Health and safety update

September 2018

In the news

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Court of Appeal reduce fine by 85%

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Metal forging company fined £500,000 after worker is fatally injured when struck by metal component

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Tata Steel fined £450,000 after worker falls into an open pit

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Dimension Data Advanced Infrastructure Ltd was contracted to carry out gas, plumbing and drainage work at the Royal Veterinary College in Hertfordshire from December 2010 until September 2011. more›

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Custodial sentence for landlord for repeated gas-safety failings

Steven Ladell was landlord of a property in Kings Lynn, Norfolk. In 2017 the HSE inspected the property and found a gas oven to be "at risk" along with the gas central heating boiler being unsafe. more›

Environmental

Waste management firm agrees enforcement undertaking for odour pollution

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Round up

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ISO45001: Occupational health and safety management systems – Requirements with guidance for use, is designed to help organisations reduce workplace injuries and illnesses around the world. more›

HSE releases annual figures for work-related injuries for 2017/2018

The HSE has released provisional annual data for work-related fatal injuries revealing that 144 workers were fatally injured between April 2017 and March 2018 (0.45 per 100,000 workers). more›

In the news

ENRC wins Appeal to uphold its right to legal professional privilege

On 5 September 2018 the Court of Appeal delivered its judgment in *Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd & Law Society*[1].

Background

A whistleblower had alerted Eurasian Natural Resources Corp Ltd (ENRC), a multi-national mining and natural resources company, to fraudulent practices allegedly committed in Kazakhstan and Africa. ENRC carried out an internal investigation generating various documents following investigations by its solicitors and forensic accountants.

The Serious Fraud Office (the SFO), during their investigation of ENRC into a possible prosecution of it, sought declarations that the documents were not the subject of legal professional privilege.

The SFO issued notices compelling the production of documents including witness interview notes taken by external lawyers, forensic accountant's reports, documents prepared by external lawyers in order to advise and receive instructions from ENRC, and documents from an ENRC executive who was also a qualified Swiss lawyer.

One of the arguments raised by ENRC was that all such documents were subject to litigation privilege. This applies when there is actual litigation or litigation which is "reasonably in contemplation". Litigation must be adversarial and litigation privilege applies to all communications for the dominant purpose of conducting or advising in relation to such litigation.

In the first instance Mr Justice Andrews sitting in the High Court found that the criminal investigation by the SFO was not "litigation" but a prior step required to determine whether or not to prosecute. Litigation privilege did not therefore apply.

The judge also held that for a corporate client, legal advice privilege (communications between a client and lawyer) was limited to communications between a lawyer and certain individuals authorised by the company to obtain the legal advice. It did not extend to communication with other officers or employees of the company.

The Appeal

ENRC has now successfully appealed the above decision.

The Court of Appeal stated it was "not sure" that "every SFO manifestation of concern would properly be regarded as adversarial litigation", or that it "necessarily followed that once a SFO criminal investigation is reasonably in contemplation, so too is a criminal prosecution". However, in this case it was held that the SFO's action was adversarial.

The SFO had made clear to ENRC there was a prospect of a criminal prosecution with legal advisers engaged. ENRC was therefore reasonably entitled to contemplate a criminal prosecution.

As to the documents themselves, it was held that the High Court should have found that these were created in order to defend or avoid contemplated criminal proceedings. Even though ENRC's lawyers may have prepared documents with the intention of later showing these

1. [2018] EWCA Civ 2006.

to the SFO, litigation privilege equally applies for the purpose of seeking to avoid or settle any proceedings.

Furthermore, even if litigation or reasonably contemplated litigation was not the dominant purpose at the start of an investigation, it was clear that it quickly became the dominant purpose; *Waugh v British Railways Board*[2] and *Highgrade Traders Ltd, Re*[3] followed.

Given the above findings the Court of Appeal did not need to determine the issue of legal advice privilege. It did, however, state *obiter* that it would have been bound by the decision in *The Three Rivers DC anors v Governor and Company of the Bank of England*[4] (*Three Rivers (No.5)*), ie that communications between an employee of the company and the company's lawyers would remain privileged, only if such an employee was tasked with receiving legal advice and providing its lawyers with instructions.

The Court of Appeal was invited by ENRC to depart from *Three Rivers (No.5)* in view of its findings in relation to litigation privilege. However, it held that it was a matter for the Supreme Court to determine.

