

Hampshire Health, Safety and Environmental Group

Legal Update

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What's on the Agenda

- Statistics
- Legislation
- Fee For Intervention
- Enforcement Notices
- Legal Privilege
- Fines – Update & Appeals
- Manslaughter
- Fire Safety



H & S Statistics

- 1.3 million working people suffering from a work-related illness
- 2,595 mesothelioma deaths due to past asbestos exposures (2016)
- 144 workers killed at work (2017/18)
- 609,000 injuries occurred at work according to the Labour Force Survey
- 70,116 injuries to employees reported under RIDDOR
- 31.2 million working days lost due to work-related illness and workplace injury
- £14.9 billion estimated cost of injuries and ill health from current working conditions (2015/16)

- MORE ON 31 OCTOBER!

Fee For Intervention

- 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.
- New process - in force from 1 September 2017!



Fee for Intervention

- Judicial Review by **OCS Group**
- Settled with consultation for a new scheme
 - A FFI will still be charged
 - If a duty holder wishes to query it **MUST** be raised within 21-days (review undertaken by PI)
 - If upheld, a dispute can be raised now to a panel **INDEPENDENT** of HSE;
 - Disclosure of evidence and reasoning to duty holder
 - Notification of panel to duty holder

Brexit – more than 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- Great Repeal Bill- now European Union (Withdrawal) Act 2018
- Received royal assent on 26 June 2018

Impress your friends

- S1- “The European Communities Act 1972 is repealed on exit day”.
- S2 (1) EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day.
- S3 (1) “Direct EU legislation, so far as operative immediately before exit day, forms part of domestic law on and after exit day.”

Enforcement – Chevron

The Facts?

- 23 April 2013 - HSE took the view that stairways and gratings leading to helipad weakened by corrosion
- Prohibition Notice served
- Chevron ordered to stop using the stairways
- Some of the metalwork was removed for testing by Chevron and those tests confirmed that the metalwork met the relevant British Standard and was **not unsafe**

Enforcement – Chevron

Challenge?

- Chevron appealed against the Notice
- Employment Tribunal cancelled the Notice
- HSE appealed – but cancellation affirmed
- Conflicting E&W judgment :
 - *Rotary Yorkshire v Hague [2014] EWHC 2126*
(Admin): “...only evidence available or which could reasonably have been available to the HSE Inspector could be taken into account when deciding an appeal”
- HSE sought leave to appeal to the Supreme Court

Enforcement – Chevron

Decision?

- Supreme Court upheld the previous decisions
- Ruled that later evidence **can be taken into account** when determining an Enforcement Notice appeal
- Lady Black said that:

*“When the inspector serves the Notice, section 22 makes clear that what matters is that he is of the opinion that the activities in question involve a risk of serious personal injury. If he is of that opinion, the Notice comes into existence. **However ... when it comes to an appeal, the focus shifts. The appeal is not against the inspector’s opinion, but against the Notice itself***

The Inspector’s opinion about the risk, and the reasons why he formed it and served the Notice, could be relevant ... but I can see no good reason for confining the Tribunal’s consideration to the material that was, or should have been, available to the inspector.”

Legal Privilege:

HSE v Jukes - Court of Appeal

- 23 December 2010 employee of Gaskells NW Limited was fatally injured in a baling machine
- He entered the compaction chamber to clear a blockage and was crushed by the movement of the hydraulic ram.
- Prior to the appellant's trial, Jonathan Gaskell (the managing director), Gaskells NW Limited and Michael Cunliffe (a fitter employed by the company) had pleaded guilty to H&S offences.
- H&S Manager Paul Jukes also prosecuted, pleaded not guilty.

HSE v Jukes - Appeal

- Prosecution relied on a signed statement the appellant gave to the company's solicitors which said "I took over formal responsibility for health and safety. I started a process of assessing the overall health and safety competency of the lads ... I'm responsible for daily housekeeping and health and safety on site, including the implementation of site safety and working practices".
- In his prepared statement to the HSE and Defence Statement he asserted he wasn't responsible for Health and Safety.
- Jukes also said he had signed it but under pressure from Gaskell (the MD)

HSE v Jukes- Appeal

- 22 September 2016, the appellant (Health and Safety Manager) was convicted of breaching section 7 HSWA.
- Sentenced to nine months' imprisonment and ordered to pay £7,000 prosecution costs.
- Matter appealed on the basis that the note to the company's solicitor was inadmissible as evidence, legal privilege also considered.

