Health and safety law update

June 2017

News

The Sentencing Council publishes a new guideline for early guilty plea

The new guideline applies to any case where the hearing in either the Magistrates or Crown court is on or after 1 June 2017 regardless of the date of alleged offence. more›

The continued erosion of Litigation Privilege?

There has been caselaw in recent years where the courts have been asked to determine whether or not certain documents or classes of documents can be deemed to be privileged from disclosure. more›

NHS Trust faces prosecution following drowning of an 18-year old man

The HSE has confirmed that it will prosecute Southern Health NHS Foundation Trust over the drowning of Connor Sparrowhawk, an 18-year old patient under their care at Slade House, Oxford in July 2013. more›

Sentence reduced on appeal for company engaged in the iron industry

MJ Allen Holdings Ltd was the holdings company for a group of engineering companies and an automotive parts distribution company. more›

Scottish quarry operator can sue advisor for fine recovery

A Scottish quarry operator and aggregates company, D Geddes (Contractors) Ltd, was fined £200k for a breach of Regulation 6 of the Quarries Regulations 1999. more›

Fines and sentences

Construction manager convicted following the death of a lawyer crushed by windows

On 30 August 2012, 43-year old lawyer, Amanda Telfer, was killed when a stack of window frames fell from height and collapsed upon her, as she walked past a building site in Hanover Square, London. more›

Three directors jailed following death of roofer

On 10 December 2014, Benjamin Edge, aged 25, was fatally injured when he fell from the roof of a building at Fletcher Bank Quarry in Ramsbottom, in wet and windy weather conditions. Mr Edge was employed by SR and RJ Brown. more›

Any comments or queries?

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Packaged food manufacturer fined £2m following fatality

On 4 February 2015, Jacek Adamowicz, aged 29, was working for Hitchen Foods, owned by Bakkavor Foods Limited. more›

South West Water fined £1.8m following drowning incident

On 30 December 2013 Robert Geach was working in a sand filtration unit in Falmouth when he was discovered face down in the water by a colleague. more›

Oil refinery fined £1.65m for explosion at Ellesmere Port

On 14 November 2013 there was an explosion at Stanlow Manufacturing Complex in Ellesmere Port. more›

Magistrates' Court imposes £1m fine for furniture retailer

On 2 July 2015 an employee of DFS Trading Limited, Doncaster, suffered serious neck and head injuries whilst unloading wooden furniture frames. more›

KFC fined £950k due to burns suffered from two employees when handling hot gravy

A 16 year-old boy and a woman suffered burns in separate accidents at restaurants in Stockton. more›

Round up

Regulator proposes revised FFI disputes process

In our previous bulletin we reported on a facilities outsourcing company, OCS Group UK, obtaining permission to proceed with its judicial review of the HSE's Fee for Intervention (FFI) Scheme. more›

Analysis of health and safety prosecutions shows increased sentencing

The construction safety consultancy, MPW R&R, has published an analysis of prosecution data available on its website. more›

News

The Sentencing Council publishes a new guideline for early guilty plea

The new guideline applies to any case where the hearing in either the Magistrates or Crown court is on or after 1 June 2017 regardless of the date of alleged offence.

If a guilty plea is made at the "first stage" (the first hearing at which a plea or indication of plea is made) a one-third reduction shall be made. Thereafter the maximum level of discount reduces to one-quarter.

In a departure from the 2007 guideline, the discount will remain the same regardless of how strong the prosecution case may be. The previous guideline stated that where the prosecution case was "overwhelming" the full discount may not be applied.

Following the "first stage" there is a sliding scale reduction of one-quarter to one-tenth up to the first day of trial.

Although the new guideline highlights the importance of considering an early guilty plea in order to minimise sentencing, there are exceptions for those defendants who may not have understood the case against them, or required more time to seek legal advice. Many health and safety cases will fall into this category.

Back to contents>

The continued erosion of Litigation Privilege?

