

Legal Update
to the
CPI Biennial Health & Safety
Conference 2009

Ron Reid, Solicitor

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Statistics

Between 8th April & 1st October 2008

- 18 fines of over £100,000.00
- 15 persons jailed for work related safety offences (6 Directors)

In Year 07/08

- 233 fatalities down from 247 but highest since 2001/2002
- Five year average is 230 per year

In Year 08/ 09

- Provisional figure 180

First 3 months 09 /10

- 58 fatals in total



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Enforcement Strategy - FEB 09

- HSE to use “intelligence” to focus on businesses less likely to comply with health and safety legislation.
- Duty holder's management competence important factor
- How far the duty holder has fallen short
- Ensure board member informed of enforcement actions and employees
- Will raise court awareness of the gravity of H&S offences and the full extent of their sentencing powers



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CORPORATE MANSLAUGHTER

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THE NEW LAW

An organisation is guilty of an offence if the way
In which its activities are managed or organised—

- (a) causes a person's death, and
- (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach.



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The New Law -

Maria Eagle (Parliamentary Under-Secretary,
Ministry of Justice)

*"The Act will make it easier to prosecute
Companies who fail to protect people"*

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CORPORATE MANSLAUGHTER

- Act came into force on 6th April 2008
- New Offence where duty of care owed by / when acting as –
 - Employer
 - Occupier of land
 - Supplying goods or services
 - Constructing or maintaining buildings, infrastructure of buildings
 - Engaging in other commercial activities



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CORPORATE MANSLAUGHTER

- Test is - gross failing on part of its senior managers, to take reasonable care for the safety of its workers or members of the public that caused a person's death
- Must be causal link between the failure and the fatality



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GROSS BREACH

For the purposes of the Act—

“a breach of a duty of care by an organisation is a “gross” breach if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances”



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CORPORATE MANSLAUGHTER – “SENIOR MANAGEMENT CONTRIBUTION”

- Persons who play a significant roles in the making of decisions about how the whole or part of the organisation’s activities are to be managed or organised or
- The actual managing or organising of the whole or a substantial part of those activities
- Persons falling in this category will have their aggregated conduct examined to see if failings substantially contributed to the breach of the duty of care



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CORPORATE MANSLAUGHTER – KEY ELEMENTS

- Is there a gross breach of a duty of care?
- Jury to consider –
 - failure to comply with H & S legislation
 - the seriousness of that failure
 - how much of a risk of death was posed by it
 - the extent to which there were attitudes, policies, systems or accepted practices in place that were likely to have encouraged the failure or produced a tolerance of it



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CORPORATE MANSLAUGHTER – EFFECTS

- Greater focus on individuals who are senior management - more interviews of management
- Focus on Policy making & implementation
- No personal prosecution for corporate manslaughter but Section 37 more likely and common law remains
- “Culture” crucial



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EXAMPLES

- Death from Vehicle Movement at Large Employer
- Facts - significant traffic movement –poor segregation of pedestrians – reversing vehicle
- Problems - traffic risks very well recognised for a long time - traffic management should be a prominent activity in this business - very difficult for production or transport managers to say they unaware of risks - plenty of guidance that makes it clear what amounts to an unsafe situation.



EXAMPLES

- Q Is this workplace safe?
NO
- Q Is that a product of a failure to manage or organise ?
Arguably
- Q Is senior management a substantial element in the breach?

MAY BE HARD TO SAY NOT AT RISK!



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CORPORATE MANSLAUGHTER

Proposed CMA Fines –

First time offender pleading not guilty – 5 per cent of average annual turnover during 3 years prior to sentencing. After taking into account any aggravating or mitigating features, fine will normally range between 2.5 and 10 per cent of average annual turnover.



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CORPORATE MANSLAUGHTER

Proposed H&SWA Fines where there is a death –

First time offender pleading not guilty – 2.5 per cent of average annual turnover during 3 years prior to sentencing. After taking into account any aggravating or mitigating features, fine will normally range between 1 and 7.5 per cent of average annual turnover.



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CORPORATE MANSLAUGHTER

Publicity Orders

To be imposed to publicise –

- The fact organisation has been convicted
- Particulars of the offence
- The amount of the fine
- The terms of any remedial order
- Court to determine / approve, media, content etc.



