



Health and safety law update

December 2016

In the news

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Contractors face prosecution over Crossrail death and two serious injuries

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Company director and three managers given suspended sentences for continued failings at a furniture factory in Port Talbot

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Middlesbrough businessman given suspended sentence following a fire at his chemical plant

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Fines and sentences

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Any comments or queries?

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In the news

Two separate fines for Burger King franchisee show significant disparity between the old and new sentencing penalties

KFG Quickserve Limited runs several food outlets, including 35 Burger Kings. On 28 March 2015 a 21-year old worker, Michael Firth, was emptying oil from three of the branch's four fat fryers. Whilst carrying the oil in a metal bucket up some stairs, he spilt oil on his feet scalding himself and dropping the bucket.

The Environmental Health Officer's investigation revealed various issues with the oil emptying process which included transferring the oil when it was hot rather than waiting for it to cool below 40°C, the absence of a lid and inadequate PPE. Ipswich Borough Council prosecuted KFG with two charges under Section 2(1) HSWA 1974, the date of each alleged breach falling either side of the accident date. Each charge related to management of the risk in respective periods.

Any offences committed from 16 January 2009 to 12 March 2015 carried a limited fine of £20,000 in the Magistrates' Courts. After the coming into force of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, any offence committed after 12 March 2015 carries an unlimited fine in the Magistrates' Courts. An unlimited fine was always available for these offences in the Crown Court. For cases sentenced from 1 February 2016, whatever the date of the offence, the Sentencing Council's updated guidelines for health and safety offences apply. These are being seen to result in far higher fines in some cases.

District Judge Celia Dawson had previously retained jurisdiction of the case in the Magistrates' Court rather than grant the prosecution's request to transfer to Ipswich Crown Court.

Judge Dawson said: "This is not a case that involves death or a significant life-changing injury, serious though the injury was. Financially I'm in a position to impose a suitable punishment. I'm therefore content the case should remain in the Magistrates' Court and dealt with summarily."

The fine for breaches of section 2(1) HSWA 1974 **before** 12 March 2015 was £13,300.

The fine for breaches of section 2(1) HSWA 1974 **after** 12 March 2015 was £153,360.

The difference in fines for the same continuing offence was therefore significant, illustrating the impact of the Sentencing Council's guidelines.

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Contractors face prosecution over Crossrail death and two serious injuries

BAM Nuttall Limited, Ferrovial Agroman (UK) Ltd, and Kier Infrastructure and Overseas Ltd will face charges in January 2017 arising from one worker's death and serious injuries to two other workers during construction of the Crossrail tunnel in London.

The contractors will appear at Westminster's Magistrates Court on 25 January 2017 each facing two charges under Sections 2 and 3 HSWA 1974 and two further charges of breaching the Construction (Design and Management) Regulations 2007.

On 7 March 2014, a 43-year old worker, Rene Tkačik, was fatally crushed when a piece of concrete from the ceiling of the tunnel fell and hit him at the Fisher Street cross-over tunnel, Holborn.

The other charges relate to injuries suffered by Terrence Hughes on 16 January 2015 and Alex Vizitiu on 22 January 2015. Mr Hughes was working between the Bond Street and Paddington section of the tunnel when he was crushed by a tipper truck and suffered severe leg injuries.

Alex Vizitiu was working in the same stretch of the tunnel just over a week later when he suffered head and hip injuries after being struck by a high pressure mixture of water and concrete, during a routine operation to clean concrete lines.

The HSE's head of operations, Annette Hall said: "These were all serious incidents and resulted in the death of one of their workers. We have concluded following thorough investigations that there is sufficient evidence to prosecute and it is in the public interest to do so."

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83-year old farmer fined £30,000 and given suspended prison sentence following the death of a rambler trampled by a herd of cows

Mike Porter, 66, was trampled to death as he walked across a public footpath in Elbow Field, Turleigh, Wiltshire in May 2013. Mr Porter had been walking with his brother, John Porter, and their dogs when they were knocked to the ground and trampled on by the herd, which had been protecting their calves. Mike Porter died at the scene due to internal injuries. John Porter suffered severe injuries but survived the attack.

