

# Health and Safety

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CMS Cameron McKenna Newsletter

July 2010

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## Coalition Government to Review Health and Safety Laws

On 14 June 2010, the government announced its intention to review health and safety laws in the UK. The Prime Minister is perceived to be somewhat sceptical of the UK health and safety laws, and has previously said the UK is "saturated" by them. The review will be led by Lord Young of Graffham, a former trade and industry Secretary of State under Margaret Thatcher during the 1980's. Lord Young has said that the system and the approach thereto has to be 'proportionate and not bureaucratic.' He will be providing the Prime Minister with regular updates on progress.

The review has been met with some reluctance by Unions, who have warned against attacks on any legislation that protects staff at work. The review is expected to publish its findings in summer and will primarily investigate concerns over the 'application and perception' of health and safety legislation and its connections (if any) with the increasing 'compensation culture' in the United Kingdom, during the last decade.

Prime Minister Cameron has said: "The rise of the compensation culture over the last 10 years is a real concern, as is the way health and safety rules are sometimes applied. We need a sensible new approach that makes clear these laws are intended to protect people, not overwhelm businesses with red tape. I look forward to receiving Lord Young's recommendations on how we can best achieve that."

Lord Young went on to state, "Health and safety regulation is essential in many industries but may well have been applied too generally and have become an unnecessary burden on firms, but also community organisations and public services. I hope my review will reintroduce an element of common sense and focus the regulation where it is most needed."

However, the TUC have expressed some concern over Lord Young's review saying that it is unlikely that this will be a review to achieve better regulation, but a review to "undermine the already limited protection that workers have by focusing on the needs of business."

The TUC also expressed surprise that the Government would be addressing the issue of 'compensation culture' as it states that there are successive reports that show that claims have been falling over the last decade.

We will monitor Lord Young's review with interest.



## Donaghy Report Response Published

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The former Government fully accepted the 23 recommendations made by the report including recommendations for common minimum standards throughout publicly funded construction projects, mutual recognition between pre-qualification schemes, and support for greater worker participation.

To see the report please go to <http://www.dwp.gov.uk/docs/one-death-is-too-many.pdf>

## North Sea Installation Inspections on the Increase

DECC has announced that it will increase its inspections and monitoring of offshore compliance. A new Oil & Gas UK industry group, known as the Oil Spill Prevention and Response Advisory Group (OSPRAG), is to report back to DECC on its findings on ability to prevent and efficiently respond to oil spills.

Secretary of State for Energy and Climate Change, Chris Huhne, has said "I will review our new and existing procedures as soon as the detailed analysis of the factors which caused the incident in the Gulf of Mexico are available. A review has been carried out by DECC officials which has found that our existing system is fit for purpose, but in light of the spill in the Gulf we are strengthening the regime further...the Deepwater Horizon gives us pause for thought and, given the beginning of exploration in deeper waters West of Shetland, there is every reason to increase our vigilance."

DECC is increasing the monitoring of drilling operations by recruiting additional inspectors, based in Aberdeen. The number of annual inspections is expected to double. In light of the Gulf of Mexico incident, DECC is also reviewing the indemnity and insurance requirements for operating in the UK Continental Shelf.

Oil & Gas UK, representative organisation to the oil and gas industry has stated that the work of OSPRAG is now firmly underway. Four work groups have been established to look at technical, oil spill response capability and remediation, insurance and pan-North Sea response issues. The technical review group will be carrying out a comprehensive assessment of industry practices, including the creation of an inventory of blowout preventers (BOP) and remotely operated vehicles (ROV) currently employed in the UKCS, including function testing, operating capabilities, modifications and secondary control system requirements. As soon as the work is completed, Oil & Gas UK will publish the findings.

To find out more on OSPRAG, please visit the Oil & Gas UK website, [www.oilandgasuk.co.uk](http://www.oilandgasuk.co.uk)

## Focus on - Fire safety

### **New Guidelines for Firefighters**

Following calls for a change in the law to enable fire-fighters to respond effectively to dangerous situations, a new Health and Safety Executive policy statement has provided that while the fire service still has a duty under the Health and Safety at Work Act 1974 to protect their workers' health and safety, fire-fighters will not consequently be prevented from doing their job, that is, the job of protecting the public.

