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Health and Safety

CMS Newsletter

November 2014

Foreword

CMS Cameron McKenna LLP is recognised as a leading firm in the area of Health and Safety. We provide specialist advice on regulatory compliance, prosecutions, investigations and corporate governance.

Emergency Response Service

The steps a company takes immediately following an incident can be pivotal and can significantly increase or decrease the likelihood of a subsequent conviction. Health and Safety Inspectors have substantial powers to enter and examine premises, remove articles and demand documents necessary for them to carry out their investigations. Immediate, on the spot advice and support can therefore prove to be invaluable in the event of an emergency.

Our dedicated team is on call 24 hours a day to provide assistance and respond to incidents on site. Our lawyers are qualified to practice in England, Wales and Scotland; but we also regularly advise clients in relation to health and safety matters in other jurisdictions and can draw on the expertise of our CMS network of European offices.

We are available for health & safety emergencies and advice; along with any other related urgent matters. In the event of an emergency the team will ensure a swift and efficient response to client queries, irrespective of the time of day or day of the week.

If your company has a health and safety emergency, you can contact us on:

Emergency Response Hotline: 0333 20 21 010 (available 24 hours a day, 7 days a week)

London: 020 7367 3000

Edinburgh: 0131 228 8000

Aberdeen: 01224 622 002

Out of hours: 07811 362 201 (Ask for Jan Burgess)

Kelvin TOP-SET

A number of our team are qualified as approved Senior Investigators under the Kelvin TOP-SET incident investigation system. They are also able to assist in conducting an incident investigation itself, in order to ascertain the 'root cause' of an incident with a view to future preventative measures and improvements to health, safety and welfare.

Offshore Environmental Issues

Our team has considerable experience in advising in relation to offshore oil & gas issues – ranging from defending prosecutions by DECC to appealing enforcement notices – along with general advice in drafting of OPEPs and complying with the extensive range of offshore environmental regulation.

News

HSE appoints a new Chief Executive

The Health and Safety Executive (HSE) have announced a new senior appointment.

As of November 2014, Dr Richard Judge will take the position as HSE's chief executive. Prior to becoming the chief executive of the Insolvency Service, Dr Judge has had a varied career in science and technology organisations spanning the nuclear, rail and environmental sectors. He also has a professional background as a Chartered Engineer (fellow of the Institution of Mechanical Engineers), and is qualified as a Chartered Director.

Dr Judge will be taking over from Kevin Myers. Mr Myers replaced Geoffrey Podger last August; Geoffrey stepped down as chief executive after eight years in the role.

HSE's Chair, Judith Hackitt, commented that: "His valuable, considerable experience in both the public and private sector is a perfect fit for HSE, enabling us to take forward our commercial agenda whilst also ensuring we can build on our standing as a world-class regulator of workplace health and safety."

Richard Judge remarked: "This is a great opportunity to lead the executive of a renowned and respected regulator that will soon celebrate its 40th year. I look forward to working with my new HSE colleagues, and with everyone who has a stake in delivering further improvements in Britain's health and safety performance."

New Explosives Regulations 2014 and Acetylene Safety (England & Wales and Scotland) Regulations 2014

The 1st of October marked the coming into force of the new Explosives Regulations 2014 (ER2014) and Acetylene Safety (England & Wales and Scotland) Regulations 2014 (ASR2014).

As such, the Approved Code of Practice (ACOP) for the Manufacture and Storage of Explosives Regulations 2005 has ceased to apply. Guidance relating to the security of explosives (HSE Circular 1/2005), and guidance on the placing of civil use explosives on the market (L66) have also been withdrawn and replaced by the overarching guidance contained in L150 Safety provisions and L151 Security provision.

The ACOPs provide overarching guidance on how the safety provisions of the Regulations should be met. It is supported by subsector guidance to be published in summer 2015. These top-level documents are principally aimed at more complex and larger operations but they contain overarching technical guidance and background information that will help all dutyholders to comply with the safety and security provisions in the regulations.

In relation to ASR2014, these new consolidated regulations provide additional legal requirements for the safe use of acetylene gas at equal to or greater than 0.62 barg ("compressed acetylene gas") and the equipment used with this. Acetylene gas poses an additional hazard to other flammable gases as it is also reactive. Under certain conditions, even in the absence of any air or oxygen, it can decompose explosively into its constituent elements, carbon and hydrogen. This hazard was not fully addressed by the previous regulations (Dangerous Substances and Explosive Atmospheres Regulations 2002). Therefore, the ASR2014 increase the safety of working with acetylene gas by including, in certain circumstances, the requirement for a flame arrestor to stop the progression of a flame resulting from the decomposition or uncontrolled combustion of acetylene gas, which could lead to an explosion.

The purpose of these consolidations was to make dutyholder compliance easier, by making the law simpler to understand and apply, and by reducing bureaucracy. Whilst ensuring that existing standards of safety are maintained, the proposals remove overlapping legal duties, clarify legal definitions and simplify and modernise the law. This consolidation was one of the recommendations of the review of health and safety undertaken by Professor Ragnar Löfstedt.