There has been caselaw in recent years where the courts have been asked to determine whether or not certain documents or classes of documents can be deemed to be privileged from disclosure. Such documents can be held back from a request for disclosure from a prosecuting authority or as part of a civil claim. There are two types of privilege:

- Legal advice privilege – where the document is created in the course of giving or receiving legal advice.
- Legal litigation privilege – where the dominant purpose of a document is to bring or defend Court proceedings.

The latter category has recently been the subject of a High Court decision in the case of *Serious Fraud Office (SFO) v ERNC*. The case was brought by the Serious Fraud Office (SFO) to challenge ENRC's position that certain classes of documents requested were subject to litigation privilege.

The issue arose out of an internal investigation carried out by ENRC in 2011 following allegations of corruption, bribery, and fraud in overseas operations which were reported by a whistleblower. It was alleged that ENRC had agreed to provide the SFO with documents produced from the internal investigation via the self-reporting system. However, after completing their investigation they declined to do so, prompting the SFO to start its own investigation.

There were four categories of documents where the assertion of litigation privilege was challenged by the SFO:

- Notes taken by ENRC's solicitors from current and former employees, subsidiaries, suppliers and third parties.
- Materials generated by forensic accountants instructed to conduct a review.
- Documents containing factual evidence used by the solicitors to present to the ENRC board.
- Emails between a senior executive and the head of mergers and acquisitions at ENRC, who was a Swiss qualified lawyer.

All four tranches of documents were determined not to attract litigation privilege, save for the presentation to the ENRC board. Although that presentation was not discloseable, the documents which were relied upon to produce the presentation were.

The High Court held that although the SFO had commenced an investigation, this did not mean that a prosecution would inevitably follow. A prosecution would only arise if there was sufficient evidence to satisfy the prosecutor that the evidential burden for taking that step had been met. It was therefore found that the purpose of the documents produced during the investigation was a fact finding expedition rather than in contemplation of potential litigation.

A claim for legal advice privilege on the documents produced by solicitors during the internal investigation was also denied, unless the advice was between the solicitor and specific individuals within the client entity authorised to obtain legal advice on the company's behalf. Any working papers produced by solicitors would also not be protected from disclosure via legal advice privilege unless the contents of the documents betrayed the nature of the legal advice. Therefore interview notes with employees, even where they were taken by a solicitor, were deemed not to attract either legal advice or litigation privilege.

On litigation privilege, a distinction was drawn with civil proceedings where, the Court considered, it was possible for a claim without foundation to be brought. However, the position was different with criminal proceedings as prosecutors are required to ensure that the evidential test is met before they can decide to bring a prosecution. This would indicate that where a potential civil claim might arise from an incident, there is more scope for litigation privilege to attach to internal investigation documents in comparison with circumstances where the only proceedings that might arise are criminal.

This decision, if applied more broadly, could have significant ramifications in circumstances where a prosecuting authority is making a request for documents which were produced as a result of an internal investigation. ENRC's representatives have already confirmed an intention to appeal the decision.

Back to contents>

NHS Trust faces prosecution following drowning of an 18-year old man

The HSE has confirmed that it will prosecute Southern Health NHS Foundation Trust over the drowning of Connor Sparrowhawk, an 18-year old patient under their care at Slade House, Oxford in July 2013. Connor was autistic and had learning difficulties. He was under the care of the Trust when he suffered an epileptic seizure while in a bath.

A jury-led inquest in October 2015 found that negligent care led to Connor's death. The Trust later admitted responsibility and offered Connor's family compensation. A subsequent report by auditors, Mazars, commissioned by NHS England at the request of Connor's family, revealed that out of 722 unexpected deaths over four years, only 272 were properly investigated.

Despite the Care Quality Commission (CQC) having issued a warning in September 2013 to significantly improve the care and protection of mental health patients, the Trust continued to put them at risk. The Trust's chief executive, Katrina Percy, resigned in October 2016 following public pressure. Slade House closed in 2014 and the building is being transferred to Oxford Health NHS Foundation Trust.

