



# Health and safety law update

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July 2015

## Case law

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### Court of Appeal uphold HSE's decision to impose enforcement notice where the recipient was unable to prove safety

We have previously reported on a prohibition notice issued against Rotary Yorkshire Limited (RYL) in December 2012 which was quashed by the Administrative Court following an appeal. [more>](#)

### Complaint to the HSE's Myth Busters panel lands Waltham Forest BC £66k fine

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### Incident which resulted in injury to tourists in Tower Bridge lift ends in £100k fine

Temple Lifts has been fined £50k and ordered to pay £50k prosecution costs after an incident in which an ascending lift carrying 10 people to the Tower Bridge Exhibition suddenly dropped in the shaft causing four of the occupants to suffer from broken legs or ankles and the remaining six to suffer from shock. [more>](#)

### Two prosecutions after inadequate risk assessments relating to the movement of lorries

The first prosecution arose from two separate incidents where members of the public were killed by reversing refuse lorries which were operated by South Lakeland District Council. [more>](#)

Any comments or queries?

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## Fines and sentences

### Fruit farm manager jailed after conviction for manslaughter following death of two employees

Farm manager Andrew Stocker and the company Blackmoor Estate Ltd were prosecuted following an incident where two employees, Scott Cain and Ashley Clarke, were suffocated after entering a container which had an oxygen level of 1%. [more>](#)

### Director of a healthcare firm ordered to pay penalties of £250k after 100 year old resident died in fall from hoist

Company director Mohammed Zarook and the company which owned the Meppershall Care Home, GA Projects, were prosecuted following an incident in August 2010 when a resident, May Ward, fell from a hoist as she was being moved between a chair and a bed by two carers. [more>](#)

### Two builders jailed after their failures during a refurbishment led to a structural collapse and injury to three people

Brothers Naveed and Rizwan Hussain were refurbishing a basement on a three-storey Sheffield terrace. However, despite removing a number of internal walls, they inadequately shored up the basement which undermined a central wall which subsequently collapsed. [more>](#)

### London's largest fine for fire safety offences imposed on hotel owner who ignored enforcement notices

Salim Patel, owner of the six floor 18 room Radnor Hotel in Bayswater, was fined £200k and jailed for four months, suspended for 10 months, for seven breaches of the Regulatory Reform (Fire Safety) Order 2005. [more>](#)

### Pirelli fined £150k after employee was killed in industrial autoclave

On 30 September, employee George Falder was seen on CCTV footage at 2.45 pm. The autoclave door was shut and put into operation approximately an hour later. [more>](#)

### Toy manufacturer fined after failing to check competence of roofing contractor

Halsall Toys Europe was fined £200k after contracting with a self employed builder, David Plant, to clean a 36,000 square foot asbestos cement roof at its warehouse in Lancashire. Mr Plant's son worked for Halsall Toys and had recommended his father to carry out the work. [more>](#)

### £415k penalty imposed on Grundfos following death of trainee engineer

The prosecution followed an incident in March 2009 when trainee design engineer Jake Herring was electrocuted as he carried out live electrical testing. [more>](#)

## HSE updates

### Construction (Design and Management) Regulations 2015 came into force April 2015

As trailed in our previous bulletin, the CDM Regulations 2015 came into force on 6 April, replacing the 2007 version. [more>](#)

### HSE releases annual workplace fatalities figures

The figures indicate that the previous downward trend of fatal workplace accidents has continued. Fatalities are currently at half the level that they were 20 years ago. [more>](#)

## Case law

### Two companies acquitted of health and safety offences following successful submissions of no case to answer at the close of the prosecution case

The first case involved the prosecution of Francis Brown Ltd which was prosecuted for a breach of the Electricity at Work Regulations 1989 after an employee, Les Buller, was electrocuted whilst rewiring a barn and fitting a new socket at the home of company director Simon Brown. Mr Buller was not qualified to carry out the work and was using only basic tools when the incident occurred. The prosecution alleged that the company had failed to ensure that a specialist contractor was instructed to do the work and refused to accept the defendant's position that Mr Buller had not been acting in the course of his employment at the time of the incident.

However, three days into the seven day trial, the Judge ordered the jury to return a verdict of not guilty, after determining that there was no case to answer. The HSE accepted the decision that was largely based on the premise that the company had no control over the work Mr Buller was carrying out at the time that the incident occurred.

