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:

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

020 7367 3000 – London

01224 622 002 – Aberdeen

07811 362 201 – Out of hours (ask for Jan Burgess)

Kelvin TOP-SET

A number of our team are qualified as approved Senior Investigators in Root Cause Analysis. 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 enforcement action 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

Figures Reported for Second HSE Fee for Intervention Invoice Run

On 1 October 2012, the Health and Safety Executive's Fee for Intervention ('FFI') scheme came into force. The scheme introduced a charging regime for organisations found to be in "material breach" of health and safety laws. Under which, those in breach are liable for the HSE's inspection, investigation and enforcement action costs in relation to ensuring compliance with health and safety legislation.

It has been reported that the HSE's second invoice run under the FFI scheme (covering 1 December 2012 to 31 January 2012) generated around £857,000 in fees for the HSE. This is said to equate to 60% of inspections carried out resulting in a FFI charge. The figures show an increase in invoices compared to the first invoice run (1 October 2012 to 30 November 2012) which came in at £727,644.81. The total number of invoices issued also appears to be rising, with the second run said to have produced 1,800 invoices, as against 1491 in the first run.

Stephen Groch, Head of Regulatory at DWF (the firm who made the freedom of information request for the release of the second run figures) is reported to have noted that: of those in receipt of a FFI, 89 queries were raised. Of such queries, 26 are said to have resulted in the FFI being amended in the recipient's favour. Mr. Groch also noted that the average fee value remained low at £474.

For our report on the first run FFI figures, please visit http://www.law-now.com/xc.asp?g=8B85217D-D3D7-45F9-8C40-66E0A2DF74C2&c=1

Further information and HSE guidance of the FFI scheme generally can be accessed via: http://www.hse.gov.uk/fee-for-intervention/

Further Implementation of Health and Safety Reforms

The Government continues to remain committed to implementing the recommendations of Professor Löfstedt – in his 2011 report "Reclaiming health and safety for all: An independent review of health and safety legislation" – to overhaul the UK health and safety regulatory framework. Some recent areas of progress include:

Further changes to UK health & safety law for self-employed workers

In May 2013, the Government announced proposals to change the law to exempt certain self-employed workers from health and safety law. The proposals have now been published in draft form (known as the "Deregulation Bill") and will proceed to be scrutinised by a joint committee of MPs and peers.

Clause 1 of the Bill amends section 3 of the Health and Safety at Work etc. Act 1974, which currently imposes a duty upon every organisation to conduct its trade, business *or other undertaking* and to matters within his control, so far as is reasonably practicable, so that not only their employees but also persons not in their employ but who may be affected thereby, are not exposed to risks to their health and safety. The changes will amend "undertaking" to "relevant undertaking".

The Bill sets out that an undertaking is a "relevant undertaking" if: (a) it is of a prescribed description; or (b) persons who may be affected by the way in which it is conducted, other than the person conducting it (or his employees), could thereby be exposed to risks to their health and safety. The question of what activity constitutes a "prescribed undertaking" is to be defined by regulation, in order to ensure that

the duty imposed by section 3 continues to apply to all self-employed persons who conduct their undertaking in a high risk sector or activity.

It is however still not entirely clear what impact these changes will have in practice. For example, a decision to prosecute takes into account both sufficiency of evidence and the public interest. Consequently, a HSE prosecution is unlikely to be deemed to be in the public interest, where a self-employed person who poses no risk to others, injures himself. As such, the proposed changes would not alter this situation. Where there has been a prosecution of a self-employed person under the current regime, this is most likely due to there being harm, or a risk of harm to others; in which case the proposed exemption would not apply.

The changes also pose a question as to who will decide when there is "no potential risk of harm". It is hoped that it will become clearer as the Bill progresses, how interpretation this and other key terms will be approached. The consultation concerning the changes ran from August to October 2012, with concerns raised by interest groups who called for extreme caution and protection for the self-employed.

