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Health & Safety Newsletter

November 2018

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Foreword

CMS Cameron McKenna Nabarro Olswang 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 and 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:

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

020 7367 3000 – London

01224 622 002 – Aberdeen

0114 279 4000 – Sheffield

0781 136 2201 – Out of hours (ask for Jan Burgess)

0797 049 7274 – Out of hours (ask for Lukas Rootman)

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 and gas issues – ranging from defending prosecutions by BEIS to appealing enforcement notices – along with general advice in drafting of OPEPs and complying with the extensive range of offshore environmental regulation, including those introduced by the European Union Offshore Safety Directive (OSD) in 2015. Changes introduced by the Offshore Safety Directive are extensive and have significant impact on oil & gas operators, FPSO operators, drilling companies and contractors engaged in offshore activities. We are able to assist in any transitional measures that may be required.


Danger
Deep excavations
WE'RE
REDUCTION

News

New Manslaughter Sentencing Guidelines Issued

The Sentencing Council has published new guidelines (The Manslaughter Guidelines) for the sentencing of offenders convicted of manslaughter in England and Wales.

The Manslaughter Guidelines are the first comprehensive guidelines in regard to cases that range from an unintended death resulting from assault to a workplace fatality caused by a negligence in the work place by an individual – be that a director or a junior employee. Previously, guidance was for corporate manslaughter, which was restricted to companies or other corporate entities. Therefore they offer complete guidance.

The Manslaughter Guidelines are effective from 1 November 2018 and the Sentencing Council have issued them in accordance with section 120 of the Coroners and Justice Act 2009. They apply to all offenders aged 18 or older, who are sentenced on or after 1 November 2018, regardless of the date of the offence.

The Manslaughter Guidelines cover:

— Unlawful act manslaughter

— Gross negligence manslaughter

— Manslaughter by reason of loss of control

— Manslaughter by reason of diminished responsibility

The Manslaughter Guidelines specifies offences ranges – which are the range of sentences appropriate for each type of offence. Within each offence, the Sentencing Council has specified a number of categories which reflect varying degrees of seriousness. A starting point within each category has also been identified. Starting points define the position within a category range from which to start calculating the provisional sentence. Starting points and ranges apply to all offenders, whether they have pleaded guilty or been convicted after trial.

Gross negligence manslaughter arising from workplace deaths

— Gross negligence manslaughter is a serious specified offence for the purposes of section 224 and 225(2) (life sentences of serious offences) of the Criminal Justice Act 2003.

— It is also an offence listed in Part 1 of Schedule 15B for the purposes of section 224A (life sentences for a second listed offence) and section 226A (extended sentence for certain violent or sexual offences) of the Criminal Justice Act 2003.

Gross negligence manslaughter is a common law offence. The jury must be satisfied that the defendant owed a duty of care to the deceased and that there had been a breach of this duty of care. The gross negligence must then be a substantial cause of the death. The offence range for gross negligence manslaughter is 1-18 years' custody. This reflects the breadth of circumstances in which the offence can be committed.

The Manslaughter Guidelines outline a nine step process in relation to sentencing for gross negligence manslaughter:

1. Determining the offence category
   Characteristics are set out as indicators of the level of culpability that may attach to the offender's conduct. The court should balance these in the context of the circumstances of the case.
2. Starting point and category range
   The relevant starting point corresponds with the level of culpability established in stage one. Where the offender's acts or omissions would also constitute another offence, the sentencer should have regard to any guideline relevant to the other offence to ensure that the sentence for manslaughter does not fall below what would be imposed under that guideline. The sentencer should also be aware that the guidance in this step is for a single offence of manslaughter resulting in a single fatality. Where another offence or offences arise out of the same incident or facts, concurrent sentences reflecting the overall criminality will ordinarily be appropriate, in which step six must be referred to.
3. Consider any factors which indicate a reduction for assistance to the prosecution
   The court should take into account any rule of law whereby an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.
4. Reduction for guilty pleas
5. Dangerousness
   The court should consider whether a life sentence would be appropriate.
6. Totality principle
   If sentencing an offender for more than one offence, or where the offender is already serving a sentence, the court should consider whether the total sentence is just and proportionate.
7. Compensation and ancillary orders
   The court should consider whether to make compensation and/or other ancillary orders.
8. Reasons
   Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.
9. Consideration for time spent awaiting sentence
   The court must consider whether to give credit for time spent awaiting sentence.

The Sentencing Council states that The Manslaughter Guidelines are unlikely to change sentence levels, but in some gross negligence cases, it is expected that sentences will increase. Companies should now have regard to The Manslaughter Guidelines rather than the old Corporate Manslaughter Guidelines, which have been rendered outdated following legislative changes.

Lengthy delays before work-related fatalities reach court

In response to a Freedom of Information (FOI) request, the Health and Safety Executive (HSE) recently confirmed that ongoing investigations and prosecutions following work-related fatalities may take several years to reach a conclusion.

The FOI request was prompted by the HSE's announcement to prosecute two companies involved in the Pembroke Refinery Explosion over seven years after the incident. Whilst historically such delays might have been an exception, they are becoming increasingly common, even in non-fatal cases.

Lengthy work-related investigations create difficulties. Changes within a workforce, documents being destroyed, systems being updated and witness memory issues are just some of the problems that can arise due to the passage of time.

Why are there delays?

The role of the police, which takes primacy when there has been a death, is to investigate whether any serious criminal offences are disclosed i.e. manslaughter. Other regulators deal with their own area of jurisdiction, usually once the police have concluded their investigations. In these cases, it will inevitably be some considerable time before any prosecution decisions are determined.