The HSE will now prosecute the Trust under Section 3 HSWA 1974.

The beleaguered Trust is also facing charges after a patient fell from a roof suffering serious injuries at Melbury Lodge, Royal Hampshire County Hospital, Winchester, in December 2015. The prosecution is the first to be brought by the CQC against an NHS Trust under the fundamental standards regulations. Previously, the CQC has only used its fundamental standards to prosecute four care home providers. These standards became effective in April 2015 after the Francis report into care standards at the former Mid Staffordshire NHS Foundation Trust.

Back to contents>

Sentence reduced on appeal for company engaged in the iron industry

MJ Allen Holdings Ltd was the holdings company for a group of engineering companies and an automotive parts distribution company. The company was fined after a maintenance worker slipped and put his foot through an asbestos sheet during repairs to a roofing panel, potentially exposing employees working underneath to debris and asbestos fibres.

The company pleaded guilty at their first opportunity on 3 February 2016 to an offence committed on 19 September 2014 under Regulation 6(3) of the Work at Height Regulations 2005.

On 5 April 2016 the company was sentenced by HHJ Adele Williams DL to a fine of £160k (reduced from £240k to reflect the guilty plea) and ordered to pay prosecution costs of £5,767.34.

On appeal against the sentence, the Court of Appeal ruled that HHJ Adele Williams DL had failed to properly apply the sentencing guidelines. In particular she had wrongly assessed the likelihood of harm as "medium" when it should have been "low". In addition, she may have

inadvertently double-counted the period over which the breach existed as an additional aggravating factor affecting seriousness when identifying the starting point, when it ought to have been a factor to assess culpability.

Back to contents>

Scottish quarry operator can sue advisor for fine recovery

A Scottish quarry operator and aggregates company, D Geddes (Contractors) Ltd, was fined £200k for a breach of Regulation 6 of the Quarries Regulations 1999. In 2015, a 76-year old employee, Joseph Troup, a tipper driver, suffered fatal injuries when he reversed over a raised edge at Hatton Mill Quarry in Angus in 2012.

The company now seeks to recover the fine from its adviser and quarry operator Neil Johnston Health & Safety Services Ltd, whose duties were to carry out regular inspections of the quarry and supply inspection reports. The company alleges that Neil Johnston Health & Safety Services were negligent for failing to advise of the danger posed by a "stop block" or "bund". The bund was present as a barrier to prevent vehicles from tipping over the edge. However, due to an accumulation of dumped sand this acted as a ramp over which a lorry was capable of driving. This lessened the effect of the bund thereby allowing Mr Troup's vehicle to proceed over it.

The company alleges that any competent health and safety adviser exercising ordinary skill and care would have highlighted the issue so that preventative measures could be carried out.

Neil Johnson Health & Safety Services dispute the claim on the basis that liability rests with the company. They also contend that the company cannot by law recover a fine imposed on it due to a criminal act though a civil award of damages.

Lord Tyre considered the legal principle of ex turpi causa, which states that no action may be brought based on illegal activity. He stated that: "I was not referred to, and am not aware of, any Scottish authority bearing directly on the point at issue." He went on to say that "There is no absolute rule in English law that a person who has committed a criminal act is precluded from recovering damages sustained as a consequence of it."

Lord Tyre confirmed in his written opinion that: "It is certainly true that the courts have placed emphasis, in narrower form cases, on the need to avoid inconsistency between the criminal and civil law so that the law does not...give with one hand what it takes away with the other.... But all of these observations were made in the context of a claimant who was, or was at least presumed to have been, aware of what he was doing when he committed the offence. When one is considering the position of a person with no such awareness but who has nevertheless been punished for commission of an offence, it seems to me that a different balancing of policy considerations is required."

