

Health and Safety Legal Update



Issue 2: May 2018

Zero incidents
Zero harm
Zero compromise
Keeping you healthy and safe, every day at work.

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Introduction

Karl Simons

Welcome to the second issue of our Health and Safety Legal Update newsletter. The first issue was well received and I hope that you and your team find this one as informative and thought-provoking as the last.

We have included updates on changes in legislation that will affect our operations and look at the impact changes in sentencing guidelines have had on health and safety cases where, tragically, lives were lost. We hope to learn from these preventable events in our organisation to help ensure that similar events don't happen while we are working.

We also look at further proposed changes to the sentencing guidelines for cases involving negligent manslaughter.

Once again, the intent of these proposed changes is prevention of harm: a goal we all share equally here at Thames Water.

Thank you all for reading it.



Sentencing: Sentencing of VLO's

Following the feature in our last newsletter on the effect of the Sentencing Guideline on fines in health and safety cases, our new legal partners at Eversheds Sutherland have provided their view on recent cases dealing with the sentencing of large and very large organisations.

The introduction of the Guideline heralded a significant increase in the level of fines imposed by the Courts. Fines are now based on a number of criteria, including turnover and the level of risk, which has resulted in the Courts imposing significant fines for what appear to be relatively minor injuries, but where there was a risk of something much more serious and in some cases to more than one person. By way of example, Poundstretcher was fined £1 million for health and safety breaches across three of its stores, where there was no injury but a risk posed to many.

These fines are near un-appealable as the Guideline gives such a large bracket in which the Court can impose a fine. For example, for a large organisation, which has committed a medium culpability harm category 2 offence, the Guideline sets out a fine range of £300,000 to £1.5 million. Furthermore, for very large organisations the Guideline states “...it may be necessary to move outside the suggested range to achieve a proportionate sentence”. The huge discretion afforded to judges means that an appeal is rarely likely to be successful.

However, there have been some recent cases that show highest level fines may not always be imposed.

The appeal of *Whirlpool UK Appliances Ltd v R* heard in December 2017 by the Lord Chief Justice considered a fatal incident case where the Crown Court had imposed a sentence of £700,000 (reduced from a starting point of £1.2 million for mitigation and an early guilty plea). The argument heard by the Court of Appeal was not that the fine was a disproportionate penalty, rather that the sentencing judge had erred in his application of the

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Guideline and setting of the starting point. This was accepted and the fine imposed on Whirlpool (an organisation with a turnover of nearly £711 million) was reduced to £300,000.

This judgement demonstrates that the conviction of a very large organisation does not automatically mean a large fine and appears to be supported by the recent cases of *Tesco* and *McDonald's*.

On 20 March, Tesco was fined £116,000 after an employee suffered chemical burns when cleaning an oven. A few days later on 23 March, McDonald's was fined £200,000 following an incident where an employee suffered a fractured knee when he was directing traffic at Drive-Thru and car park entrances. These appear to be very modest fines for such large organisations, so why did the Courts treat these cases differently?

In both cases a strong argument was made that culpability under the Guideline should be assessed on the basis of corporate culpability, so for very large organisations where a breach is identified on one site, store or restaurant, the Court could conclude that corporate culpability was low as there was no systemic breach by the organisation. In the case of McDonald's, why should it be considered to have committed a high culpability offence when there was a breach in one of its 406 restaurants? In order to make such an argument, an organisation would have to have evidence to support this.

In these cases, this argument was accepted by the sentencing judges. Having said that, care has to be taken when deploying such an argument. For example, this was rejected in the Poundstretcher case and appeared to aggravate Judge Hetherington who commented, *"To blame the local management is not only deeply unattractive, coming from a major employer employing some 6,000 people, but, in my judgment, on the evidence I heard, quite unfair....And it is, in any event, a circular argument - it is part of higher management's function to see to it that local management is in place and performing to a proper standard..."*.