The same can be said for any individuals who find themselves subject to an investigation by the police or enforcing authorities. The introduction of the Policing and Crime Act in April 2017 reduced the time a suspect could spend on police bail to 28 days. However, following this, the police have attempted to circumvent this requirement by releasing suspects "under investigation" rather than on bail. The result of an absence of bail return dates potentially allows investigations to hang in abeyance, without the individual having any recourse.

Meanwhile, the number of serving police officers is currently just under 122,000, the lowest figure recorded since comparable records began 22 years ago. Furthermore, the HSE's funding for 2019/20 has been reduced by 46% compared with its budget allocation 10 years ago.

Despite the HSE's initial involvement in supporting a police investigation, when a case is handed over to the HSE, the investigation often starts afresh. Any HSE prosecution is typically concerned with an interpretation of the foreseeability of risk and whether the control measures engaged were reasonably practicable in the circumstances.

In HSE prosecutions, delays often continue as the case proceeds to the criminal courts, which are often the first opportunity for the defence team to review the evidence the HSE has collated and to understand how the executive is interpreting it. Disputes can arise when the parties review and seek to agree the facts of an incident and the application of the sentencing guidelines. This may require additional expert evidence, witness enquiries or forensic financial advice – further lengthening the time of the case.

Investigations are also linked to coronial proceedings, which may be halted if a criminal trial is scheduled. In the event of an HSE investigation, however, the inquest in most cases proceeds whilst a prosecution decision is being considered. This sequential approach can also affect the progress of an investigation.

Can these delays be reduced?

The HSE has stated that it aims to complete investigations into fatalities, after receiving primacy from the police, within 12 months. In the HSE's 2018/19 plan, this target is applied to 80% of fatal incidents and 90% of non-fatal incidents. These improvements will be based on improving partnerships and collaborative investigations with other regulators and updating internal investigation procedures to ensure effective case management.

The introduction of a time limit in which to commence a prosecution has been considered. For example, in food safety cases, the authorities have three years from the commission of the offence; or one year from its discovery (whichever is shorter) to commence a prosecution. Whilst in principle, a fixed time limit is attractive, in view of the complexity of police and HSE cases, an investigation conducted in haste is likely to give rise to many more issues through insufficient enquiries; insufficient times to collate and disclose documents; and inadequate preparations for court hearings. The absence of a statutory time limit for the police and the HSE at least enables the opportunity to complete thorough investigations.

Elsewhere, both France and Germany engage an investigating judge in complex cases to determine whether there is sufficient evidence to commence a prosecution. However, it has been argued that if a similar approach was adopted in the UK, it could actually lead to further delays as it would introduce an additional tier in the review process.

Comment

Developments in the partnership between the police and the HSE have enhanced the efficiency of investigations through the sharing of information, joint interviews and review meetings. Continuing this collaboration and implementing case management strategies should continue to improve the timely completion of investigations.

A new global standard on reporting health and safety statistics has been introduced

At last year's World Congress on Health and Safety, estimates quoted there were 2.78 million work-related fatalities and 374 million non-fatal accidents in 2017. As employers, regulators, and safety bodies work to improve these statistics, transparency is a powerful tool at their disposal, enabling them to readily assess the impact of their activities and to use this information to aid their decisions.

Informative reports about health and safety performance should be publicly available, easy to access, provide reliable data, and enable meaningful comparisons to be made. Organisations that provide high-quality performance analysis can benefit from being seen as socially responsible, open and accountable. They are also more likely to be attractive investments, employers, business partners and suppliers.

In a response to a UK Government consultation on a statutory requirement on large companies to produce an operating and financial review the Institution of Occupational Safety and Health (IOSH) proposed in 2003 that health and safety at work should be an integral part of overall business objectives. The Center for Safety and Health Sustainability (CSHS) was then co-founded with the American Society of Safety Professionals to promote public disclosure and standardised health and safety reporting metrics.

Two research studies commissioned by CSHS found problems with comparability of data. It found variability in the terms and definitions used to report health and safety, making it difficult to use reports to compare performance across organisations. There were also marked differences in the formulas used to determine injury rates, occupational disease rates, lost day rates and absentee rates.

To help address these challenges, the CSHS produced a best practice guide for occupational health and safety in sustainability reports, and a list of standardised health and safety metrics. Recognising the importance of standardised reporting frameworks and the prominence of the Global Reporting Initiative (GRI) in the sustainability area, IOSH and others in the global health and safety community called for improvement in the health and safety content of GRI, which is used by thousands of organisations in over 90 countries.

This led to the establishment of a GRI working group on health and safety reporting requirements, which included IOSH and CSHS. The group published a revised standard in June 2018, GRI 403: Occupational Health and Safety 2018 (GRI 403). As well as standardising reporting metrics, GRI 403 also aligns with ISO 45001, which is a standard aiming to clarify the terminology of health and safety management systems.

GRI 403: Occupational Health and Safety 2018

The final standard published in the GRI 403 represents a global best practice on reporting about occupational health and safety management systems, prevention of harm, and promotion of health at work. It is claimed that the standard can be used by any organisation of any size, type, sector or geographic location that wants to report on its impacts in relation to occupational health and safety. The GRI 403 replaces the 2016 version and will be effective for reports or other materials published on or after 1 January 2021, however earlier adoption is encouraged.

The health and safety of workers can be affected by both the work they perform and the workplace where it is performed. Therefore, an organisation is expected to be responsible for the occupational health and safety of:

— All workers performing work that is controlled by the organisation;

— All workers whose workplace is controlled by the organisation, whether or not their work is under the control of the organisation.

The principles of occupational health and safety management systems includes developing a policy, analysing and controlling health and safety risks, providing training, and recording and investigating health and safety incidents.