The second case involved G & AM Lawson which had been prosecuted for two breaches of health and safety legislation (Regulation 3(1) of the Management of Health and Safety at Work Regulations 1999 and s2(1) HSWA) following an incident in April 2010. Their employee, Les Brown, sustained fatal injuries when he was struck by a ramp which fell from a trailer as he was assisting in moving a bulldozer on site. Subsequent investigations found that there was insufficient oil in the hydraulic system which had allowed air to get into the cylinder and this caused the ramp to collapse. The prosecution alleged that the company had failed to carry out sufficient mechanical and functional checks on the trailer which resulted in the defect not being picked up.

However, following the conclusion of the prosecution case, the Judge determined that, even taken at its highest, the prosecution evidence had failed to support charges that had been laid and directed the jury to return verdicts of not guilty. HHJ Hughes was also critical of the fact it had taken five years for the case to come to court, particularly as the family of Mr Brown had been present throughout the trial and had therefore heard evidence surrounding the evidence five years after material events.

The cases highlight how the burden on the prosecution to provide sufficient evidence in support of charges that they present is not a mere formality. Despite the decision being taken to proceed with a prosecution implying that evidence had been assessed adequately, it is important to dissect the prosecution case to establish if each of the elements of the offence(s) can be proven.

[Back to content](#)

### Court of Appeal uphold HSE's decision to impose enforcement notice where the recipient was unable to prove safety

We have previously reported on a prohibition notice issued against Rotary Yorkshire Limited (RYL) in December 2012 which was quashed by the Administrative Court following an appeal. The prohibition notice was issued in relation to a high voltage room which included exposed electrical conductors which, if live, could have posed a serious risk. RYL was unable to produce

at the time of the HSE inspector's visit any documentation to confirm that the conductors were not live when the switch was in the off position and there was no authorised person on site to test the conductors to prove that was the case.

The next day an authorised person was able to prove that the conductors were indeed dead and an initial appeal to the Employment Tribunal resulted in the wording of the prohibition notice being changed, but not the quashing of the notice itself. However, RYL then appealed to the Administrative Court which did quash the notice, a significant part of the reasoning being that there were other less onerous options available to the HSE (specifically a direction to leave the area undisturbed using their powers under s 20(2)(e) HSWA). Another factor was that the service of the notice (which could not be withdrawn other than by appeal) was noted on a publically available website which would have a detrimental affect on the business and so should only be issued in circumstances where it was clearly required.

The HSE went on to appeal the decision to the Court of Appeal which ultimately upheld the enforcement notice.

The Court of Appeal said that the appeal to the Administrative Court could only proceed on the basis of a point of law. It was not for the judge in effect to treat the hearing as a complete reassessment of the inspector's decision. Whilst noting that the correct approach for the Employment Tribunal was to decide whether it would have served the notice on the basis of information available to the inspector, or, importantly, which ought reasonably to have been available following suitable enquiries, the Court of Appeal was satisfied the test had been appropriately applied in this case. Therefore the judge in the Administrative Court was not entitled to substitute his decision for that of the Employment Tribunal, even though he had come to a different conclusion. The specific factors considered by the judge, whilst not irrelevant, had been considered by the Employment Tribunal and discounted.

[Back to content>](#)

### **Complaint to the HSE's Myth Busters panel lands Waltham Forest BC £66k fine**

A HSE investigation was prompted by a complaint made to the Myth Buster's panel when a member of the public asked to see information on election expenses but was told that this was not possible because the paperwork had been contaminated with asbestos. The investigation established that the Council had commissioned a survey of the building in 2002 which highlighted the presence of asbestos in the basement, and yet no steps were taken to control or remove it. A second survey in January 2012 also identified the asbestos and noted that no steps had been taken since it was first identified 10 years previously. This was despite the fact that staff and contractors who had worked in the basement throughout that time would have been exposed to asbestos. An improvement notice was subsequently served requiring the Council to produce a management plan to deal with the risk.

The Council pleaded guilty to breaching sections 2(1) and 3(1) HSWA and Regulation 4(8) of the Control of Asbestos Regulations 2006 and after a reduction of 1/3 to reflect the early guilty pleas, the Council was fined £66k and ordered to pay costs of £16,862.

[Back to content>](#)

## Incident which resulted in injury to tourists in Tower Bridge lift ends in £100k fine

Temple Lifts has been fined £50k and ordered to pay £50k prosecution costs after an incident in which an ascending lift carrying 10 people to the Tower Bridge Exhibition suddenly dropped in the shaft causing four of the occupants to suffer from broken legs or ankles and the remaining six to suffer from shock.

The investigation found the root cause to be a critical counterweight which had failed. Temple Lifts had replaced various components in the counterweight, both in the lift in question and on a second lift on site, but failed to investigate why the components were failing. The HSE formed the view that if Temple Lifts had carried out those investigations, they would have identified the problem with the counterweight which could have prevented the incident. Temple Lifts pleaded guilty to two breaches of s 3(1) HSWA.