When the Bill was announced in the Queen's speech, the government stated that the intention was to remove unnecessary burden, "*scrapping health & safety rules for self-employed workers in low risk occupations, formally, exempting 800,000 people from health & safety regulation and saving business an estimated £300,000 a year*". These changes form part of the "red tape challenge" which the Government states has already saved businesses £212 million a year. The second phase of the "red tape challenge" is now due to start.

The Health & Safety (Miscellaneous Repeals, Revocations and Amendments) Regulations

On 6 April 2013, the Health & Safety (Miscellaneous Repeals, Revocations and Amendments) Regulations 2013 came into force. The Regulations repeal the Celluloid and Cinematograph Film Act 1922 and revoke 12 other regulations (along with related provisions in the Factories Act 1961). Consequential amendments are also made to the Dangerous Substances (Notification and Marking of Sites) Regulations 1990 and the Workplace (Health, Safety and Welfare) Regulations 1992.

The Health and Safety Executive ('HSE') has noted that these changes aim to make health and safety legislation "simpler and clearer". Although some opposition is said to have been made to the changes, the HSE regards that such "do no compromise essential health and safety protections". Indeed, some key protective regulations have been incorporated into other legislation. For example, the requirement to provide head protection on construction sites will remain under the Personal Protective Equipment Regulations 1992.

The HSE has also indicated that it will be taking steps to raise awareness of the impact of the reforms. For more information on the reforms and for a full list of the regulations affected, please visit: http://www.hse.gov.uk/legislation/repeals-revocations.htm

The further revocation of unnecessary or redundant regulations continues to be reviewed, with the residual sections of the Factories Act 1961, the Offices Shops and Railway Premises Act 1963 and 10 supporting regulations all due to be consulted on in the upcoming months. Review and revision/consolidation of all HSE Approved Codes of Practice (ACOP's) also remains ongoing.

National Local Authority Enforcement Code

The HSE has also now launched the National Local Authority Enforcement Code, effective from 29 May 2013. The code sets out standards for a risk based approach to target health and safety regulatory interventions. This will ensure that interventions are consistent, proportionate and targeted; with the code

also including a list of ten sector-specific risks that Local Authorities are permitted to proactively inspect. The effectiveness of the code will be reviewed in 2014.

Changes to the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 ('RIDDOR')

The HSE has now published details of its plans to simplify the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 ('RIDDOR'). The draft regulations – the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 – are expected to come into force on 1 October 2013.

The key changes made will see clarified and/or shortened lists in relation to:

- Specified reportable injuries ("major injuries") to workers sustained as a result of a work-related accident, with removal of the term "major injury" itself;
- Reportable ill-health conditions in workers (replacing 47 ill-health conditions with 8 categories of work-related diseases). The offshore specific diseases have however not been amended;
- Reportable dangerous occurrences ('near-miss events'). The definition of "pipeline or pipeline works" has, for example, been significantly simplified; and
- Dangerous occurrences within the rail-sector, and removal of the requirement to report suicides on railways.

However, no changes are to be made in respect of the following: recording requirements; reporting of fatal accidents; reporting of accidents involving non-workers (including members of the public) or accidents which incapacitate workers for more than seven days; or requirements to preserve certain incident sites at mines, quarries and offshore workplaces (which are pending investigation and subject to overriding safety needs).

The explanatory memorandum to the draft regulations anticipates that those with reporting duties under RIDDOR will see a net benefit of approximately £270,000 over a ten-year period due to the reduction in the number of reports required. Further, it is expected that the simplification and clarification of the reporting requirements generally will yield non-monetary benefits: reducing the time and effort necessary to determine whether or not an incident is reportable. The public sector (including central and local government) is also anticipated to save a net value of £1 million over the same ten-year period.