The GRI 403 includes disclosures on the management approach and topic-specific disclosures such as:

— Types and rate of injury;

— Occupational diseases;

— The number of work-related fatalities; and

— Workers with high incidence.

The management approach disclosures are a narrative explanation of how an organisation manages a material topic, the associated impacts, and stakeholders' reasonable expectations and interests. The disclosures can provide information about an organisation's impacts related to occupational health and safety, and how it manages these impacts.

An organisation that claims its report has been prepared in accordance with the GRI Standards is required to report on its management approach for every material topic, as well as reporting topic-specific disclosures for those topics.

HSE has announced that RIDDOR 2013 needs reform

The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR) 2013 puts duties on employers, the self-employed and people in control of work premises to report on certain serious workplace accidents, occupational diseases and specified dangerous occurrences (near misses).

The Health and Safety Executive (HSE) have conducted a post-implementation review of RIDDOR 2013 and issued their recommendations in a report in which they propose a redraft of the current RIDDOR 2013 guidance. RIDDOR 2013 replaced the former schedule of 47 "industrial diseases" with eight categories of reportable work-related illnesses.

The post-implementation review was mandatory and assessed whether the new measures have achieved their objectives. The review was based on "direct engagement with relevant duty-holders through interviews, focus groups, workshops and a survey" and it has prompted a "re-think" on occupational diseases.

The HSE have stated that RIDDOR 2013 has reduced the HSE's visibility of rare occupational health conditions and should be revised in a future legislative amendment.

"RIDDOR 2013 excluded a small number of work-related diseases, for example pneumoconiosis (e.g. silicosis), extrinsic allergic alveolitis, decompression illness, pulmonary barotrauma and poisoning due to certain chemical exposures that are of specific interest to HSE from a regulatory and scientific perspective. With the long term focus on work-related ill health, the exclusion of these diseases reduces the scope for research and the evidence base to improve worker health. Without investigation and enforcement where appropriate, workers could be left at risk of potentially life-threatening illnesses due to workplace exposures."

The HSE published their post-implementation review on gov.uk, however it is still being considered by Sarah Newton, Minister for disabled people, work and health. The HSE is likely to follow the post-implementation review with a stakeholder consultation on future revisions to RIDDOR.

Cases

Company receives an 85% reduction in the fine imposed against them

Electricity North West Ltd (the company) was found guilty of breaching regulation 4(1) of the Work at Height Regulations 2005 (WAHR 2005) (count 2). They were acquitted of breaching regulation 3(1) of the Management of Health & Safety at Work Regulations 1999 (count 1) and also s2(1) of the Health & Safety at Work Act 1974 (count 3). They were fined £900,000 and appealed against conviction and sentence.

The company owns, operates and maintains the electricity distribution network in the north-west of England. The three counts on the indictment resulted from an investigation into a fatality that occurred on 22 November 2013, when a linesman employed by the company, fell from height while clearing ivy from a vertical wooden pole. Whilst carrying out the work, he was held in place by a work positioning belt, which was designed to allow him to lean back and work at height, but was not designed to arrest a fall. The equipment that was designed to arrest a fall was a fall-arrest lanyard, and the worker was not wearing one. As he cleared the vegetation with a handsaw, he cut through his belt and fell, sustaining fatal injuries. The work ought to have been carried out from a Mobile Elevated Work Platform (MEWP) or a ladder. On the day in question, the MEWP was being used elsewhere.

The company was convicted for being in breach of regulation 4(1) WAHR 2005 as they failed to ensure that work at height carried out by a linesman was properly planned, appropriately supervised, or carried out in a manner which was so far as reasonably practicable safe. The Judge held there had not been proper plans as the regulations require the work at height to be properly planned irrespective of whether there was a foreseeable risk of harm.

The company appealed against the conviction on two grounds: firstly, in light of the acquittals on counts 1 and 3, the only factual basis for the conviction on count 2 could be one that did not give rise to any material risk, and such a shortcoming could not constitute a breach of regulation 4(1) of WAHR 2005. Second, and linked to the first ground, the conviction on count 2 was logically inconsistent with the acquittals on counts 1 and 3.

The company also argued that the size of the fine bore no relation to the seriousness of the count 2 offence, in terms of culpability and harm, and in the light of the acquittals on counts 1 and 3, that it was manifestly excessive.

Giving the judgment of the court, Lord Justice Simon accepted the appellants' submissions on culpability and found that the appropriate starting point was on the cusp between "low" and "medium" culpability.

The result was that the starting point was too high. It was also held there had been error in approaching the issue of sentencing on the basis that, because the company was a "very large" organisation, he was required to make an upward adjustment to the sentence. In fact, it was not necessary to increase the fine in order to achieve a proportionate sentence. In short, the sentence was out of proportion to the shortcoming the Judge had identified.

The correct application of the Sentencing Guidelines was on the basis that the seriousness of harm risked was at level A, because of the inherent nature of working at heights if no proper plan was in place; but there was, on the facts of the case, a low likelihood of harm. The Judge concluded that there was high culpability because the company allowed the breaches of WAHR 2005 to subsist over a long period of time. However, the failure was not comparable to the other factors indicating conduct or omission which falls "far short of the appropriate standards" such as to justify a finding of "high culpability". In light of the jury's verdicts, the company had been convicted of an offence which was properly characterised as an offence of between low and medium culpability.

On the basis of offending on the cusp of low and medium culpability, and harm category 3, the Guidelines that apply to a large organisation indicate a starting point of between £35,000 (low culpability) and £300,000 (medium culpability).

The fine was therefore reduced from £900,000 to £135,000.

Construction industry targeted by the Health and Safety Executive

There has been an increasing number of construction companies being sentenced as a result of health and safety breaches. A few significant cases are discussed below.