Swindon Crown Court heard that there had been at least four previous incidents involving 83 year old farmer Mr Brian Godwin's cattle, in which six people suffered injuries needing hospital treatment, dating back to 2004.

Mr Godwin had been previously told either to segregate the animals or put up warning signs that the cows were with calves so that people knew to be more careful.

Tim Mousley QC, sitting at Swindon Crown Court told Mr Godwin "I'm satisfied that you quite blatantly failed to ensure the safety of people who came on your land. I'm quite satisfied that the way you managed your livestock created an obvious risk to people on public footpaths and a risk of serious injury."

Mr Godwin admitted breaching his general duty of controlling his livestock and was given a 12-month sentence suspended for two years. In addition Mr Godwin was ordered to pay a fine of £30,000.

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Company director and three managers given suspended sentences for continued failings at a furniture factory in Port Talbot

During a planned visit by the HSE in February 2015 to a factory operated by Margam Hall Upholstery Limited to inspect woodworking practices, a number of health and safety issues were raised, including poor control of wood dust, no maintenance of work equipment including fume and dust extraction, noisy conditions and inadequate toilet and washing facilities.

Ten improvement notices were served on the company. Despite continuing HSE intervention the factory remained in a poor condition with seven of the improvement notices not being complied with.

Judge Geraint Walters commented that: "The operation you were engaged in was nothing short of a ticking time bomb in relation to the health and safety of employees."

The Defendants were previously in charge of a factory at the same premises called Celtic-Leather and Fabric Upholstery Ltd.

Director, Brian Baggs, Port Talbot, pleaded guilty to breaching Section 37 HSWA 1974 and was given a 10-month prison sentence suspended for two years, and ordered to pay costs of £2,500. He was disqualified from acting as a company director for five years.

David Lewis, along with his brother Matthew Lewis and Michael Ball, all shareholders and managers, pleaded guilty to the same breach. They were also each given a 10-month jail sentence suspended for two years and ordered to pay costs of £2,500. Although not current directors, they were also disqualified from acting as a company director for five years.

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Middlesbrough businessman given suspended sentence following a fire at his chemical plant

Brian Hannon, aged 73, of Faceby, North Yorkshire, was charged with two waste offences when he appeared before Teesside Crown Court on 16 November 2016.

The court heard how Mr Hannon's poor environmental practices caused a waste fire and major incident for emergency crews in March 2015. Mr Hannon had instructed his staff to burn materials in an on-site fire pit rather than hiring a commercial waste collector. The fire at Melbray Chemicals Ltd on Durham Lane Industrial Estate, Eaglescliffe in March 2015, resulted in a chemical spill and significant costs incurred by insurers in cleaning up the site and making the premises and surrounding properties safe to use.

The Environment Agency told the court how there was no concreted surface at the site to prevent chemicals spilling into the ground, also that the company's production manager had received no formal training during his 27 years at the firm.

There was an estimated 1,600 litres of formaldehyde spilled into the ground during the fire and "extremely hazardous" industrial-strength sulphuric and hydrochloric acid leaked out of containers.

Mr Hannon had said during an interview that he was unaware of it being illegal to burn waste on his site. He admitted that he had left the fire pit unattended on the day of the fire. In mitigation Mr Hannon appeared to have no previous convictions with a number of character references provided during the hearing. Mr Hannon also submitted that his business went into receivership following the incident.

Mr Hannon pleaded guilty to two charges under the Environmental Protection Act 1990 and was sentenced to 6 months in prison, suspended for 18 months. He was also ordered to pay £5,000 costs and an £80 victim surcharge.

