

# Legal Matters

## Regulatory, Health & Safety

### Inside this issue:

Corporate manslaughter - the first 6 months	2
New penalties for health & safety	3
Increased proactivity by HSE	4

### Round up of Recent Case Law

Site specific risk assessment	4
Load falls from height	4
Drill rig death	5
415V cable left exposed	5
Company in liquidation still prosecuted	5
Legionnaires fine	6
HGV trailer crush	6
Insufficient guarding	6
Wedding party fire	7
Contact details	7

### Special feature of interest:

The Health and Safety (Offences) Act 2008 comes into force in January 2009 raising the maximum penalty in the lower courts to £20,000 for most offences and making imprisonment an option. See page 3.

Our newsletter aims to highlight developments and recent case law in this area in a concise and readable style. The newsletter will be published twice a year with the next issue due in May 2009.

For further information on any of the articles in this issue please see the contact details on the back page.

## R v Chargot - no change signalled by the House of Lords



The House of Lords has dismissed the Defendants' Appeal in the case of **R v Chargot** and confirmed the decision of the Court of Appeal.

On 10 January 2003, Sean Riley, an employee of Chargot Ltd, was involved in an accident when the dumper truck he was driving tipped on its side and buried him in the load of spoil he was transporting. He died from his injuries the following day in hospital.

The investigation which followed the accident revealed there were various shortcomings in the health and safety organisation at the construction site. There were, however, no witnesses to the accident and the precise cause of the accident was never established. The dumper truck itself had no defects and was fitted with a seatbelt. Mr Riley was not wearing a seatbelt at the time of the accident.

The Court of Appeal found

that in order to secure a conviction in proceedings against an employer under section 2 or section 3 of the Health & Safety At Work Act 1974 it is sufficient that the Prosecution proves a risk of injury to employees and non-employees arising from a state of affairs.

The Appellants argued that the Prosecution should be required to go further and to prove the acts and omissions by which it was alleged there had been a breach of duty. It was not enough for the Prosecution simply to assert that the state of affairs existed which gave rise to a risk of health and safety. The House of Lords upheld the approach adopted by the Court of Appeal, requiring the Prosecution only to prove the existence of state of affairs or a particular result, namely the exposure of employees or non-employees to a risk.

If an incident has occurred this will usually be sufficient to establish the existence of exposure to risk, although in a prosecution pursuant to section 3 of the Act the Prosecution may be required to prove the respects in which the injured person was liable to be affected by the way the Defendant conducted his undertaking.

Once the Prosecution have established the above, the burden of proof shifts to the Defendant to prove all reasonably practical steps were taken to ensure the health and safety and welfare of employees and non-employees as required by section 40 of the Health & Safety at Work Act 1974. The House of Lords approved the decision in **R v Janway Davies [2003]** and have not interfered with the burden of proof shifting to the Defendant.

The House of Lords also re-enforced **R v Porter [2008]**. In that case, the Court of Appeal set aside the conviction of a Headmaster of a school who was prosecuted



Continued from page 1...

after an unsupervised pupil fell from a step linking one playground to another resulting in the pupil's death. The Court of Appeal held the risk identified must be a real rather than hypothetical risk. In that case there was no evidence that the conduct of the school had exposed the child to any real risk. The House of Lords has stated the risk must be a material risk to health and safety, which any person would appreciate and take steps to guard against.

**R v HTM Ltd [2006]** remains untouched.

There are likely to be further challenges to the reverse burden of proof contained within section 40 of the Health & Safety At Work Act 1974 once the Health & Safety (Offences) Act comes into force in January 2009 (further information on page 3). This new Act provides courts with greater sentencing powers for health and safety offences including imprisonment of

individuals for a period of up to 2 years on indictment. For now the position remains unchanged.

**R v Chargot [2008] HL**

## Corporate manslaughter - the first 6 months

The new offence of Corporate Manslaughter and Corporate Homicide was introduced in April 2008. (A summary of the provisions of the new Act can be found within the Regulatory newsletter published in June 2008). While it is too early to assess what the effect of the new legislation will be and the number of prosecutions likely to be pursued, there have been indications as to how fatal accidents will be investigated.

The company or organisation will be guilty if the way in which their activities are managed or organised by senior managers causes a person's death and amounts to a gross duty of care owed to the deceased. Very little guidance has been given as to the meaning of the term 'senior managers' and no approved code of practice has been produced to support the legislation. The Ministry of Justice provided a summary of the Act but this does not provide sufficient guidance. The Act describes a senior manager as "someone who plays a significant role in the organisation in the making of decisions about how the whole or a substantial part of its activities are to be managed or organised or someone who is actually managing or organising those activities." There is likely to be lengthy legal argument as to whether individuals can properly be described as senior managers.

