Health and safety gets personal

AOSH
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Richard Voke
Speakers

Richard Voke
Partner
Ashfords LLP

- 8 year HSE inspector (6 years major hazards)
- 17 years lawyer
- 2 years risk management consultant
- 3 years science teacher
- Msc Environmental Toxicology
- Post Graduate Law Diploma

Email: r.voke@ashfords.co.uk
Telephone: 0117 321 8098
Mobile: 07967 327 282
Explosion at Texaco Refinery, Milford Haven 24th July 1994
Texaco Refinery 1994 - Consequences

- Cost £48 million to rebuild
- £1 million losses per week till the prohibition notice discharged
- Significant reduction in national refining capacity – business disruption
- 10% reduction in national GDP
- Prosecution under Health and Safety at Work etc. Act 1974
- Swansea Crown Court 1996 - £200k fine plus £144k costs
What’s the worst that could happen?

- Industrial accident
- Death
- Criminal offence
- Environmental / Pollution consequences
- HSE / EA Investigators on site
- Loss of communications
- Closure of facilities / lost revenue
- Media coverage – reputation damage
- Victims’ families
- Concerned clients
- Damaged plant / buildings
- Insurance problems

All the above?
Section 2 HSWA – Duties to Employees

“It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees”

• R v Gateway Foodmarkets [1997]
• R v HTM Ltd [2008]
• R v Chargot [2008]
Section 3 HSWA – Duties to Non-Employees

“It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety”

• R v James Porter 2008(CA)
Section 3 HSWA – Duties to Non-Employees – CONTRACTORS!!

“It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety”

• HSE v Norwest Holst Ltd, 2007 Crown Court
• R v Associated Octel 1996 (HoL) – Contractor Control
Section 7 HSWA

• “Duty of every employee ... reasonable care ... health and safety of himself ... persons who may be affected by ... acts or omissions at work and to co-operate with employer so far as is necessary ...”

• HSE v Dudley MBC (Feb 2010) incident October 2006
  ○ Loading shovel going wrong way around one way system in council depot resulted in fatal accident
  ○ Driver pleaded guilty to two breaches of s. 7 fined £750 and £500 costs
  ○ Council pleaded guilty to breach of s. 2 fined £30k and £20k costs
Section 37 HSWA – Senior Managers (consent, connivance, neglect of manager)

R v P Ltd [2008]

- 6yr old boy dies in a collision between FLTs – one was ‘riding reel’
- MD charged with s37 (neglect)
- CC Judge – neglect/connivance MD required actual knowledge of material facts and practices
- Court of Appeal said too prescriptive – need not know if neglect - to have been in a position to know

Classic case Fresha Bakeries
Management of Health and Safety at Work regs 1999

• HSG65 – successful health and safety management
• Suitable and sufficient risk assessment
• Health and safety arrangements - planning, organisation, control, monitoring and review
Risk Assessment (cont)

- Hazard = something with the potential to cause harm
- Risk = likelihood that the harm from a particular hazard is realised
- Risk evaluation process
- Suitable and sufficient and proportionate
- Hazops, Chazops, FMEA, RTA, whatever
- Recognise change
- Recognise people
- Recognise limitations
- DO SOMETHING !!!!
Over-cautious or Over-zealous?

- HSE continues to have around a 90% conviction rate, and collected £38.3million in fines.
- LA prosecution success rate – 94%
- Environment Agency – 99%

Levels of risk or levels of proficiency?
Can Defendants Go to Prison?

- Sections 2-6 HSWA
  - Fine unlimited in Magistrates’ Court
- H&S Regulations
  - Fine unlimited in Magistrates’ Court
- Section 7 HSWA (individual)
  - Fine unlimited in Magistrates’ Court
  - Now up to 6 months imprisonment in Magistrates’ Court
  - Now up to 2 years imprisonment in Crown Court and/or an unlimited fine
- Section 37 (consent, connivance, neglect)
  - Fine unlimited in Magistrates’ Court
  - Now up to 6 months imprisonment in Magistrates’ Court
  - Now up to 2 years imprisonment in Crown Court and/or unlimited fine
Deaths at Work