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Fines and sentences

Toxic vapour cloud released from chemical company leads to £3m fine

During the early hours of 5 March 2010, at the Grimsby plant of Cristal Pigment UK Limited (formerly Millennium Inorganic Chemicals), there was a build-up of Titanium Tetrachloride within a vessel. The chemical came into contact with water, creating a violent reaction which ruptured the vessel. The liquid came into contact with the air, creating a large toxic vapour cloud.

Paul Doyley, 48, died after being covered with the liquid and toxic vapour cloud. His colleague, Ron Ingoldby, was also covered by the cloud. Although he survived his injuries, Mr Ingoldby was left with irreversible lung damage.

The vapour cloud rapidly expanded to several metres in height and poured out from the site as a thick cloud. The wind blew the cloud across the river Humber and closed down the shipping lanes for several hours, until the incident was eventually brought under control by the emergency services.

The following year, on the 27 July 2011, there was another uncontrolled release of a toxic vapour during the cleaning of a redundant vessel.

Hull Crown Court heard how the HSE investigation found that the company had failed to follow their operating procedures. Parts of the plant and its procedures were poorly designed and the company had not established robust safety management procedures and systems of work to assess and control risk and to ensure that these were actually followed.

As to the second incident involving the vessel, the HSE found that it was due to be replaced. The company decided to clean the vessel but poorly managed the design and installation of fabricated plates to seal the vessel before carrying out the cleaning process. The plates were incompatible, incorrectly designed and used inappropriate sealants that could not contain the gas created during the procedure, releasing a toxic vapour cloud.

Cristal Pigment UK Ltd of Stallingborough pleaded guilty to Sections 2(1) and 3(1) of HSWA 1974 for the 2010 incident and also Regulation 4 of the Control of Major Accident Hazards Regulations 1999 for the 2011 incident.

The breakdown of the £3m fine was £1.8m and £600,000 for charges associated with the incident on 5 March 2010 and £600,000 for the charge associated with the incident on 27 July 2011 with costs of £37,868.00.

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Star Wars film production company fined £1.6m following injury to the actor, Harrison Ford, whilst filming *Star Wars: The Force Awakens*

In our previous bulletin we reported on the then pending sentencing hearing for Foodles Production (UK) Ltd, a subsidiary of Disney, arising from an accident in June 2014 when a vertically operating hydraulic door on the set of the Millennium Falcon closed too quickly causing the actor, Harrison Ford, to suffer a broken leg. The accident occurred at Pinewood Studios and Mr Ford was air-lifted to hospital for surgery.

During a previous hearing the court heard how Mr Ford had passed through the door with another actor and hit a button. As he began walking back through the door, he believed the set was not live but it was in fact being remotely operated by another person. As Mr Ford passed underneath he was hit in the pelvic area and pinned to the ground.

The HSE submitted that the power of the rapidly-closing door was such that Mr Ford was hit with a force comparable to the weight of a small car.

Sitting at Aylesbury Crown Court, Judge Francis Sheridan said that Foodles had failed to communicate its risk assessment to Mr Ford. He commented that “The greatest failing of all on behalf of the company is a lack of communication, a lack because if you have a risk assessment and you do not communicate it, what is the point of having one?”

Foodles had pleaded guilty to charges under Sections 2 and 3 of the HSWA 1974. According to a Foodles’ statement, “The court acknowledged both the additional safety protocols that were immediately implemented, and that it was a very safe production in all other respects.” Nevertheless, Foodles was fined £1.6m for the above breaches.

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Contractor imprisoned for 5 years after death of 17 year old worker

Colin Jeffery (who was trading as Utterly Gutterly) pleaded not guilty to manslaughter by gross negligence and a breach of the Work at Height Regulations 2005 following an incident when a 17 year old worker, Beau Jennians, fell 6.7m from a ladder and sustained fatal injuries whilst painting the eaves of a house.

During the trial, Mr Jeffery claimed that he was not an employer and that Beau Jennians had been working for himself. This was rejected by the jury at Exeter Crown Court who found him guilty of the charges. He also pleaded guilty to further health and offences at four other properties breaching s 2(1) HSWA 1974.