Construction company and director sentenced for health and safety failings

A construction company and its managing director have been sentenced after poor conditions at a building site were found to be dangerous.

Health and Safety Executive (HSE) inspectors visited the site following an incident in January 2017. They found evidence of poor health and safety conditions on site including dangerous work at height, a lack of suitable equipment, and untrained operatives working without adequate supervision.

A HSE investigation subsequently found that the construction company failed to plan, manage and monitor the work on site and its managing director was responsible for the poor conditions on site.

The company pleaded guilty to breaching regulation 15(2) of the Construction (Design and Management) Regulations 2015, and was fined £80,000 and ordered to pay costs of £6,000.

The company's managing director pleaded guilty to breaching Section 37(1) of the Health and Safety at Work etc. Act 1974 and was ordered to carry out 150 hours of unpaid community work and pay costs of £1,673. He was also disqualified from being a company director for a period of three years.

Speaking after the hearing, one HSE inspector commented:

"Duty holders should be aware that the HSE will not hesitate to take appropriate enforcement action against those that fall below the required standard".

Construction company fined after work suffers fractured spine

On 20 September 2017, an employee was removing roof sheets from a timber frame farm building when he fell approximately 4 metres through one of the asbestos cement roof sheets onto the ground below, suffering a fractured spine.

An investigation by the HSE found that, while a risk assessment and method statement were in place to remove the roof sheets from below, this method was then changed to remove them from above. It was during this process that the employee fell through a roof sheet.

The Construction company pleaded guilty to breaching Regulation 4(1)(a) and Regulation 4(1)(c) of the Work at Height Regulations 2005 and was fined £150,000 with £791.70 in costs.

Speaking after the hearing, one HSE inspector commented:

"Suitable and sufficient measures should have been in place through the use of alternative access equipment. This would have negated the need for the employee to be on the roof of the building, therefore eliminating the risk of a fall from height through the roof sheets."

Construction company fined after exposing members of the public to carbon monoxide fumes

A construction company has been fined after failing to prevent exposure to carbon monoxide. This case shows that exposure is enough to breach Section 3(1) of the Health and Safety at Work etc. Act 1974 and no injury or death needs to occur for a company to be convicted. Equally, the risk of harm may not necessarily be to workers, but, as in this case, to the general public.

An investigation by the HSE found that the construction company had built flats several years before the incident in question and in 2014 some remedial work was needed to be carried out on an external wall. During the demolition and reconstruction of the wall, many live flues of gas boilers were removed, damaged and blocked, exposing the residents to a risk from carbon monoxide poisoning.

A householder then reported the smell of gas, and it was concluded that a number of gas installations were found to be either immediately dangerous or at risk. As the principal contractor, the construction company had not ensured that an adequate system of work was in place to manage the risks from working around the live flues.

The construction company pleaded guilty to breaching Section 3(1) of the Health and Safety at Work etc. Act 1974 and has been fined £1.25m and ordered to pay costs of £23,972.33.

Speaking after the hearing, the HSE inspector commented:

"Risks from gas installations, including those related to carbon monoxide, need to be managed by all during refurbishment. This incident could have been avoided if the company had implemented a safe isolation system for the live boilers."

Comment

It has recently been announced by the HSE that construction companies across the United Kingdom will be targeted on their health standards, particularly in relation to exposure to dust and damage to lungs.

The inspections will be the first time the HSE has targeted the construction industry with a specific focus on respiratory risks and occupational lung disease. Inspectors visiting construction companies and sites will be looking for evidence of construction workers knowing the risks, planning their work and using the right controls, and if necessary will use enforcement to ensure people are protected.

The HSE's chief inspector of construction said:

"We want construction workers to be aware of the risks associated with the activities they carry out on a daily basis; be conscious of the fact their work may create hazardous dust; and consider how this could affect their health, in some cases irreversibly. We want businesses and their workers to think of the job from start to finish and avoid creating dust or disturbing asbestos by working in different ways."

Company sentenced after worker suffered fatal burns in an incident at a water treatment works

Yorkshire Water Services Ltd (the company) has been sentenced after a fitter suffered fatal burns when his clothing was ignited by sparks.

A fitter was doing works in the bottom of a dry well, a designated confined space, at a brewery trade waste treatment plant at a sewage treatment works. The brewery trade waste plant was the only waste treatment plant to use oxygen gas injection to assist the clean-up process.

Together with a colleague, the fitter had been tasked with changing the stop valve on the end of a disused drain pipe which emerged into the bottom of the dry well. He was using an angle grinder to cut through corroded bolts when sparks from the grinding wheel impinged onto his overalls, bursting into flames. He suffered whole body burns and died in hospital two days later.

An investigation by the Health and Safety Executive (HSE) found that the drain valve was half-opened and the atmosphere within the dry wall was oxygen enriched, greatly increasing the risk of fire.

It was also found that a near miss report had been recorded at the same location in September 2014. Employees had found the interior of the dry well to be heavily oxygen-enriched and had alerted local managers to the problem. Following the near miss, the company did carry out an investigation. However the company reached the wrong conclusion that the oxygen enrichment was due to residual oxygen and that the issue had been resolved. This had implications for future work in that the company proceeded on the basis there was no further risk of oxygen enrichment within the dry well.

The HSE investigation showed that the company's risk assessment and permit to work procedures had been inadequate.

There were no site-specific procedures in place and the generic risk assessment template form did not include oxygen enrichment as a possible hazard. The employees working on the day of the incident were not familiar with the site and they were not aware of the September 2014 near miss. This meant they did not have the knowledge or experience to recognise that oxygen-enrichment of the dry well was a potential hazard when the valve was taken off or opened.