The Court of Appeal did indicate, however, that it would have departed from *Three Rivers (No.5)* had it been free to do so. The structure of large organisations is now radically different to those which were under consideration in the case law applied in *Three Rivers (No.5)*. Therefore the current law puts large organisations at a disadvantage compared to smaller companies when considering the issue of who may constitute the "client".

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Firms plead guilty for the death of a 5-year old girl

In our December 2017 bulletin we reported on the death of five-year old, Alexys Brown, after her head became stuck in a lift at Emmadale Close, Weymouth, on 13 August 2015. Alexys became trapped between the lift and the ground floor ceiling at her family home. The lift was for her brother Jack (11 years old at the time) who suffered from a rare neuro-degenerative illness and was wheelchair-bound.

The HSE have since prosecuted merged Synergy Housing Limited (Synergy) and Aster Property Limited (Aster), along with Orona Limited (Orona) for breaches of Section 3(1) HSWA 1974. Synergy and Aster were responsible for providing inspections of the equipment contracting others to install the lift. Orona was responsible for ongoing maintenance of the lift.

Synergy of Poole, Dorset and Orona of Sheffield have now pleaded guilty to breaching Section 3(1) HSWA 1974 and are due for sentencing at Bournemouth Crown Court on 14-15 January 2019.

According to the HSE the charges against Aster, also under Section 3(1) HSWA 1974, "have been ordered to lie on file."

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2. [1980] A.C. 521.
3. [1984] B.C.L.C. 151.
4. [2004] UKHL 48.

Court of Appeal reduce fine by 85%

Electricity North West appealed against its conviction of contravening Regulation 4(1) Work at Height Regulations 2005 and fine of £900,000. The conviction occurred at Preston Crown Court (HHJ Altham and a jury) on 23 March 2017. The sentencing took place on 31 March 2017.

The company owned and operated the electrical distribution network in North-West England. On 22 November 2013, one of the company's employees, John Flowers, fell from height whilst trying to clear ivy from a wooden pole. He had accessed the wooden pole by a ladder and secured himself with a work positioning belt. A mobile elevated work platform was on site but in use at the time. Mr Flowers accidentally cut through the belt and was fatally injured after falling.

The company was charged with 1) failing to carry out a suitable and sufficient risk assessment; 2) failing to ensure that work at height was properly planned, including the selection of work equipment; and 3) failing to ensure, as far as reasonably practicable, the health and safety of its employees.

After HHJ Altham gave a separate direction to the jury on each count, the jury acquitted the company on counts 1) and 3) but convicted on count 2).

HHJ Altham placed the breach in the category of high culpability. Given the not guilty verdicts for counts 1 & 3 he concluded that the likelihood of harm was low, so harm category 3 applied. HHJ Altham took a starting point of £540,000 (large organisation) but made an upwards adjustment to reflect the company's turnover and held that the minimum fine which could be imposed was £900,000.

The company appealed on the following two distinct grounds:

1. The conviction on count 2 was not safe and was inconsistent with the findings of not guilty on counts 1 & 3. This appeal was dismissed; the Court of Appeal was reluctant to second-guess the jury's verdict when it had been directed to consider each count separately. There was no obligation to consider the counts in the same way. In this case there had been a proper evidential basis for the conviction, which was not inconsistent with the not guilty findings on the other two counts.
2. The fine imposed was manifestly excessive. This ground of appeal was upheld. The Court of Appeal confirmed that HHJ Altham had incorrectly applied the Sentencing Guidelines on Health & Safety. Due to the jury's verdicts the offence was characterised as between low and medium culpability (not high). As to harm, the correct application of the guidelines was made (Level A), but on the facts there was a low likelihood of harm. It therefore followed that the offence under count 2 was harm category 3. The starting point was between £35,000 (low culpability) and £300,000 (medium culpability) with ranges between £10,000 to £140,000 and £130,000 to £750,000 respectively. The correct fine was therefore £135,000 and no further upward adjustment was made to reflect turnover.

It remains to be seen whether either party will attempt a further appeal.

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Court of Appeal confirms correct approach to sentencing in fire safety offences

In *R v Butt*[5] Mr Butt was converting a large property in East London into a hotel. Although Mr Butt had engaged consultants and secured planning permission, building regulations were not passed due to concerns about the fire escape.