The new guidelines follow the findings of a Fatal Accident Inquiry in March, where Alison Hume died following a fall of 40 feet down a disused mineshaft near Glasgow. Fire-fighters had been

HSE chair Judith Hackitt has stated, “Fire-fighters perform a unique and indispensable role. It is part of their job to intervene in dangerous situations to protect people and property. The law expects that they will themselves be protected as far as is reasonably practicable – but in fast moving situations they must exercise their judgement about what is reasonable and what is not.”

## Fines for Breaches of Fire Safety Legislation

Paul Ashley of P and S Ashley Timberworks appeared before Chester Crown Court on Tuesday 11 May 2010. He pled guilty to eight counts of breaching the Regulatory Reform (Fire Safety) Order 2005.

- £30,000 – Lack of suitable and sufficient risk assessment.
- £20,000 – Failure to take suitable and sufficient preventative and protective measures.
- £30,000 – All other offences sentenced at the same level including lack of suitable fire alarm and unsuitable means of escape.

The court heard that timber was found to have been piled high in the yard and combustible materials (including cylinders containing liquid petroleum) blocked escape routes. Various appliances were also found to have electrical faults. The court heard that Mr Ashley did produce a risk assessment, but inspectors deemed it “inadequate”.

Mark Cashin, Deputy Chief Fire Officer for Cheshire Fire and Rescue Service, said:  
 "Fire safety is a key part of good business management and Mr Ashley showed little or no regard for the safety of his employees or the people living and working around his premises. The action was brought against Mr Ashley after he repeatedly refused to carry out essential fire safety work on the business. This included the lack of a suitable fire alarm, unsuitable means of escape and the implementation of a suitable and sufficient risk assessment. This was despite a number of visits by fire service personnel."

The Co-operative Group has been fined £210,000 after pleading guilty to six breaches of fire safety legislation at Southampton Crown Court.

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Co-op was prosecuted under the Regulatory Reform (Fire Safety) Order 2005, along with three other offences at other Co-op premises in Southampton and Portsmouth.

A spokeswoman for the Co-operative Group said: "As a responsible retailer, the Co-operative Group takes health and safety issues very seriously. At the time of these incidents, the Group was introducing substantially more stringent health and safety procedures, investing heavily, both in time and money, in all aspects of fire safety. The Co-operative Group deeply regrets the breaches but reiterates that its rigorous measures, now established and continually reviewed in conjunction with fire authorities across the country, ensure the safety of its valued customers and staff."

## HGV Drivers Legionnaires' Risk

In a recent study led by the Health Protection Agency, it was found that people who drive regularly are more likely to be at risk from Legionnaires' Disease. 'Professional' drivers, for example people who drive a van daily as part of their trade, or heavy goods vehicles, were found to be most at risk. These vehicles will also reportedly commonly drive through industrial areas, increasing the risk further. People in this category are five times more likely to contract legionnaires'. Having the window open will also increase exposure. It is estimated that at least twenty per cent of all cases of legionnaires' disease may be due to exposure from driving.

Drivers who do not use screenwash apparently are at an even greater risk, as it was found that screenwash will kill off the legionella bacteria. The study shows that the legionella bacteria was found in one in five cars that did not have screenwash, but not in any cars that did. "Legionella bacteria breeds in stagnant, warm water which can cause potentially fatal lung infections. The report, published in the European Journal of Epidemiology, stated "this simple public health advice may be of worldwide relevance in reducing morbidity and mortality from Legionnaires' disease."

The findings highlight another potential area in which personnel in industry can be exposed to legionella. Suitable risk assessments and inspections should be carried out on all company vehicles before use and vehicles should be regularly maintained using appropriate cleaning fluids and substances.

For more information on Legionnaires' Disease, please visit the HSE Website:  
<http://www.hse.gov.uk/legionnaires/index.htm>

## Focus On - Wood Work

### **HSE Launches New Website for Workers in Woodworking Sector**

Last year over 300 people in the woodworking industry suffered major injuries and over 1,100 were absent from work following an accident for more than three days.

A new website launched by the HSE aims to make it easier for workers, supervisors and managers to fully understand the risks that may be faced when working with wood and how to deal with them.