- 06/07 – 247 in total (0.8 per 100k workers)
- 07/08 – 233 in total (0.8 per 100k workers)
- 08/09 – 180 in total (0.6 per 100k workers)
- 09/10 – 152 in total (0.5 per 100k workers)
- 10/11 – 171 in total (0.6 per 100k workers)
- 11/12 – 172 in total (0.6 per 100k workers)
- 12/13 – 148 in total (0.5 per 100k workers)
- 13/14 – 133 in total (0.44 per 100k workers)
- 14/15 – 142 in total (0.46 per 100k workers)
- 15/16 – 144 in total (0.47 per 100k workers)
- 16/17 – 137 in total (0.43 per 100k workers)
Individual Gross Negligence Manslaughter

- To be convicted, an individual must be proved to have been:
  - Grossly in breach of a duty of care owed to the deceased
  - Breach must be a substantial cause of the death

- R v Adomako
Corporate Manslaughter & Corporate Homicide Act 2007

Clause 1(1)

- Organisation guilty if the way in which its activities are managed or organised
  - Causes a person’s death and
  - Amounts to a gross breach of a relevant duty of care

Clause 1(3)

- Organisation guilty of an offence if the way in which its activities are managed or organised by its senior management is a substantial element of the breach
Jury to consider whether ‘gross’ breach

- ‘gross’ breach if conduct falls far below what can be reasonably be expected of the organisation in the circumstances

- Jury must consider whether organisation failed to comply with H&S legislation, and if so:
  - How serious was the failure
  - How much risk of death it posed.
Key components – ‘Gross’

- Jury may consider whether evidence showed:
  - Organisation’s attitudes, policies, systems, practices (safety culture) encouraged failures or tolerated them
  - Have regard to health and safety guidance

- This will not preclude the jury considering other evidence regarded as ‘relevant’
Key components - ‘senior management’

• ‘Senior management’ – persons who play significant roles in:
  ○ Making decisions about how the whole or a substantial part of the activities are managed or organised (Strategic - MDs, FDs or in LAs = corporate management team), or
  ○ The actual managing or organising of the whole or substantial part of those activities (Operations, Regional managers)
New Sentencing Guidelines – Feb 2016

Now applicable to all offences (regardless of when they were committed)

Importance:

- The new guidelines raise the level of fines available.
- Change in tactics for defences
Step 1: Culpability categories - Organisations

- **Very high** – deliberate breach / flagrant disregard.
- **High** – offender fell far short of standard e.g. ignoring concerns raised by employees / allowing breaches to subsist over long period of time. Systematic failings.
- **Medium** – fell short of the appropriate standard. Systems in place but not adhered to.
- **Low** - did not fall far short of appropriate standard e.g. significant efforts made to address risk although they were inadequate / no prior warning.
Step 1: Harm – 2 stages

**First – risk of harm created by the offence:**
- The seriousness of the harm risked by the offenders breach (level A, B or C).
- The likelihood of that harm arising (High, Medium, Remote).

**Second:**
- Exposed a significant number of people to the risk of harm.
  - AND
- Whether the offence was a significant cause of actual harm (more than minimal, negligible, trivial contribution).

Victims actions highly unlikely to be looked at
Categories of organisations

Large – Turnover or equivalent: £50 million and over
Medium – Turnover or equivalent: £10 million and £50 million
Small – Turnover or equivalent: between £2 million and £10 million
Micro – Turnover or equivalent: not more than £2 million

Charities

Where a fine falls on public or charitable bodies, the fine should normally be substantially reduced.
Step 2: Starting point

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## Step 2: Starting point

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Step 2: Aggravating and mitigating factors for individuals and organisations – Movement within range

- **Factors increasing seriousness** – previous convictions, cost cutting, obstructions of justice, poor record, falsification of documents / licenses, deliberate failure to obtain / comply with licenses

- **Factors reducing seriousness or reflecting personal mitigation** – no previous, steps taken to remedy, cooperation, good record, acceptance of responsibility
Steps 3 – 5:

- **Step 3:** Proposed fine based on turnover is proportionate to the means of the offender – court to ‘step back’ and adjust e.g. profit margins, economic benefit, put out of business.

- **Step 4:** Other factors that may warrant adjustment of the proposed fine – public or charitable bodies e.g. impact on employment, customers and local economy (but not shareholders or directors).