Fatal Accident Inquiry (FAI) Reform (Scotland)

We have previously reported on Lord Cullen's 2009 Review of Fatal Accident Inquiries (FAI) legislation, which sought to endorse a more effective, practical and modern system of public inquiry into deaths in Scotland. The Scottish Government considered Lord Cullen's 36 recommendations in discussion with the Scottish Court Service (SCS) and the Crown Office and Procurator Fiscal Service (COPFS). The COPFS has already implemented six non-legislative recommendations.

The government consultation that considered further legislative reform of FAI procedure has recently closed. The consultation paper invited views on six areas in particular:

— Extending the categories of death in which it is mandatory to hold FAIs. Under current legislation, FAIs are mandatory only for deaths occurring as a result of an accident at work, or in legal custody, including prison;
— Permitting discretionary FAIs into deaths of Scots abroad where the body is repatriated to Scotland. There are currently no provisions to hold FAIs into deaths of persons domiciled in Scotland who die abroad, even if the body is repatriated to Scotland;
— Creating a more efficient system in order to avoid unreasonable delays;
— Consider holding FAIs in alternative accommodation. At present, FAIs typically take place in a court room setting;
— Making legal aid for bereaved relatives more accessible; and
— Aligning Sheriffs' determinations with the practice of Coroner's Inquests, to ensure that the recommendations are implemented, or, reasons given for non-compliance.

Rules regarding FAI procedure will be drafted as part of the implementation of the proposed Bill. The proposed Bill will repeal the current Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 and enact new legislation to govern the system of FAIs.

Cases

NHS board sentenced for patient committing suicide

We have previously reported on "want of care" incidents, whereby health authorities and private providers of health care were prosecuted for neglecting its patients.

NHS Ayrshire and Arran Health Board have been fined £50,000 after a vulnerable patient took her own life at a hospital in Kilmarnock. The health authority pled guilty to a breach of Section 3(1) of the Health and Safety at Work etc. Act 1974.

Sheriff Murphy described Ms Black's death as a "systematic failure" of management.

Nicola Black, 33, died the day after she was admitted to a mental health ward at Crosshouse Hospital, East Ayrshire. Ms Black had been assessed by a doctor as being at a high risk of suicide, self-harming and absconding from her room. She was to be kept under constant observation. However, she still succeeded in using her bootlaces as a ligature to hang herself off a window restrictor which was secured to the top of the window of her hospital room.

After investigation, the HSE found that a number of failings had led to the death.

Firstly, despite previously identifying that window restrictors were at risk of being used as a ligature point and instructing a contractor to remove them, there is no record of this work having been completed.

Secondly, the three healthcare assistants tasked with supervising Ms Black were apparently misinformed as to the patient's psychiatric health. They were unaware of a suicide risk; only the risk of absconding was brought to their attention.

Thirdly, only part of the patient's room was visible. When Ms Black was out of sight initially, the supervising assistants looked in and saw her standing in the corner. Shortly after this, one assistant looked in again and found the patient hanging.

Fourthly, the ward had no specific procedure or policy for checking and removing personal items (in this case boot laces) which may be used as a ligature.

HSE Inspector Jane Scott commented: "This tragic incident was both entirely foreseeable and preventable by NHS Ayrshire and Arran."

This case follows on an increasing trend for the HSE to prosecute health providers, under existing health and safety legislation, for "want of care" of their patients.

Private health care provider sentenced for resident death

Another incident which perpetuated the trend of "want of care" cases in which health providers neglect the health and safety of their patients, involved a person suffering from clinical dementia in a Hertfordshire care home.

Borehamwood-based Life Style Care PLC was fined a total of £85,000 after pleading guilty to a breach of the Health and Safety at Work etc. Act 1974. Their patient, Mrs Claire Hughes, 64, suffered from dementia. For certain reasons, the wardrobe in her room was locked to prevent her from gaining access. On the morning of her death, she had attempted to open the wardrobe which proceeded to fall on her, suffocating her.

Following investigation, the HSE concluded that the care home failed, firstly, to adequately secure the wardrobe to the wall and, secondly, to provide the maintenance manager with necessary information, instruction or training so that the wardrobe would be properly secured at all times.

Commenting on this incident, HSE Inspector Sandra Dias said: "Mrs Hughes' death was a wholly preventable tragedy caused by unacceptable management failings on the part of Life Style Care PLC. They put her at unnecessary risk…Working in a care home is a specialised job, which involves dealing with vulnerable people. Care homes must ensure that they have the correct training in place for all their employees, and that they work to adequately assess and eliminate all significant risks."

This case follows on an increasing tendency for the HSE to prosecute health providers, under existing health and safety legislation, for "want of care" of their patients.

Agust helicopter crash

The Aviation Accident Investigation Branch (AAIB) released a report on Tuesday, following a fatal helicopter incident near Vauxhall Bridge, London, in January of last year.

The incident occurred on 16 January 2013, when the helicopter collided with a crane attached to a building development at St George Wharf, close to London Heliport, at a height of approximately 700 feet. This collision and the helicopter's subsequent impact with the adjacent roadway resulted in the death of the pilot, a pedestrian and a number of casualties. A cloak of freeze fog and low cloud over London meant that the weather conditions were challenging at the time of the incident.