The company pleaded guilty to breaching Section 2(1) of the Health and Safety at Work etc. Act 1974 and was fined £733,000 and costs of £18,818.

The HSE inspector commented:

"This was a tragic and wholly avoidable incident, caused by the failure of the company to implement an adequate and effective safe system of work for work in a confined space. Those in control of work activities have a duty to identify hazards that could arise, to eliminate and mitigate them, and to devise suitable safe systems. The risk assessment process is central to this role."

"The employer also has a duty to provide the necessary information, instruction and training to his workers, and to provide an appropriate level of supervision to ensure that the work can be carried out safely and without risks to health."

Legionnaires disease case adjourned

Last year it was held that five companies would face prosecution over breaches of health and safety legislation following an outbreak of legionnaires disease in Edinburgh. The investigation that followed the outbreak did not identify the source of the outbreak. The charges all relate to the maintenance and cleaning of cooling towers on the premises. Four people died and 92 cases were identified during the outbreak in 2012. However there were no prosecutions in relation to the fatalities and in May last year the Crown Office announced there would be no fatal accident inquiry either into the deaths.

North British Distillery Company Limited, MacFarlan Smith Limited, Ashland Industries UK Limited, Pera Services Limited and Chemtech Consultancy Limited were accused of exposing people to the risk of legionnaires disease between 2009 and 2013.

It was announced earlier this year that the charges had been dropped against three of the aforementioned companies. The case against North British Distillery, Pera Services Limited and Chemtech Consultancy Limited concluded when not guilty pleas were accepted.

The case against the remaining two firms continues. The case was due to go ahead in July 2018, however the case has been adjourned until February 2019.

Legal professional privilege

The Court of Appeal has overturned the restrictive interpretation of litigation privilege in the ENRC dispute with the Serious Fraud Office.

In its highly anticipated judgment regarding the scope of legal privilege in relation to documents created during internal investigations, the Court of Appeal has ruled that communications between the Eurasian Natural Resources Corporation (ENRC), its employees and advisers, including notes of interviews conducted during an internal investigation, were protected from disclosure by litigation privilege. The Court noted that large corporations need, as much as small corporations and individuals, to *"seek and obtain legal advice without fear of intrusion."*

This Court of Appeal decision reverses the first instance decision by Andrews J in *Director of the Serious Fraud Office (SFO) v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB) that litigation privilege would not arise in internal investigations unless and until "the prospective defendant knows enough about what the investigation is likely to unearth, or has unearthed, to appreciate that it is realistic to expect a prosecutor to be satisfied that it has enough material to stand a good chance of securing a conviction".

While the appeal raised issues in respect of both litigation privilege and legal advice privilege, the Court was constrained from determining the legal advice privilege questions by earlier authority. However, unusually, the Court gave its view as to how it would have decided those issues if it had not been so constrained, indicating that it would have overturned previous authorities to allow for a more practical and realistic approach to who is "the client" in a corporate body.

Although this case is not a health and safety one, it is nevertheless significant for those dealing with other regulators, such as the Health and Safety Executive (HSE). Any company faced with undertaking an internal investigation in response to an allegation of a health and safety breach should carefully consider our practical implications stated at the end of this article. The HSE may carry out inspections in workplaces if they have the information that health and safety is a significant concern. This could be if there has been an incident; if there have been concerns raised by workers, the public or others; or there have been reports of injuries, diseases and dangerous occurrences.

If a company has experienced a health and safety incident and finds themselves involved in internal investigations in relation to that incident, it is now important to consider which documents may attract privilege, and which may not. As part of the HSE's investigation procedure, the HSE considers the appropriate enforcement and one type of enforcement is prosecution. In this case, one of the questions in relation to legal privilege was whether a criminal prosecution was reasonably in contemplation or not.

Background

In 2011, following a whistleblower report, ENRC instructed solicitors to investigate allegations of corruption and financial wrongdoing in relation to some of its overseas operations. The company also instructed forensic accountants to review its books and records in connection with both the whistleblower allegations and a general evaluation of its compliance controls.

The SFO became aware of certain allegations through press reports and in August 2011 wrote to ENRC to invite the company to consider self-reporting and cooperating with the SFO. Meetings and correspondence followed, but it was in issue whether the company ever did formally self-report. ENRC provided a copy of its investigation report to the SFO in February 2013. The SFO opened a criminal investigation into the company shortly afterwards and issued notices to ENRC and its legal advisers to compel the production of documents using its powers under s.2(3) of the Criminal Justice Act 1987. The powers do not extend to documents covered by legal professional privilege, and ENRC resisted disclosure on that basis. The SFO applied for a declaration that the documents were not covered by privilege.

There were four main categories of documents at issue:

1. Notes taken by external lawyers of their interviews with various individuals, including current and former employees of ENRC;
2. Papers created by the forensic accountants as part of their review;
3. Documents indicating or containing the factual findings presented by ENRC's external lawyers to its Corporate Governance Committee; and
4. Email communications between a senior ENRC executive and ENRC's Head of Mergers and Acquisitions, a qualified lawyer who had previously been ENRC's General Counsel, in which ENRC claimed that legal advice was sought and given.

Andrews J rejected all of ENRC's claims for litigation privilege and found that ENRC was entitled to legal advice privilege in respect of only the documents in category 3. This category was therefore not considered further in the appeal.