It will be interesting to see how Courts approach sentencing in light of these arguments and whether they will result in increasingly modest fines where the breach can be shown to be isolated to a specific site. Alternatively, whether the Courts push back on such an argument, as we must not forget that it was the very modest fines imposed on large and very large organisations, which led to the introduction of the Guideline in the first place.

We will keep you up to date.

Eversheds Sutherland (International) LLP
March 2018

Sentencing
Council

**Health and Safety
Offences, Corporate
Manslaughter and
Food Safety and
Hygiene Offences**
Definitive Guideline

Sentencing: Mobile Phones and Driving:

Press reports have highlighted the confusion among motorists regarding the use of mobile phones as satnavs in cars. A Daily Telegraph report explained the source as the Department of Transport telling drivers not to "use" their phones, while some police tell drivers not to "touch" their phones while driving. A prosecution case included in the Daily Telegraph article resulted from a driver putting their phone back into its cradle from which it had fallen, while the car was stationary at traffic lights. The phone was being used as satnav at the time.

Call records were used to prove that the driver of a 32 tonne heavy goods vehicle was using his phone at the time the vehicle struck a pedestrian who was fatally injured. The incident occurred in May 2017 in Buckinghamshire. The pedestrian was crossing the road and was pronounced dead at the scene. Records showed that the driver had been engaged in a call for 12 minutes prior to the incident and it was ended



16 seconds after the collision. The driver was sentenced to three years in prison and banned from driving for 5 years from the date of his release.

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A driver, whose heavy goods vehicle veered into a neighbouring lane when he was checking his satnav, causing the death of two people in another vehicle, has had his custodial sentence doubled to four years by the Court of Appeal. The Court of Appeal also extended his driving ban to four years, eleven months. The original sentence imposed by Canterbury Crown Court was a custodial two year sentence and a driving ban of two years and seven months. The sentence was reviewed after Solicitor General Robert Buckland QC MP thought it was too low and referred it to the Court for review.

Thames Water procedure HSP 47 "Using Mobile Phones While Driving" is clear and states, "The use of a mobile phone or similar device when driving on company business is prohibited. You must never make or receive calls, send or read texts or emails or otherwise use a mobile phone, whether hand-held or hands-free." As well as helping to ensure the safety of all road users, observing the requirements of this policy should prevent employees driving on behalf of Thames Water from facing similar prosecutions.

Sentencing Guidelines: The Second Year

The Sentencing Guidelines for Health and Safety offences have now been applied for two years, since February 2016. The intention of the Guidelines is to ensure that fines have a real economic impact which will serve to increase the importance of health and safety compliance to managers and shareholders of organisations. Increasing levels of compliance should therefore reduce the number of injury incidents occurring and increase workplace safety in the UK.

Records show that there has been an increase in the level of fines imposed over the past two years, which include the examples below. Fines have risen from £13 million to over £61 million. Since 2015, fines have risen by approximately 80%. In addition to an increase in fines, custodial sentences for individuals for breaches of health and safety legislation have also risen. There has also been a rise in the value of fines to over £1 million, many from non-fatal cases.

- London and Southeastern Railways (LSER) and Wetton Cleaning Services Ltd (Nov 2017) - £2.5m and £1.1m respectively - an employee of Wetton Cleaning Services was electrocuted after falling on a 750-volt live rail.
- Iceland Foods Ltd (Sept 2017) - £2.5m - a contractor, hired to replace filters within an air conditioning unit, fell three metres from a platform and sustained fatal injuries.
- Warburtons Ltd (July 2017) - £1.9m - an agency worker was cleaning parts of the bread line when his arm became trapped between two conveyor belts leaving him with friction burns that required skin grafts.
- Nottinghamshire County Council (April 2017) - £1m - a disabled man was struck by a tractor operated by council employees, suffering serious bruising and injuries to his arms, legs and head.
- Aldi Stores Ltd was fined £1 million and ordered to pay £70,000 in costs after a delivery driver suffered severe injuries to his foot while operating an electric pallet truck.
- A golf company director was jailed after a ball collector drowned in a lake on 11 February 2016 while collecting golf balls at Peterstone Lake Golf Course near Newport. The director pleaded guilty to manslaughter by gross negligence and was sentenced to 32 months in prison.

