

IOSH/AOSH LEGAL UPDATE

Developments/Proposals etc.

Richard Voke

Environment, Health and Safety Department

13 January 2011

Lyons Davidson Solicitors

0117 904 5790 rvoke@lyonsdavidson.co.uk

Guidance/Legislation Updates

- February 2010 – *Protecting Migrant Workers* – guide for small business employing migrant workers
- March 2010 – *Asbestos: The survey guide, HSG264* – for those commissioning, carrying out surveys and those using the surveys e.g. architects and demolition/ removal contractors
- 6 April 2010 – Notification of Conventional Tower Cranes Regulations 2010
 - Types of tower crane to be notified
 - Who, when, what and how
- October 2010 – *Fire Safety in Construction, HSG168*

Recent Civil Cases

- Threlfall v Hull CC [2010]
 - Rubbish collector injured hand when lifting rubbish bags
 - First Instance – claim rejected – C was author of own misfortune
 - Appeal – Upheld – effectiveness of PPE is at the heart of its suitability. Starting point should be “Does this item of PPE prevent or adequately control the identified risk of injury?” If not, PPE is unsuitable.
 - Followed *Allison v London Underground [2008]* that a risk assessment is ‘logically anterior’ to the taking of safety precautions

Bhatt v Fontaine Motors Ltd [2010]

Work at Height Regulations 2005

- reasonably practicable for items to have been stored elsewhere – eliminating the risk of working at height
- fixed ladder should have been installed once decided loft would be used
- On Appeal – argued C had been wholly to blame – ignored system of work
- Appeal dismissed – looked at intention of regs – work at height must be avoided altogether if reasonably practicable to carry out the work otherwise than at height

HSE v Wolverhampton CC [2009]

- PP awarded to build flats within 100m of LPG facility.
HSE only aware once flats were being built
- HSE sought JR to quash PP – Council breached planning controls for hazardous substances requiring them to obtain advice from HSE when such permission was sought
- Relief refused – HSE’s failure to take action until after the development had started indicated it could not have thought the risk unacceptable
- Case awaiting final appeal before the Supreme Court

S v HSE [2010]

- Parents sought JR of HSE's decision not to investigate sons accident at school
- C focussed on HSE's reasoning - did not meet investigation criteria & 3-yr time lapse made it difficult to obtain reliable evidence to prove breach
- Court considered HSE's enforcement policy & management model – HSE is not obliged to investigate all reported accidents and has a discretion which the Court would be cautious in interfering with
- No error of law in deciding that this accident did not fall within its investigation criteria

Akzo Nobel & Akcros v European Commission 2010 (ECJ)

- 2003, the Commission and OFT carried out dawn raid on alleged anti-competitive practices
- two emails between the general manager of Akcros and an in-house lawyer at Akzo – asserted emails were covered by legal professional privilege
- ECJ did not accept that in-house lawyers are as independent as external lawyers
- Legal professional privilege does not apply to legal advice given to an organisation by its in-house lawyers (only applies to competition proceedings and investigations conducted by EC)

Effect on H&S

- Internal accident report?
 - What if internal report is prepared by in-house lawyers in contemplation of legal proceedings?
 - Attract legal professional privilege? Or not?

Common Sense Common Safety – Report by Lord Young

- 15 October 2010
- investigate and report back to the PM on the rise of the ‘*compensation culture*’
coupled with of the low standing that health and safety legislation now enjoys

Common Sense Common Safety

Executive summary

- 1974..Act has provided effective framework
- Today we have the lowest number of non-fatal accidents and second lowest of fatal accidents in Europe
- Present system, although probably over bureaucratic is nevertheless effective

Executive summary

- Sensible health and safety rules that apply to hazardous occupations have been applied across all occupations
- The standing of health and safety in the eyes of the public has never been lower
- Press articles recounting stories of health and safety being applied in most absurd manner

Executive summary

- Problem = part from EU Framework Directive. Part from enthusiasm H&S consultants tried to eliminate all risk rather than reasonably practicable approach
- Businesses now operate their health and safety policies in climate of fear

Recommendations

- Compensation Culture
 - Clarify (through legislation if necessary) that people will not be held liable for any consequences due to well-intentioned voluntary acts on their part
 - Simplify claims procedure - cheaper
- Low hazard workplaces
 - Simplify risk assessments
 - No risk assessments required for employees working from home/self employed in low hazard businesses (choice)

Recommendations

- Raising Standards
 - Health and Safety Consultants to be accredited to professional bodies
- Insurance
 - No need for those in low hazard environments to employ health and safety consultants to carry out full risk assessments
 - Only use qualified consultants
 - Consultation with insurance industry to ensure worthwhile activities are not curtailed on health & safety grounds

Recommendations

- Education
 - Simplified risk assessment for classrooms, single consent forms
 - Shift from system of risk assessment to system of risk-benefit assessment and consider review of HSWA to separate play and leisure from workplace
- Local Authorities
 - Route or redress of refusals on health and safety grounds
 - “Unfair” decisions to be referred to the Ombudsman

Recommendations

- Health and Safety Legislation
 - Clear guidance to small and medium sized businesses engaged in lower risk activities
 - Current regulations should be consolidated into single set of accessible regulations
 - UK to cooperate with other member states to ensure health and safety rules for low risk businesses are not overly prescriptive, are proportionate and do not attempt to eliminate all risk
- RIDDOR
 - Extend period for reporting to 7 days