The site includes woodworking machine demonstration videos and advice on best practice. The information that was already available on the HSE site has also been updated and re-organised so that users can easily access specific advice on particular health and safety issues.

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There is also a selection of Woodworking Information Sheets, the Safe use of Woodworking Machinery Approved Code of Practice. This, along with other information can now be downloaded for free.

To visit the new woodworking site, please go to <http://www.hse.gov.uk/woodworking/index.htm>.

### **Wood Processing Plant Fined**

After pleading guilty to breaching Section 2(1) of the Health and Safety at Work etc Act 1974, Allan Jenkinson, the owner of a wood processing plant was fined after a worker had his foot completely severed by a log shavings machine.

Mr Jenkinson was fined £20,000 for putting workers at risk and also ordered to pay £6,146 in costs.

Penrith Magistrates Court heard that a 24-year-old employee of A W Jenkinson Forest Products in Clifton, owned by Mr Jenkinson, was using a chainsaw to deal with a stuck log in the log box at the end of a conveyor. He lost his balance and his right foot became caught in the 48 razor-sharp revolving blades at the bottom of the log box. As the employee was working alone, he crawled out of the log shavings box and used a radio to call for help. He had only worked at the firm for 15 days on a temporary contract before the incident occurred on 25 June 2009.

The HSE investigation concluded that Allan Jenkinson had failed to ensure that safe systems of work associated with the shavings machine were in place. Since the incident, the company has installed fixed guards around the machine to prevent workers from being able to access the conveyors and logs boxes.

## **Employment Changes from April 2010 - Fit Notes**

New fit notes will come into use from 6 April 2010 replacing the existing "sick note" and focusing on what can be done to assist an employee's return to work. An early proposal to give GPs the option to certify an employee as "fit for work" was rejected in favour of the more ambivalent "you may be fit for work ". If this option is used, the doctor can then suggest adjustments to the work or workplace which would enable the employee to go back to work. Focusing on what the employee is able to do should help to facilitate the employee's return to work. If however, the employer is unable to accommodate the adjustments proposed by the doctor, the employee will be considered not fit for work.

The introduction of fit notes should assist employers to manage long-term sickness absence by encouraging employees and employers to evaluate whether there are any aspects of the employment that the employee can undertake, notwithstanding the sickness reason. Fit notes will need to be utilised properly by both doctors and employers if they are to achieve their full potential.



# Case Law

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## **H.M Advocate v Discovery Homes (Scotland) Limited and Richard Pratt**

On 29 May 2008, Andrezej Freitag, an employee of Discovery Homes, fell down a smoke extraction shaft adjacent to a stairway on a construction site operated by his employer. He was in the process of laying concrete with fellow employees when he fell from an unprotected edge a distance of approximately three metres on to a hard surface. His injuries due to this fall resulted in his death.

Discovery Homes were charged under sections 2(1) and 33(1)(a) of the Health and Safety at Work Act 1974. Mr Pratt, the company director, was charged under section 37(1) of the Act as having consented to or connived in that offence or it having been attributable to his neglect. It was held that the respondents had failed to provide adequate protection, such as a barrier or a guard-rail, so as to prevent anyone falling down the smoke extraction shaft.

The case was appealed by the Crown solely on the grounds of leniency of the fines imposed at first instance - £5,000 for the Company and £4,000 for the Director. These fines were both discounted due to the fact that there had been a prompt admission of responsibility and a timely plea of guilty. Moreover, steps had been taken very quickly to remedy the deficiency and Discovery Homes had, in general, a good safety record.

The Company turnover for the year to September 2008 was approximately £2.9 million and the accumulated profit was approximately £283,000. The trial judge had found the circumstances of the case to be severe and taking all information into consideration, stated; "in the normal course, I would have imposed upon the respondents a very substantial fine." The judge had difficulty in doing so due to the perceived financial worth of the Company. From the information that had been provided to him, he considered that a "substantial fine would almost inevitably result in the respondents falling into administration or liquidation."

The Crown, on appeal, was able to provide a great deal of additional documentation with regard to the financial affairs of the Company. At appeal, the Court (whilst stating that the trial judge's reasoning with regard to the gravity of the offence was sound) stated that the trial judge had not taken into consideration many aspects of the finances of the business.

