

Newcastle Construction Safety Group 2019 Legal Update Seminar

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Today's Session:

- HSE Initiatives 2019 – Occupational Health
- Review of Construction Statistics in 2018
- Update on Enforcement by the HSE – the Chevron case
- Sentencing Guidelines and Fines for H&S Breaches
- Questions and Answers

HSE Initiatives for 2019

- Construction
- Agriculture
- Manufacturing



HSE Focus for 2019

- Continued HSE focus to reduce levels of work-related stress, musculoskeletal disorders, lung disease.
- Possible prosecution action in work-related stress cases?
- Legionella focus.
- Targeted Industries.
- Allergens focus in the food industry.
- And on everyone's mind... **Brexit**

Musculoskeletal Disorders (MSDs)

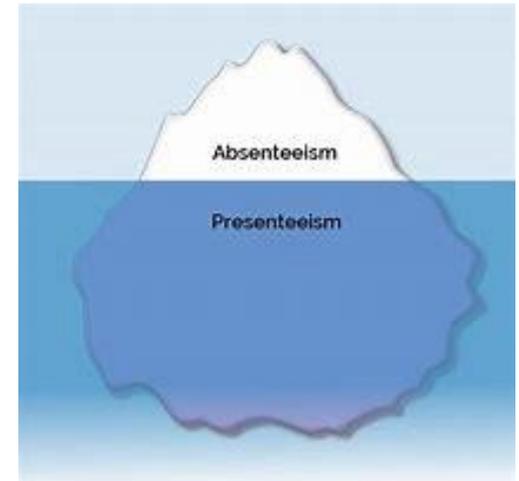
- HSE moving away from manual handling training and towards eliminating and reducing risk of MSDs by design.
- Training on handling techniques found not to be effective.
- Refresh your approach to manage this risk. How?
- Some ideas – Supervision - Physical training/practice - Invest in appropriate equipment



Work-Related Stress

- Shift in focus:
 - *From*: employees no longer absent.
 - *To*: excessive employee work patterns.
- Increased work. Is it really that productive/profitable?
- Are we going to see an attempt by the HSE to prosecute employers for work-related stress?

Stress Continued



- We recommend taking proactive steps.... *just in case*
 - Stress Risk Assessment
 - Stress Policy
 - Management/Supervisor/Team Leader training to *'spot the signs' and review workloads.*

HSE Enforcement Notices

- HSE v Chevron North Sea Limited
- Appeal of an Enforcement Notice issued by the HSE
- On Appeal the Court ruled that they were “not limited to considering the matter on the basis of material which was or should have been available to the Inspector”.
- The Court is now entitled to take into account **all** available evidence relevant to the state of affairs at the time of service of the notice, including information which comes to light after service;

Enforcement Post Chevron

- It is likely less Notices will be served
- Impact started in 2018 when 565 less Notices were served compared to 2017
- The issue of who pays the cost of a successful Appeal is still not clear – discussions with the HSE will be critical
- Appeals should always be considered where the Notice is not sustainable
- Reputational and commercial considerations should be taken into account

Enforcement by HSE (Advice, Enforcement Notices & Prosecution)

Enforcement Options

- HSE Enforcement Policy & Enforcement Management Model
- Providing information and advice face-to-face or in writing
- Serving enforcement notices on duty holders
- Prosecution

Enforcement – The Follow Up

- HSE will often follow up to check that any necessary changes have been made
- Publish data on notices served and prosecutions taken
- Recover investigations fees where a ‘material breach’ is identified – known as Fee for Intervention (FFI)

HSE Statistics – Enforcement in 2018/19

- 1,742 Prohibition Notices issued;
- 1273 Improvement Notices issues;
- Slightly less notices than the 3153 issued to the Construction Industry in 2017/2018
- 206 Prosecutions
- 94% Conviction rate
- £19m in fines – average of £98k per conviction

Direct and indirect costs of HSE action

Direct

- Immediate business interruption / site closure
- Investigation costs & Fee for intervention
- Fine if guilty and legal costs (prosecution and defence)
- Cost of defence costs if NOT GUILTY cannot be recovered
- Cost of civil claims

Indirect

- Social media
- Reputational damage
- Insurance premiums
- Workforce morale
- Trade Union

Sentencing guidelines for England & Wales

- New sentencing regime in since February 2016;
 - Largest overhaul of fines in health and safety arena since HSWA 1974;
 - Marked increase in fines/custodial sentences;
 - Company turnover now the starting point;
 - Assessment of culpability and harm.
- Health and Safety
Offences, Corporate
Manslaughter and
Food Safety and
Hygiene Offences
Definitive Guideline**

Turnover

- Micro under £2m
- Small £2m - £10m
- Medium £10m - £50m
- Large over £50m
- Very Large no guidance but “greatly exceeds the threshold for large organisations”