- **Step 5:** Consider any factors which indicate a reduction for assistance to the prosecution – e.g. assistance given to the prosecutor.
Steps 6 – 9:

- **Step 6**: Reduction for guilty pleas

- **Step 7**: Compensation and ancillary orders – corporate manslaughter, includes publicity and remediation orders

- **Step 8**: Totality principle

- **Step 9**: Reasons
### Sentencing Ranges - Environment

<table>
<thead>
<tr>
<th>Category</th>
<th>Deliberate</th>
<th>Reckless</th>
<th>Negligent</th>
<th>Low / No culpability</th>
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**Range:** £1,000,000 - £3,000,000 for Deliberate, £550,000 - £1,500,000 for Reckless, £300,000 - £750,000 for Negligent, **£50,000 - £130,000** for Low / No culpability.
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<td>£35,000 – £250,000</td>
</tr>
<tr>
<td>Harm category 3</td>
<td></td>
<td>£35,000</td>
<td>£10,000 – £140,000</td>
</tr>
<tr>
<td>Harm category 4</td>
<td></td>
<td>£10,000</td>
<td>£3,000 – £60,000</td>
</tr>
</tbody>
</table>

Turnover or equivalent: £50 million and over
Sentencing – Examples

- Very Large organisations:
  - “This may result in a fine equal to a substantial % (up to 100%) of the company’s pre-tax net profit for the year…even if this results in fines in excess of £100m”

- ConocoPhillips (UK) Limited:
  - First “very large” organisation sentenced under the new regime
  - Turnover of £4.8 billion
  - 3 health and safety breaches related to uncontrolled and unexpected gas release on offshore installations
  - NO actual injury
Sentencing – a more average example

• Falcon Crane Hire:
  o Crane collapse caused the death of it’s operator and a passing pedestrian (in 2006)
  o Guilty plea to Section 2/3 HSWA 1974 charges.
  o Bolt failure caused the collapse due to overloading. The bolts had failed in a similar way 2 months before – no investigation was carried out.

• Medium size company (£22 million turnover)
  o High culpability and aggravating features
  o Starting point of £950,000
  o Fined £1.1 million pounds (reduced to £750,000 due to early guilty plea)
Sentencing – a massive micro-failing

- Rainbow Waste Management
  - Worker fatally crushed by a motorised shovel
  - CCTV captured consistently bad working practices (near misses, workers being lifted in JCB buckets).

- Micro-company (turnover of <£2million)
  - High culpability and category 1 harm
  - Starting point of £160,000, range of £100,000 to £250,000
  - Fined £136,000 (including a 1/3rd off for early guilty plea).

- A lot of ink has been spilled on how very large companies will now be facing massive fines. This is equally true for small and micro companies – the judge in this case expected the company to take over 5 years to repay the fine.
Sentencing - Examples

- Sentencing guidelines have, as expected, seen new and larger fines:
  - Merlin Entertainments:
    - £5 million fine (plus ~£70k costs);
    - “Catastrophic failure” causing a “needless and avoidable accident”
    - “Those who were injured were lucky not to be killed”
    - High Culpability and Harm Category 1 (£2 – 6 million range);
    - Previous convictions (but otherwise a good record)
    - Early guilty plea
Personal prosecutions

- Huge rise in prosecution of directors in 2016:
  - In 2014/15 – 15 were prosecuted;
  - In 2015/16 – 46 were prosecuted
    - 34 of those 46 were found guilty (~73% - lower than usual!)
    - 12 of those 34 were given custodial sentences;
    - 4 of which were immediate custodial
    - 2 were disqualified from being directors (for 2 and 10 years respectively)

- S 37 Consent, connivance and neglect

- Policy? Denial by Ex HSE Construction Chief
Personal prosecutions

Those who received immediate custody had been convicted of

- Gross negligence manslaughter in two cases,
- HSWA s3 in relation to a double fatality in one case, and
- In the fourth case had been convicted of serious gas safety breaches putting many lives at risk
Personal prosecutions - Culpability

• Very high - Offender intentionally breached, or flagrantly disregarded, the law.