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CORPORATE MANSLAUGHTER - ACTIONS

- Are all senior management aware of the very real threat this act poses?
- Do they know what is considered good practice?
Are they aware of the new guidance has been issued by HSE / IOD
- Can they demonstrate enforcement of safe working practices?



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CORPORATE MANSLAUGHTER - ACTIONS

- Are “senior management” identified. It is not about their title. It is all about what they do.
- Are they trained / competent ? Can you prove it ?
- Retention of records / loss of expertise over time – “corporate memory loss”
- Benchmarking – internal across sites / external
- Auditing of performance
- Management to find out what happens ‘on the ground’



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Corporate Manslaughter - a year on

- Police now involved in every fatal
- Attitude is “one step away from murder”
- Police liaising with HSE during investigation so they are lengthy interviews. HSE priming police questions
- Police taking wide view of who are “senior management” – Supervisors upwards arrested
- Effect on board, managers & workforce



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Corporate Manslaughter - a year on

- First Charge under new Act - April 09
- Many more under investigation.
- Sentencing guidelines referred to in sentencing of Scottish company



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How to Comply

- Institute of Directors and HSC joint publication – ‘Leading health and safety at work – Leadership actions for Directors and Board Members’.
- Essential principles:
 - Strong and active leadership from the top
 - Worker involvement
 - Assessment and review



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LEADERSHIP IMPACT

The lowest standard leaders exhibit is the highest standard the organisation can expect



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Management Essentials

- Policy
- Clear responsibilities
- Integrated into organisational structure across departments / sites
- Well documented systems
- Monitoring and supervision



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Proactive Approach

- Identify risks and hazards
- Assess residual risk
- Develop safe system of work, document it and ensure it is understood by those using it
- Competent people properly trained
- Preventative maintenance / inspection procedures
- An open safety culture
- Supervision & Audit



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Reactive Approach

- Analysing Statistics
- Near Miss and Accident Investigation
- Preventing reoccurrence
- Are you confident incidents and accidents are being reported?



MEASURES - PERFORMANCE INDICATORS

Output
Lagging
Performance
Indicators

Risk/Input
Leading
Performance
Indicators



Results based

Lagging indicators give minimal information
Leading indicators are indicative of risk



WHAT ARE THE BEST PERFORMERS DOING ?

- Actively managing health & safety
- Equal ranking with profit and productivity
- Slogan – “If you cannot do it safely - don't do it”
- Avoid complacency caused by only measuring lost time accidents. They do not forget process safety.
- Performance Appraisal includes H&S
- Reward structures for individual managers reflect improvements made



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MAKING A DIFFERENCE

- Safety can be improved by the action of individuals
- Safe system of work
 - How should it be done?
 - How do they actually do it?
 - Is the safe way a habit ?
- Are you prepared to tackle those who act in an unsafe manner?
- Can you do so and avoid a “blame culture”?



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PERSONAL LIABILITY

- Trend toward personal liability continues apace
- This year we have successfully defended “director” for gross negligence manslaughter
- Representing company where production director also convicted and fined under PUWER - £10k fine
- Both involved workers accessing machines where guards fitted and a classic failure to manage process safety



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Health & Safety (Offences) Act

- Increases health and safety penalties
 - Fines in Magistrates' Courts from £5,000.00 to £20,000.00
 - Most health and safety offences now imprisonable.
- In force 16th January 2009.
- Sentencing Guidelines still to be issued by Sentencing Guidance Council.



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Health & Safety (Offences) Act

- Implications for “Public interest” test
- Increased Penalties have a direct effect on the likelihood of personal prosecution
- A more serious offence which lowers the bar
- Current climate = less risk to some businesses but more for individuals



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R -v- P Limited

- Prosecution of MD following fatal accident involving forklift truck and child
- Issue was meaning of “neglect”
- Held – offence committed if he knew of the relevant facts giving rise to the breach or if he ought to have been put on inquiry as to whether the relevant safety procedures were in place
- Do not have to prove actual knowledge, just that he or she should have known



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AGGRAVATING FEATURES

- Failure to heed previous warnings
 - notices
 - letters and advice
 - audits
 - near misses
- Profit / production before safety
- Running a risk to save money
- Death or serious injury as result of breach



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CAMPAIGNS

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THE NINE HSE PRIORITY TOPICS

- Workplace transport
- Work related stress
- Slips and trips
- Falls from height
- Musculoskeletal disorders
- Noise
- Hand - Arm Vibration
- Disease reduction (specifically cancer, dermatitis and occupational asthma)
- Absence management, return to work and rehabilitation