To view the draft regulations please visit: http://www.legislation.gov.uk/uksi/2013/1471/contents/made

The draft HSE guidance on the regulations can also be viewed at: http://www.hse.gov.uk/pubns/indg453-rev1.pdf

Implementation of the Coroner reforms

Earlier this month (July 2013), the Government published its response to the consultation, "Implementing the coroner reforms in Part 1 of the Coroners and Justice Act 2009". A number of the Act's provisions have already been implemented since receiving royal assent in November 2009; however the Government now intends to bring further provisions into force on 25 July 2013.

Implementation of these outstanding changes will repeal sections 1 to 7 and the majority of the other provisions in the Coroners Act 1988, which currently governs the Coroner's system in England and Wales.

A number of reviews and inquiries led to Part 1 of the 2009 Act, which provides for important reforms and a new national framework for the Coroner system. The original aims of the 2009 Act were to put the needs of bereaved people at the heart of the system; for coroner services to be locally delivered but within a new framework of national standards; and to enable a more efficient system of investigations and inquests. It is hoped that the framework will improve the experience that bereaved people have of coroner investigations, while making investigations more efficient for coroners and the local authorities that fund them.

One of the changes to be implemented by the Act concerns the governing of the coroner investigation process and the timescale for completion of inquests. The consultation process raised the question of what an appropriate target would be, to conclude an inquest. Taking into consideration factors such as reliance on third parties and the management of expectations, it was concluded that the rules will say a coroner must complete an inquest within six months of the date on which the coroner is made aware of the death, or as soon as is reasonably practicable after that date. What is considered to be a "reasonably practicable" timescale will of course depend on whether other organisations are involved, such as the Health and Safety Executive and the police.

Other changes to be made by the Act include regulations governing practice and procedure at inquests; allowances, fees and expenses in connection with investigations and inquests; new statutory guidance concerning the operation of the coroner system and the provision of new coroner areas.

The consultation process ran from 1 March 2013 to 12 April 2013, with nearly 300 responses received. The final versions of the rules and regulations that underpin the reforms to the coroner system were laid before Parliament on 4 July 2013 for approval prior to implementation.

HSE continues to Clamp Down on Construction Site Safety

Enforcement Notices served on 1 in 5 Construction Sites

In February 2013 the Health and Safety Executive ('HSE') announced plans to crack down on construction site safety across Britain. The national campaign aimed to raise standards, and to emphasise that poor standards are unacceptable and can result in enforcement action.

The month-long initiative saw the HSE visit a total of 2363 sites (where refurbishment or repair works were being undertaken) and also 2979 contractors. The HSE has now confirmed that nearly one in five construction sites it visited as part of the initiative have been subject to enforcement action. A total of 631 enforcement notices were served in respect of poor safety practices which could potentially put workers at risk, with 451 notices ordering work to stop immediately until corrective action is taken.

During the site visits, HSE Inspectors sought to confirm whether high-risk activities were being correctly managed. They also inspected equipment (including its installation, assembly, maintenance and operation) as well as considering the proper use of protective safety wear and general good order on site.

Philip White, HSE Chief Inspector of Construction, said that the initiative has "*once again shown that the majority of employers do take their responsibilities to their workers seriously. However, our inspectors also encountered numerous examples of poor practice*". He confirmed that the "*HSE will not hesitate to use its enforcement powers against reckless employers...who continue to make construction one of the most dangerous industries in which to work*".

HSE Fines for Breach of Health and Safety Regulations

Following this drive, the HSE has been very active in undertaking such inspections and taking action/imposing fines in relation to breaches of health and safety regulations on construction sites. The last few months in particular have seen a large number of cases reported and penalties being imposed. This further highlights that the HSE is taking enforcement of construction site safety seriously.

In addition, the HSE also appears to be taking a hard line in respect of repeat offenders. For example, a Bury roofer (trading as Massey Roofing and Building Contractors) appeared in court in June 2013 for charges relating to putting workers' lives at risk. This is despite a previous prosecution after a man was paralysed in a fall through a warehouse roof. Mr Massey was ordered to undertake 100 hours of community service in the next 12 months and ordered to pay £2,000 in prosecution costs. HSE Inspector Matt Greenly stated that: "*work at height has the potential to be extremely dangerous if it isn't planned and carried out using appropriate equipment*". He further commented that Mr Massey had failed to learn any lessons from his previous actions and that his reckless attitude to safety was "*shocking*".

