jan 17

- Practical Lesson on supplements in Applied Sports Course
- Volunteer students ingested caffeine
- Mathematical error led to potentially lethal doses being ingested
- Two students in intensive care had to receive dialysis
- No risk assessment
- Improvement notice followed by prosecution
- Fine £400k plus £26k costs

R-v- Warburtons Bakery Jan 17

- Routine everyday cleaning task - mixer
- Worker fell from height
- Compressed fracture of spine - off work a year
- Inadequate training / fall prevention
- Fined £2m plus £19.5k costs

R –v- Southwark Council - Feb 17

- Fire at Larknall House which claimed six lives
- Council prosecuted under RRO
- Failure to make adequate fire risk assessment, allowing breaches of fire-resistant structures between each maisonette staircase and the common internal doors, a lack of compartmentation in the false ceiling structures of common corridors and a failure to provide fitted intumescent strips (which swell when heated) and smoke seals on fire doors
- Guidelines used even though not specific re fire
- Council fined £270K plus £300k costs

R-v- T Scudder Ltd & Pearson – 6th March 17

- One man died and second seriously injured after falling six storeys down lift shaft
- Scudder was Principal Contractor and Pearson director of Intervale Ltd responsible for planning the decommissioning of lift shafts on site
- T Scudder fined £600k + £27 costs under sections 2 & 3 of HSWA
- Pearson 120 hours community service plus £3k costs under section 3(2)

All can be liable!

R v Lakin-Hall – IN TRIAL

Fatal accident at Hanover Square, London. Passer by fatally injured by falling window frame

7 defendants: 3 corporate, 4 human. Manslaughter charges and HSAWA charges

ISSUES

CDM Project: Refurbishment of art gallery

Defendants include:

Companies: Principal Contractor and 2 x sub-contractors.

Individuals: Site Manager, Contracts Manager (both employed by PC),
Project Manager (1st Contractor), Director (2nd contractor)

Contractor management is pivotal to case. Issues include:

Should the work have been sub contracted in the first place?

Who was responsible for drafting RAMS?

Who was responsible for reviewing RAMS?

Site control and supervision

R –v- Deaney - March 2017

- Nikki Deaney, a former care worker has been sentenced after the death of a service user Majid Akhtar.
- Nottingham Crown Court heard how a group of service users from the day centre where she worked, including Majid, had been on a trip to a reservoir.
- Ms Deaney, who at the time was supposed to be providing one to one supervision, lost sight of Majid, who drowned when he suffered an epileptic seizure around the time that he fell into the reservoir.
- A joint investigation by the HSE and Nottinghamshire Police found that Ms Deaney spent a significant amount of time on her mobile phone instead of giving her full attention to Majid while walking with him around the reservoir.
- She pleaded guilty to breaching section 7 of the Health and Safety at Work Act 1974 and has been sentenced to four months imprisonment.

*Responsibility is a unique concept ...
You may share it with others, but your
portion is not diminished. You may
delegate it, but it is still with you ... If
responsibility is rightfully yours, no
evasion, or ignorance or passing the
blame can shift the burden to someone
else”*

Admiral Hyman Rickover of the U.S.Navy

Corporate Manslaughter

- There have now been twenty convictions and three acquittals
- Another company has pleaded guilty but awaiting sentence
- More companies on trial in early 2017
- The most recent was Bilston Skips on 16th August 2016 as it had small firm exemption at Companies House no turnover figure available. Fined £600k plus costs. Site Manager guilty of gross negligence manslaughter given 2 year suspended sentence and ordered to pay £10k costs

Are recent fines any real guide?

- According to the Lord Chief Justice – No
- In the appeal by Watling Tyre Service and a linked appeal by a Mr Kenneth Thelwall , a company director, against a 12 month prison sentence (which was dismissed) the LCJ said that it was no longer “permissible” to refer the court to previous sentencing case law.
- Each case will have to be judged on its merits against the new guidelines
- Senior director to make statement to confirm turnover & details of mitigation

Successful reductions

- We have recently argued that where the HSE used a very comprehensive report by the company as the basis of the prosecution the company were entitled to additional credit beyond that contained in the normal list of mitigating factors. That argument was successful
- A judge has also allowed a deduction in full of the amount paid by a company under Fees for Intervention (£70k) when setting a fine for a fire at the premises of Roxel. The judge said he had followed the guidelines and “stepped back and looked at the penalty in the context of the economic realities of the company, including profit margin” and “the costs already occasioned to the business as a result of this incident”
- He reduced the planned fine by £70k plus a further £140k for “internal staff costs and other associated costs”. He refused to reduce it further by the legal costs they had incurred of £65k
- So if your prosecuted call for an accountant!

Reduction in Sentence for early guilty pleas

- Government has consulted on changes to the existing guidelines
- Proposals will make it more difficult to get a full reduction unless guilty plea at very first hearing
- That is often difficult because of slow service of evidence on defence including expert evidence
- Government seem to think that does not matter much because people should know if they are guilty, even if they do not know all the details of what they are alleged to have done.
- No allowance for reverse burden of proof
- Steeply reducing scale dependant on timing of plea between 33% and nil
- Effect could be penalties are higher
- Consultation finished 5th May

What's New?