- A construction company boss was sent to jail for 14 months following the death of two employees from a balcony fall in London's Cadogan Square. The incident occurred after he failed to undertake an adequate risk assessment or offer training.
- Tata Steel successfully appeal £1.98m fine - The Court of Appeal reduced Tata Steel UK's £1.98m fine by a quarter. The steelmaker appealed its conviction for two separate sentences after two workers' hands were trapped in unguarded machinery. Three appeal court judges ruled the categorisation of the likelihood-of-harm should have been medium and not high.



Legal Update:

Brexit

Experts predict that no changes to UK health and safety legislation will take place for five to ten years after the UK leaves the European Union on 29 March 2019. There are over 8,000 statutory instruments that implement EU legislation, which the UK and all other member states, have to adopt. Changes to legislation in the UK must go before parliament and it is estimated that it would take four to five years to review any changes, if that was all that was on the parliamentary agenda.

Some regulations in the UK, such as the Display Screen Equipment (DSE) Regulations, could be updated to take account of technological advances. Using this example, there have been great advances since 1992, with the introduction of smartphones and tablets, and the UK would be free, following Brexit, to revise these regulations without being constrained by European Directives.

The Repeal Bill that was included in the Queen's speech at the opening of parliament in 2017, states that all EU Directives and legislation will be rolled into UK law when the UK leaves the EU. The DSE, Management of Health and Safety at Work and Provision and Use of Work Regulations are already UK law, having been made so by the Secretary of State under the powers of Section 15 of the Health and Safety at Work etc. Act 1974. Therefore, these regulations will not be affected by the Repeal Bill.



Building and Fire Safety Regulation Changes

It is very likely that changes will be made to fire safety and building regulations when the review, chaired by Dame Judith Hackitt, is concluded. An interim report published in December 2017, stated that existing regulations are too complex and are poorly implemented. The report also suggests that the frequency of fire risk assessments for building should be increased to be carried out annually. The second stage of the review will be concluded by spring 2018 and the final report is expected to specify requirements for a new regulatory approach. There are seven industry working groups who will be submitting recommendations for the final report.



These groups are looking at:

- design, construction and refurbishment, to establish what industry and regulators need to do to make sure building safety is embedded during the design and construction phase;
- occupation and maintenance, to recommend how building owners, landlords and regulators can ensure that a building is always safe throughout its life cycle;
- construction products, to determine how product testing can be improved and marketing claims on products can be made more accurate;
- professional "competency", to establish how the skills and qualification of people involved in building and managing complex and high-risk buildings should be assessed;
- giving residents a voice in fire safety issues, with an effective statutory route for raising concerns;
- regulations and guidance, to assess whether central government should be in charge of technical guidance for complex and high-risk buildings;
- the interim report's idea that a "golden thread" should run through all complex and high-risk building projects, so that the original design intent around fire safety is preserved, and that any subsequent changes go through a formal review and sign-off process.

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The inquiry into the fire at Grenfell Tower in London began in March 2018 and includes a review of more than 26,700 documents which could rise to 300,000. The procedural hearings for the inquiry also began in March with evidence hearings starting in May. 521 applications have been received from individuals and organisations offering to become core participants, (giving evidence), 495 of these from survivors and their families and the rest from local businesses. Thames Water was one of the companies that offered to participate.