He added: "For the foregoing reasons I am satisfied that the pursuer has pled a case for recovery of the £200,000 fine which is relevant for proof. In response, the defender avers that Mr Troup's accident was caused by the fault of and breach of statutory duty by the pursuer. That defence, if established, may constitute the basis for application of the ex turpi causa principle. A proof before answer is accordingly necessary."

It will be interesting to see how the civil claim now develops and any subsequent judgment.

Back to contents>

Fines and sentences

Construction manager convicted following the death of a lawyer crushed by windows

On 30 August 2012, 43-year old lawyer, Amanda Telfer, was killed when a stack of window frames fell from height and collapsed upon her, as she walked past a building site in Hanover Square, London.

The Old Bailey heard how together the frames weighed 655kg and had been left leaning against a wall overnight after being delivered the previous day. They were left unsecured and public concern was raised after the frames were seen moving in the winds. Another member of the public had almost been hit in a "near-miss" at the site just days before the accident.

Prosecutor Duncan Atkinson QC said it was "obvious to anyone" that the unsecured frame carried a "clear and serious risk of death" to anyone walking past. He said: "There were a series of obvious and, in many cases, straightforward steps that could have been taken to avoid that risk – ranging from cancellation, delay, refusal of delivery on the one hand, to the storage, the use of straps and barriers. None were taken by any of the defendants and Amanda Telfer died as a result."

Kelvin Adsett, 64, supervisor of IS Europe Ltd, was found guilty of gross negligence manslaughter and sentenced to 12 months' imprisonment. Judge Peter Rook QC told him: "Your actions contributed to the wholly needless and untimely death of Amanda Telfer." He highlighted the "reckless disregard" for what was a life-threatening situation.

In mitigation Mr Adsett stated that his life had been "destroyed" as the result of "an aberration of carelessness". His dormant company, IS Europe, was said to have finances amounting to £250. Judge Rook said: "There would have been a fine of £100,000. However, given ISE's limited assets, the only fine I can order is £250."

Site manager Damian Lakin-Hall, 50, of Westgreen Construction Ltd, was sentenced to six months imprisonment, suspended for two years, for failing to take reasonable steps to ensure health and safety whilst at work.

The costs of £100k were to be split between Mr Adsett and Mr Lakin-Hall. Others prosecuted but cleared of any charges were Claire Gordon, 36, Steven Rogers, 62, Westgreen Construction Ltd and Drawn Metal Ltd.

Back to contents>

Three directors jailed following death of roofer

On 10 December 2014, Benjamin Edge, aged 25, was fatally injured when he fell from the roof of a building at Fletcher Bank Quarry in Ramsbottom, in wet and windy weather conditions. Mr Edge was employed by SR and RJ Brown.

During a two-day sentencing hearing at Manchester Crown Court, Christopher, 25, and James Brown, 32, brothers and owners of SR and RJ Brown, were each imprisoned for 20 months for

failing to ensure Mr Edge's safety at work and thereafter trying to cover up their lack of risk assessment and perverting the course of justice.

Mark Aspin, owner of contractor MA Excavations, was jailed for 12 months for his failure to ensure that work was planned safely and exposing workers to risk.

SR and RJ Brown were fined £300k having pleaded guilty to corporate manslaughter, and MA Excavations was fined £150k for exposing workers to risk.

The Brown brothers had attempted to cover up what was a "gross dereliction" of their duty as employers, according to Mr Justice Peter Openshaw. They proceeded to create backdated health and safety documents during the afternoon following Mr Edge's fall. They ordered another worker, Peter Heap, 33, to fetch lanyards and harnesses so that it appeared as though Mr Edge had failed to use the correct equipment. Mr Heap was jailed for four months for his part.

Back to contents>

Packaged food manufacturer fined £2m following fatality

On 4 February 2015, Jacek Adamowicz, aged 29, was working for Hitchen Foods, owned by Bakkavor Foods Limited. He was cleaning a storage yard when a number of plastic bales weighing 703kg fell and trapped him against the ground.