Litigation Privilege

Litigation privilege applies to communications made when adversarial litigation is in progress or contemplated and for the dominant purpose of that litigation. The Court of Appeal considered:

Reasonable contemplation of proceedings

Having reviewed the facts, the Court of Appeal held that the judge was wrong to conclude that a criminal prosecution was not reasonably in prospect. Taking into account (i) advice given to ENRC by its legal advisers after the initial whistleblowing email including advice on privilege, (ii) that at various times before the SFO wrote to ENRC the company had indicated in internal communications that a raid was anticipated, and (iii) that the "sub-text" throughout the dealings between ENRC and the SFO was that a prosecution was likely to follow if the self-reporting process did not result in a civil settlement, ENRC had clearly demonstrated that litigation between itself and the SFO was a real possibility. The Court noted that not every *"manifestation of concern"* by the SFO would give rise to a prospect of adversarial litigation, the position was different *"when the SFO specifically makes clear to the company the prospect of its criminal prosecution… and legal advisers are engaged to deal with that situation"*.

The court commented that whilst a party will often need to make further investigations before it can say with certainty that proceedings are likely, that uncertainty does not in itself prevent proceedings being in reasonable contemplation. The court highlighted the disparity between individuals, small and large corporates in this regard: *"An individual suspected of a crime will, of course, know whether he has committed it. An international corporation will be in a different position, but the fact that there is uncertainty does not mean that, in colloquial terms, the writing may not be clearly written on the wall."*

Andrews J had reached a controversial conclusion that reasonable contemplation of litigation was more difficult to establish in the criminal context, as a prosecutor has a higher threshold test to meet before commencing a prosecution – the Full Code Test – which does not apply to a claimant in civil proceedings. The Court of Appeal rejected that approach and noted: *"Andrews J was not right to suggest a general principle that litigation privilege cannot attach until either a defendant knows the full details of what is likely to be unearthed or a decision to prosecute has been taken. The fact that a formal investigation has not commenced will be one part of the factual matrix, but will not necessarily be determinative"*.

The Court of Appeal held that ENRC was right to say that proceedings were in reasonable contemplation from the start of its investigation, even before the SFO formally opened its investigation into the company.

Dominant purpose

The SFO had argued that the dominant purpose of the investigation was to strengthen ENRC's governance and compliance programme. The Court of Appeal held that, in context, this purpose could not realistically be separated from the defence of an anticipated prosecution: *"Although a reputable company would wish to ensure high ethical standards in the conduct of its business for its own sake, it is undeniable that the 'stick' used to enforce appropriate standards is the criminal law and, in some measure, the civil law also."* Even if litigation was not the dominant purpose of the investigation at its inception, it was clear from the evidence that it swiftly became the dominant purpose.

Further, *"it is obviously in the public interest that companies should be prepared to investigate allegations from whistle blowers or investigative journalists, prior to going to a prosecutor such as the SFO, without losing the benefit of legal professional privilege for the work product and consequences of their investigation. Were they to do so, the temptation might well be not to investigate at all, for fear of being forced to reveal what had been uncovered whatever might be agreed (or not agreed) with a prosecuting authority".*

The Court of Appeal considered the judge had gone wrong, firstly, in holding that documents prepared for the purpose of settling or avoiding a claim were not created for the dominant purpose of defending litigation. The Court of Appeal held that was an error of law. Secondly, the judge had failed to appreciate that investigating the existence of corruption was a subset of the defence of the contemplated legal proceedings. Thirdly, the judge misinterpreted the contemporaneous material, wrongly concluding that ENRC always intended or agreed to share the core material obtained from its investigation with the SFO (as opposed to any final report). Instead, the material clearly demonstrated that no such agreement was ever reached. ENRC led the SFO to believe it might in the future waive privilege in such material, but it never actually did so. Further, the judge did not appreciate that even if the ultimate intention in producing a document was that it would be shown to the opposing party, that did not deprive the preparatory work and drafts to finesse that document from the protection of litigation privilege.

Decision on litigation privilege

The Court of Appeal held that all of the interviews undertaken by ENRC's legal advisers were covered by litigation privilege (category 1), as were the working papers of the forensic accountants (category 2). These were all part of ENRC's fact-finding process at a time when criminal prosecution was in reasonable contemplation, and were undertaken for the dominant purpose of resisting or avoiding prosecution.

Legal Advice Privilege

Legal advice privilege applies to confidential communications between a lawyer and client for the purpose of seeking and receiving legal advice or advice as to what should prudently be done in a relevant legal context.

Having found in favour of ENRC on litigation privilege, the Court of Appeal did not strictly need to consider most of the issues of legal advice privilege in the case. However, given that these had been fully argued by the parties and by the Law Society (as an intervener), the court, unusually, did comment on a number of questions to indicate their dissatisfaction with the current law on legal advice privilege.

The decision in Three Rivers (No. 5) [2003] CP Rep 34 (*Three Rivers*)

Three Rivers (No 5) is the leading authority on the scope of legal advice privilege and, in particular, the meaning of "client" for this purpose. The correct interpretation of the decision was in issue in the present case. The Court of Appeal confirmed that the earlier case decided that employees of a corporate are in the same position in relation to legal professional privilege as an independent agent of the corporate, unless specifically tasked with seeking and receiving legal advice. This controversial conclusion has had wide implications for corporate clients and has added significant complexity to ensuring instructions from large corporates benefit from legal advice privilege.

Applying the *Three Rivers* principle to the facts of ENRC's investigation, the Court of Appeal agreed that the category 1 documents could not be protected by legal advice privilege on the basis that the interviewees were not authorised to seek or receive legal advice on behalf of ENRC. The email exchange with ENRC's Head of Mergers and Acquisitions in category 4 was also not protected. Although he had previously been General Counsel, on the facts, at the time of the email exchange he was not acting in his capacity as a lawyer, but as "a man of business."

However, the Court of Appeal indicated that it would have departed from the *Three Rivers* line of authorities if it were free to do so, but considered that this would require a decision of the Supreme Court. The court also noted that English law is currently out of step with international common law on this issue.

