

Visions of the Future

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A 'Vision'

“Our vision is to gain recognition of health & safety as a cornerstone of a civilised society and, with that, to achieve a record or workplace health and safety that leads the world”

Bill Callaghan, Chair HSC - 2004

Another ‘Vision?’

“ a synonym for unnecessary bureaucracy ”

“ an excuse for not doing things ”

Who said that??

Judith Hackitt – HSE Chair

“‘Health and safety’ is being used increasingly as a synonym for unnecessary bureaucracy and an excuse for not doing things. It is time for us to regain the value of the brand for genuine health & safety – and not trivia”



From Vision to Reality

Steps to success and failure

- Health and Safety Offences Act 2008
- Regulatory Enforcement and Sanctions Act 2008
- Are the Courts helping? – R v Porter, R v Chagot
- Getting the priorities right
- Draft HSE strategy
- Effective regulation and enforcement
- Corporate Manslaughter
- The right Defendant – Company or Individual?
- Blame it on the media!

THE HEALTH AND SAFETY (OFFENCES) ACT 2008

Main Points

- Into force 16th January 2009
- Only effects offences taking place after that date
- Does not create any new offences
- Does effect the punishments available for existing Health & Safety offences
- New tougher sentencing regime
- Offences previously triable only in the magistrates court are now triable in the Crown Court as well

Can I Go to Prison?

- BEFORE (NO)
- NOW (MAYBE)
 - Organisations can not go to prison
 - Magistrates' are restricted to 6 months imprisonment per offence

Visions of the Future

- May see an increase in Defendants choosing Jury trial
- “Slippery slope” to higher sentences in future?
- Use of Community Punishment Orders
- May not actually increase the fines passed by the Courts

Regulatory Enforcement & Sanctions Act 2008

- All in force from 6th April 2009
- Overall purpose is to ensure fair and consistent regulation by ‘the regulators’
- The Act is divided into 4 parts:
 - establishes the Local Business Regulation Office
 - creates a statutory Primary Authority scheme
 - gives regulators new powers to impose civil penalties for regulatory non-compliance
 - places a duty on regulators not to impose or maintain unnecessary burdens on businesses

New Civil Penalties

- Fixed Monetary Penalties
- Discretionary requirements (i.e. requirements for a business to take such steps as the regulator may specify to ensure the offence does not reoccur)
- ‘Stop’ notices (prohibit the carrying on of a specified activity until certain requirements have been complied with)
- Enforcement undertakings (an undertaking to take agreed actions within a defined time period)

- Regulator must be satisfied to the criminal standard of proof (beyond reasonable doubt) before issuing either of the first two sanctions
- For stop notices, the regulator must reasonably believe that an activity is causing, or there is a significant risk it will cause, serious harm to human health, the environment or the financial interests of consumers and that the perpetrator of the activity is committing or will commit an offence
- monetary value of sanctions is governed by the statutory limits already imposed upon the courts

HSE Approach

- The HSE have welcomed the LBRO but gave a “Lukewarm” response to civil sanctions
- Health & Safety regime is mature with no significant gaps in its powers
- HSE emphasis is on encouraging Courts to use their powers
- LA’s have shown some interest in using sanctions for health and safety but would require LBRO approval first. Unlikely, given the HSE’s position (consistency of approach)
- “On the spot fines” may have offered a quick alternative for focussing employer’s minds on safety without recourse to prosecution

Caselaw Update 2009

Are the Court's Helping?

- R v HTM Ltd [2006] EWCA Crim 1156
- R v P Ltd [2007] EWCA Crim 1937
- R v PORTER [2008] EWCA Crim 1271, CA
- R v CHARGOT Ltd and Others [2008] UKHL 73, HL
- R (on the application of HSE) v Pola [2009] EWCA Crim 655
- Ferdinand Ammah v Kuehne & Nagel Logistics Ltd [2009] EWCA Civ 11, CA

R v HTM Ltd [2006] EWCA Crim 1156

- Defendants can question the likelihood/foreseeability of an incident taking place to support an argument that they took all reasonable means to eliminate the risk
- "so far as [was] reasonably practicable" in s. 2(1) HSWA does not operate as a defence but qualifies an employer's duty

R v P Ltd [2007] EWCA Crim 1937

- In determining whether a Director is guilty of s37 **neglect**, the HSE must show that a Director should have known or found out about dangerous practices being used in his workplace
- HSE needs not go further and show that the Director had a duty to find out what was going on and that he did, in fact, know about the prevalence of the dangerous activity in his workplace but allowed it to continue regardless