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HSE CURRENT CAMPAIGNS

- Slips Trips & Falls
- Risk Assessment (European H&S week)
- Asbestos
- Stress
- Ladder Exchange
- Dermatitis
- Better Backs
- Falls from vehicles



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Some Hot Topics



- Workplace Transport (including Work Related Road Risk)
- Falls from height
- Slips & Trips
- Hit by moving / falling object



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Workplace Transport

- Accounts for 40% of all fatal accidents
- High risk area for you – site deliveries, collections, site layout, reversing vehicles
- Link to manual handling
- Links to falls from height
- Low level falls from vehicles



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Work Related Road Risk

Current examples of police interest –

- Fatal after office party
- Suicide
- Phone records of drivers often called for following incidents
- Fitness of “private” vehicle



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Worker Involvement

- HSE have launched new worker involvement website pages.
- There are concerns that the consultation with Employees Regulations are not being followed.
- Expect Inspectors to making enquiries as to your arrangements.



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LPG GAS

- HSE have concerns following the ICL Plastics explosion in Glasgow (9 killed, 33 injured)
- Cause corroded underground pipework
- Suppliers are supposed to contact users with HSE survey
- Aim to prioritise replacement pipework
- Expect HSE to contact in any event



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WHATS COMING / TRENDS

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Asbestos

- New campaign started 2nd November
- Likely to include new guidance on surveys replacing current guidance MDHS 100
- Obligation to check competence of surveyor
- See – www.shoosmiths.co.uk/news/2507.asp
- Types of survey reduced to two
 - Management survey (akin to type 2)
 - Refurbishment / Demolition survey (akin to type 3)



Swine Flu

- Assess real risk
- Business Continuity Planning
- Increase home working
- Video / telephone conferencing
- Encourage good personal hygiene
- Sick pay if sent home on quarantine grounds



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Radon

- Naturally occurring gas – carcinogenic
- Second only to smoking as cause of lung cancer. Greatly increases risk for smokers.
- High risk area map can be misleading
- Need to monitor – must do so if any workplace “below ground level” – not just basements.
- Current workplace level 400 Becquerel's per sq. metre is likely to be halved by EC.
- WHO has just recommended reduction to 100 b/sq but recognises some countries not able to go below 300 b/sq



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Nanoparticles

- New technology leading to increased use
- Study in China shows exposure leads to serious health problems particularly heart & lungs. Of seven female workers exposed between 5 & 13 months, 2 died within 2 years
- Factory involved sprayed adhesive paint
- At post mortem particles found of 30 nanometres (nano = 0.000001 of millimetre)
- Guidance – www.hse.gov.uk/pubns/web38.pdf



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Penalties

- Trend is for higher fines.
- More cases referred to Crown Court even if guilty plea.
- Court of Appeal held acceptable for fine to wipe out offending Company's annual profit (R –v- F J Cholcroft Construction 2008).



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Risk

R -v- Porter

- Risk must be real not fanciful or hypothetical
- “Where risk can truly be said to be part of the incidence of everyday life, it is less likely that the injured person could be said to have been exposed to risk by the conduct of the operations in question”



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Foreseeability

R -v- HTM

How to approach “reasonable practicability”

- Was there an appreciable risk to safety?
- What the incidence of risk actually was
- How had that risk been addressed by measures in place?
- How effective and costly would further measures be?



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"A concern for safety which is sincerely held and repeatedly expressed but nevertheless, is not carried through into action, is as much protection from danger as no concern at all"

Clapham Junction railway accident inquiry

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- Ron regularly advises and defends clients facing prosecution for serious breaches of health and safety legislation and manslaughter. He has experience of prosecuting more complex matters on behalf of the Health and Safety Executive giving him considerable insight into the enforcement process and the major causes of prosecution.
- Ron heads up the Shoosmiths Occupational Safety (SOS) offering a comprehensive occupational safety service to clients. The emphasis is on pre-emptive advice and services include full compliance audits,. He devises and delivers health and safety training courses tailored to clients' requirements. He regularly delivers papers to national and international conferences and seminars
- Ron is the secretary of the Food Industry Regional Safety Team (FIRST), Northamptonshire Occupational Safety, Health and Environment Association (NOSHEA) and is a director of the Radon Council.
- Chambers and Partners 2009 legal directory ranks Ron among the Best in the UK for Health & Safety advice

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