The police appear to have changed the way they investigate fatal accidents. They are now heavily assisted by the Crown Prosecution Service (CPS) at early stages in the investigation. The CPS advise the police on specific questions that should be put to those being interviewed. The police are also assisted by the HSE. The police are adopting a very wide interpretation of the term senior manager. Questions being put to managers and directors surround issues such as roles and responsibilities and delegated authority. The police have arrested and interviewed directors, senior managers and supervisors as part of their investigation.

---

**It is likely in the future that the police will provide a company with a list of directors, managers and supervisors they wish to interview under caution.**

---

It is essential therefore that directors and senior managers are aware of their roles or responsibilities and their job descriptions. Some directors and senior managers are likely to be interviewed under caution in the course of a police investigation and we will have to answer questions on their roles, responsibilities and delegated authority.

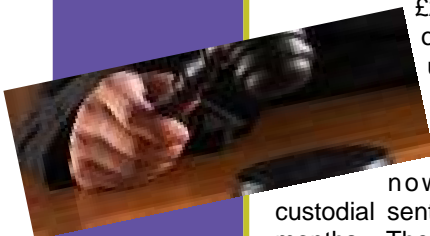
The police are likely to require

interviews under caution in the weeks following the accident rather than towards the end of their investigation and are more likely now to use their powers of arrest. These investigations are likely to generate greater press coverage.

The police and the HSE will require disclosure of the company's documentation. A jury, when deciding on whether there has been a gross breach of duty, can take into account the safety culture of an organisation. The prosecution will therefore be looking at previous advice provided by the HSE or enforcement notices served upon the company and any reports produced by the company into health and safety as well as its practices and procedures and health and safety policy.

We are likely to see prosecutions for corporate manslaughter very soon. We will probably see a number of defendants prosecuted arising out of the same incident including directors under section 37 of the Health and Safety at Work Act, companies charged under the Health and Safety at Work Act, and individuals charged with manslaughter and health and safety offences.

“It is likely that magistrates will retain jurisdiction of more prosecutions for regulatory offences in view of their greater sentencing powers.”



## New penalties for health & safety offences

The Health & Safety (Offences) Act 2008 received royal assent on 16 October 2008 and will come into force in January 2009. In contrast to the Corporate Manslaughter Act, this new legislation completed its journey through Parliament relatively unscathed and largely unnoticed. The Act started as a Private Members Bill, introduced by Labour MP, Keith Hill. It amends section 33 of the Health and Safety at Work Act 1974 (HSWA) to raise the maximum penalty available in the lower courts to £20,000 for most safety offences and more importantly makes imprisonment an option for individuals charged with Health and Safety offences.

Schedule 1 of the Act contains a new Schedule 3(A) to the HSWA. Under Schedule 3(A), breaches of sections 2 to 6 of HSWA can be dealt with by the Magistrates or the Crown Court. The maximum fine in the Magistrates' courts remains £20,000 for each offence with an unlimited fine in the Crown Court. However, magistrates can now impose a custodial sentence of up to 12 months. The Crown Court has power to impose custodial sentences of up to 2 years.

General duties of employees at work are governed by section 7 of HSWA. Section 7 states that 'it shall be a duty of every employee while at work to take reasonable care for health & safety of himself and other persons who may be affected by his acts or omissions at work.' The maximum penalty on conviction in the magistrates' courts is a term of 12 months imprisonment and/or a fine not exceeding £5,000. If the matter proceeds to Crown Court, the maximum term of imprisonment is 2 years and/or an unlimited fine.

Health and Safety regulations have previously attracted fines

in the magistrates' courts up to a maximum of £5,000. Under the new Act, magistrates have greater powers to fine up to £20,000 for each regulatory offence or impose a term of imprisonment not exceeding 12 months. In the Crown Court the maximum penalty is a period of 2 years imprisonment and/or an unlimited fine.

In the third reading of the Bill in the House of Lords, Lord McKenzie said of the Bill, "good employers and diligent managers have nothing to fear, indeed they have much to gain as it tackles commercial advantage that unscrupulous business gain from non compliance". He also stated that he intended to write to the Sentencing Guidelines Council to ensure that it updates its guidelines so that courts have an up to date advice on the use of custodial sentences. He stated that imprisonment should be reserved for the most serious matters and the expectation is that these matters will generally be concluded in the high courts.

The HSE also welcomed the new Act. HSE Chair Judith Hackett said "the new Act sends out an important message to those who flout the law. However, good employers and good managers have nothing to fear. In fact they have much to gain".