The report makes a number of technical safety recommendations:

- The Civil Aviation Authority (CAA) should require the UK Air Navigation Service Providers to assess the effect of obstacles on operational procedures:
  - Relating to published Visual Flight Rules (VFR) routes near those obstacles, and controlling non-Instrument Flight Rules flights within the Control Areas and Control Zones surrounding UK airports, and to modify the procedures to enable pilots to comply with ATC instructions and Air Navigation regulations.
- Department for Transport should:
  - Implement a mechanism, compliant with Regulation (EU) 73/2010 and UK law, for the formal reporting and management of obstacle data, including a reporting requirement for newly permitted developments;
  - Implement measures that enable the CAA to assess, before planning permission is granted, the potential implications of new obstacles for airspace arrangements and procedures; and
  - Remind the relevant authorities to notify the CAA: (i) where planning permission for developments which include obstacles is granted; (ii) about obstacles not previously notified; and, (iii) about obstacles previously notified that no longer exist.
  - (A similar recommendation applies to the Scottish Government reminding the relevant Scottish planning bodies)
- The CAA and the European Aviation Safety Agency (EASA) should:
  - Review Federal Aviation Regulations (VFR Flight Planning, Pre-flight Risk Analysis) to assess whether their implementation would provide safety benefits for those helicopter operations within the UK and Europe, respectively; and
  - Assess whether mandating the use of Helicopter Terrain Awareness and Warning Systems compliant with Technical Standard Order C194 or European Technical Standard Order C194 would provide benefits for helicopter operations within the UK and Europe, respectively

Company pleads guilty to health and safety law breaches following worker falling from height

The Glasgow based company, SW Global Resourcing Limited, pled guilty to contraventions of sections 2 and 33(1) (a) of the Health and Safety at Work etc. Act 1974, which resulted in the death of an employee at the Annick Water Viaduct in Stewarton, Ayrshire, in 2010. The company was fined £200,000 for the breaches.

Between March and April of 2010, employees of the company worked to cap and grout strengthening rods which had been inserted across the arches of the Viaduct. This involved working at height using mobile elevated work platforms (MEWPs) positioned on concrete plinth that were built to create level working surfaces.

On 13 April 2010, an employee was working from the basket of a MEWP positioned at a height of approximately 13 metres (42 feet). The plinth that the MEWP was positioned on had been built with no end stop or edge protection to remove the risk of the MEWP falling from it. Resultantly, the incident occurred when the MEWP drove off the edge of the concrete plinth, throwing the employee from its basket and into the shallow river bed. He died at the scene as a result of his injuries.

The case was investigated by the Office of Rail Regulation (ORR) with assistance from the HSE. The investigating authorities found that no suitable and sufficient risk assessment had been carried out for the task, and the system of work was found to be unsafe. The accident could have been avoided had reasonably practicable precautions been taken, in particular, had edge protections been used.

Gary Aitken, head of the COPFS health and safety division, said: "The company failed to ensure the safety of its employees and as a result of this Leslie Watson [the employee] died. This was an entirely avoidable tragedy which has left family and friends devastated at the loss of a loved one. Hopefully, today's outcome will highlight the need for companies to keep the health and safety of their employees to the fore."

Environment Agency prosecuted over worker's saw injury

The Environment Agency (EA) has been fined £5,000 after an employee was badly injured when his finger was caught by an unguarded circular saw.

The incident occurred when an employee used a circular saw on a multi-function woodworking machine to cut 2 inch thick pegs – a task which was carried out once every few months. It had become standard practice for employees to use the saw without its guard because it was too difficult to cut large pieces of wood with the guard in place. No risk assessment had been carried out for the work, and supervision had been insufficient. Therefore, managers were unaware of this malpractice.

The HSE prosecuted the EA for breaches of the Provision and Use of Work Equipment Regulations 1998 by failing to prevent access to dangerous parts of machinery. The organisation has since reviewed its procedures and no longer uses the saw at its Levens site.

Speaking after the hearing, HSE Inspector Anthony Banks said:

"An employee has suffered an injury that will affect him for the rest of his life because the machine he was using was unsafe. Workers should never have been able to use the circular saw without the guard in place, but the Environment Agency failed to carry out a risk assessment or to properly monitor the work. The Environment Agency has now decided that the machine isn't suitable and no longer uses the saw. If it had considered the risks from the start then the employee's injury could have been avoided."

Inner House (Court of Session, Scotland) considers employer's liability under health and safety regulations

"The law does not impose on an employer a generalised duty to ensure or take care for the safety of a person who happens to be his employee wherever or however that person meets risks in his or her daily life." (Lord Clarke [2014] CSHI 76, at 43) That was the resounding message in the Inner House of the Court of Session, Edinburgh when considering the appeal in *Tracey Kennedy v Cordia (Services) LLP* [2014] CSHI 76.

Tracy Kennedy (K), a home carer, raised an action for damages against her employer, Cordia (Services) LLP (C), for injuries she sustained when she fell on an icy path during the course of her employment. K argued that C breached: (i) the Management of Health and Safety at Work Regulations 1999; (ii) the Personal Protective Equipment at Work Regulations 1992; and, (iii) their common law duty of care. At first instance, the Lord Ordinary accepted the pursuer's arguments, holding that C breached its duties. However, the Inner House rejected the Lord Ordinary's opinion, and provided a more common sense approach to interpreting employer's duties both under the above named regulations and at common law.