Comment

This ruling is significant for any company faced with undertaking an internal investigation in response to a whistleblower or other allegation of wrongdoing. It is important that companies are able to instruct lawyers to conduct investigations confidentially, or they may be incentivised not to investigate at all. However, this decision should not be taken as meaning that any internal investigation will benefit from litigation privilege protection from the outset. The Court of Appeal reached its view in this case on a careful review of the facts and circumstances in which the investigation was undertaken. A careful assessment of whether the test for litigation privilege is met will still need to be undertaken in any given case. What is helpful is the clarification that in relation to criminal matters, the threshold for litigation to be in reasonable contemplation is not the very high one that a prospective defendant must have enough evidence to believe a prosecutor would be able to meet the Full Code test for prosecution.

The Court of Appeal's approach is also positive from the perspective of corporate clients. In particular, the view that legal advice privilege should be assessed on a principled basis, rather than by reference to historical precedent, is more likely to lead to an approach that reflects the modern world and business structures.

Practical implications:

The decision will be welcomed by companies and practitioners dealing with anticipated civil or criminal proceedings, who wish to investigate by interviewing employees, instructing third parties and creating documents. However, companies should not assume that all internal investigations will attract litigation privilege. There must be a real likelihood of adversarial proceedings in order for this to be the case. This should be assessed on an ongoing basis as events unfold and evidence is gathered. Corporates should keep a written record of their assessment of the position to support any later claim for privilege.

The HSE:

In the HSE's Enforcement Policy Statement it states that *"inspectors may provide written information and advice regarding breaches of the law following an inspection or investigation… Where appropriate, we may prosecute (or report to the Crown Office and Procurator Fiscal Service (COPFS) with a view to prosecution in Scotland). We expect, where sufficient evidence has been collected and it is considered in the public interest to prosecute, that prosecution should go ahead."*

In the HSE's Enforcement Management Model it states that prosecution is usually always considered where there has been an extreme risk gap and there has already been a defined or established improvement notice issued.

In each case it will be a question of fact as to whether the firm reasonably suspects that enforcement proceedings may be pursued against it. Where that is the case, the interview notes and other communications with third parties are likely to attract litigation privilege. This is significant not just for ENRC, but for any company faced with undertaking an internal investigation in response to a whistleblower or other allegation of wrongdoing.

Oil and Gas News

Oil & Gas UK publish their annual Health & Safety Report

Oil & Gas UK have published their report on Health and Safety (the Report) which aims to give an overview of the offshore oil and gas industry's performance in health and safety in 2017. It also provides a summary of the activities that Oil & Gas UK groups have undertaken to protect people who work in the industry.

Key findings

— Health performance has seen a year-on-year improvement since 2014;

— There were no work-related fatalities in 2017;

— Offshore helicopter operations across the UK Continental Shelf (UKCS) were completed without accident in 2017;

— 2017 saw a continuing improvement in personal and process safety, where the numbers of reportable injuries continued to fall along with another consecutive year of record-low numbers of reportable incidents, 67% lower than in 2001;

— Concerted industry action to reduce hydrocarbon releases since 2000, together with the Health and Safety Executive's (HSE) Key Programme initiatives, has resulted in continued decrease;

— Despite the significant reduction in total hydrocarbon releases over the past decade, the number of major releases has plateaued at around two per year. In April 2018, the HSE wrote to all UKCS duty holders asking them to confirm what measures their organisation had put in place since 2015, or would be putting in place, to improve safety management performance and challenged the wider industry to assess whether it could do more to reduce the occurrence of major hydrocarbon releases. The importance of preventing hydrocarbon releases was also emphasised this summer, when industry came together at Safety 30, a two day event marking the 30th anniversary of the Piper Alpha disaster.

2017 performance

To minimise harm to people, Oil & Gas UK have stated that the primary focus for this major-hazard industry must be on process safety, and the effective containment of hydrocarbons and associated hazards.

Major accidents occur rarely and leading indicators must be assessed in addition to lagging indicators such as hydrocarbon releases. Leading indicators such as maintenance backlogs for safety critical elements and overdue verification findings are also used to monitor how well safety critical elements are being managed. It is also important to manage the health and well-being of the offshore workforce effectively, given the remoteness of the worksite and the nature of the work they perform.

Every year, Oil & Gas UK conducts a benchmarking exercise so that installation operators can compare their own safety performance against the industry average. Other industry associations monitor and report the safety performance of marine and drilling contractors. Thirty-six installation operators were included in the benchmarking exercise for 2017 data, the average frequency rates for those companies is calculated to the industry standard of incidents per million man-hours on a 12-hour working day. Incident frequency rates, rather than absolute numbers, are used for comparison in this exercise. However, even with that standardisation, the wide variation in frequency rates between the best and worst performers is affected by the relative size of the company's operations. A more detailed benchmarking report is issued to companies directly. Over the last decade, the frequency of dangerous occurrences and reportable injuries has fallen by over 50%. Three operators completed 2017 having recorded no dangerous occurrences and 11 experienced no reportable injuries, compared with nine in 2016.

The industry also has an asset integrity Key Performance Indicator (KPI) scheme which uses the data provided by Oil & Gas UK member companies on a voluntary basis at the end of every quarter. KP-1 measures hydrocarbon releases, while KP1-2 and -3 measure verification non-compliance and safety-critical maintenance backlog.

Offshore helicopter operations

The UK oil and gas industry continues to work in concert with helicopter operators, helicopter and safety equipment manufacturers, and regulators to further reduce aviation risks. This is achieved by collectively and vigorously pursuing robust operating procedures and practices, by pursuing offshore helicopter safety initiatives and research projects, as well as ensuring, where practicable, swift implementation of actions and recommendations arising from accident investigations, inquiries and reviews.

