



Legal Update

NOSHEA – 9 October 2018

Hannah Frost - Solicitor

SH ∞ SMITHS

www.shoosmiths.co.uk

A bit about shoosmiths..



ENFORCEMENT OVERVIEW



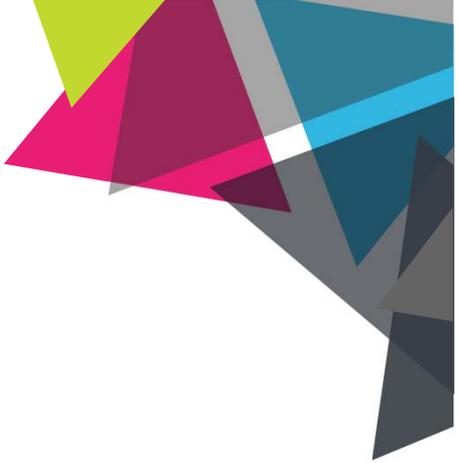
HSE STATISTICS

- **137** workers killed at work (provisional figures for 2017/18)
- **70,116** injuries to employees reported under RIDDOR
- **593** cases prosecuted by the HSE in 2016/17 (decrease in 17% from the previous year) with a conviction rate of 93%.
- 9,495 enforcement notices issued by HSE which is up on the previous year by 8%
- Duty holders found guilty of health and safety offences in 2016/17p received fines totalling **£69.9 million**, an average penalty of around **£126,000** per case resulting in conviction, which is more than double the average fine in 2015/16
- See: www.hse.gov.uk/statistics

Investment in health and safety: cost of compliance v fine

- The average cost of health and safety fines in 2016 far outstripped the cost of compliance, according to a new study*
- The research found that businesses paid an average of **£115,440** in fines after being found guilty of health and safety breaches in 2016

**Arinite Health and Safety*



Personal liability

H.S.E. ENFORCEMENT POLICY:

One of the “principles of enforcement” requires inspectors to consider the management chain and role played by individual directors and managers and prosecute them where appropriate

Personal liability

Individuals prosecuted:

- 2015 - **15**
- 2016 – **46** (34 convicted with 23 receiving prison sentences)
- As at 18 April 2016, (excluding driving offences, and asbestos waste dumping), there had been **186** individuals who, since 1975, had received an immediate or suspended prison sentence for Health and Safety at Work offences
- Of those, **175** have occurred since May 2008
- Additional **54** for manslaughter – usually resulting in immediate custody

Clearview Design and Construction Ltd – July 2018

- Recent case on personal liability where director was sentenced to eight months in prison after pleading guilty to a health and safety breach that resulted in the death of two brothers and a third employee being seriously injured.
- Three employees were refurbishing industrial units in Hertfordshire. The director supplied them with thinners which they then poured onto the floor of the unit to remove old dried carpet tile adhesive. This then ignited.
- No serious consideration to the safe use of the thinners, despite the obvious warnings on the containers.

impact of THE NEW GUIDELINES



THE NEW APPROACH

The guidelines require a step by step assessment of:

- Culpability
- Harm
- Turnover
- Aggravating and mitigating factors
- Proportionality
- Other factors
- Reduction for guilty plea
- Compensation and ancillary orders
- Totality principle



Step 1: Organisations - determining the offence category (1)

Based on two stages:

- **Culpability** – 4 categories
 - a) Very high – deliberate or flagrant breach
 - b) High – fell far short of the standard e.g. below industry standards, ignoring concerns raised, failing to respond to prior incidents, breaches subsisting over long period
 - c) Medium – e.g. systems in place but not sufficiently adhered to or implemented
 - d) Low – e.g. significant efforts made to address risk but inadequate on this occasion

Step 1: Organisations - determining the offence category (2)



Seriousness of harm risked			
	Level A <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 	Level B <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 	Level C <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)

Step 2 - starting point and category range

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

The outcome of the new reality

- Since February 2016, there have been approximately 40 fines in excess of £1m
- 2015 saw just three fines in excess of £1m and 2014 none
- In 2016/17 period the largest fine was £5 million and a total of 38 cases received fines over £500,000
- This is in contrast to the 2014/15 period, which was the last full year without these guidelines, where the single largest fine was £750,000 and 5 cases were at or above £500,000
- The average level of fine increased moving from £29,000 per conviction in 2014/15 to £58,000 in 2015/16 and has reached an average of £126,000 per conviction in 2016/17



COSTAIN AND GALLIFORD TRY (jv) – September 2018

- Incident where a supervisors boot was drawn into some machinery at a water treatment works resulting in the loss of three toes.
- Fine 1.4million
- Severity of the fine linked to; previous concerns about lack of supervisors on site and the fact that the supervisor was made to do a task that he was not trained to do which resulted in the injury. They were seen to be cutting corners by not contracting specialists to do the task.
- Culpability (Medium) Harm Category (2) Large Company – starting point £600,000.
- Sentencing Judge didn't think that would have a "sufficient economic impact" on the companies based on their turnover and so significantly increased the fine.