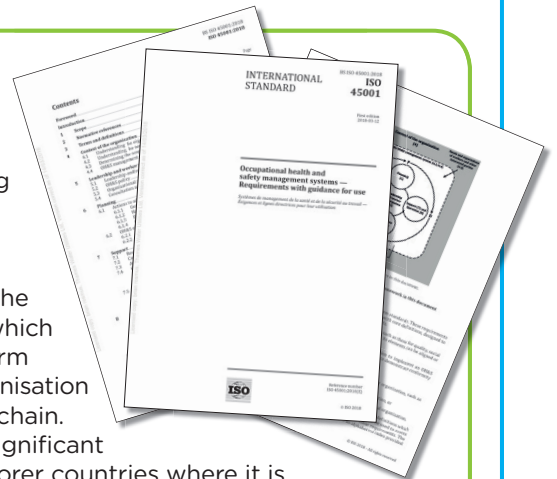
The human impact of incidents cannot be overlooked. In addition to the tragic loss of life, 400 adults are receiving treatment for mental health issues arising from the Grenfell Tower fire; 96 people have completed treatment. £23.9 million of government funds have been allocated to address survivors' needs and a further £28 million was recommended to be allocated in the autumn budget.

ISO 45001

ISO 45001, the new international occupational health and safety systems standard, was launched in March 2018 following a development period of four and a half years. It is anticipated that there might be up to 350,000 certifications around the new standard across the world. As an international standard, it can help companies that trade across the globe to demonstrate a consistent and understood common standard in safety management to others. The current OHSAS 18001, which the new ISO 45001 replaces, has approximately 150,000 certifications across the world.

The new standard has leadership and context at its heart which should lead to safety management being integral to organisational strategy. It also provides

for worker involvement in decision making and will require a management system in proportion to the organisation, which will prevent harm within the organisation and its supply chain. This will be a significant step across poorer countries where it is estimated only 10% of the workforce is covered by health and safety regulation.



New PPE Regulation EU 2016/425

The Personal Protective Equipment (PPE) Directive, which is now 25 years old, is being repealed. The new Regulation, (EU) 2016/425, is implemented in the UK via the Personal Protective Equipment (Enforcement) Regulations 2018, which are in force from 21 April 2018. The old Directive set goals for EU Member states to meet, which meant each one could decide how they would achieve this and implement changes to legislation as required. The new EU Regulation, however, is binding on all EU Member states and must be applied in its entirety across the EU. The reason for the change from Directive to Regulation is to ensure consistency across the EU and to ensure all Europeans get effective PPE.

PPE, which is covered by the old PPE Directive 89/686/PPE, can still be sold until 21 April 2019 and EC examination certificates issued under the old Directive remain valid until 21 April 2023, unless they expire before that date. All PPE will have to be certified to the new Regulation after 21 April 2018.

The manufacturers, importers, distributors and retailers of PPE must comply with the Regulation and share the responsibility of ensuring products

are safe and effective. The Certification will last a maximum of five years and then needs to be renewed. This will help to reduce the number of counterfeit items for sale in the EU and will mean that older, obsolete products which are potentially less effective than more modern ones, will be removed from the market.

Some items have different categorisation under the new Regulation. For example, life jackets and hearing protection move from Category II to Category III.



There remain three categories of risks that the PPE is associated with:

- Category I, simple PPE used to protect from low risks, such as cleaning materials
- Category II, intermediate risks
- Category III, high risks likely to lead to severe health problems or death

Sentencing Guidelines: Gross Negligence Manslaughter Proposal

The Sentencing Council issued a consultation paper in July 2017 on the sentencing of manslaughter. The consultation ended in October 2017. The impact of the proposals could be significant: potentially more so than the February 2016 Sentencing Guidelines.

Gross negligence manslaughter is the most serious health and safety offence. The consultation

explains that gross negligence manslaughter would occur when the offender is in breach of a duty of care towards the injured person. If the breach causes death, the offenders would be assessed to determine whether a criminal act or omission was evident, without any intention to cause death. This would apply in a work setting where an employer disregarded the safety of employees.