Reportable accident data for UKCS offshore operations are collected by the Civil Aviation Authority under its mandatory occurrence reporting scheme. Since 1997, four fatal accidents have claimed the lives of 38 offshore workers and flight crew, and there have been 16 non-fatal accidents. Over the past 20 years industry-led initiatives have brought many safety improvements to UKCS helicopter operations.

2017 was an accident-free year in offshore helicopter operations. As a result, the UKCS' five-year average all accident rate has decreased from 1.0 to 0.52 per 100,000 flying hours.

Significant activities

In 2017, Oil & Gas UK worked with stakeholders and members to ensure that accumulated experience, knowledge and expertise is shared broadly within the industry. One way in which this is achieved is by developing industry guidance to promote awareness of sector-specific good practice and regulatory compliance.

In 2017, documents were produced on topics such as fire and explosion risk management, emergency response and rescue vessel requirements and electrical operations. Oil & Gas UK also supported industry in resolving significant issues and co-ordinating activities, including the management of accommodation fire risk, lifeboat familiarisation requirements, safety case improvements, and finalising the inclusion of the Category A Compressed Air Emergency Breathing System into basic offshore safety induction and emergency training. Another key role for Oil & Gas UK is the identification of potential changes to the operating environment arising from legislative and constitutional changes.

In summary, health and safety performance in 2017 showed an improvement in many of the key indicators. However, complacency is a significant risk and companies must aim to continuously improve.

Oil & Gas Authority publish Financial Guidance

Following a consultation on 1 June 2018 seeking the industry's views on revised "Guidance on the Assessment of Licensee Financial Capability" (the "Financial Guidance"), the Oil and Gas Authority (OGA) have now published the Financial Guidance on 8 August 2018. The OGA plans to use the Financial Guidance in assessing a licensee's financial capability at the time of a licensing event offshore and onshore.

The Financial Guidance sets out when the OGA will consider the financial capability of a legal or natural person and the factors it will take into consideration when doing so. The factors may vary according to circumstances and will be assessed on a case by case basis. The Financial Guidance also sets out steps that a person seeking a decision from the OGA should take to facilitate those considerations.

A "Commitment"

Many of the OGA's decisions are based on "Commitments" made by the Applicant to undertake certain activities in the future. The OGA has identified the following activities as possibly including the making of a Commitment, or the transfer of that Commitment from one person to another:

— Licence award;

— Licence agreement;

— Innovate licence progression;

— Well consent;

— Field development (including extended well tests);

— Change of control of Licensee; and

— Pipeline Works Authorisation

The OGA states the above list is not exhaustive and the OGA may also apply the Financial Guidance in other circumstances where a Commitment is made that will or may require material financial resources to discharge it.

Assessment

Following what was set out in the Consultation Paper, when assessing an Applicant's financial capability, the OGA will assess two broad financial criteria:

1. Financial viability – this refers to an Applicant's historic, current and future solvency and provides assurance that the Applicant is currently solvent and is expected to remain so for the foreseeable future.
2. Financial capacity – this refers to an Applicant's ability to meet all known and anticipated future commitments, and will normally focus on the Applicant's financial forecasts.

The OGA will then consider assessment areas within each criteria:

Financial viability

— Demonstrable Track Record – it is the OGA's view that an established company with an extended track record of solvent trading is more likely to meet future commitments than a company without such track record. However, the OGA does not wish to exclude new entrants.

— Current Financial Analysis – the OGA will assess the Applicant's solvency, as at the date of the application.

— Capital Structure – to establish how the Applicant is funded, the OGA will consider the latest audited and filed statutory accounts and the Applicant's most recent management accounts.

The OGA recognises that persons may choose to incorporate a new company to make an application to the OGA. In that case, the OGA will place more importance on the financial capacity section set out below.

Financial capacity

— Net Worth – if an Applicant has demonstrated that it has a Net Worth substantially greater than the estimated cost of the Commitment, then the OGA will normally deem the Applicant has demonstrated sufficient financial capacity.

— Cash Flow Forecasts – these will be from the date of the application to the date in the future when the Commitment is fully discharged. These forecasts should include details of all sources of free cash flow expected to be available to the Applicant for the forecast period.

— Sensitivity Analysis – the OGA may ask for cash flow forecasts to be re-worked based on sensitivities such as lower oil and gas prices or delays to field start-up.

The purpose of the assessment areas is to highlight any risks to and vulnerabilities of the Applicant that may impact its ability to carry out the Commitment. In assessing each application, the OGA will give each relevant assessment area an appropriate risk-rating and commentary as to key risks that the assessment area presents.

The Applicant does not have to demonstrate that it has financial capability to meet a Commitment on a standalone basis. The Applicant may wish to rely on a guarantee from a natural person or a corporate body. Where an Applicant has informed the OGA of its intention to rely on a Guarantor, the Applicant should provide a draft deed of guarantee, together with a letter of undertaking from the Guarantor confirming they will execute such deed if the application is successful. If a guarantor meets the OGA's financial capability requirements, the financial capacity tests will not be applied to the Applicant.

The OGA recognised in the Consultation Paper that existing and proposed new licensees are exploring new sources of finance and innovative financing structures to meet their Commitments. While the OGA will need to be satisfied that the sources and structures meet an Applicant's Commitments, the OGA has stated it does not want to discourage this innovation by setting rigid requirements.

Applicants should be aware that the Financial Guidance is not a substitute for any other financial assessments that may be carried out by other regulators who may separately seek to satisfy themselves that obligations have been met.

What we do

CMS 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 specialist 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
- Technology
- Infrastructure
- Waste
- Real Estate

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 and 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 and 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 and 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 Health and Safety Executive 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

— Successfully defending environmental prosecution

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