Culpability

Criteria for organisations and individuals:

- Organisations:
 - Very High – deliberate breach / flagrant disregard for the law
 - High – falling far short of the appropriate standard
 - Medium – falling short of the appropriate standard but not high or low
 - Low – did not fall far short of the appropriate standard
- Individuals:
 - Very High – intentional breach / flagrant disregard for the law
 - High – actual foresight of or, wilful blindness to risk
 - Medium – reasonable care not taken
 - Low – offence committed with little fault

Harm: Stage 1

Seriousness of harm risked			
	Level A	Level B	Level C
	<ul style="list-style-type: none"> • Death • Physical or mental impairment resulting in lifelong dependency on third party care for basic needs • Significantly reduced life expectancy 	<ul style="list-style-type: none"> • Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day-to-day activities or on their ability to return to work • A progressive, permanent or irreversible condition 	<ul style="list-style-type: none"> • All other cases not falling within Level A or Level B
High likelihood of harm	Harm category 1	Harm category 2	Harm category 3
Medium likelihood of harm	Harm category 2	Harm category 3	Harm category 4
Low likelihood of harm	Harm category 3	Harm category 4	Harm category 4 (start towards bottom of range)

Harm: Stage 2

- 2) Next, the court must consider if the following factors apply. These two factors should be considered in the round in assigning the final harm category.
- i) **Whether the offence exposed a number of workers or members of the public to the risk of harm.** The greater the number of people, the greater the risk of harm.
 - ii) **Whether the offence was a significant cause of actual harm.** Consider whether the offender's breach was a **significant cause*** of actual harm and the extent to which other factors contributed to the harm caused. Actions of victims are unlikely to be considered contributory events for sentencing purposes. Offenders are required to protect workers or others who may be neglectful of their own safety in a way which is reasonably foreseeable.

If one or both of these factors apply the court must consider either moving up a harm category or substantially moving up within the category range at step two overleaf. If already in harm category 1 and wishing to move higher, move up from the starting point at step two on the following pages. The court should not move up a harm category if actual harm was caused but to a lesser degree than the harm that was risked, as identified on the scale of seriousness above.

Sentencing

Very large organisation

Where an offending organisation's turnover or equivalent very greatly exceeds the threshold for large organisations, it may be necessary to move outside the suggested range to achieve a proportionate sentence.

Large

Turnover or equivalent: £50 million and over

	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
Harm category 2	£1,100,000	£550,000 – £2,900,000
Harm category 3	£540,000	£250,000 – £1,450,000
Harm category 4	£240,000	£120,000 – £700,000
Medium culpability		
Harm category 1	£1,300,000	£800,000 – £3,250,000
Harm category 2	£600,000	£300,000 – £1,500,000
Harm category 3	£300,000	£130,000 – £750,000
Harm category 4	£130,000	£50,000 – £350,000
Low culpability		
Harm category 1	£300,000	£180,000 – £700,000
Harm category 2	£100,000	£35,000 – £250,000
Harm category 3	£35,000	£10,000 – £140,000
Harm category 4	£10,000	£3,000 – £60,000

Sentencing: Aggravating & Mitigating Factors

Factors increasing seriousness

Statutory aggravating factor:

Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction

Other aggravating factors include:

Cost-cutting at the expense of safety

Deliberate concealment of illegal nature of activity

Breach of any court order

Obstruction of justice

Poor health and safety record

Falsification of documentation or licences

Deliberate failure to obtain or comply with relevant licences in order to avoid scrutiny by authorities

Targeting vulnerable victims

Factors reducing seriousness or reflecting mitigation

No previous convictions or no relevant/recent convictions

Evidence of steps taken voluntarily to remedy problem

High level of co-operation with the investigation, beyond that which will always be expected

Good health and safety record

Effective health and safety procedures in place

Self-reporting, co-operation and acceptance of responsibility

Sentencing: Proportionality

- Proportionality / Financial
- Take into account financial circumstances of the offender
- The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence: **it should not be cheaper to offend than to take the appropriate precautions**
- The fine must be **sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with health and safety legislation.**

Fines in CDM Prosecutions

- Of the 74 companies prosecuted:
 - 24 are SMEs (between c£10m and £50m turnover)
 - 7 are large or very large (over £50m turnover) – Amey, Balfour Beatty, Ingen, Kier, St James Group, ENGIE and Tesco.
 - Remainder are micro/small organisations and represent the majority of CDM breaches.

Conclusions

- The sentencing guidelines are beginning to bite but aren't being applied consistently in Scotland
- No designer prosecutions as yet. But it is only a matter of time
- HSE remain a stretched organisation and may look for alternatives to prosecution for lower level breaches
- Above all, be proactive & vigilant in terms of CDM compliance

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