

BLAKE   
MORGAN



# Health and Safety legal update IOSH November 2017

John Mitchell

Partner, Regulatory Risk & Compliance

- FFI changes
- Manslaughter
- Sentencing cases
- Principles of compensation
- Workplace regs – workplace
- Workplace regs – traffic routes
- PUWER
- Hazardous pursuits
- Occupiers liability

# FFI changes

- Making the FFI dispute process independent of HSE
- Paper “appeals” to a panel of a lawyer and two members with practical experience of health and safety in the relevant industry
- Suspension of review process pending outcome of
  - Appeal against an enforcement notice
  - An investigation
- HSE said that there would be different procedure for low cost cases but so far hasn’t devised one

# Manslaughter

## *R v Rose*

- The defendant was an optometrist
- She was carrying out a routine eye test
- She failed to carry out an examination of the back of the patient's eye
- She therefore did not see symptoms that would have indicated that the patient might have been suffering from papilloedema
- The patient subsequently died from the condition
- She was convicted of gross negligence manslaughter

- Company pleaded guilty to two charges under s. 2(1) HSWA
- Judge ruled that one of the offences was Category 2 on the basis that the likelihood of the harm eventuating was high
- Company was fined £1.985m
- Company appealed
- One ground of appeal was that the finding that the likelihood of harm was high was wrong

- May 2012 – risk assessment identifies a number of high risks in relation to legionella
- Nov 2013 – LA finds no steps taken to control the risks
- May 2014 – improvement notice expiring in June
- Aug 2014 – no steps taken in relation to the improvement notice
- Judge found “very high” culpability and fined G4S £1.8m
- G4S appealed on the ground that culpability was high, not very high.

# Sentencing guidelines

## *R v MJ Allen Holdings Ltd*

- R v MJ Allen Holdings Ltd
- Pleaded guilty to an offence of failing to take measures to prevent a person falling distance liable to cause personal injury
- Risk based prosecution
- Harm risked : “A” (death or permanent impairment)
- Likelihood of harm: medium
- Culpability: medium
- Company appealed against the sentence

# Sentencing guidelines

## *R v Strakers (Holdings) Ltd*

- The defendant was a firm of estate agents.
- A prospective purchaser was viewing the garden when she fell down a covered well and was seriously injured
- The agents had been warned about the well, but had done nothing about it
- As they had not inspected the property they were unaware of any risks at it such as asbestos or faulty wiring
- The judge took the view that culpability was high and there was a high likelihood of harm
- Fined £200,000

# Reduction for public authorities

## *R v Havering Borough Council*

- Worker injured when cutting tree brush away around a pipe
- Starting point fine was £1.3m
- Step 4 provides for “substantial” reduction where the fine might impact on the provision of public services
- Sentencing court:
  - Reduced the notional fine to £0.75m
  - Discounted that to £0.5m for guilty plea
- On appeal, HBC argued that “substantial” meant >50%

## *Connect Packaging and Creo Retail*

- Connect occupied premises in 2007
- The premises obviously contained asbestos in poor condition but they did nothing about it
- Creo sublet the premises from Connect in 2009
- Creo appointed an new H&S officer in 2014, who carried out a survey which found large quantities of blue asbestos in poor condition
- Instead of sorting the problem out, the two companies spent months arguing about who was going to pay for the work
- Creo fined £150,000
- Connect fined £65,000 under s.4

# Sentence

## *R v Amandeep Sandhu*

- Defendant was a director of a hotel company
- He pleaded guilty under s. 37 HSWA to 5 offences under the Fire Safety Order
- He was sentenced to 8 months imprisonment and appealed
- The court said that although the sentencing guidelines weren't relevant, it would have put culpability as high, risk of harm as high and harm risked at "A"
- Appeal dismissed

# Liability in damages for fines

## *D Geddes Ltd v Neil Johnson Ltd*

- The defendant was a health and safety consultant
- The claimant was an ex-client
- The claimant had been fined £200k for a fatal accident
- The claimant blamed the consultant and sued it for the cost of the fine
- The court tried a preliminary issue: was there a principle which prevented the fine being recovered?
- Held: in principle the fine was recoverable, but would not be recoverable if the claimant had any responsibility for the event that led to the prosecution

# PUWER and Workplace Regs

## *Johnson v University of Bristol*

- A university carpenter was asked to repair a cupboard in a university student flat
- He opened the cupboard door and the cupboard collapsed, showering him with utensils and injuring him
- He claimed damages on the basis that the flat was a workplace, the cupboard was work equipment and the university was in breach of its statutory duty
- He lost the claim and appealed

# PUWER – implications of control

## *Casson v Hudson and St Winifred's PCC*

- Claimant was a serving prisoner
- On day release he had been working as a volunteer at a local church
- He was under instruction from his placement officer not to use ladders
- He used a ladder to clean a wall and fell off
- It was agreed he was not an employee
- At issue was the extent of control and its legal significance under reg. 3 PUWER

# Workplace Regs – Traffic routes

## *MacLachlan v Strathclyde Partnership for Transport*

- Claimant worked in a train workshop
- The train workshop had embedded rails in the floor
- To get to his office he had to cross the workshop using a marked route that ran at right angles to the rails
- On the day of the accident a train was parked across the route
- The claimant had to walk around it which meant crossing the rails diagonally
- He put his foot in a rail and fell over

# Workplace Regs – Traffic routes

## *McLeish v Lothian Health Board*

- Claimant was a hospital nurse
- She went into a room and slipped on a floor that was wet because it was being cleaned
- There was no wet floor sign
- Wet floor signs were in common use in the hospital
- The cleaner had attempted to indicate that the floor was wet by putting her trolley across the doorway

# Occupiers' Liability

## *Debell v Dean of Rochester Cathedral*

- Claimant tripped while walking in the precincts of the cathedral
- He tripped over a lump of concrete protruding from the base of a traffic bollard
- He succeeded in the County Court
- The cathedral appealed
- The issue was the extent of the common duty of care under the Occupiers' Liability Act 1957

# Hazardous pursuits

## *Maylin v Dacorum Sports Trust*

- Claimant being assisted on a climbing wall by a friend who had been certified as “rope proficient”
- Claimant fell off due to no fault by the friend
- Claimant sued the sports centre on the ground that it had failed to warn her of the dangers
- At issue was:
  - Whether it was relevant that climbing was obviously dangerous
  - The steps that D should have taken to inform the claimant of the risks



# Health and Safety legal update IOSH November 2017

John Mitchell

Partner, Regulatory Risk & Compliance