TUFFNELLS PARCEL EXPRESS – SEPTEMBER 2018

- Worker became trapped between a lorry and a trailer sustaining fatal injuries.
- Fine - £1.5million
- The worker was coupling the lorry and trailer when the trailer rolled forward and trapped him against the other vehicle. The trailer was parked on slight slope, sufficient to allow it to roll forward.
- The slope wasn't taken into account in the risk assessment and if it was the accident could have been avoided.
- Poor H&S record (multiple improvement notices and one other conviction over the last 3 years).

BAM NUTTALL – april 2018

- Subcontractor who was working at height fell 3m suffering life changing injuries which have meant that he is unable to return to work.
- Fine - £900,000
- Basic site induction failed to cover any warnings about the fragile roof and the subcontractors were not briefed on the risk assessment.
- HSE Comment – “proper risk assessments and briefings must be carried out and followed.”

KEY recent COURT OF APPEAL DECISIONS



Whirlpool March/ December 2017 - Appeal

- A contractor was knocked off a MEWP while fitting an alarm and was fatally injured
- Good processes in place
- **Initial fine: £700,000**
- Low culpability but fine linked to large turnover and the fact there was a fatality
- **Appeal:** Starting point too high – **fine reduced to £300,000**
- The reduction was due to the particular circumstances of this case -Things are likely to have been very different if they didn't have such a good health and safety record
- **Turnover: £703m**



R v Ate Truck and Trailer Sales Ltd 2018

- A contractor, who worked independently from the company's employees in a designated area, had died when the roof section of a trailer he was dismantling struck him
- HSE stated that the method of work was unsafe. The company's employees dismantled trailers using a different method
- Judge departed from the parties agreement on culpability and harm
- **Initial fine: £475,000**
- It was held that the sentencing judge had no reason in this instance to depart from the agreed level of culpability
- Judge erred in his assessment of the risk of harm
- **Appeal allowed – sentence reduced to £200,000**

WHAT'S NEW?



HM Inspector of Health and Safety (Appellant) V Chevron North Sea Limited

- On Thursday 8 February 2018, the Supreme Court handed down a judgment defining the scope of an appeal under section 24 of the Health and Safety at Work etc Act 1974 (“HSWA”)
- Appeal of a prohibition notice served on an offshore oil installation. Chevron obtained an expert report which confirmed that there was no risk of injury at the time the notice was served. However, this was 11 months after the initial inspection
- It was held that, if expert evidence proves that there was no risk to safety at the time of service of a notice, the Court should be allowed to take this evidence into account in on appeal.



New PPE Regulation (EU)

- Replaces 25 year old PPE directive
- Reflects modernisations in the market
- Full enforcement will take place in April 2018. After this date, all PPE will have to be certified to the new Regulation
- Anyone in the PPE industry will be legally required to comply with the Regulation
- Five-year validity period on EU Type Examination Certificates
- Changes to classifications – risk based approach rather than by pieces of equipment





Fees for intervention update

- Following a lengthy consultation, the HSE has just announced that all disputed invoices will now be considered by a fully independent panel made up of a lawyer and two others who have practical experience of management of health and safety. HSE members will no longer be able to sit on the panel
- The move to a totally independent panel is encouraging and will ensure that all disputes are reviewed from an impartial and unbiased perspective

Office of product safety and standards

- **New Office for Product Safety and Standards announced**
- To help manage large-scale product recalls and identify risks to consumers
- To help to businesses hit by unfair competition from rogue firms
- Annual budget £12m
- Support to trading standards teams
- The OPSS will not reduce the responsibilities that currently sit with manufacturers, importers and retailers
- They have published guidance to support business with managing Product Recalls.