The Act has not imposed any new legal duties upon employers and individuals and should not in itself result in more prosecutions.

The HSE's enforcement policy statement makes it clear that prosecutions should be in the public interest and where 1 or more of a list of circumstances apply. These include:

- a breach of legislation resulting in death;
- there has been a reckless disregard for health and safety requirements;

- there have been repeated breaches which give rise to significant risk or persistent or significant poor compliance;
- the standard of managing health and safety is judged to be far below what is required by health and safety law giving rise to significant risk;
- there has been a failure to comply with an improvement or prohibition notice or a repetition of a breach that was subject to a caution;
- false information has been supplied wilfully and there has been intent to deceive or inspectors have been intentionally deceived.

The new Act also comes at a time when the Sentencing Guidelines Council is considering appropriate financial penalties where a fatality has resulted from a breach of duty. It is proposed that the starting point for the financial penalty for a company convicted of corporate manslaughter should be 5% of the company's average annual turnover. Where a company has been convicted of an offence under HSWA resulting in death, the starting point should be 2.5% of average annual turnover.

It remains to be seen how far courts are prepared to use the new powers to impose custodial sentences on individuals convicted of health and safety offences. It will no longer be necessary for an individual to be convicted of gross negligence manslaughter. Prison is now an option for those convicted of neglect under HSWA. This will raise issues on the legality of the reverse burden of proof contained in section 40 HSWA.

It is likely that magistrates will retain jurisdiction of more prosecutions for regulatory offences in view of their greater sentencing powers.

## Increased proactivity by HSE

A Parliamentary Select Committee reported into the work of the HSE and has suggested more workplace inspections and a construction plant register.

The cross party Select Committee closely scrutinised the work of the HSE following 2007's rise in construction fatalities, the Health and Safety Commission/Health and Safety Executive merger and a relocation of Headquarters from London to Bootle in Merseyside.

The Select Committee's recommendations included:

- more workplace inspections as there was "a correlation between inspection and safety standards";

- that the HSE bring forward plans for a national register of construction plant, to include large plant such as tower cranes and when they were last inspected;

- a compulsory accreditation scheme for Health & Safety Consultants to help stop under qualified advisors giving small businesses poor advice.

The HSE's Health & Safety Executive Business Plan for 2008/2009 entitled 'Influencing Change' also highlights the HSE's targets for improving occupational health and safety outcomes over a 10 year period between 2000 and 2010 as follows:

- reducing the number of working days lost by 100,000 workers from

work related injury and ill health by 30%;

- reducing the incidence rate of cases of work related health by 20%;

- reducing the incidence rate of fatalities and major injury accidents by 10%.

To achieve this the HSE is maintaining the number of frontline inspectors, recruiting extra specialists (including nuclear inspectors) and recruiting general staff given the Headquarters move to Bootle. It is clear that the HSE is becoming more proactive and we can probably expect greater numbers of prosecutions given the greater resources available to the HSE.

## Round up of Recent Case Law

### Site specific risk assessment

The City of York Council was fined £20,000 in 2008 following the death of a Council worker when his ride on lawnmower overturned on sloping ground.



The Court found that the Local Authority had not properly assessed the risk and was not following the mower manufacturer's safe operating instructions.

Frank Smith, aged 54, died on 19 May

2005 whilst using a ride on mower to cut long wet grass on a sloping embankment. Unfortunately Mr Smith lost control of the lawn mower and it slid down a hill, hitting a retaining wall and causing the lawn mower to flip over onto him causing death.

A successful prosecution was brought by the HSE as York Council only had a generic risk assessment and there was no competent assessment of the degree of the slope on the embankment which was at 25 degrees and significantly greater than the 19

degree upper limit specified in the manufacturers instructions for safe use.

A ride on mower was therefore not appropriate for use in the area and there was a successful prosecution under section 2(1) Health & Safety at Work Act 1974 for failing to ensure the employee's safety. A fine of £20,000 was handed down plus prosecution costs of £20,423.

**HSE v MRX Engineering, Liverpool Crown Court April 2008**

### Load falls from height

A steelmaker was fined £100,000 after 1 employee was killed and another badly injured when a half tonne load fell onto them from an overhead crane.

A welder named Keith Wharton was killed instantly and a colleague suffered a broken neck and leg when a steel lifting frame fell from a crane.

An HSE inspection revealed that there was no safety catch on the hook of the crane and operators had not been adequately trained and the company should not have allowed loads to be moved over peoples' heads.

MRX Engineering Support Services pleaded guilty to an

offence under section 2(1) Health & Safety at Work Act 1974 and the business was fined £100,000 and ordered to pay prosecution costs of £16,941.