The consultation contained four draft guidelines:

1. Unlawful act manslaughter
2. Gross negligence manslaughter
3. Manslaughter by reason of loss of control
4. Manslaughter by reason of diminished responsibility

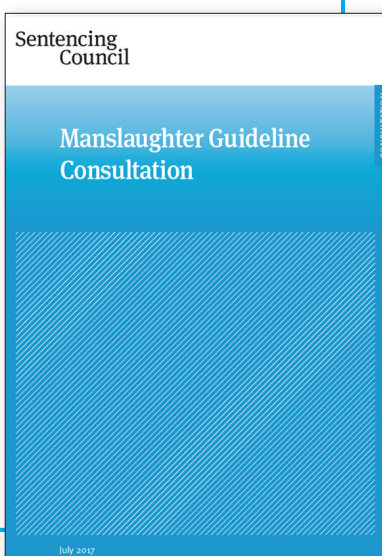
There are four levels of culpability set out in the consultation paper, ranging from A – Very High Culpability, to D – Lower Culpability. The factors indicating each category are shown in the table.

Culpability	
<ul style="list-style-type: none"> The characteristics set out below are indicators of the level of culpability that may attach to the offender's conduct: the court should balance these characteristics to reach a fair assessment of the offender's overall culpability in the context of the circumstances of the offence. The court should avoid an overly mechanistic application of these factors. 	
A – Very high culpability	Very high culpability may be indicated by: <ul style="list-style-type: none"> the extreme character of one or more culpability B factors and / or a combination of culpability B factors
B – Factors indicating high culpability	The offender persisted in the negligent conduct in the face of the obvious suffering of the deceased
	The negligent conduct was in the context of other serious criminality
	The negligent conduct was motivated by financial gain (or avoidance of cost)
	The negligent conduct persisted over a long period of time (weeks or months)
	The offender was in a dominant role if acting with others
	The offender was clearly aware of the risk of death arising from the offender's negligent conduct
	Concealment, destruction, defilement or dismemberment of the body (where not separately charged)
C – Factors indicating medium culpability	Cases falling between high and lower because: <ul style="list-style-type: none"> factors are present in high and lower which balance each other out and / or the offender's culpability falls between the factors as described in high and lower
D – Factors indicating lower culpability	The offender did not appreciate the risk of death arising from negligent conduct
	The negligent conduct was a lapse in the offender's otherwise satisfactory standard of care
	The offender was in a lesser or subordinate role if acting with others
	The offender's responsibility was substantially reduced by mental disorder, *learning disability or lack of maturity
<i>*Little, if any, weight should be given to this factor where an offender exacerbates a mental disorder by voluntarily abusing drugs or alcohol or by voluntarily failing to follow medical advice</i>	

The level of culpability would be used to identify the starting point for sentencing. For culpability level A this would be a custodial sentence with a starting point of 12 years and could range from 10 to 18 years. The sentencing guidelines are shown in the table below for all levels of culpability.

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

The guidelines are expected to come into force for sentences imposed from December 2018.



Risk and Prosecutions:

Lifting Equipment

There were 15 convictions made following HSE prosecutions during the year 2016/17 for offences involving lifting operations. These convictions resulted in average fines of around £30,000 per offence, (over £400,000 in total). Since 2013, there have been 416 Prohibitions and 2,332 Improvement Notices issued by the HSE. This works out to 550 per year, or more than ten per week. HSE RIDDOR reporting statistics show that, for the same period since 2013, there have been a total of 2,386 dangerous occurrences involving failure of lifting equipment. Again this works out to just over 11 per week.

With Labour Force Survey statistics showing that lifting and handling accounted for 25% of workplace injuries during 2016/17, it is not surprising to find companies employing technical solutions to reduce the level of risk from these activities. Thames Water employees use lifting equipment as part of their day-to-day operations. In order to ensure this equipment remains in a condition suitable for use, an inspection programme runs across the business. The programme itself is monitored at the monthly Thames Water Dynamic Risk Review Meetings where actions can be raised to ensure the inspection programme remains on target.