Firstly, in considering regulation 3 of the Management of Health and Safety at Work Regulations 1999, Lord Brodie clarified that to discharge the duty to carry out a suitable and sufficient risk assessment imposed by this regulation "does not require the taking of any safety precaution" (paragraph 19). In other words, regulation 3 is discharged provided employers have carried out sufficient and suitable risk assessments to *identify* safety measures to be taken. The taking of safety measures, in itself, is not mandated by this regulation, although it may be required by other legislation.

In this case, carrying out two risk assessments which included assessment of risk of home carers slipping on snow and ice on public streets while in the course of their employment was held by the Inner House to sufficiently discharge the employer's duty under regulation 3.

Secondly, regulations 4 and 10 of the Personal Protective Equipment at Work Regulations 1992, which requires employers to provide personal protective equipment to employees who are exposed to health and safety risks "while at work", was considered. Lord Brodie drew a distinction between the health and safety risks that employees face *as part of* their employment, and risks which, although faced *during* employment, are shared with the public at large. He emphasised that the 1992 Regulations are designed to target the "worker at work and the risks to which that worker is exposed which arise specifically from that work" (paragraph 23). He went onto explain, firstly, that unless the nature of the work materially increases the level of risk to which other members of the public are equally exposed, it will not be regarded as "a risk at work". Applying this to the facts, he concluded that the risk posed by the icy public paths was not materially increased by the nature of K's employment – it was not dissimilar to the risk faced by the public at large navigating the streets of Glasgow that day. Second, had it been "a risk at work", the next question would be if it was "adequately controlled" by the employer. Given the training provided by C to its employees, it was held that this condition would have also been satisfied.

Thirdly, the Inner House rejected the notion that the employer owned a common law duty of care. It was thought that adults in Scotland can be expected to have experience of negotiating snow and ice in urban environment and in choosing appropriate footwear for those purposes. As such, it was thought that in some cases, employees are better placed to make choices regarding their health and safety. Consequently, employers are sometimes entitled to rely on their employees' common sense and ability as normal adults to wear what they would see as appropriate footwear in slippery conditions.

In conclusion, the law of employers' liability comes into play where risks of injury arise from the performance and nature of the tasks which the employee is instructed to perform on behalf of its employer - not in relation to risks produced by other independent factors and forces – albeit, on occasions, risks may be encountered, for example, where the employee is on his way to, from and between places of work. It appears that, in relation to some matters, care for health and safety is best left in the hands of the individual adult concerned.

Accordingly, this case clarifies that the Regulations are "designed to deal with risks which arise in the performance of the… employee's duties as such, where the employer has a degree of control over the employee, the place of work and the performance of the task which has to be carried out." (Lord Clarke, paragraph 40). Another conclusion would "not only be impracticable and irrational but would also constitute an unwarranted intrusion into the private lives of competent adults who within the sphere of day to day living are likely to be better placed to make judgements as to what will be conducive to their health and safety than their employers will be." (Lord Brodie, paragraph 24)

HSE prosecution: Safety failing could risk lives of employees working at heights

A Covent Garden-based civil engineering contractor was prosecuted in early October for safety failings after an inspection of a Mayfair construction site identified work-at-height risks.

Peter Lind and Co (Central Region) Limited was fined a total of £11,500 and ordered to pay £1,369 in costs after pleading guilty to two separate breaches of the Work at Height Regulations 2005. The prosecution followed a visit by the HSE to the company's project on Queen Street (London) on 23 January this year (2014).

The concerns regarding safety standards at this site were first raised by an anonymous complainant in December 2013. Resultantly, the HSE inspected the site some eight weeks later, uncovering a host of issues, including:

— Missing or inadequate edge protection in several locations – exposing workers to potential falls of between three and eight metres;
— Missing toe boards;
— Unsafe temporary ladders in place of a staircase that been removed; and
— Materials and equipment, including a heavy fire extinguisher, were left on edges where it was liable to fall and cause injury.

These shortcomings mirrored those raised by the original complainant, meaning nothing had changed in the intervening period to protect workers. They were exposed to unnecessary risk for at least two months.

HSE immediately served a Prohibition Notice requiring urgent improvements in relation to work at height. Two improvement notices were also served that needed action.

HSE concluded that the work at height was poorly assessed, managed and monitored, and fell well short of the required legal standards. Although nobody was injured at the site, the potential for a serious or potentially fatal fall was very real.

After the court hearing, HSE inspector Andrew Verrall-Withers commented:

"Falls from height remain the biggest single cause of death and serious injury in the construction industry, and it is vital that developers and principal contractors work within the law and meet the required standards at all times."

Focus on: "Safe standing" in Football Stadiums

The issue of spectator safety in football stadiums has become increasingly contested in recent years. While the audiences at horse racing and rugby grounds are allowed to remain on their feet, football supporters in stadiums hosting England and Wales' top two divisions must stay seated for safety reasons. Safety in football ground ought to strike a balance between stadium design, crowd management and spectator experience. Accordingly, following several footballing catastrophes in the UK, the atmosphere at Premier League and Championship games has been shaped by the requirement to provide all-seater accommodation.