• High - Actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken

• Medium - Offence committed through act or omission which a person exercising reasonable care would not commit
Personal prosecutions - Culpability

Low - Offence committed with little fault, for example, because:

- Significant efforts were made to address the risk although they were inadequate on this occasion
- There was no waning/ circumstance indicating a risk to health and safety
- Failing were minor and occurred as an isolated incident
Personal prosecutions

- Increased enthusiasm for personal prosecution = increased risk for directors = increased importance in the boardroom
- No sign of an increase in pursuing employees themselves.

- How does it affect health and safety prosecutions?
- Unfairly affecting the smaller organisations?
- How will Directors protect themselves?
- Is that a good thing?
Personal prosecutions

- Custody Threshold – when is prison on the table?

<table>
<thead>
<tr>
<th></th>
<th>Starting point</th>
<th>Category range</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Very high culpability</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Harm category 1</td>
<td>18 months’ custody</td>
<td>1 – 2 years’ custody</td>
</tr>
<tr>
<td>Harm category 2</td>
<td>1 year’s custody</td>
<td>26 weeks’ – 18 months’ custody</td>
</tr>
<tr>
<td>Harm category 3</td>
<td>26 weeks’ custody</td>
<td>Band F fine or high level community order – 1 year’s custody</td>
</tr>
<tr>
<td>Harm category 4</td>
<td>Band F fine</td>
<td>Band E fine – 26 weeks’ custody</td>
</tr>
</tbody>
</table>

|                      |                                     |                                                     |
| **High culpability** |                                     |                                                     |
| Harm category 1      | 1 year’s custody                    | 26 weeks’ – 18 months’ custody                       |
| Harm category 2      | 26 weeks’ custody                   | Band F fine or high level community order – 1 year’s custody |
| Harm category 3      | Band F fine                         | Band E fine or medium level community order – 26 weeks’ custody |
| Harm category 4      | Band E fine                         | Band D fine – Band E fine                           |
2016 and onwards – Personal prosecutions

- Custody Threshold – when is prison on the table?

<table>
<thead>
<tr>
<th>Medium culpability</th>
<th>Starting point</th>
<th>Category range</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harm category 1</td>
<td>26 weeks’ custody</td>
<td>Band E fine or high level community order – 1 year’s custody</td>
</tr>
<tr>
<td>Harm category 2</td>
<td>Band F fine</td>
<td>Band E fine or medium level community order – 26 weeks’ custody</td>
</tr>
<tr>
<td>Harm category 3</td>
<td>Band E fine</td>
<td>Band D fine or low level community order – Band E fine</td>
</tr>
<tr>
<td>Harm category 4</td>
<td>Band D fine</td>
<td>Band C fine – Band D fine</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Low culpability</th>
<th>Starting point</th>
<th>Category range</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harm category 1</td>
<td>Band F fine</td>
<td>Band E fine or medium level community order – 26 weeks’ custody</td>
</tr>
<tr>
<td>Harm category 2</td>
<td>Band D fine</td>
<td>Band C fine – Band D fine</td>
</tr>
<tr>
<td>Harm category 3</td>
<td>Band C fine</td>
<td>Band B fine – Band C fine</td>
</tr>
<tr>
<td>Harm category 4</td>
<td>Band A fine</td>
<td>Conditional discharge – Band A fine</td>
</tr>
</tbody>
</table>
Health and Safety Practitioners

R v Richard Golding 2015

First custodial sentence for safety practitioner – 9 months

Death of worker in basement –

- Trench collapsed during basement extension, crushing labourer
- Consultant visited site but did not identify unsupported excavations
- Construction firm’s director jailed for gross negligence manslaughter
Health and Safety Practitioners

S7 HSWA 1974

• **General duties of employees at work.**

• It shall be the duty of every employee while at work—

• (a) to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work; and

• (b) as regards any duty or requirement imposed on his employer or any other person by or under any of the relevant statutory provisions, to co-operate with him so far as is necessary to enable that duty or requirement to be performed or complied with.
Health and Safety Practitioners

• The health and safety adviser was criticised by the prosecution because:
  • The method statement he had helped to prepare was inadequate;
  • The site inspections he undertook were inadequate as the prescribed method was not being followed, with work actually being undertaken in a totally different way;
  • He failed to ask any questions in relation to temporary works, principally in relation to the propping and shoring of open excavations; and
  • Despite having the authority to stop works he deemed to be unsafe, he failed to do so.
Health and Safety Practitioners

- Peter McCormack - 2008 prohibition notice - should not inspect bouncy castles and other play equipment and issue safety certificates. Despite an 18 week suspended prison sentence and 60 hours of community service in 2010, he carried until he was jailed for 14 months in 2012.