During construction, building control visited several times highlighting various fire safety concerns and served an enforcement notice upon Mr Butt. He failed to comply and was prosecuted for various fire safety failings under the Regulatory Reform (Fire Safety) Order 2005. In particular:

- the fire escape and lift shaft were not fire resistant
- there was no safe internal means of escape from the upper floors, and
- the fire alarm system was inadequate.

Mr Butt pleaded guilty to three counts of failure to comply with the Regulatory Reform (Fire Safety) Order 2005 and one count of failing to equip his premises with firefighting equipment, fire detectors and alarms.

On 17 November 2017 Southwark Crown Court sentenced Mr Butt to 18 months' imprisonment, suspended for six months, and a fine of £300,000, reduced to £250,000 on account of the guilty plea. Mr Butt was ordered to pay costs of £14,210.

Mr Butt appealed the sentence as manifestly excessive. His fine was reduced to £150,000 and the costs order upheld. However, the case is noteworthy due to the Court of Appeal's remarks as to how sentencing in fire safety cases should be approached.

In particular the Court of Appeal noted:

- fire is inherently dangerous and unpredictable and fire safety offences should be met with severe penalties
- although fire safety offences were excluded from the Health and Safety Sentencing Guidelines due to the risk of distorting sentencing levels upwards, the structure of those guidelines might usefully be followed in cases such as this
- culpability should be assessed as it would under the Guidelines
- the harm risked in fire safety cases will always be "Level A" (risk of death of serious injury)
- the likelihood of harm depends on the facts and chances of a fire breaking out
- the risk of actual harm, and number of potential victims, as covered in the Health and Safety Sentencing Guidelines, will comprise aggravating features when considering sentencing
- a combination of a fine and a suspended sentence or community sentence is available when sentencing
- when considering a fine by reference to the Defendant's "resources" the Courts should bear in mind that disposable income, evidenced by tax returns, might not tell the whole story. The wealth of a Defendant could be reflected in substantial capital rather than high income.

A full copy of the judgment is provided here.

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5. [2018].

Army officers acquitted of negligence after the death of three reservists on an SAS march

In July 2013, 3 reservists, Lance Corporal Craig Roberts, L/Cpl Edward Maher and Corporal James Dunsby died after a 16 hour march in the Brecon Beacons on one of the hottest days of the year.

The march involved those taking part covering almost 30 km with candidates carrying a Bergen, a backpack weighing between 22 and 27kg, and a dummy rifle. The march had to be completed within eight hours 45 minutes and those who failed to complete the march within that time, or who either voluntarily withdrew or were withdrawn on medical grounds, failed the test and were removed from the selection process of an elite military unit.

The identities of the defendants, who were subject to a Court Martial, were protected by an anonymity order. 1A was the captain and training officer in charge of the march and 1B was a warrant officer and chief instructor for the exercise. They both denied negligently performing a duty by failing to take reasonable care for the health and safety of those who took part in the exercise.

Judge Advocate General Jeff Blackett ruled that the defendants had no case to answer and directed the five-person panel to acquit them of the charges they faced. He told the families of the three reservists who had died "The allegations of negligent performance of duty were only a small part in the overall failings – the deaths occurred because of systemic failures within Joint Forces Command...These two defendants did the best they could in the circumstances of fewer resources than requested, a lack of even the most basic of training in relation to heat illness and risk assessment and within the culture that existed at the time."

Following the incident, the Ministry of Defence, which is immune from prosecution under health and safety legislation, was issued with a Crown Censure by the HSE after they concluded that there were serious failings in the planning, assessment, conduct and monitoring of the test week, which led to the three deaths.

Corporal Dunsby's widow, Bryher Dunsby, stated that there should be 'new guidelines for endurance marches and heat illness' as there is still no official guidance on heat related illness during endurance training for the British army.

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Fines and sentences

Fine of £1.5m for a logistics company after worker is fatally crushed

On 22 January 2016 an employee of the logistics company, Tuffnells Parcels Express Limited, was attempting to attach a trailer to his vehicle. The trailer was parked on a slight incline causing it to roll forward and trap the employee, causing fatal injuries.

The HSE discovered that the company had failed to take into account safety measures for coupling trailers and the presence of the incline.

The company based in Dudley pleaded guilty to breaching Section 2(1) HSWA 1974. It was fined £1.5m and ordered to pay costs of £32,823 by Dudley Magistrates' Court.

