

Health and Safety Legal Update



Issue 3: May 2019



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Introduction

Karl Simons

I am delighted to be introducing the third issue of our Health and Safety Legal Update Newsletter. The first two issues were well received and we hope that you find this one just as informative.

Our legal partners at Eversheds Sutherland take a look at the sentencing of manslaughter cases and we take a look at the impact of the Sentencing Guidelines now these have been applied to cases for the last three years.

Brexit has been filling all news media for many months now and while the process has not yet concluded, we examine some of the impacts it has had already and what the impacts could be if it concludes without an agreement and ends in a no-deal situation.

Latest news from the Health and Safety Executive leads us to an update on some new road safety technology.

I hope you enjoy it.



Manslaughter Offences: New Definitive Guideline

Having given us their view on the sentencing of very large organisations in the last issue, our legal partners at Eversheds and Sutherland take a look at Manslaughter Offences.

From 1 November 2018, manslaughter offences committed by individuals have been sentenced in accordance with the new Definitive Guideline for Manslaughter Offences.

Like the Sentencing Guideline for Health and Safety Offences that came into effect from February 2016, this introduces the potential for higher penalties for gross negligence manslaughter offences, which occur in the context of a work activity. The Guideline sets out a range of 1 to 18 years imprisonment, so it is no surprise that once again health and safety is at the top of the agenda.

What is gross negligence manslaughter?

Gross negligence manslaughter is the most serious charge an individual can face following a fatal workplace incident. The offence requires a gross breach of a relevant duty of care to the deceased which causes (or significantly contributes to) the death.

A duty of care is usually always established in a workplace context; if work is being carried out, the individuals responsible for it or doing it have a duty of care to anyone who might be affected by that work.

A jury would then consider if there has been a gross breach of that duty. There is no set test for this and it is a matter for the jury to decide once it has heard all of the evidence in a case. Judges often direct juries to consider the guidance set down in a case called *R v Misra (2004)*:

"Mistakes, even very serious mistakes, errors of judgment, even very serious errors of judgment and the like are nowhere near enough for a crime as serious as manslaughter to be committed [It has to be something which was] truly exceptionally bad which showed such an indifference to an obviously serious risk of life..."

How does gross negligence manslaughter apply to workplace deaths?

Manslaughter prosecutions remain relatively rare when there has been a workplace death as establishing manslaughter following a workplace fatality is not straight forward. There are often a number of individuals with overlapping and interwoven responsibilities and at the same time there can be a hierarchy of command for investigators to pick through. However, this can mean charges are often brought against more than one person following a death.

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So what will sentencing look like under the new Guideline?

In the Hanover Square case the owner of a small window installation company was found guilty of manslaughter and sentenced to twelve months imprisonment. Under the new Guideline that sentence would undoubtedly be higher.

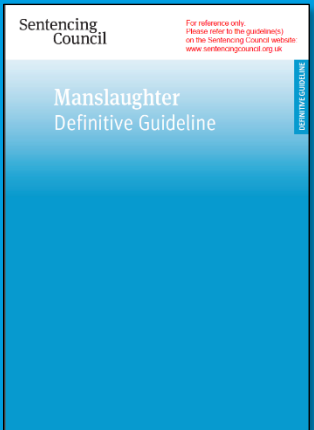
The Guideline asks judges to adopt a step by step approach to sentencing, assessing the culpability of the offender, applying aggravating and mitigating features and taking into account a number of other factors.

At the most serious end for level A "very high" culpability offences there is a starting point of 12 years imprisonment with a range of 10-18 years. At the other end culpability level D "lower culpability" offences start at 2 years with a range of 1-4 years.

When the health and safety guideline was introduced, prosecutors nearly always argued that offences sat at the most serious "high culpability" end of the scale. The Guideline sets out high culpability offences to include where "the offence was particularly serious because the offender showed a blatant disregard for a very high risk of death resulting from the negligent conduct and conduct being "motivated by financial gain (or avoidance of cost)". Again we can see how prosecutors might say that nearly all manslaughter cases are high culpability as gross negligence always requires a very high risk of death and decisions made in the work context often have an element or relevance to cost.

Helpfully there are a number of factors indicating lower culpability which may apply in workplace cases. This includes "The negligent conduct was a lapse in the offender's otherwise satisfactory standard of care" and for those lower in the hierarchy "The offender was in a lesser or subordinate role if acting with others in the offending".