The HSE found that the stacking of bales of plastic was unsafe. The company failed to implement properly planned safe systems of work for employees exposed during the stacking of the bales. In addition there was no formal training in stacking bales and a lack of monitoring in the bale area.

Bakkavor Foods, Wigan, pleaded guilty to breaching of Section 2(1) HSWA 1974 and in addition to a fine of £2m was ordered to pay costs of £32,595. According to documents filed at Companies House, the company had a turnover of £1.4bn in 2015.

Bakkavor Foods had previously been fined £500k in April 2015 after a worker sustained a broken arm when his clothing was drawn into an unguarded nip-point between a conveyor belt and roller. It was also fined £20k in October 2013 after the tip of a worker's finger was sliced off as she worked off a conveyor belt.

Back to contents>

South West Water fined £1.8m following drowning incident

On 30 December 2013 Robert Geach was working in a sand filtration unit in Falmouth when he was discovered face down in the water by a colleague. He had died having drowned and was last seen working on top of the unit several hours before being discovered. The colleague was responding to the lone worker system.

The HSE told Truro Crown Court how Mr Geach was carrying out a routine task when he slipped and fell into the tank. There was no means of escape or system to call for help. HSE investigators found that the company had failed to identify the risk of drowning associated with the maintenance activity in question.

Judge Robert Linford stated:

"Robert Geach drowned in a sand filtration tank at the waste water treatment works at Falmouth docks. His death was caused by the failure of South West Water to ensure he was safe at work.

The danger of people falling into tanks was pointed out to South West Water on a number of occasions and the fact that something needed to be done to address it. It was an accident waiting to happen and it happened and a family has been devastated as a consequence.

Although the opening Mr Geach fell into was small, the risk was a very real one. That said South West Water could not have been more co-operative with the Health and Safety Executive in their investigation and has taken steps to rectify failings. It has championed a new and extremely effective Lone Worker System. But a substantial fine must be passed to show that health and safety failures are serious matters."

South West Water Ltd of Exeter pleaded guilty to Section 2 (1) HSWA 1974 and was fined £1.8m and ordered to pay costs of £41,607.

South West Water Managing Director Dr Stephen Bird stated that since the incident the company has: "updated procedures and policies, carried out comprehensive staff training and invested in new equipment and technologies, particularly to ensure the safety of staff who may be working alone." He further stated his belief that their "lone worker protection now sets the standard across the industry."

Back to contents>

Oil refinery fined £1.65m for explosion at Ellesmere Port

On 14 November 2013 there was an explosion at Stanlow Manufacturing Complex in Ellesmere Port. There were no injuries but damage was said to have cost around £20m.

The HSE stated that the incident occurred during the start-up of the main distillation unit when extremely flammable hydrocarbons were allowed to enter an unignited furnace. The heat from another furnace nearby triggered the explosion.

The operators of the complex were Essar Oil UK Ltd. They pleaded guilty at Liverpool Crown Court to charges under HSWA 1974 and were fined £1.65m. This was the largest fine under the Control of Major Accident Hazards (COMAH) Regulations 1999 since the Buncefield disaster in 2005. In addition Essar were ordered to pay almost £58k legal costs.

Back to contents>

Magistrates' Court imposes £1m fine for furniture retailer

On 2 July 2015 an employee of DFS Trading Limited, Doncaster, suffered serious neck and head injuries whilst unloading wooden furniture frames. An unsecured piece fell from an unstable load knocking the employee unconscious.

The HSE investigation revealed that there was a lack of supervision and management of loads. There had been several previous near misses arising from unstable loads.

DFS pleaded guilty to ss. 2(1) and 3 HSWA 1974. They were fined £1m and ordered to pay costs of £15,099 by Derby Magistrates' Court.