For more information regarding construction site safety please go to: www.hse.gov.uk/construction

Non-Pecuniary Penalties ordered for Health and Safety Offences

A number of recent cases involving breach of health and safety regulations have led to individuals being sentenced to non-pecuniary penalties in addition to monetary fines. Recent figures indicate that these sentences bring the total number of prison sentences (immediate or suspended) for work-related health and safety offences to 78. This is in addition to 42 prison sentences for manslaughter. Recent health and safety prosecutions also indicate that an order of community service is now not uncommon as a sentencing tool.

Three year prison sentence for company boss following shipyard worker's death

A company boss was sentenced after a worker fell to his death from a cherry picker after it was struck by a plate girder.

The jury at Newcastle Crown Court heard that numerous health and safety failings led to the fatality at the Swan Hunter shipyard in Wallsend, Newcastle. Mr Turnbull did not take advice from a competent person, identify the risks involved in the job or conduct a specific risk assessment.

Mr Turnbull was sentenced to three years' imprisonment for gross negligence manslaughter. In addition Mr Christopher Taylor, a director of North Eastern Maritime Offshore Cluster Ltd ('NEMOC'), was fined £30,000 and ordered to pay £50,000 in costs after being convicted of one count of consenting to, or conniving at, the failure to discharge a duty under section 2(1) and section 3(1) of the Health and Safety at Work etc. Act 1974.

NEMOC was also found guilty of failing to discharge a duty under section 2(1) and section 3(1) of the Health and Safety at Work Act etc. 1974. However, as the company is in liquidation its fine was limited to £1 for each offence.

Self-employed businessman imprisoned for 9 months after supply of faulty plant leads to gardener's death

Brian Beavis, a self-employed businessman trading as Heavy Plant Repairs, was sentenced to a 9 month prison sentence (suspended for a year) after he supplied unsafe construction plant to a landscape gardener, ultimately leading to his death.

Ken Pinkerton, aged 47, was working to dismantle and rebuild a retaining wall in a garden in Reigate, Surrey. Due to the nature and size of the job he hired a mini-digger and skip loader. However, there was no access to the garden from the front of the house and he had to bring the plant through a wood at the rear. The terrain of the wood caused the plant to tip onto its side, and Pinkerton was thrown from his seat and crushed, causing fatal injuries.

The HSE identified significant faults with the skip loader, including that: it had no seat belt; the rollover protection could not be operated; one set of bolds used to secure the rollover protection structure was missing, and the other not suitably robust; and a missing spring meant the engine cover could not be secured. The HSE had also previously served three prohibition notices on Beavis during the same month of the incident in relation to other equipment.

Mr. Beavis pleaded guilty to a breach of section 6(1)(a) of the Health and Safety at Work Act etc. 1974. Guildford Crown Court also ordered him to pay £10,000 in compensation to Pinkerton's partner, rather than impose costs. It should be noted that the Sentencing Council's guideline for health and safety offences that are a significant cause of death – stating that fines should not normally fall below £100,000 – was not applicable in this case as its scope is limited to organisations and does not extend to individuals.

Cases

Rail company fined £450,000 and employee ordered to undertake community service following death at level crossing

Rail infrastructure company Network Rail has been convicted following the death of a woman in 2010.

Jane Harding, aged 52, died when the car she was travelling was struck by a train. The accident occurred at a level crossing in Herefordshire shortly after the barriers had been raised by the signalman on duty, who had mistakenly believed the train had already passed through the crossing. Birmingham Crown Court is thought to have heard that he had been distracted by a call to the signal box relating to a crossing further up the track.