The Guideline can be accessed at the following link - https://www.sentencingcouncil.org.uk/wp-content/uploads/Manslaughter_Definitive-Guideline_WEB.pdf



Sentencing Guidelines: Impact After Three Years

The Sentencing Council introduced new sentencing guidelines which were applied to cases from February 2016. The aim of the increased cost of fines this introduced was to ensure that the seriousness of offences committed are reflected by them. Now, in 2019, the Sentencing Council has carried out an impact assessment and has revealed that prior to February 2016 the median fine for health and safety offence was £25000, but now this has risen 15-fold to £370800. The Sentencing Council examined 161 cases that preceded the introduction of the new guidelines and 129 cases that have been heard since the introduction.

Increases in levels of fines imposed have been seen for small, medium and very large organisations. There has also been an increase in prosecutions of individuals under Section 7 of the Health and Safety at Work etc Act 1974, (requires individuals to take reasonable care of themselves and others at work).

Two hundred individual adult offenders were prosecuted and sentenced in 2017 with just over half of these for offences under Section 33 of the Health and Safety at Work etc Act 1974, (specified offences such as, to fail to discharge a duty imposed by other sections 2 to 7 of the Act, which include the general duty on employers to ensure the health and safety of employees and non-employees affected by the activities of a company).

The review also confirmed that the guidelines were being applied by judges as intended and that the number of successful appeals against fines had decreased. This is believed to be due to the clarity of the guidance available for judges to refer to when sentencing, leading to greater consistency.

While there have been some custodial sentences imposed on individuals since February 2016, these were not in sufficient number to enable meaningful analysis.



Brexit:

2019 update: At the time of producing this issue of the Thames Water Health and Safety Legal Update Newsletter, the outcome of the Brexit process was not determined. The impact that the conclusion of the process will have on health and safety law and risk management was also not determined, however, some of the potential impacts and effects that have already been seen are covered here.

Health and Safety Legislation

All EU Directives and legislation will be rolled into UK law when the UK leaves the EU. Some have already been enshrined in UK law by the Secretary of State, under Section 15 of the Health and Safety at Work etc Act 1974. The DSE, Management of Health and Safety at Work and Provision and Use of Work Regulations have already been incorporated into UK law in this way. The Health and Safety (Amendment) (EU Exit) Regulations 2018 have been prepared to ensure continuity of EU derived health and safety legal requirements after the UK leaves the EU. These Regulations have been made under Section 8 of the EU (Withdrawal) Act 2018 and remove references made to the UK being part of the EU. Reporting requirements in the Control of Major Accident Hazard Regulations 2015 (COMAH), which enable the sharing of learning from incidents would be amended to reflect the proposed change for this to be done via the UK being party to the United Nations Economic Commission for Europe ('UNECE') Transboundary Effects of Industrial Accidents Convention (TEIA).



Minister For Health and Safety

The Department of Pensions minister of state with responsibility for health and safety regulation and the Health and Safety Executive, resigned in March 2019 in order to vote in favour of rejecting a no-deal Brexit, which was not aligned with government. Sarah Newton had been in post since November 2017 having taken over the post from Penny Mordaunt. The post is now currently occupied by Justin Tomlinson.

Operation Brock

As part of plans for a no-deal Brexit, Highways England had installed a contraflow system and lowered the speed limit to 50mph on the M20 in Kent. This was done in March 2019 to create a lane just for lorries that were travelling to France from Dover in anticipation of queues that would have been created by vehicles taking longer to clear the customs checks required if the Brexit process had ended with no-deal. Now the departure date from the EU has been extended to 31st October 2019, the system has been removed from the M20 and the 70mph speed limit restored. The contraflow would be reinstated if a no-deal end to the Brexit process was to occur.

Maintaining Supplies

In the event of a no-deal Brexit, supplies coming into the UK could be disrupted because the free movement of goods to and from the UK and the EU would cease. This has meant that businesses that are reliant on imported products to continue operations have needed to make alternative plans to limit the impact of this. Thames Water, (and the other UK water companies), has been monitoring the Brexit process carefully and along with suppliers, has arrangements in place to minimise the impact of a no-deal Brexit on operations.

CE Marking

In the event of a no-deal Brexit, the 'CE' mark will be replaced by a new, "UK Conformity Assessment" mark, (UKCA). The CE mark is present on all items of Personal Protective Equipment (PPE) that is used throughout the EU, including the UK. There is likely to be a transitional period when items carrying the CE mark can be sold in the UK and this would be phased out by the UK government in consultation with businesses.

The new UKCA marking will have the same rules as the CE marking scheme currently has. If the product is assessed for conformity in the UK the UKCA marking then must be used. If the certificate of conformity is transferred to an EU recognised body then the CE marking will be used. Products which carry a CE mark based self-declaration of conformity will be eligible to be self-certified under the UKCA scheme in the same way and carry the UKCA mark. UKCA marking will not be recognised in the EU and products intended for sale in the EU market will need to be certified to and carry the CE mark.