Dangerous Goods in Harbour Areas Regulations 2016

- Came into force on 1st October 2016
- A new ACoP has been published (CoP18) and new guidance (HS(R)27) previously there was just guidance.
- Relevant to all those involved in the transport, handling, or storage of dangerous goods or substances in harbours and ports including loading and unloading
- Have removed a lot of duplicated legislation
- Introduce provisions aligning the definition of 'dangerous substances' with international standards for transport by sea
- Have allowed ports to accept less than 24 hours notice of arrival of dangerous goods

Control of Electromagnetic Fields Regulations 2016

- Came into force 1st July 2016
- Explicitly requires duty holders to assess levels of EMF's to which their workers are exposed against a specific set of levels
- It covers
 - Limitation on exposures
 - Exposure action plans
 - Risk Assessments
 - Obligation to reduce or eliminate exposure

See <http://www.hse.gov.uk/pubns/books/hsg281.htm>

Guidance contains likely sources of EMF

What's Coming ?

Brexit

- Government has announced a 'Great Reform Bill' with which intends to revoke the European Communities Act when we leave
- However, it has also announced that all current UK law in force as a result of EU directives will remain as they will all be incorporated into UK law and then reviewed and possibly revoked as necessary
- If we remain in the single market it is likely we will have to retain EU-derived health and safety law
- As our H&S laws were used as a model for a lot of safety related directives, with the HSE playing a considerable role in their development, content and implementation. It is doubtful much will change
- In the meantime for at least the next two / three years we will still be subject to any new directives

New International Standards

- New Standard 45001 to supersede 1SO 18001
- Likely to be introduced now in late 2017
- *Publication of the long-awaited new international standard for occupational health and safety – ISO 45001 – is likely to be delayed after participating members of the ISO committee ‘disapproved’ its first draft (1.O.S.H. 16th May 2016)*
- Aim to increase Executive Leadership Health and Safety commitment, improve worker involvement, and insert Health and Safety practices into the business processes and procedures of an organization, in a holistic manner
- See more at:
<https://community.intellex.com/library/explore/ondemand-webinars/iso-45001-ohsms-what-it-will-mean-you-and-your-business#sthash.0bUSF9ag.dpuf>

Nanoparticles

- Continuing focus Europe wide of work with nanoparticles, a European Commission assessment of need to review occupational health and safety legislation is underway. (They fall under definition of chemical substance in REACH regulations). A web portal has been created to provide information. HSE has published guidance
- Currently research has not provided sufficient evidence to set a measurement methodology to allow Occupational Exposure Limits to be set
- Currently relying on good hygiene control practices under COSHH

Basic Safety Standards Directive on Ionising Radiation

- Consolidates several legislative measures on radiological protection
- Must be complied with in UK by 6th February 2018
- Was being led by Department for Energy and Climate Change (now abolished!) Now BEIS.
- HSE was due to make implementation recommendations by end of 2016
- It will include Radon
- Radon levels in 1999 regulations considered too high by many including WHO
- BRE Map remains a real problem
- New Building Regulations missed an opportunity
- Don't rely on map - test

New Regulations on Freight Containers

- HSE originally intended to amend the Freight Containers (Safety Convention) Regulations of 1984 but following initial consultation abandoned plan thereby delaying the new regulations planned to come into force in October 2016
- Second consultation now underway with view to a replacement set of regulations being brought into force in 2017
- Will introduce significant physical changes to safety approval plates on containers and additional safety tests.

Chemicals legislation review

- HSE undertaking review “to promote proportionate risk management and to make it easier for dutyholders to understand and comply with their duties”
- Intention is to “simplify” legislation on chemicals under COSHH, control of lead at work, and DSEAR
- To help inform the review the HSE wanted individuals to complete a 15 minute survey
- Result could be merged regulations

New directive on OEL's

- EU Commission has published new proposal for directive setting new and strengthening Occupational Exposure Limits for 13 substances that are carcinogens
- The government believes that the reduction in the exposure limit for hardwood dust (down from $5\text{mg}/\text{m}^3$ to $3\text{mg}/\text{m}^3$) may be difficult to achieve
- New limits for five - epichlorohydrin (used in paper manufacture and resins: ethylene dibromide (chemical / pharma sectors) ethylene dichloride (plastics and vinyl products) 4,4-methylenedianiline or MDA (polyurethane foams) and trichloroethylene a solvent often used to degrease metal parts

Asbestos

- The HSE intends to review the 2012 Asbestos Regulations with any proposals for change identified by April 2017
- The TUC and an all party group of MP's have also called on HSE to change its approach to existing advice on leaving undamaged asbestos undisturbed.
- They are calling for legislation to remove all asbestos in phases by 2035

Risk Assessment Survey

- HSE has recently published some proposed changes to the risk assessment guidance contained in INDG163, which would allow duty holders some flexibility to rely on other documents to demonstrate a record of the significant findings of their risk assessment.
- A draft of the guidance changes is currently available on the HSE website www.hse.gov.uk/risk/news.htm
- So that risk assessment can be part of an existing business documents, such as:
 - your workplace ‘housekeeping’ rules
 - manufacturers’ instructions
 - training materials
 - method statements
 - safety data sheets

FFI – Fees for Intervention

- Hourly rate has gone up to £129 per hour
- In February - The Health and Safety Executive (HSE) has announced that it is to consult on proposals to make its cost recovery scheme dispute process fully independent
- Until now, disputes were considered by a panel which consisted of two members from HSE and one independent person. However, after reviewing the current process HSE will consult with relevant stakeholders with a view to making the process fully independent
- Could this be anything to do with a judicial review planned to come before Supreme Court in April??
- When pressed – “HSE has always kept the dispute process under review and following a recent application for a judicial review we believe the time is right to move to a dispute process which is completely independent of HSE.”

Questions?