Timeline of stadium disasters:

— 1946: Overcrowding at a Bolton vs. Stokes cup tie at Burnden Park results in 33 deaths.
— 1971: 66 killed in the Ibrox stadium in Glasgow, as supporters exited the stadium.
— 1989: 96 Liverpool fans die during an FA Cup semi-final at Hillsborough. Shortly after, the Football Spectators Act 1989 was introduced, requiring safety authorities to ensure that fans attending games in England's top two divisions are seated. This legislation followed the Lord Justice Taylor's repot, which made recommendations to eliminate hazards relating to overcrowding on standing terraces. At the time, Lord Taylor commented: "There is no panacea which will achieve total safety and cure all problems of behaviour and crowd control. But I am satisfied that seating does more to achieve those objectives than any other single measure."
— 1998: UEFA bans standing areas for European games, but clubs in Germany refuse to scrap terraces.
— 2001: Football Supporters' Federation (FSF) is formed, and starts campaigning to reintroduce standing in football stadiums a year later.
— 2011: The Scottish Premier League drops its standing ban.
— 2013: A majority of Football League clubs vote in favour of reviewing the current position and permitting supporters to stand in rail seating areas at Championship grounds.
— 2014: The Liberal Democrats commit to reform health and safety laws to allow Premier league and Championship football clubs to introduce "safe standing" facilities as part of their 2015 General Election manifesto.

Ever since the changes to stadium design introduced by the Football Spectators Act 1989, the policy of successive governments has been to keep football grounds of clubs in the top two divisions all-seater. It is thought that this is the best means to ensure the safety and security of fans: it protects public safety, by improving crowd management, crowd behaviour and security. Additionally, all-seater stadiums offer more comfortable facilities for people to enjoy football matches, by increasing customer care and encouraging a modern, inclusive and diverse environment.

However, what is in theory a sound solution, neglects the reality; despite concerted efforts of governments to relegate standing in stadiums, the practice of standing has never escaped the arena. The abject failure of authorities to persuade fans to sit down has resulted in whole sections of grounds designed for sitting to be occupied by those who choose to stand. This has created a twofold problem: firstly, the safety of ten thousands of fans standing in areas designed for sitting is impaired; and, secondly, this practice has prevented the accessibility of football grounds to all. Some people, while not confined to a wheelchair, may not be able, or wish, to stand for an entire match. For such fans it is increasingly difficult to attend games where persistent standing is the norm.

It appears that pressing fans to sit down to a game that has a historic and entrenched culture of standing is often more precarious than providing a safer solution to standing. Consequently, there has been a growing dissatisfaction with the current position and an increasing plea for "safe standing", which was largely sparked by the FSF's campaign. The recent meeting of Football League clubs, on 6 February 2014, fuelled this fire by revealing that a majority of the league's 72 clubs are in favour of reviewing the current position and permitting supporters to stand in areas at championship grounds.

The answer tendered is: "rail seating". Rail seating offers a flexible solution for clubs who wish to have both standing and seating sections. The seats can be folded in the upright position and locked to provide space to stand behind a waist-high rail that runs along the back of the row in front. Alternatively, the seats can be unlocked and folded down to comply with the UEFA rules for European games. Every "seat" is also linked to a ticket number to ensure that the terraces are not oversubscribed and overcrowded.

The concept of rail seats is not novel; it has already been tried and tested, with much success, in many grounds across Europe, including Germany, Austria and Sweden. In Borussia Dortmund, for instance, the railed seats are safe, create a great footballing atmosphere, cheaper tickets and alleviate areas specifically designed for seating from those fans who block seated fans' views by standing. This compromise ensures the safety of standing fans who have a railing to hold onto at hip level while, simultaneously, catering for the safety of seated fans.

Nonetheless, even railed seating is not the panacea to football spectator safety. Admittedly, it does not address all concerns of crowd control and, therefore, it still faces opposition by a number of proponents. Andy Holt of the Association of Chief Police Officers on football policing, has voiced opposition to standing areas because he believes it could contribute to unruly behaviour and hooliganism. Margret Aspinall, chair of the Hillsborough Family Support Group, opposes the proposals and has argued: "Standing should never, ever come back. I do not think there is anything safe about standing."

In Scotland, although the Scottish Premiership clubs are strong backers of safe standing, Celtic's application to install a section of rail seating was rejected by Glasgow City Council earlier this year. Nonetheless, the chief executive of Celtic, Peter Lawwell, commented: "These [railed seats] are new systems that are extremely safe, and we are very keen to explore that at Celtic Park."

The chief executive of the Football League commented: "We recognise that this is an extremely emotive issue and that significant change isn't necessarily going to happen overnight. However, a logical first step would be for safe standing products, such as rail-seating, to be licensed for use by the relevant authorities…This would give everybody greater insight into the use of this type of accommodation and help take the debate forward in a cautious and responsible manner, as it would not require any changes to the existing law as these clubs are already permitted to have fans standing at their matches."

Indeed, the current law insists upon all-seater stadia, but it is not illegal for fans not to use those seats and, as such, no change in the law is presently required. Therefore, the overwhelming support by clubs and fans, the continuing practice of standing at UK football matches and the role-model at European football grounds, are factors signposting that railed seating may be becoming increasingly likely in UK football stadiums.