HSE News

Changes to RIDDOR Form & Fees for Intervention

Changes to RIDDOR Form

The Health and Safety Executive has begun a process of modernising the forms used to report specified workplace injuries, illnesses and dangerous occurrences, (near misses). The requirements for the required reports are set out in the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013, (RIDDOR). While the reporting requirements remain unchanged, the forms used to make the reports will have an updated look and feel and will be held on a more modern platform. A copy of the report being made can be downloaded from the website at the point of submission only. Copies will not be available after that and email confirmation with report attached will no longer be sent out. In Thames Water, the Health Safety and Wellbeing team manage any reporting requirements that may arise. If you have any queries please email: safetyhealthandwellbeing@thameswater.co.uk.



Fees For Intervention Increase

Since October 2012 the Health and Safety Executive, (HSE), has been able to charge companies 'fees for intervention'. This system was introduced so that companies who break health and safety law cover the costs incurred by the HSE that arise from subsequent interventions, (inspection, investigation and enforcement action).

Recently it was announced that the fees currently collected by the HSE do not cover the costs incurred when interventions are made. It was stated that this was partly due to inflation. The HSE uses the system to charge companies when it has been necessary for a notification of contravention, (NOC), to be issued by an HSE Inspector. A NOC is issued when an HSE Inspector finds a material breach of health and safety legislation. HSE Inspector visit workplace premises to carry out inspections and investigations across the country and a material breach may come to light at that time.

In order to ensure that the costs are recovered, the fees for intervention were increased from 6th April 2019 by almost 20% to £154 per hour. Previously, the fees had been charged at £129 per hour. This is an incentive for organisations to ensure health and safety compliance is maintained. The HSE guidance states that a material breach is, "when, in the opinion of the HSE inspector, there is or has been a contravention of health and safety law that requires them to issue notice in writing of that opinion to the dutyholder". Fees are charged for time during visits, preparing reports and in obtaining any specialist advice that may be required.

EH40 Revised:

Changes to workplace exposure limits for hazardous substances



The Health and Safety Executive has updated its publication, EH40, which contains workplace exposure limits for hazardous substances. It has been updated to include new and revised workplace exposure limits (WELs) introduced by the 4th Indicative Occupational Exposure Limit Values (IOELV) EU Directive. Two of the substances used by Thames Water were affected by the revision and both now have WELs. This change has been reflected in the Thames Water COSHH Information, (CI), sheets, which have been revised to include this new information. The substances and corresponding CI sheets are Sodium Bisulphate, CI030 and Sulphur Dioxide CI034. The CI sheets are available from the Health and Safety intranet portal.

HSE News (continued)

Mental Health

First Aid Guidance Update Includes Mental Health First Aid

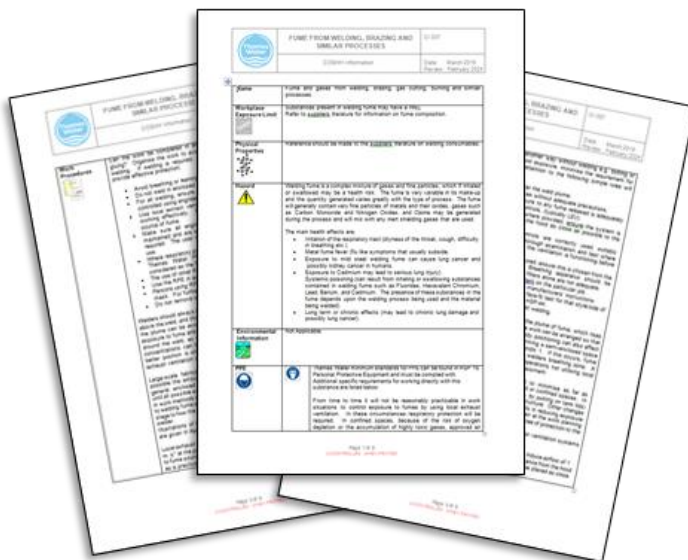
The manifesto prepared by the government for the 2017 general election included a commitment to change Health and Safety Law to include mental health. In November 2018, CEOs of over 50 companies in the UK signed an open letter to the Prime Minister calling on the government to uphold this promise. Recently, the Health and Safety Executive announced that the First Aid guidance on its website had been revised to include the need to consider mental health alongside physical health when undertaking a 'needs assessment'. (A 'needs assessment' is carried out by employers to identify the appropriate level of first aid provision needed in an organisation). The guidance suggests that companies may find it beneficial to have staff who are trained to identify and understand the symptoms of mental ill health and to provide support to colleagues.