Recommendations

- Working with Larger Companies
 - Enhanced role for HSE for large multi-site retail businesses
- Combining food safety and health & safety inspections
 - Combine inspectors in LA's
 - LA participation in FSA's Food Hygiene Rating Scheme

Recommendations

- Police and Fire Services
 - Not at risk of investigation or prosecution under H&S legislation when engaged in their duties if have put themselves at risk as a result of committing a heroic act
- Adventure Training
 - Abolish Adventure Activities Licensing Authority and replace with code of practice

Umm

- Resolves problems or creates more?
 - Consolidated health and safety code – New Factories Act, OSRP Act, Construction, Agriculture etc.?
- National Accreditation for safety practitioners
 - Occupational Safety Consultants Register to go live in January 2011
 - Must be chartered member of IOSH, CIEH, REHIS or a fellow of IIRSM
 - Levels of accreditation – chartered/technician
 - Members will be bound by a code of conduct that requires them to give sensible and proportionate advice

Other recent proposed system changes

The Hampton Review 2005

- “Reducing administrative burdens: effective inspection and enforcement’
- Recommended a comprehensive review of regulators penalty regime as it was cumbersome and ineffective
- Commissioned Prof McCrory UCL

McCrory Report 2006

McCrory Report 2006

- Regulators lack flexibility in enforcement toolkit
- Reliance on criminal sanctions
- Gap in tools
- Criminal sanctions lost stigma – not deter rogues – disproportionate to non rogues

HSE Response (September 2009)

- Health & safety regime is mature with NO significant gaps
- HSE and LA's have sufficient powers to ensure:
 - Duty holders take action to deal with immediate risks
 - Sustained compliance with the law
 - Duty holders who breach law are held to account
- H&S offences are different (i.e. they deal with death and injury) and this should be reflected in sentences
- HSE will continue monitoring other regulators' use of civil sanctions

LA Response

- Some interest in civil sanctions as an additional tool
- In general, H&S is such a serious matter it should not be demeaned by introducing civil sanctions, resulting in a loss of justice
- Could increase inconsistency of enforcement in H&S offences
- Concerns regarding possible bureaucracy of the appeals system

Regulatory Enforcement and Sanctions Act 2008 (RESA)

- In force on 6th April 2010
- The Environmental Civil Sanctions Order 2010
- Regulators involved:
 - EA
 - Natural England
 - Countryside Council for Wales
- EA to begin using new powers from 4 January 2011

Available Penalties

- Fixed monetary penalties
- Variable monetary penalties
- Stop notices
- Enforcement undertakings
- Compliance notices
- Restoration notices
- 3rd Party undertakings

What's covered?

- Packaging Waste
- Hazardous Waste Regulations
- Wildlife and Countryside Act
- Water Resources Act (not s.85!)
- Water Industry Act
- Environmental Protection Act (ss.33(6) & 71)

Appropriate?

- Lord Justice Leveson (senior presiding judge in England and Wales)
 - Expressed concerns about the high numbers of penalty notices and other out of court disposals of justice (disorder type offences)

“risk criminalising people who on a one off occasion do something out of character and who feel that the quickest thing to do is to accept the penalty or caution...even if further analysis might have revealed no offence”

“Criminal Liability in Regulatory Contexts”

- Consultation paper published by Law Commission 25 August 2010 – **McCrory revisited**
 - 3000 new criminal offences since 1997
 - Criminal law should only be used to tackle serious wrongdoing
 - Civil penalties should be used for minor breaches – reduce costs for regulators and the criminal justice system

The Proposals

- Regulatory authorities should make more use of cost effective, efficient and fairer civil measures, such as stop notices, fixed penalties, enforcement undertakings
- Set of common principles established to assist agencies consider when and how to use the criminal law to tackle serious wrong doing
- Regulatory criminal offences require proof of fault elements such as intention, knowledge or a failure to take steps to avoid harm being done or serious risks posed

H&S Alternative Punishment

- Tenant suffered 80% burns following a fire at her rented property
- Landlord pleaded guilty to breached under:
 - Section 3(2) HSWA
 - Regulation 36(3)(a) Gas Safety (Installation and Use) Regulations 1998
 - Article 32(1)(a) Regulatory Reform (Fire Safety) Order 2005
- Judge rejected request for compensation order
- Prison sentence reduced following landlord's payment of £20,000 to the victim (May 2010)

The Proposals

The basis of Corporate and directors liability –

- Doctrine of identification – mentions Corp Manslaughter and Homicide Act 2007,
- Strict vicarious liability of new Bribery Act 2010
- Common law director's liable for company's offence if consent and connivance, but not neglect as in S37 HSWA - Law Commission think this is going too far (remember R v P!)

One In, One Out

- From 1 September 2010 Government intend to operate a ‘one in, one out’ system for all pieces of legislation affecting business
- Restricted to domestic legislation

Bribery Act 2010

- Due to come into force April 2011
- Replaces previous bribery and corruption offences
- Creates 5 principal new offences of:
 - Giving or receiving bribes
 - Promising, offering, requesting or agreeing to receive bribes
 - Bribing foreign public officials
 - Strict liability corporate offence of failing to prevent bribes where adequate preventative procedures are not in place
 - Senior officers consenting to or conniving in the commission of any of the above

Bribery Act (cont)

- Individuals ordinarily resident in UK and organisations doing business in the UK can be prosecuted for offences committed anywhere in the world
- Maximum penalty for individuals is 10 years imprisonment and/ or a fine, and for organisations an unlimited fine (max previous UK fine is £8.5 million in March 2010)
- Facilitation payments and corporate hospitality are both potentially caught under the Act