- John O’Rourke sold fire extinguishers. But supplied fire risk assessments for two hotels - serious deficiencies at both hotels, inadequate or locked fire doors, substandard alarms and untested extinguishers, 8 month sentence for providing inadequate risk assessments and was ordered to pay nearly £6000 in costs.

- Keith Whiting for seven years to provide health and safety advice. Whiting failed to identify (and control) the health hazards of working with trichloroethylene, **Whiting was fined £1500 with £1000 costs**.
IOD/HSC – Core Actions 1

Agree a policy that considers the risks facing the organisation

• Set out board member’s requirement to lead health and safety considerations
• ‘Own and understand’ the key issues
• Communicate and promote those issues

Ownership of Health and Safety

• H&S arrangements must be adequately resourced
• Competent advice obtained
• Risk assessments carried out
• Employees involved in decisions that affect their H&S
IOD/HSC – Core Actions 2

Reporting of preventative and incident information

• Conduct periodic audits into the effectiveness of management
• Ensure that any major incidents, changes or procedural alterations are reported to the board
• Procedures are in place for any new/ altered legal requirements

Annual reviews by the Board of:

• Appropriateness of H&S policy
• The effectiveness of risk management and reporting procedures
• Identified shortcomings
• Action decided upon to address those shortcomings
Defend early! Engage

• Have a plan!
• Time between the incident and the enforcement decision critical
• Most cost effective work done before the prosecution decision?
• Two Tests:
  1. Evidential
  2. Public Interest
• Pros – Avoid prosecution
• Cons – give away ‘defence elements’?
“Everybody has a plan until they get punched in the face.”
— Mike Tyson
What’s the worst that could happen?

- Industrial accident
- Death
- Criminal offence
- Environmental / Pollution consequences
- HSE / EA Investigators on site
- Loss of communications

- Closure of facilities / lost revenue
- Media coverage – reputation damage
- Victims’ families
- Concerned clients
- Damaged plant / buildings
- Insurance problems

All the above?
Making a plan…Proactive

- HSG65/ISO 18001 (type stuff) – Successful Health and safety management (plan, organise, monitor, review)
- “Leading health and safety at work”

- Published by:
  - Institute of Directors (www.iiod.com/hsguide)
  - & Health and Safety Commission (www.hse.gov.uk/leadership)
Making a plan…Reactive

- Is it a crisis…definitions?
- Roles, Responsibilities and Leadership
- Crisis management centre?
- The ‘Golden Hour’
- Emergency Services
- Information management
- Communications
- External affairs
- Human resources
- Getting help from stakeholders / govt. bodies / competitors?!
Horizon Scanning -
Security and Travel related Deaths in the Workplace

Terrorists
- Al Qaeda, Isis,
- Republicans
- Animal rights
- Tooting Liberation Front

Home / Abroad
Disease, Traffic
Kidnap
Corporate Manslaughter
Health and Safety at Work Act – Risk assessment – Foreseeability
Custodial sentences
Security and Health and Safety

- Are security incidents and terrorist attacks now reasonably foreseeable events?
- Are they a risk that employers and companies should be protecting against?
  - Civil cases suggest individuals can recover for poorly planned security
- The classic S2/3 HSWA duty
  - Is an employer ensuring the welfare of their employees/the public if they fail to plan for security incidents?
Cases

- Jean Charles de Menezes‘ R v Comm of Met
- Lubbe (and Others) v Cape PLC [2000] 1 W.L.R 1545
- Lungowe v Vedanta Resources Plc [2016] EWHC 975
- Palfrey v. Ark Offshore Ltd (2001)
- Dusek v Stormharbour Securities LLP [2015]
- Cassley v GMP Securities Europe LLP [2015] EWHC 722 (QB)
- Valentine v Ministry of Defence (2010)
Any Questions?