**HSE v MRX Engineering, Liverpool Crown Court April 2008**



## Round up of Recent Case Law

### Drill rig death

Edeco Petroleum Services Ltd was fined £200,000 following the death of a sub contractor who was suffocated when the arm of a large piece of lifting equipment descended onto his neck.

Neil Miller was found dead on 6 August 2005 at a gas storage facility in Yorkshire. Unfortunately when Mr Miller was checking a cellar in the rig beneath the machine to see how much fluid had collected during the drilling process a lifting arm descended and trapped his neck and he died of asphyxiation. The machine had

been imported from Canada and its safety had not been assessed as required by the Supply of Machinery (Safety) Regulations 1992. Metal guarding should have been provided around the exterior of the danger zone.

There was a successful prosecution under sections 2(1) and 3(1) Health & Safety at Work Act 1974 and the firm was fined a total of £200,000 together with prosecution costs of £47,400. The Judge said that the firm had failed to properly consider the risks and that cost cutting had been a

contributing factor and he wanted to send out a clear signal "that such a casual and lax approach to Health & Safety" would cost companies money. The Judge added that he wanted the fine to hurt both the reputation and management of Edeco but to avoid putting employees' jobs at risk.

**HSE v Edeco Petroleum Services Ltd, Hull Crown Court, April 2008**

### 415v cable left exposed

SP Power Systems (Part of Scottish Power) was fined when a plasterer was engulfed in flames when he tripped on a live 415v cable at a housing development in Liverpool.

SP Power Systems were called in and insulated the cables by 'pot ending' but failed to make it clear to site management that they were still live. In March 2006 a contractor tripped and fell onto one

of the live cables which exploded and he was engulfed in a fireball. The HSE were told that the SP engineers saw the 'pot ending' as a temporary measure but did not explain this to site management who thought that the cable had been disconnected and was not live.

There was a successful prosecution under section 3(1) Health & Safety at Work Act 1974

with a fine of £32,000 and prosecution costs of £15,000.

**HSE v SP Power Systems, Liverpool Crown Court, April 2008**

### Company in liquidation still prosecuted

Despite a company being in liquidation with no assets, the HSE still pursued a prosecution due to the serious aggravating features of the offence. This followed a fire at the factory of North West Aerosols Ltd in which 1 man died and 3 others sustained very serious burns. North West Aerosols Ltd went into liquidation less than a year after the incident and did not appear to defend the case at Liverpool Crown Court.

The case concerned a liquid petroleum gas leak in the factory which ignited resulting in a large number of aerosol cans exploding.

The HSE investigation revealed that the company had failed to adopt industry good practice for the change over of aerosol propellants and had failed to provide safety equipment and fire retardant clothing for staff.

In the absence of the company at Trial the Jury found that they were guilty on both charges, but there was only a fine of £2 and £1 in costs. The Judge indicated that the breaches were very serious and had the company not been in liquidation then a fine in the region of £250,000 would have been considered.

It is perhaps surprising that directors or officers of the company were not also potentially prosecuted under section 37 Health & Safety at Work Act 1974 but the case does highlight the problem which might be encountered more often due to the current downturn in the economy.

**HSE v North West Aerosols Ltd, Liverpool Crown Court, July 2008**

---

## Round up of Recent Case Law

---

### Legionnaires fine

Cider making company H P Bulmer and a water treatment contractor Nalco have each been fined £300,000 following a fatal outbreak of Legionnaires Disease.

Two people died and more than 20 others fell ill in Hereford in 2003. The Crown Court Judge

described the failure to clean 2 cooling towers adequately as "almost beyond belief". Legionella bacteria were found in the 2 cooling towers and it was stated that Bulmer had operated an outdated water treatment policy and deficiencies in staff training.

Both parties pleaded guilty and there were fines of £300,000 for each company and prosecution costs of £50,000.

**HSE v H P Bulmer & Nalco, Hereford Crown Court, June 2008**



### HGV trailer crush

A case was brought against TDG (UK) Ltd and Augustus Vaiciulis when an employee of TDG, aged 64, was crushed to death by an HGV trailer.

The Regulatory Authority contended that there was an unsafe practice at a large distribution centre whereby the management failed to check and enforce the application of a parking brake at the rear of the trailer units in their yard.

Mr Vaiciulis was a driver, not employed by TDG, who arrived on site to pick up an HGV trailer and failed to apply his own

handbrake to the tractor unit which the Court described as "an act of gross negligence". Unfortunately the trailer rolled backwards on a slight incline trapping an employee and he sustained fatal injuries.