On appeal, the Court reasoned that principles in the case of *R v. Balfour Beatty Rail Infrastructure Services Limited* [2007] IRC 354 should be followed in Scotland, where:

"the information provided to the sentencing judge, and to us, is less than it might have been hoped for. Where a company has been convicted of an offence such as the present, or indeed any other offence in respect of which its financial position would be relevant in determining the level of fine, it is for the company to place before the court sufficiently detailed information about its financial position to enable the court to see the complete picture without having to resort to speculation. In addition to the lodging of all relevant documents, it may in some cases be thought appropriate to lead the evidence of an accountant."

It also took into consideration the Definitive Guideline issued by the (English) Sentencing Guidelines Council which states that where the health and safety offence is shown to have caused death, the appropriate fine will seldom be less than £100,000 and may be measured in hundreds of thousands of pounds or more.

The Court was satisfied that the Company could meet a far larger fine and duly imposed a fine of £60,000, however discounted this to £40,000 (using the same percentage discount at first

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instance), and allowing application for time to pay. The Court was not persuaded, however, that the amount of £4,000 imposed on the director was unduly lenient taking into consideration his monthly income and so the director's fine remained the same.

The new fine payable by the Company represents a far larger percentage of turnover and of profit, being approximately 14% of profit, and tends to indicate a willingness on the part of the Courts to increase fines for breaches of health and safety legislation.

#### *Commentary*

The Corporate Manslaughter and Corporate Homicide Act (the Act), whilst relatively new and with no actual convictions as yet, has redefined the concept of sentencing with regard to health and safety breaches.

The Act prompted the idea of fining a company by a percentage of its turnover - a daunting prospect for most companies, particularly those with turnovers into the millions. There has been a distinct trend in recent years for increasing the amount of financial penalty for serious breaches of health and safety legislation. In the case of Discovery Homes, the Court on Appeal appears to be supporting the Crown's view that fines for health and safety should be higher. This is due to many different factors, including the objective of imposing a fine which will achieve a safe environment for the public, and that fines should show that serious breaches of health and safety legislation will not be tolerated.

As was confirmed in the recent case of Munro, the fine must reflect the degree of fault and the consequences, so as to raise sufficient concern on the part of shareholders as to what has occurred. It is not possible to say categorically that a fine should stand in any specific relationship with a turnover or net profit of the accused company; each case will be dealt with due to its own circumstances. As we have seen from Discovery Homes, the accused Company's perceived resources and the effect of the fine on the business was of extreme importance. Any fine should reflect the means of the offender. For this to be possible, it is necessary for the Court to be provided with accurate and up to date financial accounts so that it can make an informed decision, and the onus will be on the accused Company to provide such information.

It is also a normal practice for fines to be discounted if a guilty plea is tendered at an early stage. The discount will usually range between a third and a fifth of the fine, depending upon the timing and the circumstances that the guilty plea is tendered. It follows from this that in the event of conviction following a trial, no discount can be applied.

To read our Law Now on Munro v. H. M. Advocate, please go to <http://www.law-now.com/cmck/pdfs/nonsecured/healthandsafetysummer.pdf>

## Sweet Firm Fined Over Crush Death

Tangerine Confectionery (the largest independent confectioner in the United Kingdom) has been fined £300,000 after an employee was crushed to death in one of its machines. The company was also ordered to pay full costs of £72,901 following the nine-day trial. Martin Pejril, 33, climbed into the machine to clear one of the blockages, but it restarted and killed him at a factory in Poole in February 2008. The sweet company, which has its headquarters in Blackpool, said it may appeal against the conviction.

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The court heard that Mr Pejril, a Czech-born starch room operator, became trapped in the machine at Tangerine's Alder Road plant in Poole. The injuries were so severe he died at the scene.

One HSE inspector has stated: "This tragic case highlights the need to ensure that machines are safely isolated before any maintenance takes place so they cannot unexpectedly start up. Simply pressing a stop button does not adequately isolate a machine." A spokeswoman for Tangerine Confectionery Ltd extended the company's sympathies to the victim's family, but said it was 'disappointed' by the conviction and the sentence and that it was considering an appeal.