Focus on: New Explosives Regulations 2014: an overview

It is extremely challenging, if not impossible, to regain control of an event involving explosives once control has been lost. The safety provisions found in the new Explosives Regulations 2014 (ER2014) provide the regulatory framework for identifying and implementing the high safety standards required.

The regulations are based on generally recognised principles of safe operation in the sector, and their aim is to reduce the regulatory burden on businesses by clarifying and simplifying the requirements. The following note looks at the safety provisions and the scope of these new regulations.

Safety Provisions

ER 2014 is comprised of 40 regulations; 26 – 29 and some elements of 13 comprise the safety elements of the ER 2014:

- **Regulation 26** – requires anyone manufacturing or storing explosives to take appropriate measures:
  - to prevent fire or explosions;
  - to limit the extent of fire or explosion including measures to prevent the spreading of fires and the communication of explosions from one location to another; and
  - to protect people from the effects of fire or explosion.
- **Regulation 27** – requires people storing explosives to maintain separation distances, identifies the circumstances in which separation distances do not need to be applied, and identifies how separation distances are applied to certain sites that are granted a licence by HSE or the Office of Nuclear Regulation (ONR).
- **Regulation 28** – requires anyone discarding or disposing of explosives, or who is decontaminating explosive-contaminated items, to ensure, so far as reasonably practicable, that they are undertaking those activities safely.
- **Regulation 29** – prohibits the manufacture and storage and import of pyrotechnics containing sulphur and/or phosphorus mixed with chlorates without the approval of HSE.
- **Regulation 13** – largely relates to the grant of licences but also includes safety provisions. It allows:

  - HSE and ONR to prescribe separation distances at most of the sites they license as an alternative to the 'fixed rules' approach required by Regulation 27;
  - HSE and ONR to prescribe certain activities that will be subject to the provisions of the licence at most of the sites they license to take account of potential interactions between those activities and the manufacture and/or storage of explosives that takes place at that site; and
  - all licensing authorities to reinforce the requirements of regulation 26 as they relate to the sale of pyrotechnic articles at a site which is licensed for the storage of explosives.

Scope of ER 2014

— *Work, personal and recreational use:* the regulations apply wherever there are explosives operations whether or not they are for work or non-work purposes. They therefore apply to anyone storing explosives for personal and recreational use, or to voluntary clubs and societies storing explosives (examples include storage for firework displays, bonfire processions or re-enactment events).

— *Transport:* the regulations apply to transport of explosives on site, including movement on public roads between different buildings on the same site. But they do not apply to explosive that are being transported by road, rail, air or water so long as the explosives are not kept in one place for longer than 24 hours.

  Importantly, storage means that the explosives are kept, or are to be kept, at one place for more than 24 hours. Therefore, the relevant dutyholders who store explosives that are being transported as part of the supply chain should ensure that any explosives whose onward journey cannot take place are stored safely and lawfully.

— *Offshore industry:* ER2014 applies to certain activities in the UK territorial sea adjacent to Great Britain. For example, coastal construction activities which extend into the territorial sea and the construction, operation and demolition of wind farms. It does not apply to ships at sea or ships moored within harbour areas (see the Dangerous Substances in Harbour Areas Regulations 1987 (SI 1987/37)). Outside the territorial sea, ER2014 will only apply within designated areas on the UK Continental Shelf.

The majority of ER2014 also applies to work being carried out on offshore installations. However, the following regulations **do not** apply:

- Regulations 6 (Authorisation to manufacture explosives);
- Regulation 7 (Authorisation to store explosives);
- Regulation 9 (Prohibition concerning the acquisition and supply of fireworks);
- Regulation 10 (Relating to a defence under the regulations);
- Regulation 12 (Applications for licences to manufacture or store explosives);
- Regulation 18 (Death, bankruptcy or incapacity of a licensee);
- Regulation 20 (refusal of a licence and draft licence and refusal of a renewal or transfer of a licence);
- Regulation 23 (Revocation of a licence);
- Regulation 26 (Fire and explosion measures); and
- Regulation 30 (Unauthorised access).

— *Explosives in use:* The safety provisions of ER2014 do not generally apply to explosives that are in use. Accordingly, while the operations are continuing, the explosives would be regarded as being in use. Conversely, were the operations to cease, or be suspended for any length of time, the explosives would be regarded as no longer in use and therefore subject to the 'safety provisions' of ER2014.

— *Hazard Types:* Regulation 2 sets out hazard type (HT). HT is central to both the safety and licensing elements of the regulations. It defines and describes the nature of the hazard arising from an explosive in manufacture and storage conditions. HT represents the potential behaviour of the explosives in the form in which they are manufactured or stored. As a result, explosives do not have inherent hazard types that can be automatically ascribed without consideration. Hazard type will depend upon:

- The quantity of explosives;
- The types of explosives;
- Packaging (if any) or containment'
- The presence of barriers or other controls that will prevent rapid communication of an event between explosives;
- Orientation; and
- How an event involving the explosives might progress or degrade any control.