R v Porter [2008] EWCA Crim 1271, CA

- the risk the prosecution have to prove to secure a conviction for a breach of sections 2 or 3 HSWA must be **real as opposed to merely fanciful or hypothetical**
- Factors for Court to consider when determining this include:
 - Absence of any previous, similar accidents
 - Nothing wrong with the construction of the steps themselves
 - Part of the ordinary incidence of everyday life

R v Charget Ltd & Others [2008] UKHL 73, HL

- Was hoped that this case would result in clear legal guidance on what the prosecution must prove before an organisation or individual can be convicted of breaching a section 2 or 3 duty
- Prosecution must prove only that the end results described by sections 2 and 3 have neither been achieved nor prevented
- Where someone is injured at work, those results will not (on the face of it) have been achieved or prevented and the employer will have breached their duty
- Where no injury has occurred, prosecutors may have to identify and prove the employer's specific failing giving rise to their breach of duty
- In section 3 HSWA cases, the prosecution may have to identify and prove how the injured person was liable to be affected by the way in which the employer ran his business
- the law is not intended to create a risk free environment. HSWA deals only with "material" risks, which a reasonable person would appreciate and guard against
- For section 37 HSWA offences, where the manager is remote from the activity giving rise to the breach of duty then quite detailed evidence of his involvement will be required

R (on the application of HSE) v Pola [2009] EWCA Crim 655

- Where an employer uses casual labourers they are his employees for HSWA purposes
- Criminal Courts may order guilty employers to pay injured parties compensation

Ferdinand Ammah v Kuehne & Nagel Logistics Ltd [2009] EWCA Civ 11

- Negligence case (not criminal)
- Employer may need to warn employees of even obvious risks
- General instruction not to use equipment for anything other than its intended purpose is not sufficient

A More Sensible Approach To Risk Or Further Confusion?????

- Prosecution must prove a real/ material risk
- HSWA 1974 not intended to create a risk free environment

An Opportunity Missed to Clarify Certain Issues?

- Is a material risk required in every case even where there has been a fatality?
- By whom must the material risk have been appreciated?
- Is materiality a measure of likelihood and consequence (i.e. Risk)?

Getting the Priorities Right

Current HSE Enforcement Priorities

- Agriculture
- Asbestos
- Risk Assessment
- “Coming Soon”
 - Campaign to tackle workplace stress
- No mention of construction or occupational road risk

Workplace Stress

- “the process that arises where work demands of various types and combinations exceed the person’s capacity and capability to cope”
- HSE estimate that stress costs organisations with 500 or more employees around 250 working days a year.
- Management Standards
- Dickens v O2 Plc [2008] EWCA Civ 1144, CA
- Barber v Somerset CC [2004] 1 W.L.R. 1089 reconsidered

Revitalising Health & Safety

- Launched in June 2000 and due to conclude next year
- Aim was to reduce the impact of health and safety failures by 30% over ten years

Success?????

- Three national targets set for improving health and safety performance by 2010
 - to reduce the incidence rate of fatalities and major injuries by 10%
 - to reduce the incidence rate of cases of work-related ill health by 20%
 - to reduce the number of working days lost per worker from work-related injury and ill health by 30%
- Only on track to meet major injuries target (2008)

Effective Regulation and Enforcement

Are fines high enough?

'Disquiet has been expressed in several quarters that the level of fine for health and safety offences is too low. We think there is force in this and that the figures with which we have been supplied support the concern.'
Justice Scott-Baker in R. v F. Howe and Son (Engineers) Ltd 1999

- HSE Adjusted average Fine 1998 - **£3,805**
- HSE Adjusted average Fine 2008 - **£7,809**
- 1998 inflation-adjusted fine - **£6,198**
- Current fines have risen, in real terms, by 20% over 10yrs

Turnover and Sentencing

- Sentencing Guidelines Council – guidance due in Autumn 2008 on Corporate Manslaughter and H&S offences involving death
- Consultation suggests fines for HSW involving death start at 2.5% of turnover with a range of between 1 and 7.5% for aggravating/mitigating features
- Rumours
 - turnover-based fines applying only to Corporate Manslaughter
 - dropping of the turnover-based method altogether

Example of turnover-based fines

Death-related Fines 04/06 to 02/09

- Of 68 fines over £100k only 4 were greater than 1% of turnover

H&S Fines vs. Environmental Fines

- Statutory Maximums (Magistrates' Court)
 - £20,000 H&S
 - £50,000 Environmental (Waste)
- Average unadjusted fines (07/08)
 - Environment Agency £10,508
 - HSE £12,896



Over-cautious or Over-zealous?