HSE v Jukes - Appeal

- CA stated the following must be satisfied for litigation privilege:
 - litigation is in progress or reasonably in contemplation;
 - the relevant communication or document is made or created with the sole or dominant purpose of conducting that litigation; and
 - the litigation is adversarial, not investigatory or inquisitorial.
 - When the statement had been made there **was no prosecution, only an investigation**
 - An investigation is not adversarial litigation (**SFO v ENRC**)

Legal Privilege - ENRC

Facts

- Internal investigation following whistleblower's allegations of "corruption and financial wrongdoing"
- Engagement with / self-reporting to SFO
- SFO sought disclosure. Key documents included:
 - Lawyer notes of (ex-)employee interviews
 - Products of forensic accountants' "books and records" review
- Andrews J (May 2017): these documents were disclosable – no legal professional privilege (LPP)

Court of Appeal

- Decision on Litigation Privilege reversed - Return to the position on LP pre-*ENRC (Three Rivers v Governor of the Bank of England (No.6) [2004] UKHL 48 (Three Rivers No.6))*, applied in a commercial, achievable way
- Appeal dismissed on Legal Advice Privilege

Sentencing:

- Twelve months to October 2017:
 - **146** fines of at least £100,000:
 - **22** fines of at least £1m;
 - **27** fines between £500,000 and £999,999
 - **38** fines between £250,000 and £499,999
 - **59** fines between £100,000 and £249,999
 - **65** custodial sentences for offences related to health and safety at work (excluding manslaughter) including **29** involving immediate custody



Sentencing Guidelines – Case Update

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?

APPEALS

Whirlpool UK Appliances



- **Facts**

- Whirlpool Factory, Bristol, tumble dryer manufacture
- Sub contractor moving a heat detector, standing on elevated platform between two conveyors with baskets hanging down
- Elsewhere in the factory maintenance of the conveyor was ongoing
- Conveyor maintenance workers could not see injured
- Conveyor was started and a basket hit the platform toppling it
- Fatal injuries

Whirlpool UK Appliances

- Breach
 - S3(1) HSWA 1974
 - Inadequate risk assessment for maintenance and inadequate permit to work for heat detector
- Sentence
 - Low culpability, harm category 3
 - **Fine: £700,000**
 - **Reduced to £300,000 on appeal**

Whirlpool UK Appliances- Appeal

- Issues on appeal:
 - Death resulting: Justified moving to top of next category range.
 - Identification and treatment of ‘very large organisation’: Fine increased further due to very large status.
 - Arithmetic approach discouraged.
 - This reduction was very much on the facts of this case.

Sentencing - Appeals – Electricity North West

- Employee died after falling 6 meters from a ladder in 2013
- He had cut through his work positioning strap whilst cutting ivy near to power lines
- Convicted of contravening the Work at Height Regulations 2005 but acquitted of breaching the Management of Health and Safety at Work Regulations 1999 and the Health and Safety at Work Act 1974.
- Appeal against conviction dismissed (company considering its position) but appeal against sentence allowed.
- Court of Appeal concluded there was not 'sufficient basis' for high culpability and that there was a low likelihood of harm
- No need to make upward adjustment to reflect being a 'very large' organisation.
- Fine reduced from £900,000 to £135,000 – an 85% reduction

MANSLAUGHTER

Corporate Manslaughter

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.

Corporate Manslaughter

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

Gross Negligence Manslaughter (GNM)

- **Gross Negligence Manslaughter**

Breach of a duty of care which amounts to a criminal act or omission and causes death:

- Medical - a practitioner falls far below the required standard in the treatment of a patient.
- Work - employers who disregard the safety of employees

- **New Guidelines In Force: 1 November 2018**

<https://www.sentencingcouncil.org.uk/publications/item/manslaughter-definitive-guideline/>

New Sentencing Guideline

- **In Force: 1 November 2018**

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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

Richard Pearson- Fireworks

- Incident on 30 October 2014
- Industrial Estate, Stafford
- Fireworks retailer- owner Richard Pearson
- Simon Hillier- helping out
- Stewart Staples- customer
- Fireworks exploded, intense fire, fire services could not enter initially
- Simon and Stewart were unable to escape
- Richard was badly burnt

Richard Pearson- Fireworks

- At the scene Pearson said a third party threw a firework onto the premises and it was 'rammed' with fireworks
- Staffordshire Police investigated
- Pearson said he had sold most of the stock
- Found storage far in excess of safety limits-around 250kg
- Stored far too close together
- Prepared fireworks for a display within premises rather than on site – increased risk of explosion
- Failed to put in adequate control measures to control risk of fire

Trial

- 5 week trial in May 2018
- Convicted of 2 x gross negligence manslaughter
- Sentencing comments:
 - “motivated by financial profit”
 - Demonstrated an “arrogant recklessness”
 - Remorse had not “loomed large”
 - “chose to falsely blame others”
- 10 Years imprisonment.

Fire Safety – R v Butt

- Appeal against sentence of six months' imprisonment (suspended for 18 months), tagged curfew, fine of £250,000 and costs of £14,210
- Fine of £250,000 was reduced to £150,00
- H&S Sentencing Guidelines do not apply to RRO offences However, in R v Sandhu [2017] Judge Collier QC observed that in fire safety cases the guideline might provide a "useful check for considering whether a sentence arrived at ... has produced a sentence which is either unduly lenient or manifestly excessive."
- Guidelines followed:
 - Harm risked will be at the highest level - level A
 - Culpability will vary depending upon the circumstances of the offending.
 - Referred to requirement of offender to provide detailed evidence of their financial circumstances.
- General guideline: sentencing offences for which there is no offence specific guideline – December 2018

Questions?

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