Oil and Gas News

New Helicopter Emergency Breathing System (EBS) for Offshore Oil and Gas Operations

The new Helicopter EBS was introduced at the beginning of August this year. The combination life-jacket and aqualung has replaced the re-breather previously used aboard North Sea Helicopters. The work to develop the new system and lifejacket has been coordinated by the Civil Aviation Authority (CAA) with the safety partnership, Step Change in Safety, and the manufacturer Survitec.

EBSs provide a way to extend breathing time underwater so that escape from a helicopter which has capsized as a result of controlled ditching or an uncontrolled water impact. The time needed for occupants to escape from a submerged helicopter is estimated between 45 and 60 seconds. Research suggests that this interval significantly exceeds the time that most individuals can hold their breath in cold water due to the effects of cold shock. For those wearing immersion suits, the average breath-hold time is approximately 20 seconds. The new enhanced emergency breathing system improves levels of safety for offshore helicopter passengers by increasing the time passengers have to breathe under water.

The new ESB was a response to a government inquiry into helicopter safety following a fatal crash of a Super Puma helicopter in Shetland last year.

Mark Swan Director of the CAA's Safety and Airspace Regulation Group said: "The safety of those who rely on offshore helicopter flights is our absolute priority. The majority of the work and recommendations we announced...are aimed at preventing helicopter accidents but ensuring that passengers have the best chance of surviving any accident is also imperative. The new breathing system is a major advance on the current system and provides a significantly increased level of safety for offshore passengers."

Les Linklater, team leader for Step Change in Safety, said: "The certification comes after a lot of hard work and commitment from the EBS workgroup, Helicopter Safety Steering Group (HSSG) and other industry organisations. It is a clear example of the collaboration that we must strive for in this industry."

The implementation of the new system and other safety recommendations and actions is being overseen by the Offshore Helicopter Safety Action Group, set up by the CAA and includes the offshore industry, helicopter operators and workforce and pilot representatives. Other changes include:

— Prohibiting helicopter flights in the most severe sea conditions, so that the chance of a ditched helicopter capsizing is reduced and a rescue can be safely undertaken;
— Changes to the way pilots are trained and checked;
— Recommendations to the European Aviation Safety Agency, as the regulator for helicopter certification and airworthiness;
— The development of standardised helicopter operating information for pilots; and
— Examining the impact of commercial contracts and reducing the number of industry audits.

Mutual recognition of specialised safety and emergency response training in the North Sea

The oil and gas industries in Norway, the UK, the Netherlands and Denmark have signed an agreement on specialized safety and emergency training that is valid across national borders which doesn't compromise their strict safety requirements.

The agreement is based on that specialized safety and emergency training in one country is recognized in the other North Sea countries (i.e. competence within search and rescue). At the same time, strict safety requirements are complied with and maintained. This new agreement is a revision of an existing agreement, which is based on the mutual principle of safety and emergency preparedness training in one country being recognised in the other North Sea countries.

The Wood Review: UK Government Response

We previously reported on the Wood Review led by Sir Ian Wood. Edward Davey MP, Secretary of State for Energy, has recently issued a formal response to Sir Ian Wood's findings from his independent review of the UK Continental Shelf (UKCS). Mr Davey outlines a phased approach to implementing Sir Ian's recommendations for Maximising Economic Recovery from the UKCS (MER UK).

The government has already announced that the new arms-length regulator for the UKCS' stewardship will be called the Oil and Gas Authority (OGA), headquartered in Aberdeen. It has confirmed that it will contribute £3 million per year for five years, beginning in 2016/2017, to fund the OGA's running costs.

Malcolm Webb, Oil & Gas UK's chief executive, comments: "We are delighted to see government commitment towards providing a share of the OGA's future funding. This is an excellent demonstration of the tripartite approach called for by Sir Ian. Mr Davey challenges the industry to match the government's commitment to Sir Ian's recommendations. I can assure him that our

Health and Safety – what we do

CMS Cameron McKenna is recognised as a leading firm in the area of Health and Safety. We provide specialist advice on regulatory compliance, prosecutions, investigations and corporate governance. We have specialised knowledge of the offshore and energy sector in particular, which faces greater challenges and regulation than most.

However, our client base and expertise spans a broad range of sectors, including:

— Construction
— Health and Healthcare
— Energy
— Global Health and Safety Advice
— Hotel and Leisure
— Manufacturing
— Renewables
— Transport

Regrettably, accidents at work can be serious and sometimes result in fatalities. Our clients appreciate the high level of attention and support we are able to offer during what can be a difficult time for any organisation. We are able to provide assistance with every aspect of incident response, including incident investigations, dealing with witnesses, defending prosecutions and advising senior management on relations with the Health & Safety Executive.

Emergency Response Team

Our specialist team is on call to provide assistance and respond to incidents 24 hours a day, every day of the year. Our team is qualified to practise in England, Wales and Scotland but also regularly advises clients in relation to international working practices and health & safety matters in other jurisdictions.