MPs back amendment of First Aid at Work Regs

MPs voted in favour of amending the Health and Safety (First Aid) Regulations 1981 to create a legal duty for employers to appoint and train staff in mental health first aid. The motion was put forward in January 2019 and this follows the Health and Safety Executive revising guidance for employers on its website, which now includes considering the need for trained mental health first aiders, as well as physical first aiders. The guidance doesn't give a legal duty to employers to appoint mental health first aiders, but this would be created by an amendment of the Regulations. During the debate, the positive impact that mental health first aiders and training have had in Thames Water was given as an example by MP Luciana Berger. The government is not obliged to take action as a result of this motion.

Welding Fume Risk Information Issued

Health and Safety Executive Update Advice



Cancer Risk From Welding Fume

The International Agency for Research on Cancer has found that exposure to mild steel welding fume can cause lung cancer and possibly kidney cancer.

The Health and Safety Executive (HSE), has issued information on raised control standards required. The HSE has stated that welding must be undertaken with suitable control measures in place as there is no known safe exposure level, (where no harm is caused), for welding fume. Evidence from the IARC study found that general ventilation did not achieve the required amount of control.

The HSE guidance states that local exhaust ventilation must be used and that this may need to be supplemented by respiratory protective equipment, (face masks), if it is not capable of controlling exposure when used on its own. Thames Water has a COSHH Information Sheet CI037 "Fume from Welding Brazing and Similar Process", which was revised and reissued to incorporate the new HSE information.

Risks We Manage

Reports from the last few months involving risks managed within Thames Water and monitored at our Risk Review Meetings

Unique Coupling For Sodium Hypochlorite

A recent incident occurred during a routine delivery of sodium hypochlorite at a water treatment plant in Alabama, USA. The sodium hypochlorite was delivered to the wrong site and as a result was unintentionally mixed with ferric sulphate. The two chemicals then combined and began to produce chlorine gas. The chlorine gas was not contained and the leak led to more than 50 people being sent to hospital. Local residents were asked to shelter indoors and a local highway was closed. Reports indicate that those exposed to the gas will recover.



To reduce the risk of sodium hypochlorite being inadvertently mixed with ferric sulphate during deliveries in the United Kingdom, a unique coupling has been developed. The coupling will only connect the outlet on the sodium chlorite delivery tanker with the inlet on the sodium chlorite storage tank. The coupling will not fit onto any other connector because it has a coupling pin which must be aligned to make the connection complete. The coupling was developed by ICL and the development involved suppliers and users of chemicals in the UK including Thames Water. One of the Thames Water sites has been chosen to pilot the use of the new connector and this is scheduled to begin following the conclusion of the Brexit process.

The need to avoid the use of coupling adaptors in the period of initial introduction interim period as the new fitting is introduced is critical, as this will undermine effectiveness of standard couplings. Thames Water accounts for 10% of the national UK hypochlorite use and this change of coupling affects 100% of the market.

Mandatory Speed Limiters to be Fitted to Vehicles and Detection of Mobile Phone Use by Drivers

The Department of Transport has confirmed that speed limiting technology will be mandatory in vehicles sold in the UK from 2022, following the provisional agreement of new rules by the EU. This will be introduced in the UK regardless of the Brexit process outcome. The aim of the EU is to cut road deaths to zero by 2050 and the introduction of this technology will help to reduce serious injuries that occur during road traffic incidents. Currently there are 25000 road deaths in EU countries each year and the majority of these are caused by human error, including driving at speeds that exceed the speed limit.



The 'Intelligent Speed Assistance' system uses information from GPS, digital maps and sign recognition technology to help keep the driver below the speed limit. The system can be overridden temporarily and can be fully switched off, however, it will reset to on when the vehicle is restarted. The system is being installed to encourage drivers to slow down and drive within the speed limit, rather than force them to do so. Vehicles will also be fitted with 'black-box' technology under the ruling, which will record data including speed and any warnings about excessive speed the driver ignores. This data will be available to police and insurance companies in the event of a road traffic incident, which should influence driver behaviour and increase safety on the road for all.

Mobile Phone Detection Two UK police forces, Hampshire and Thames Valley, will begin using mobile phone detectors to detect drivers who are using mobile phones while driving. When a mobile phone 2G, 3G or 4G signal is detected inside a car by the device, an illuminated sign will flash to warn the driver to stop using their phone. The device cannot distinguish between a phone used by a driver from one used by a passenger, but it can detect the use of hands-free Bluetooth connections and when it does, the sign will not illuminate. The technology is being used as a tool to educate motorists of the risks of using mobile phones while at the wheel and to identify locations where the offence is committed regularly. The detectors cost £6000 each and the hope is that they will help to make the use of mobile phones while driving socially unacceptable. Research suggests that drivers were four times more likely to crash if using a mobile phone and twice as likely to be involved in a fatal road traffic incident when texting than when driving under the influence of alcohol.