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Metal forging company fined £500,000 after worker is fatally injured when struck by metal component

On 17 July 2015, Billy Fairweather, 35, was first man in a four-man crew producing metal parts from alloy cylinders. He was tasked with moving alloys on an anvil using tongs between hammer strikes in order to forge them into shape. Although the alloy in question, weighing 20kg, was small it was very robust. The crew was therefore using the heaviest hammer available.

Given the small size of the alloy and the large size of the hammer, Mr Fairweather was working on one knee close to the hammer. Due to the alloy being incorrectly positioned the hammer struck it with a glancing blow rather than a direct hit. This caused the alloy to kick back at high speed directly into Mr Fairweather's chest. He was fatally injured.

Sheffield Crown Court heard how Abbey Forged Products Ltd of Sheffield failed to allocate the task to the correct hammer and crew. There was also a failure to risk assess properly the hazards involved in hammering small parts with large hammers.

The company pleaded guilty to a charge under Section 2(1) HSWA 1974 and was fined £500,000 and ordered to pay costs of £23,756.47.

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Tata Steel fined £450,000 after worker falls into an open pit

On 26 February 2014, Steven Ayres was working at Tata Steel's plant in Stocksbridge, tasked with emptying a skip into an open pit. The skip was full so was being removed and emptied by Mr Ayres with the assistance of a crane being operated by a driver.

After emptying the skip and replacing it back into the pit the crane replaced the first of two floor plates but it swung slightly out of position. When the second plate was being moved by the crane Mr Aryes moved out of the way in case it also moved out of position. As he did so he stepped back and fell around 3-4 metres into the pit suffering injury to his ribs and right kidney.

Tata Steel had a risk assessment in place, produced 16 months before the accident, identifying the need for a barrier around the pit when the floor plates were being moved. However, there was no barrier at the time of the accident.

Tata Steel pleaded guilty under Section 2(1) HSWA 1974 and was fined £450,000 and ordered to pay costs of £32,099.

Sheffield Crown Court considered that the fine would ordinarily have been £800,000, but evidence showed that the company had recently been restructured to allow it to continue as a "going concern". The court therefore took into account the effect a higher fine would have on pension investors. In mitigation Tata Steel had pleaded guilty early and had since the accident redesigned the area with a barrier in place.

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Utility company fined £466,660 for dangerous gas installations at Royal Veterinary College

Dimension Data Advanced Infrastructure Ltd was contracted to carry out gas, plumbing and drainage work at the Royal Veterinary College in Hertfordshire from December 2010 until September 2011.

Multiple gas leaks were found in a newly built student village, which put hundreds of students at risk. The HSE discovered that cheaper water fittings were being used instead of gas fittings. It transpired that neither the company nor its personnel were registered on the Gas Safe Register.

The installation carried out by the company was classified as "Immediately Dangerous" under the gas safe classification scheme.

The company pleaded guilty at St Albans Crown Court to breaching Section 3 HSWA 1974 and was fined £466,660 and ordered to pay costs of £11,548.68.

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Two companies each fined £270,000 after a construction worker is paralysed after falling through a roof

On 5 November 2015, Mr Marcel Păduraru, a construction worker, who was 30 years old at the time, fell through a fragile plastic skylight landing in a basement over three metres below. He suffered severe spinal injuries leaving him paralysed.

Grangewood Builders Limited (Grangewood) was the principal contractor refurbishing a large property on Chapel Road, Belgravia, London. Trenchco Limited (Trenchco) for whom Mr Păduraru worked, was the demolition contractor engaged by Grangewood.

Westminster Magistrates Court heard how the HSE's investigation revealed that neither Grangewood nor Trenchco checked the sturdiness of the skylight, or took action to prevent workers falling through it, despite work being carried out in the vicinity of the skylight.

The HSE investigation revealed other unsafe working practices, such as a lack of edge protection whilst demolishing a roof and manually handling wood beams weighing an estimated 200kg. There was inadequate supervision and instruction, the supervisor having had no formal training and Mr Păduraru, a Romanian, relying on an unofficial interpreter to pass on instructions to him.

Grangewood of Canvey Island, Essex pleaded guilty to breaching Regulation 13(1) of the Construction (Design and Management) Regulations 2015 and was fined £270,000 and ordered to pay £7,025.98 in costs.