Our clients come to us for advice on:

— Emergency Response
— Health and Safety prosecutions
— Crisis Management
— Accident Inquiries
— Formal interviews and investigations undertaken by inspectors
— Corporate Manslaughter investigations
— Inquests and Fatal Accident Inquiries
— Appeals against Improvement and Enforcement Notices
— Compliance with UK and European regulatory requirements
— Drafting corporate Health and Safety policies and contract documentation
— Safety aspects of projects and property management
— Due diligence in corporate acquisitions/disposals
— Directors' and officers' personal liabilities
— Management training Courses
— Personal injury defence
— Risk management and training

Recent Experience

— Defending Health and Safety prosecutions of client companies.
— Appealing other types of enforcement action against companies (e.g. Prohibition Notices).
— Conducting numerous Coroners' Inquests and Fatal Accident Inquiries - including some of the most high-profile and complex Inquiries to have taken place in relation to offshore incidents.
— Obtaining the first ever award of expenses 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 on forthcoming Health & Safety legislation.
— Assisting clients in consultations with the Health and Safety Executive and other regulatory bodies, including the Department for Energy and Climate Change.
— Advising clients in relation to Safety Cases, Corporate Governance issues and Directors' duties and liabilities.
— Undertaking transactional due diligence in relation to Health and Safety matters.
— Carrying out Health and Safety audits.
— Advising clients on incident investigation, legal privilege and dealing with HSE inspectors.
— Preparing and drafting incident investigation reports.
— Advising clients on media, public relations and reputational issues following incidents.
— Advising clients in the immediate aftermath of an incident and providing emergency response services.
— Advising clients in relation to protestor action and possible responses thereto.
— Successfully defending environmental prosecution.

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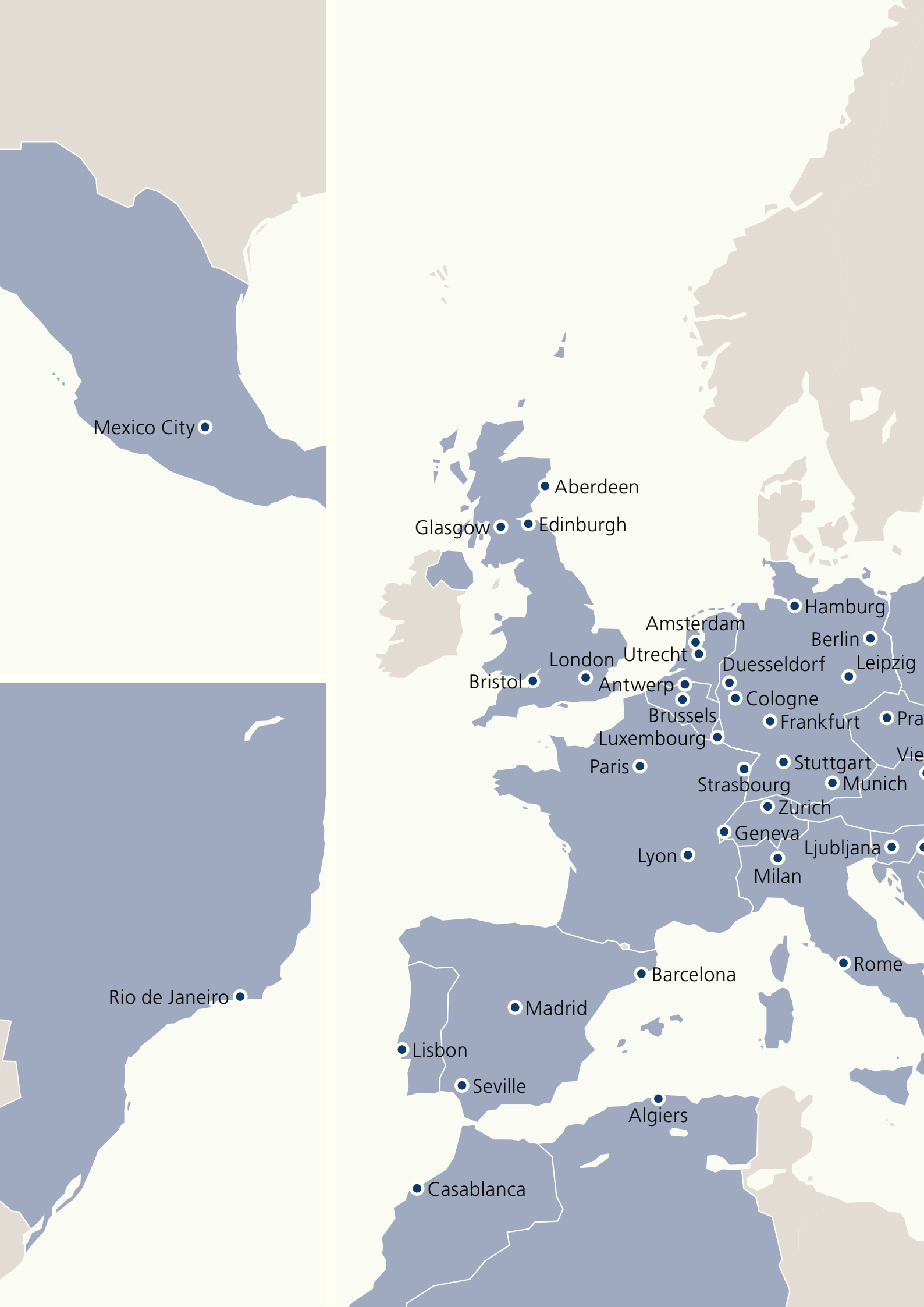
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