This case demonstrates the need to carry out an adequate risk assessment on all types of machinery. All employees need to be adequately trained in correct company procedures, be it for clearing blockages, operating machines or any other high risk activity.

#### **Crush Death Results in Fine for Waste Disposal Company**

Biffa Waste Services Limited has been fined £280,000 and ordered to pay costs of £54,000 after a member of the public was crushed to death at a waste disposal site by a motorised loading shovel bucket in 2007.

Biffa pled guilty to breaching Section 3(1) of the Health and Safety at Work etc Act 1974 and contravention of Regulation 3(1)(b) of the Management of Health and Safety at Work Regulations 1999 by failing to carry out a suitable and sufficient risk assessment of the site.

Health and Safety Executive head of operations stated; "this tragic incident could have been avoided if sensible precautions and working practices had been in place to prevent the loading shovel working in such close proximity to members of the public. Companies operating such sites must carefully assess their arrangements to ensure that they keep vehicles and pedestrians separate whenever possible."

This fine represents a significant amount of money and costs for Biffa and demonstrates the severity of the circumstances. Health and Safety injuries by crushing are becoming increasingly common.

#### **Work at Height**

Illson, who were the principal contractor on the site, pled guilty to a separate charge under the Construction (Design and Management) Regulations 2007, as they failed to notify the HSE that construction work was due to take place on the site. Kendal Varley Limited, Mr Parkin's employer, also pled guilty to the same offence. Both companies were required to have appointed a Construction Design and Management coordinator, and to notify the HSE of the construction work. They had not done so.

The Health and Safety Executive (HSE) has successfully prosecuted Illson (Builders & Contractors) Ltd, (Illson) for a breach of the Work at Height Regulations 2005. A construction worker, Graham Parkin, was left with long-term disability problems as after having fallen from height on a construction site.

Mr Parkin fell more than three metres from a terrace retaining wall, suffering fractured vertebrae, as there were no guardrails in place to prevent such a fall.

Illson were fined £5,000 and ordered to pay £1,800 in costs for both the WAH & CDM offences. Kendal Varley was fined £2,000 and ordered to pay £1,800 for the CDM offence.

## DLR operator fined £450,000

## Lack of Asbestos Survey results in Fine

## Keefe v The Isle of Man Steam Packet Company Ltd

The case highlights the importance of providing all staff with appropriate ear equipment when working in excessive noise. It also highlights the duty of employers to take accurate measurements of noise levels and to ensure that their personnel are not subject to excessive levels of noise.

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### **Buncefield Criminal Inquiry sees Guilty Verdicts**

Following the recent criminal inquiry into the Buncefield explosion, three companies have been found guilty of health and safety breaches under the Health and Safety at Work Act. These verdicts are the result of a joint prosecution by the Health and Safety Executive and the Environment Agency. Two of the three companies were prosecuted for failing to protect workers and members of the public, and one of these two companies is now in voluntary liquidation. The third company was found guilty of failing to prevent major accidents and limit their effects, contrary to Regulation 4 of the Control of Major Accident Hazards Regulations 1999 and section 33(1)(c) of the Health and Safety at Work etc Act 1974. That company had pleaded guilty to causing pollution to enter controlled waters, contrary to s.85(1) and (6) of the Water Resources Act 1991.

The Buncefield incident in December 2005 was the result of the ignition of a 55,000 gallon vapour cloud which had formed due to a leaking tank. The explosions occurred at the Hertfordshire Oil Storage Terminal, generally known as Buncefield Oil Depot. The explosion could be heard 125 miles away with fire engulfing most of the site, which burned for several days. Forty-three people were injured. Significant damage occurred to both commercial and residential properties in the vicinity and the environmental consequences of the explosion are still unknown.

The three companies in question will be sentenced on July 16. Fines in relation to health and safety breaches can be unlimited in value, likewise fines for breaches of the Water Resources Act can also be unlimited.

We will monitor the sentencing of the three companies with interest.

### **Overseas Update: French Concorde Prosecution**

There have been no recent developments in the French Concorde case at the date the Health and Safety Newsletter went to print. We will continue to monitor the circumstances as they progress and will report on any substantial points through our Law-Now service [www.law-now.com](http://www.law-now.com).