Trenchco of Harrow Weald, Middlesex pleaded guilty to breaching Regulation 15(2) of the Construction (Design and Management) Regulations 2015 and was fined £270,000 and ordered to pay £7,025.98 in costs.

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Custodial sentence for landlord for repeated gas-safety failings

Steven Ladell was landlord of a property in Kings Lynn, Norfolk. In 2017 the HSE inspected the property and found a gas oven to be "at risk" along with the gas central heating boiler being unsafe.

A further HSE visit found that Mr Ladell had failed to regularly inspect and maintain gas appliances and provide a Landlord's Gas Safety Certificate. He had also failed to comply with an Improvement Notice issue on 13 July 2017 to deal with the above issues.

The case was heard in Norwich Magistrates' Court. Mr Ladell pleaded guilty to breaching Section 21 HSWA 1974 (non-compliance with Notice) and Regulation 36(2) and Regulation 36(3) of the Gas Safety (Installation and Use) Regulations 1998. He received a 20-week custodial sentence, suspended for two years. He was also ordered to carry out 100 hours of unpaid community work and to pay costs of £4,146.

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Environmental

Waste management firm agrees enforcement undertaking for odour pollution

In June 2018, Renewi, a waste management firm based in Cumbria, became the first company to accept an enforcement undertaking for breaching an environmental permit for odour pollution.

The site where the odour arose opened in April 2013 and processed around 200,000 tonnes of municipal solid waste per year. It was closed in 2014 after numerous complaints from local businesses and residents over the odour. Local news reported that it was closed after a "plague of flies" inhabited the site.

Claire Westgarth of the Environment Agency stated that the enforcement undertaking is a "huge achievement" as it is "the first time an EU has been accepted for alleged permit breaches relating to odour at an installation."

Renewi paid a local environmental charity a sum of £60,000 and compensated local businesses and residents. In addition, the Environment Agency stated that alterations to the site were made to minimise the effect of the odour.

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Round up

The International Organisation for Standards (ISO) publishes new standard for occupational health and safety

ISO45001: Occupational health and safety management systems – Requirements with guidance for use, is designed to help organisations reduce workplace injuries and illnesses around the world.

The ISO says that according to 2017 calculations by the International Labour Organisation (ILO), 2.78m fatal accidents occur at work yearly or 7,700 people per day. Furthermore, there are around 374m non-fatal work-related injuries and illnesses each year.

ISO 45001 will seek to provide governmental agencies, industry and other affected stakeholders with effective, usable guidance for improving worker safety in countries around the world.

David Smith, Chair of project committee ISO/PC 283 that developed ISO 45001, states: "It is hoped that ISO 45001 will lead to a major transformation in workplace practices and reduce the tragic toll of work-related accidents and illnesses across the globe."

ISO 45001 uses a simple Plan-Do-Check-Act (PDCA) model, intended to enable organisations to plan systems in order to minimize the risk of injury or illness, preventing long-term health issues and absences from work, and avoiding accidents.

ISO 45001 will replace OHSAS 18001, the world's former reference for workplace health and safety. Organisations already certified to OHSAS 18001 will have three years to comply with the new ISO 45001 standard, although certification of conformity to ISO 45001 is not a requirement of the standard.

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HSE releases annual figures for work-related injuries for 2017/2018

The HSE has released provisional annual data for work-related fatal injuries revealing that 144 workers were fatally injured between April 2017 and March 2018 (0.45 per 100,000 workers).

Although this is an increase of nine fatalities on the previous year of 2016/17, the level of fatalities has mostly remained level in recent years with a long-term overall reduction since 1981. The relevant data can be found in here.

The HSE has also released data regarding deaths associated with mesothelioma set out within here.

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RPC is a modern, progressive and commercially focused City law firm. We have 83 partners and over 600 employees based in London, Hong Kong, Singapore and Bristol.

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- **Winner – Law Firm of the Year – The British Legal Awards 2015**
- **Winner – Competition and Regulatory Team of the Year – The British Legal Awards 2015**
- **Winner – Law Firm of the Year – The Lawyer Awards 2014**
- **Winner – Law Firm of the Year – Halsbury Legal Awards 2014**
- **Winner – Commercial Team of the Year – The British Legal Awards 2014**
- **Winner – Competition Team of the Year – Legal Business Awards 2014**

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