Judge Graham Cottle noted that Mr Jeffery had exploited teenage boys as cheap labour, making them work on roofs and chimneys without any safety equipment. The Court also heard how Beau Jennians had fallen from a ladder only weeks before the incident, but was saved from injury after he fell into shrubbery. However, instead of taking any steps to improve safety, Mr Jeffery told him off for spilling paint on the customer’s driveway.

Sentencing Mr Jeffery to five years in prison, Judge Cottle told him “Your attitude to safety was cavalier in the extreme and resulted in this tragic and awful outcome. You made a brazen attempt to escape responsibility by insisting all the people who worked for you were self-employed. Even in the car on the way to Derriford Hospital you were insisting to Beau’s mother that he was self-employed. Not only was there no foundation whatsoever for that assertion, it was appallingly callous and disrespectful even to mention it at what must have been a terrible time for her. I’m afraid it underlines what sort of man you are.....Not only was the degree of negligence so bad it amounted to this offence, it was as bad as it could possibly have been.”

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Care Home fined £1.5m following resident's death

George Chicken, 76, was a resident at the Rose Court Lodge in Mansfield, Nottinghamshire, owned by Embrace All Ltd, formally European Care (GB). Mr Chicken suffered with severe dementia. He had undergone hip and knee replacements. He was often found to be confused, anxious and unsteady. He was known to wander around the home, having previously pushed open fire exit doors to get out.

In November 2012, Mr Chicken wandered through a first floor fire escape door and fell from the fire escape staircase onto the concrete stairs beneath. He suffered a fractured skull and bleeding on his brain. He sadly passed away in hospital 48 hours later.

Criminal proceedings were brought against Embrace All Ltd and the care manager, Amanda Dean. During sentencing, and after a jury was stood down following the Defendants' change of pleas, Judge Stuart Rafferty said that Embrace All Ltd had failed to put in place measures that are standard in the industry and "allowed breaches to persist over a long period of time". He added that Dean "was out of her depth in managing the care home".

In mitigation, the home implemented various improvements, including daily documented checks of stairway lighting, extra members of staff in corridors, keypad controls fitted at fire doors, and reviewable procedures by the company to monitor their systems. Amanda Dean had a certificate in health and safety and was additionally trained in relation to dementia and care planning. Her counsel submitted that she had spent her life putting the needs of others before her own and had an "unblemished record" and described her as being "truly sorry".

Ms Dean was sentenced to nine months in prison suspended for two years, and ordered to pay costs of £20,000.

Embrace All Ltd was fined £1.5m and ordered to pay costs of £200,000.

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Volvo fined £900,000 following a worker suffering head injuries and being placed into an induced coma

The national truck, bus and plant division of Volvo, Volvo Group UK Limited of Warwick, pleaded guilty to s2(1) HSWA 1974. It was fined £900,000 and ordered to pay costs of £5,820.28 with a £150 victim surcharge.

Westminster Magistrates Court heard that on 17 September 2015 a worker was using a step ladder to service a large delivery truck when he fell, hitting his head and falling unconscious. He was placed in a medically-induced coma for two weeks and continues to suffer with symptoms.

An HSE investigation found that the step ladder was damaged and the anti-slip feet were worn. Although the ladder was not Volvo property, Volvo had failed to maintain or inspect it to ensure that it was suitable for use. Volvo had also failed to train staff on the proper use of ladders and working at height.

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Ejector seat manufacturer fined £800,000 after three of their workers develop debilitating lung conditions

Aylesbury Crown Court heard how three workers employed by Martin Baker Aircraft Company Limited were exposed to a metal fluid mist over at least a three-year period. They had worked for the company for around 20 years. The fluid is commonly used as a lubricant and coolant in engineering processes. During the process of using the machines the fluid creates a mist, which in this case was breathed in by around 60 workers.