Pipe Crossings and Pipe Bridges

Thames Water has a programme to inspect and manage its pipe crossings and pipe bridges to ensure the structures remain in good condition, that people cannot trespass on them and suffer injury and to ensure pollution or burst incidents caused by structural failure is reduced. Each month, the performance of the programme is monitored at the Catastrophic Risk Review Meeting. Suitable access prevention measures are being identified and can be influenced by various factors including the proximity of other pipes and structures and accessibility from private land and walkways.

National Grid was fined £2 million after an 11 year old boy fell from a pipe and died from his injuries. The pipe was positioned alongside a bridge over the Leeds and Liverpool canal. No access prevention measures had been fitted.



Staying Safe During Works On Highways

Following the death of a worker by a vehicle while working on the highway in Suffolk, a contractor was fined £1.8 million plus £12,450 in costs and a subcontractor fined £75,000 plus £12,450 in costs. The HSE Inspector stated after the hearing that the only control measures in place along the 60mph road was a line of road cones, so workers were not provided with a safety zone, which meant that adequate controls were not in place.

Failure to implement adequate control measures led to a contractor being fined after a fatal incident in Devon. Temporary road closure and traffic lights, reduction in speed limit and signs were not implemented and a worker carrying out road repair work was struck by a vehicle driven by a member of the public. The contractor was fined £500,000 plus nearly £18,000 in costs.

A pensioner was killed six weeks after another pedestrian was hit by a car at a temporary road crossing. At the time of the first incident, changes had been made to the traffic lights to reduce vehicle congestion. This shortened the time pedestrians had to cross and temporary pedestrian crossing lights were not working. When the fatal incident occurred, the temporary traffic lights had been removed but no alternative had been set up. Three duty holders were prosecuted. The highways contractor was fined £1.3m and £130,000 in costs. The Council received a £15,000 fine, plus £100,000 in costs, while a public-private partnership was fined £25,000 and billed for £80,000 in costs.

Compliance performance on street works carried out for Thames Water is monitored monthly at the Dynamic Risk Review Meeting. Form SHE6L is used to check compliance with "Safety at Street Works and Road Works: A Code of Practice", (commonly referred to as "The Red Book"), on Thames Water sites. The Thames Water Essential Standard 16 "Street Works", sets out the requirements for safe, short duration works on the highway. There is a new Thames Water Essential Standard being developed which will require higher standards than "The Red Book", where the risk of the site location is determined to be high, (work sites near schools, for example).



Trees On Thames Water Land

Owners and custodians of trees could be found liable under civil and criminal law for any harm or damage they might cause. Liability arises in criminal law, under the Health and Safety at Work etc. Act 1974 Sections 2 and 3, which place a duty on employers to ensure, so far as is reasonably practicable, that employees and non-employees are not harmed by their undertaking. Occupiers Liability Acts of 1957 and 1984 require reasonable care to be taken by owners and occupiers to ensure that visitors or trespassers are reasonably safe when on their premises.

There have been cases in the courts over recent years following incidents where trees have caused injury to, or the death of, visitors to premises. In 2011, the National Trust was found to have discharged its duty of care following an incident at Felbrigg Hall when a child was tragically killed by a falling branch which also injured three other people. Also, the Health and Safety Executive has been involved in the investigation of an incident that resulted in the death of a man at Castle Forbes in 2006.

There are trees growing on most of the Thames Water operational and office sites and a programme of inspections in place carried out by professional arboriculturalists. These inspections assess the risk based on the soundness of the trees and their location and actions are then recommended to manage this. Trees closer to access routes and boundaries are of higher risk than those in remote locations, away from site activity. Updates are presented at the Dynamic Risk Review Meetings.