TDG pleaded guilty and were fined £325,000 plus prosecution costs of £25,000. The driver (Mr Vaiciulis) was fined £1,000

under section 7 Health & Safety at Work Act 1974 and costs of £2,000.

On Appeal the Court of Appeal Criminal Division reduced the fine from £325,000 to £275,000 and costs were awarded from central funds. This was on the basis that the Crown Court held too little weight had been attached to the part played by the co-accused (driver) when setting the fine.

**HSE v TDG & Augustus Vaiciulis, Leicester Crown Court, March 2008**

### Insufficient guarding

An employee sustained an amputation of all the fingers on his left hand due to insufficient guarding and/or an unsafe system of work.

The HSE contended that the risk was plainly foreseeable as company management was aware of the absence of guarding for a number of years and a Victim Impact Statement by the injured party emphasised the life changing nature of the injuries.

The company was fined £5,000 plus costs of £2,500 following a guilty plea under section 2(1) Health & Safety at Work Act 1974.

We are seeing more Victim Impact Statements (VIS) from injured parties or families, in the event of a fatality being adduced in evidence before the Court. These statements can be very emotive and set out the dramatic impact that an

accident/injury has had on their lives and those of their families. Such VIS can be very persuasive for a court when looking at stringent sentencing.

**HSE v Rimac Ltd, Staffordshire Magistrates Court, June 2008**

---

## Round up of Recent Case Law

---

### Wedding party fire

The Defendant company hired marquees and associated equipment for weddings, parties and corporate events. In December 2005 they erected a marquee and supplied 2 gas fired space heaters to a public house. A number of functions including a wedding reception were due to be held in the marquee during the hire period. Unfortunately during the wedding reception a guest suffered severe burns when her skirt ignited as she stood near to one of the gas fired space heaters which was unguarded.



The Prosecuting Authority examined the heater and found that the temperature reached 800 degrees centigrade. The Prosecuting Authority's case was put on the basis that industry Codes of Practice provide guidance on the use of heaters specifically that "all

means of heating other than electrical should be placed externally and ducted in by means of flame retardant hosing". In a PACE Interview a Company Director accepted that they were unaware of the Codes of Practice and no formal written instructions were given to staff at the public house. It was further accepted that the company's risk assessments were generic and did not consider the use of heaters. Following the accident the company replaced its entire stock of heaters with indirect, ducted heaters.

The case was heard in the Northampton Magistrates Court and the company revealed pre tax profits of approximately £90,000 and the Magistrates acknowledged the company's 'outstanding' safety record and retained jurisdiction and

accepted that the company had demonstrated genuine remorse for the accident and entered an early guilty plea.

The company was fined £4,000 and agreed prosecution costs of £8,500.

This case shows how both the HSE and criminal courts expect companies to be fully aware of, and work in accordance to, any HSE guidance, industry guidance or Codes of Practice for the industry sector/work they undertaken. The elevated importance of HSE guidance is clear and has also been laid down in statute by the Corporate Manslaughter and Corporate Homicide Act 2007 (a summary of the provisions of the Act is set out in June 2008 issue of this newsletter).

**HSE v Chelsea Hire, Northampton Magistrates Court, March 2008**

### Contact Information

If you have any queries or require advice on any of the matters discussed in this issue, please contact:

**Peter James**  
E: [peter.james@plexuslaw.uk.com](mailto:peter.james@plexuslaw.uk.com)  
DDI: 0870 084 8319

**Anthony Baker**  
E: [anthony.baker@plexus-law.co.uk](mailto:anthony.baker@plexus-law.co.uk)  
DDI: 0870 832 5239

**Chris Foulkes**  
E: [chris.foulkes@plexus-law.co.uk](mailto:chris.foulkes@plexus-law.co.uk)  
DDI: 0870 832 5135

**Richard Salvini**  
E: [richard.salvini@plexus-law.co.uk](mailto:richard.salvini@plexus-law.co.uk)  
DDI: 0870 832 5146

If you have any suggestions for future issues, please email [jane.olive@plexus-law.co.uk](mailto:jane.olive@plexus-law.co.uk)

Plexus Law is a trading name of Parabis Law LLP, a limited liability partnership registered in England under number OC315763

[www.plexuslaw.uk.com](http://www.plexuslaw.uk.com)

The content of this newsletter is merely informative and should not be relied upon as a substitute for legal advice.

We hope you have enjoyed this issue of Legal Matters. However, if you do not wish to continue receiving the publication, please email : [anna.pickles@plexus-law.co.uk](mailto:anna.pickles@plexus-law.co.uk), providing your name, company name and address.