One worker was so severely affected he became virtually paralysed. Another will never be able to work with metal working fluids again and a third must have special measures in place to ensure he never comes into contact with the substance.

The HSE investigation found that the measures in place to prevent exposure to workers were inadequate. The company had no system to clean away the excess fluid or provide extraction. There was also a lack of health surveillance to monitor exposure and risk.

The company pleaded guilty to breaching Section 2 (1) of HSWA 1974 and Regulation 6(1) of the Control of Substances Hazardous to Health Regulations 2002 (as amended) (COSHH). They were fined £800,000 and ordered to pay costs of £36,912.36.

Incidentally the same company are currently being prosecuted by the HSE following the death of a Red Arrows pilot, Flight Lieutenant Sean Cunningham, when he was prematurely ejected from his seat whilst still on the runway at RAF Scampton, Lincolnshire. He was thrown up to 300 feet in the air on 8 November 2011. The company will appear before Lincoln Magistrates Court on a date to be confirmed.

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David Lloyd club fined £330,000 after a 5-year old boy almost drowned at one of their leisure centres

A 5-year old boy was found face down in the water during a children's holiday swimming session at the Heston leisure club of David Lloyd in February 2013.

Isleworth Crown Court heard how the boy was only discovered when a lifeguard told another child to go over and tell him to stop "bobbing" up and down in the pool. The boy was unable to swim yet was unsupervised and subsequently remained underwater for around five minutes before being pulled out and given CPR by a lifeguard.

An investigation found that the boy had been allowed to take part in the session without armbands, which was against the club's rules for non-swimmers. The boy spent two nights in hospital under observation but sustained no lasting injuries, despite the fact that he almost died.

David Lloyd pleaded guilty to breaching s3(1) HSWA 1974. The company was fined £330,000, which was the largest fine arising from an investigation brought by Hounslow Council. The company was also ordered to pay costs of £22,132.

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Local council fined £250,000 for risk management of hand-arm-vibration syndrome (HAVs)

A worker employed by Thanet District Council was left with permanent injuries after being diagnosed with HAVs. Symptoms of HAVs include tingling, pins and needles, numbness and pain in the hands.

An HSE investigation found that the worker spent up to six hours a day using a range of powered equipment. He was not under any health surveillance or told how he should report his symptoms. The investigation led to the discovery of 12 ground maintenance workers being diagnosed with HAVs, with another 40 referred to occupational health.

The council had failed to take steps to eliminate or control the exposure of their workers to HAVs. They also failed to train their workers on the risk and how to control their exposure to HAVs caused by the power tools.

At Canterbury Crown Court the council admitted two of four charges brought against them. Two other charges, which the council denied, were ordered to be left on file.

The council was fined £250,000 following their guilty pleas under Regulations 6(2) and 7(1) of the Control of Vibration at Work Regulations 2005. They were also ordered to pay costs of £18,325.84.

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Round up

FFI appeals system heading for judicial review

A facilities outsourcing company, OCS Group UK, has obtained permission to proceed with its judicial review of the HSE's Fee for Intervention (FFI) Scheme.

OCS's application arises from a Notice of Contravention it received in August 2014 regarding its use of trimmers at Heathrow Airport. Following the HSE's conclusion that there had been breaches of Regulations 6(2) and 7(2) of the Control of Vibration at Work Regulations 2005, OCS received two bills amounting to £2,306.

Disputing that there had been any material breach, OCS went through the HSE's internal process of challenging their FFI invoice, but were unsuccessful.

OCS argue that the HSE cannot act as "prosecutor, judge and jury" in its procedure of challenging a Notice of Contravention, the precursor for an FFI bill. Allowing the case to proceed to judicial review, Mr Justice Kerr commented that "It is arguable that the HSE is, unlawfully, judge in its own cause when operating the FFI scheme; and that the scheme is either unlawful or being operated in an unlawful manner."

The case is expected to be listed for a full hearing in early 2017.

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