### **Conviction 26 Years After Bhopal**

On 7 June 2010, a court in the Indian city of Bhopal sentenced eight people to two years each in jail over a gas plant leak that killed thousands of people. The convictions are the first since the disaster at the Union Carbide plant in 1984 - the world's worst industrial accident to date. The eight accused, all former plant employees, were convicted of "death by negligence". One of the convicted persons had since died, but the others are expected to appeal. Campaigners said the court verdict was "too little and too late." The gas leak involved a release of forty tonnes of a toxin called methyl isocyanate which leaked from the Union Carbide pesticide factory and settled over slums in Bhopal. The total death toll was 3,500 as a result of the explosion, with some 15,000 subsequent deaths attributed to the effects of the explosion. Campaigners say the actual death toll is probably more like 25,000. The effects of the gas continue to this day. The trials, twenty five years after the incident, have been seen as 'more symbolic' by the rights groups that work with the victims of the disaster. They say "two-year prison sentences for Indians found guilty over a tragedy which killed thousands is an indictment of the country's slow-moving criminal justice system and investigative agencies."

Campaigners would like to see the former Union Carbide chairman Warren Anderson, the principal accused in the case, brought to justice. A warrant for his arrest was issued by an Indian court in 2003 but never followed through.

The seven former employees, some of whom are now in their 70s, were also ordered to pay fines of 100,000 Indian rupees (£1,467; \$2,125) apiece.

# Health and Safety - what we do

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We have extensive experience in health and safety – particularly in the Energy sector reflecting the challenging nature of this highly regulated industry. However, our client base spans a number of industry sectors, including:

- Aviation
- Transport
- Energy
- Renewables
- Leisure
- Manufacturing
- Construction
- Communications

Regrettably incidents can be serious, even involving fatalities, and our clients have appreciated the high level of attention and support we are able to offer at what can be a very difficult time for any organisation. We are able to provide assistance in every aspect of responding to an incident, whether that is incident investigation, dealing with witnesses, defending a prosecution or advising senior management on liaising with the Health and Safety Executive. Our dedicated, specialist team is always on hand to provide assistance, 24 hours a day through our on call system if required. In addition, we provide advice on corporate governance issues, assist in transactional due diligence on health and safety and assist with general updates, information and training to clients. Our team are qualified to practice in both England & Wales and Scotland, and regularly provide advice to clients in relation to international working patterns.

## Our clients come to us for advice on:

- health and safety prosecutions
- accident inquiries
- formal interviews and investigations undertaken by inspectors
- corporate manslaughter investigations
- inquests and Fatal Accident Inquiries
- appeals against Improvement and Prohibition Notices
- compliance with UK and European regulatory requirements
- drafting corporate safety policies and contract documentation
- safety aspects of projects and property management
- due diligence in acquisitions
- directors' and officers' personal liabilities
- management training courses
- personal injury defence
- risk management and training.

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CMS Cameron McKenna has a reputation as the leading firm in the area of health and safety, providing specialist advice on regulatory requirements, risk management and corporate governance, as well as representing organisations facing enforcement action and claims for compensation.

## Recent experience

- Defending prosecutions of client companies arising out of serious incidents.
- Appealing other types of enforcement action taken against companies (e.g. prohibition notices).
- Conducting numerous Fatal Accident Inquiries - including some of the most high profile, lengthy and extensive inquiries to have taken place in relation to offshore matters.
- Conducting Coroners' Inquests.
- Obtaining first ever award against the Crown in favour of a client company following a Fatal Accident Inquiry.
- Taking appeals to the High Court of Justiciary.
- Taking appeals on human rights issues to the Privy Council.
- Defending Judicial Reviews.
- Advising clients on forthcoming health and safety legislation.
- Assisting clients in consultation with the Health and Safety Executive and other regulatory bodies.
- Advising clients in relation to Safety Cases and on Corporate Governance issues and Directors' responsibilities.
- Undertaking transactional due diligence in relation to health and safety matters.
- Advising clients on incident investigation and dealing with HSE inspectors.
- Preparing and drafting incident investigation reports.
- Advising clients on media and reputational issues following incidents.

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