[Back to content](#)

## Two prosecutions after inadequate risk assessments relating to the movement of lorries

The first prosecution arose from two separate incidents where members of the public were killed by reversing refuse lorries which were operated by South Lakeland District Council. The first incident occurred in June 2010 when a holiday maker, Mary Cook, was hit by a 7.5 tonne lorry while walking along a single track roadway. The second incident, which occurred only 9 months later, resulted in the death of a Council employee, Dorothy Harkes, when she was struck by a bin lorry as she was acting as a reversing assistant. In both instances, the drivers were convicted of causing death by careless driving but the HSE also concluded that there were inadequate risk assessments and procedures in place which could have prevented the incidents. Enforcement notices were served on the Council.

The Council pleaded guilty to breaches of s 2(1) and 3(1) HSWA and was fined £120k. A costs order of £50k was also imposed. When sentencing, HHJ Paul Batty made clear that the failings were sufficiently serious that he would have considered a fine in excess of £1m had the Council been a private company. However, since the Defendant was a local authority it had been necessary not to impose a fine which would not endanger public services that the Council provided.

The second prosecution involved TIP Trailer Services who were fined £500k after its employee, Jennifer Rose, sustained life changing injuries when she was struck by a lorry that was attempting to reverse park on a slope in April 2013. Ms Rose had been acting as a banksman for the driver, but they decoupled the trailer without engaging the parking break, which caused it to roll back and crush her against another vehicle. Ms Rose sustained multiple injuries including 13 bone fractures in her back, shoulders and ribs and a punctured lung. She also suffered a heart attack and was in intensive care for 10 days following the incident. She has since had a slow recovery although she has been able to regain some mobility.

The subsequent investigation found that drivers had been allowed to park on slopes without using chocks and that there was inadequate supervision to ensure that drivers were engaging their handbrakes appropriately. TIP Trailer Services pleaded guilty to breaches of s 2(1) and 3(1) of the HSWA and was ordered to pay costs of £56,938 in addition to the fine.

[Back to content](#)

## Fines and sentences

### Fruit farm manager jailed after conviction for manslaughter following death of two employees

Farm manager Andrew Stocker and the company Blackmoor Estate Ltd were prosecuted following an incident where two employees, Scott Cain and Ashley Clarke, were suffocated after entering a container which had an oxygen level of 1%. The specialist unit had been designed in order to produce pristine apples. The procedure of “scuba diving” developed where workers would enter the unit via a small hatch in the roof, and hold their breath as they balanced on crates of highly stacked apples before ducking down to retrieve the best apples.

Mr Stocker was on holiday at the time of the deaths, but prior to his departure had left the workers instructions to retrieve the apples for the Marden Fruit Show in Kent. The practice of “scuba diving” was one which Mr Stocker encouraged despite the fact that workers should have been prohibited from entering the unit at all. Whilst the industry practice was to use a net to hook out the fruit, the random selection that would be retrieved via this method often did not allow the best apples to be selected. On the afternoon of 18 February 2013 Mr Cain and Mr Clarke were found unconscious in one of the storage facilities. Efforts to revive them were unsuccessful and they were both declared dead at the scene.

Blackmoor Estate Ltd pleaded guilty to three offences relating to a failure to have adequate emergency plans and risk assessments in place and was fined £75k with costs of £30,000. Whilst Mr Stocker was himself deeply affected by the tragedy, and was suffering from post traumatic stress and depression as a result, he was considered to have been “reckless” in ignoring clear guidelines and allowing staff to enter the unit to retrieve apples. He was imprisoned for two-and-a-half years.

[Back to content](#)

### Director of a healthcare firm ordered to pay penalties of £250k after 100 year old resident died in fall from hoist

Company director Mohammed Zarook and the company which owned the Meppershall Care Home, GA Projects, were prosecuted following an incident in August 2010 when a resident, May Ward, fell from a hoist as she was being moved between a chair and a bed by two carers. The carers had failed to position Mrs Ward securely in the sling which resulted in the fall. Instead of calling for help immediately, the carers put her in bed and waited a further 40 minutes before calling for help. Mrs Ward was then taken to hospital by ambulance but died the following day having sustained multiple fractures to her skull, hip and knee.