new sentencing guidelines for Gross Negligence Manslaughter

- **New sentencing guidelines** have proposed jail terms of up to 18 years for gross negligence manslaughter.
- Effective from November 2018
- *“While the highest sentences apply to individuals whose disregard of safety was motivated by cost cutting, sentences are also set to increase to an 8 year starting point in mainstream cases, where the failing persisted for weeks or the offender was aware there was a risk of death.”*
- Excluded from the 2016 guideline
- Punishments will get more severe

ISO 45001

- The new standard – March 2018
- Replace BS OHSAS 18001
- 3 year transitional period
- Health & Safety must be part of a wider risk management system
- Encourage active employee involvement in H&S policies and implementation
- It will be an international standard and apply to any organization regardless of its size, type and nature
- Recently published 3 sets of priced guidelines to assist businesses with implementing the new standard.

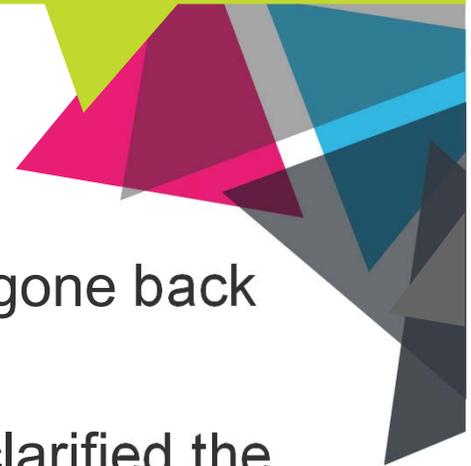


Fire Safety hackitt review

- Public Inquiry into the fire at Grenfell Tower continues and we expect that reforms to Fire Safety and Building Control will follow.
- Dame Judith Hackitt published her review earlier in the year which made a number of key recommendations including a new regulatory regime for buildings with 10 or more storeys, creation of a joint competent authority, higher competence levels for key duty holders.
- Surprisingly - no ban on combustible cladding.
- Instead, Hackitt suggests reforms to the testing regime whereby test houses should produce annual summary reports available to the public.

PRIVILEGE – practical tips

- Law around privilege in criminal proceedings has gone back and forth over recent times.
- The outcome recent judgment ENRC v SFO has clarified the position somewhat and we hope it stays this way!
- Litigation privilege is the most commonly sought and in order to claim it the following points need to be established:
 - Criminal proceedings are reasonably in contemplation; and
 - The documents are created for the sole or dominant purpose of the anticipated litigation
- What does your internal policy say about internal investigations? Will they be privileged?
- Recommend early instruction of solicitors



Horizon view





HSE BUSINESS PLAN 2018/19

- Focus on delivering the next phase of their Health and Work Programme with its focus on reducing levels of occupational lung disease, musculoskeletal disorders and work related stress.
- Plan includes taking steps to modernize their systems and also to support improvements in cyber security in the safety industry.
- Proactive inspections in high risk industries and activities.
- Work with SME's to help ensure proportionate management of health and safety

Brexit – General predicted impact (1)

- **Business as usual**
- In general, the impact of Brexit on health and safety legislation in the UK is likely to be minimal
- Health and Safety law in the UK is mainly governed by the Health and Safety at Work etc. Act 1974 which is not derived from EU law. So the main legal principles in this area will remain as they always have been
- It may be more difficult to extricate UK law from EU law in specific areas like agriculture and the chemicals industry where EU regulations govern the majority of work that is undertaken



Brexit – General predicted impact (2)

- **Risk of deregulation?**
- Some commentators fear that Brexit poses a risk of deregulation in the Health and Safety arena which could create unsafe working environments for employees and increase risks to the public
- The general consensus amongst businesses is that maintaining good health and safety standards makes good business sense whether we are a member of the EU or not and will continue to do so



Brexit – General predicted impact (3)

- **An opportunity?**
- Brexit may be an opportunity for UK Health and Safety Law to modernise and develop far quicker than it would have been able to if the UK remained in the EU
- It is hoped that greater control over our own legislative timetable will lead to some notable advances in law which could put us ahead of EU countries. For example, updating the law to fit with modern technology and including more of a focus on mental health and stress
- New role for the HSE
- Refer to Government papers for more information



Any questions?





Get in Touch

Hannah Frost

 Hannah.frost@shoosmiths.co.uk

 03700 864 161

Shoosmiths LLP

2 Colmore Square
38 Colmore Circus Queensway
Birmingham B4 6SH