Back to contents>

KFC fined £950k due to burns suffered from two employees when handling hot gravy

A 16 year-old boy and a woman suffered burns in separate accidents at restaurants in Stockton. On 14 July 2014, Joshua Arnold sustained second degree burns when hot gravy spilled over his hands and arms as he removed it from a microwave at a KFC restaurant in Teesside Retail Park.

The second accident occurred 17 months later at KFC's restaurant in Wellington Square, Stockton. Heather Storer sustained third-degree burns to her right arm, hands, chest and stomach as she removed a gravy tub from the microwave.

Environmental health officers discovered a lack of gloves and training in relation to the handling and removal of hot gravy from microwaves. The prosecution was brought by Stockton Borough Council.

Judge Sean Morris stated that Mr Arnold should have been better supervised, particularly in view of his young age. He added that: "There was – by lower management – a reluctance to follow the guidance that was provided by the company. And that's when accidents happen. Kitchens are dangerous places. There are large vats of boiling fat, hot ovens and microwaves warming up, in this case, gravy. Burns occurred as a result of inadequate supervision and the inadequate provision of safety equipment, such as gauntlets."

KFC pleaded guilty to two breaches of section 2(1) HSWA 1974 at Teeside Magistrates Court and was fined a total of £950k and ordered to pay £18,700 in costs. Their annual turnover was said to be in region of £450m.

In mitigation, KFC said that it invested £7.5m in health and safety measures each year. It stated that although procedures were in place they were not followed on these occasions, which were rare, and that they had cooperated with all aspects of the investigation.

Back to contents>

Round up

Regulator proposes revised FFI disputes process

In our previous bulletin we reported on a facilities outsourcing company, OCS Group UK, obtaining permission to proceed with its judicial review of the HSE's Fee for Intervention (FFI) Scheme.

OCS's application arose from a Notice of Contravention it received in August 2014 regarding its use of strimmers at Heathrow Airport. Following the HSE's conclusion that there had been breaches of Regulations 6(2) and 7(2) of the Control of Vibration at Work Regulations 2005, OCS received two bills amounting to £2,306.

Following settlement of the dispute by the HSE, which was due to be heard at the High Court on 8 March 2017, the HSE has confirmed that it will "move to a fully independent process for considering disputes in relation to the Fee For Intervention (FFI)".

FFI was introduced in 2012 in order to pass on the cost of health and safety regulation from the taxpayer to businesses in breach of health and safety legislation. OCS confirmed that it was not their intention to dispute FFI itself but the way in which the dispute process was handled and a perceived lack of independence.

In the consent order, approved by the High Court, the HSE agreed to introduce a revised process for determining disputes on or before 1 September 2017. Furthermore, the HSE has agreed to withdraw the original FFI notification of contravention which led to the judicial review and pay OCS's costs.

Initial proposals for future disputes are intended for the panel to be more independent consisting of a lawyer as chair together with two other members with practical experience of health and safety management.

The revision of the process for considering disputes under the FFI scheme is currently under consultation due to close on 2 June: click here.

Back to contents>

Analysis of health and safety prosecutions shows increased sentencing

The construction safety consultancy, MPW R&R, has published an analysis of prosecution data available on its website. It was produced to review the impact of the first year of the new Sentencing Guidelines for those prosecuted and working within the construction industry.

Comparisons have been made with the final year of the previous Guidelines and show that the median fine per construction firm increased from £13,400 under the old Sentencing Guidelines to £20k under the new Sentencing Guidelines. The largest fine imposed on a construction firm increased from £1m to £2.6m.

The proportion of individuals receiving prison or suspended prison sentences rose from around 1 in 3 (31%) to nearly 1 in 2 (47%) in the first year of the new Sentencing Guidelines. The proportion of individuals receiving fines reduced from 57% to 40% with the new Sentencing Guidelines.

For a full and detailed analysis of the relevant data please click here:

Back to contents>

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