The subsequent investigation found that the carers, who were from China and Bulgaria, had a poor command of English and had not been trained in the correct use of the hoist. The HSE also found that Mr Zarook, who had had no knowledge or experience of running care homes, proceeded to take vulnerable residents into the home without fulfilling his health and safety obligations. The HSE served five improvement notices regarding various deficiencies at the home. During this investigation the HSE discovered that another resident had fallen whilst being moved from her wheelchair to an arm chair in September 2009 causing her to sustain fractures to her tibia and fibula, but that incident had not been reported to the HSE. A further six improvement notices were also served on another home run by GA Projects, Tendring Meadows, in relation to deficiencies at that facility.

GA Projects admitted breach of s 3(1) HSWA and was fined £50k with costs of £36,992. Mr Zarook, who admitted that the company's offence was due to his consent, connivance or neglect (in breach of s 37 HSWA) was fined £150k with costs of £100k.

[Back to content>](#)

### Two builders jailed after their failures during a refurbishment led to a structural collapse and injury to three people

Brothers Naveed and Rizwan Hussain were refurbishing a basement on a three-storey Sheffield terrace. However, despite removing a number of internal walls, they inadequately shored up the basement which undermined a central wall which subsequently collapsed. This in turn caused the collapse of the floors above and the front wall. Two residents and another builder sustained minor injuries, and it was considered remarkable that there had been no deaths or serious injury due to the extent of the collapse.

Naveed Hussain had previously received enforcement notices for activities on another site surrounding his failures in planning the work. It was considered that the present incident had been caused by a failure to manage and plan the works on site properly.

Rizwan Hussain was given a 12 month custodial sentence and fined £42k with £40k costs after he pleaded guilty to breaches of the HSWA and CDM Regulations 2007, and he further admitted breaching two prohibition notices issued in May 2013. Naveed Hussain too received a 12 month custodial sentence, with a fine of £40k and costs of £60k, after admitting breaches of the HSWA and CDM Regulations 2007.

When sentencing, HHJ Murphy stated that it was a miracle that there had been no serious injury or death caused by the incident and that a statement needed to be made to highlight the importance of taking health and safety seriously. As a result "The public would be appalled at anything less than a custodial sentence."

[Back to content>](#)

### London's largest fine for fire safety offences imposed on hotel owner who ignored enforcement notices

Salim Patel, owner of the six floor 18 room Radnor Hotel in Bayswater, was fined £200k and jailed for four months, suspended for 10 months, for seven breaches of the Regulatory Reform (Fire Safety) Order 2005. The prosecution followed a routine inspection by the London Fire Brigade, when several breaches were noted including inadequate fire detection systems, missing fire doors or fire doors tied open with extension cords and string, no fire risk assessment, and evidence that the basement storeroom had been used for sleeping. Despite being served with an enforcement notice, Mr Salim failed to put in place any changes by the time the London Fire Brigade carried out a follow up visit.

In addition to the fine and the term of imprisonment, Mr Salim was ordered to pay prosecution costs of £29,922. When sentencing, HHJ Kennedy made clear that as the owner of the business, the "buck stopped" with Mr Patel.

[Back to content>](#)

### **Pirelli fined £150k after employee was killed in industrial autoclave**

On 30 September, employee George Falder was seen on CCTV footage at 2.45 pm. The autoclave door was shut and put into operation approximately an hour later. When the autoclave was subsequently checked at 6pm at the end of the shift, Mr Falder's body was found. The autoclave was used to heat tyre beads – which strengthen tyres – to temperatures of up to 145°C. Not only is the heat intense, there is very limited oxygen within the autoclave when it is in operation. Medical experts at the inquest were of the view that Mr Falder was likely to have died within seconds of the autoclave being switched on.

The HSE's investigation established that workers would often enter the autoclave to pick up fallen beads in between cycles, but that there were no procedures in place to prevent / restrict access to the autoclave, nor was there any system whereby the autoclave would be checked before the door was shut and the autoclave was switched on, by which stage any employee inside the autoclave would have no way of opening the door or stopping the operating cycle once it had begun. Improvement notices were served within days of the incident to address these deficiencies, which were rectified within the required 1 month period.

Pirelli pleaded guilty to a breach of s 2(1) HSWA and was fined £150k and ordered to pay costs of £46,706.

[Back to content>](#)

### **Toy manufacturer fined after failing to check competence of roofing contractor**

Halsall Toys Europe was fined £200k after contracting with a self employed builder, David Plant, to clean a 36,000 square foot asbestos cement roof at its warehouse in Lancashire. Mr Plant's son worked for Halsall Toys and had recommended his father to carry out the work. Mr Plant then asked a family friend and fellow unemployed builder, Craig Gray, to assist in the works. Mr Gray's 17 year old son was also assisting with the works on the roof. Whilst the precise circumstances of the incident remained unclear, Mr Gray fell through a skylight to the floor 9 meters below and sustained fatal injuries.