- HSE prosecution success rate – 82% (07/08)
80% success shows the correct balance between caution and zeal –
Judith Hackitt
- LA prosecution success rate – 94%
- Environment Agency – 99% (2006)
- Avon & Somerset CPS – (05/06)
 - Mags Court – 82% success
 - Crown Court – 78% success

Levels of risk or levels of proficiency?

Enforcement Activity

- Absolute number of HSE prosecutions at lowest levels on record
 - 565 (07/08)
 - 1500 in (89/90)
- HSE prosecutions down 40% over last 5 years
- LA prosecutions down 14% over last 5 years

Local Authority Woes?

- Only 1 in 4 LA's prosecuted a H&S offence in 07/08
- 94% of prosecutions resulted in at least one conviction
- Average (adjusted) fine of £5,650 (up 30% over 5yrs)
- Average of £5,650 compares with £7,809 for the HSE

Enforcement Notices vs. Prosecution

- HSE Improvement notices down to 627 to 4,512
- HSE Prohibition notices up 118 to 3,159
- Overall drop in enforcement notices of 6.3% on 06/07 levels
 - third lowest levels on record
- Dramatic drop in agriculture from 2,018 to 294
- LA notices down 950 to 6,010 – lowest level since 02/03

Focus of Prosecutions

- 48% of prosecutions under HSWA '74
- Regulations with 75+ prosecutions:
 - PUWER
 - Work at Height Regs
 - Gas Safety Regs
 - MHSW Regs
- Only 22 prosecutions under CDM Regs

Directors not targeted (much)

- 2006 Guidance to Inspectors:
 - s.37 prosecutions should no longer be restricted to where there has been a reckless disregard for health and safety or a deliberate act or omission
- s.37 prosecutions easier following judicial guidance in case of R v P
- Trends in s.37 prosecutions:

2003:	20
2004:	17
2005:	12
2006:	12
2007:	22
2008:	13



Director's Disqualification

- Section 2 of the Company Directors Disqualification Act 1986
- *“Where appropriate, enforcing authorities should seek disqualification of directors.”* (HSE Enforcement Policy Statement)
- Only available for indictable offences
- Crown Court – max 15 years
- Magistrates’ court – 5 years
- *“A sanction of disqualification of company directors is also available to the courts under the Company Directors Disqualification Act 1986 and I assure the House that the power has been and will continue to be used.”* (The Right Hon. Jane Kennedy M.P., Minister for Work and Pensions, March 2005)
- 7 disqualifications 1998 – 2004
- Powers referred to in magistrates’ sentencing guidelines for H&S offences

First Corporate Manslaughter Prosecution

- Under the new Corporate Manslaughter and Corporate Homicide Act 2007
- Death of a junior geologist who was taking soil samples from inside an excavated pit as part of a site survey when the sides of the pit collapsed crushing him
- An organisation is guilty of corporate manslaughter if the way in which its activities are managed or organised causes a death that amounts to a gross breach of a duty of care owed by the organisation to the deceased
- A substantial part of the breach must have been in the way activities were organised by senior management
- Individual manager also being prosecuted for Gross Negligent Manslaughter
- Will larger organisations now face prosecution?

Individual or Corporate Responsibility

- Which is preferable?
- Will greater police participation in the investigation of gross negligence manslaughter cases increase targeting of individuals?
- Is it fair to prosecute both?

Blame it on the Media?

- Cutting Edge, *“The Fun Police,”* 4th December 2008
- Panorama – *“May contain nuts,”* 20th April 2009
 - *“The Daily Mail's Quentin Letts reached the conclusion in Panorama last night that common sense must rule when it comes to protecting people's health and safety. We at the Health and Safety Executive applaud this sentiment.*
 - *‘Health and safety’ is sometimes used as an excuse to save money or justify unpopular decisions - from banning hanging baskets to Christmas lights. This is a constant frustration to HSE. As Quentin Letts discovered, many of these decisions have little to do with real health and safety regulations.*
 - *HSE's work is not about wrapping people in cotton wool, but working with employers to reduce the numbers of families devastated by their loved ones being killed or injured.”*

HSE Press Statement, 21st April 2009

The End