Although a reasonable price for the work in question, if properly completed, should have been in the region of £60 – 70k, Halsall Toys accepted a written quote of £3,700 from Mr Plant, which was clearly well below the expected cost. Despite this, the company failed to check whether Mr Plant was competent to carry out the work, nor did it ask to see any method statements or risk assessments for the work. Following the incident, prohibition notices were served both on Halsall Toys and Mr Plant, which prevented further work on or accessing of the roof.

Despite Mr Gray's family maintaining that Mr Plant and Mr Gray were partners for the works in question, intended to share the profits equally and that they did not hold him responsible, Mr Plant was prosecuted on the basis that he was in sole charge of the work. He alone had carried out the quote, arranged the works and provided equipment for it.

Halsall Toys admitted breach of s 3(1) of HSWA and was ordered to pay cost of £10,483 in addition to the £200k fine which was imposed in line with the Sentencing Guidelines on the basis the breach was a significant cause of death. Mr Plant, who admitted breach of s 3(2) HSWA was given a custodial sentence of 6 months, suspended for 12 months.

[Back to content>](#)



### **£415k penalty imposed on Grundfos following death of trainee engineer**

The prosecution followed an incident in March 2009 when trainee design engineer Jake Herring was electrocuted as he carried out live electrical testing. Subsequent investigations established that there was no adequate risk assessment in place and that a notice outlining a procedure for employees to follow which was placed on the wall was unsuitable. Mr Herring had been carrying out live electrical testing and it is believed that following the test he was disconnecting the panel when he was electrocuted. Although there was a test box, with lights to warn the panel was live, this was positioned on the other side of the panel door. Mr Herring would not have seen the warning lights engaged.

The investigation also concluded that there was inadequate supervision of the testing area and that there was no formal procedure by which Mr Herring had been assessed as competent to undertake electrical testing.

The starting point for the fine was confirmed by HHJ Dugdale to be £450k, but was reduced by one-third to reflect the guilty pleas to breaches of Regulation 3(1)(a) of the Management of Health and Safety at Work Regulations and Regulation 14(c) of the Electricity at Work Regulations. In addition, Grundfos Pumps were also ordered to pay costs of £115k.

[Back to content](#)

## **HSE updates**

### **Construction (Design and Management) Regulations 2015 came into force April 2015**

As trailed in our previous bulletin, the CDM Regulations 2015 came into force on 6 April, replacing the 2007 version.

The new Regulations create the role of Principal Designer, and abolish that of CDM-Coordinator. A Principal Designer must plan, manage and monitor health and safety during the pre-construction phase, so far as reasonably practicable, to minimise risks.

The organisation or person taking on the role must be sufficiently skilled, knowledgeable and experienced to fulfil this duty. In many cases the Principal Designer will be the project architect, but that is not inevitable. Others can be appointed, provided they have the requisite skills, knowledge and experience to understand, manage and co-ordinate the work and protagonists involved in the project. Preparation of an appropriate health and safety file is a key specific duty.

In most cases, a Principal Designer will need to be in post as soon as practicable, and in any event before the construction phase commences. Projects involving more than one contractor trigger this requirement. The appointment will be by the client, and must be in writing. In a change from the 2007 regulations, however, client duties will remain.

Transitional arrangements apply to projects commenced before the new regulations came into force on 6 April and where a CDM-C was in place by that date. In such projects where completion takes place before 6 October 2015, it will not be necessary to replace the CDM-C. In all other cases, however, a Principal Designer must be appointed to replace the CDM-C from the 6 October date.

The HSE has set out guidance on the CDM Regulations – please [click here](#).

The Construction Industry Training Board have produced industry guidance and a comprehensive template of a Construction Phase Plan addressing the requirements of the CDM Regulations, which includes information on the requirements placed upon the Principal Designer role to manage and coordinate design risks at the pre construction phase.

For a copy of the CITB's guidance – please [click here](#).

[Back to content](#)>

### **HSE releases annual workplace fatalities figures**

The figures indicate that the previous downward trend of fatal workplace accidents has continued. Fatalities are currently at half the level that they were 20 years ago. Provisional figures indicate that there were 142 workplace deaths from 1 April 2014 – 31 March 2015, which is 9% lower than the average figure for the past five years.

For a summary together with the full statistics – please [click here](#).

[Back to content](#)>

## About RPC

RPC is a modern, progressive and commercially focused City law firm. We have 77 partners and 560 employees based in London, Hong Kong, Singapore and Bristol.

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- Highly commended – Law Firm of the Year at The Legal Business Awards 2013
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