It has been suggested that accident was entirely preventable and that Network Rail had decided not to install an automatic barrier locking system. It is considered that such a system would have detected the oncoming train and held the barriers down. This would also not have allowed the barriers to be raised manually, even if it was viewed to be clear to do so.

Following the incident, Network Rail is said to have adopted a policy of closing crossings wherever possible. It has reportedly closed around 700 crossings completely, which "along with a £130m investment in improvements across the country is making level crossings even safer".

The company was fined £450,000 and ordered to pay £33,000 in costs for breaches of health and safety regulations in relation to the incident. Signalman, Adrian Maund, was also fined £1,750 plus a costs contribution of £750 for failing to take reasonable care for the safety of persons using the crossing. In addition to the monetary fine, he was ordered to undertake 275 hours of unpaid community service.

Network Rail was also recently fined £125,000 in respect of the serious injury of a maintenance worker; and £200,000 for failures causing the death of a worker inside an engineering machine (GT Railway Maintenance was also fined £118,125 for this fatality). In addition, a fourth case saw London Underground, Tube Lines and Schweerbau GmbH each fined £100,000 after an engineering train ran out of control for four miles on the London Underground. These four railway-related prosecutions therefore saw fines of £1,193,125 being imposed in the space of just six weeks.

School fined £9,000 for safety failings

Manningtree High School in Essex has been fined for a breach of section 3(1) of the Health and Safety at Work etc. Act 1974 after a 14 year-old boy fell four metres from a climbing wall during a PE lesson in October 2012. The pupil suffered a fractured heel bone, which saw him in crutches for over 14 weeks and from which he is still recovering.

The HSE found that none of the pupils involved had been trained on, or made aware of the risks of, this more advanced type of climb. The school was said to have failed to have any adequate safety management system in place for the activity and the instructor was further found not to be competent to teach or supervise the activity.

The school pled guilty to the breach as a result of these failings and was fined £9,000, with £1,641 ordered in costs.

£100,000 fine for rest home reduced to £70,000 on appeal

A woman in her 80's fell over and died as a result of her injuries whilst on a walk with a junior carer from the rest home she resided in. The woman had been out with the assistance of her zimmer frame. This was despite the fact she had fallen twice indoors during her time in the home and had been identified as being at high risk of sustaining falls and unable to safely move around independently. A wheelchair was therefore recognised as being necessary during outdoor travel.

During its investigations the HSE found that there was no system to ensure care plans were properly executed, with care information often communicated verbally between carers. The rest home, D Roche Ltd, was therefore fined £100,000 for breaches of section 33(1) of the Health and Safety at Work etc. Act 1974.

On appeal, the fine was reduced to £70,000 in accordance with the relevant sentencing guidelines (given that may of the mitigating factors listed therein were present). In light of the rest home's financial position, the 12 month time to pay was also extended to 3 years.

Engineering firm sentenced after death of worker

A specialist engineering firm, AETC Ltd, has been sentenced after protracted health and safety failings led to the death of a worker.

Mr Graham Britten, aged 46, died from fatal head injuries after an isolation valve he was carrying out maintenance on suddenly closed, trapping his head. Leeds Crown Court herd that the HSE uncovered repeated health and safety failings by the company (over a number of years) which had put may employees at risk or injury or death.

The company was fined £300,000 and ordered to pay £77,500 in costs after pleading guilty to breaching section 2(1) of the Health and Safety at Work etc. Act 1974.

Hospital trust fined £15,000 over fatal fall

Southend University Hospital NHS Foundation Trust has been prosecuted for serious safety breaches after a vulnerable patient fell from a third floor window to his death in July 2010.

The 69 year-old male, died after falling 9 metres from the window, which was only fitted with a single angle-bracket restrictor (allowing the window to open fully). He had only recently been moved to a separate room for his own safety after becoming confused and agitated.

Guidance states that windows in hospitals caring for vulnerable patients should be restricted to a maximum opening of 10cm to prevent falls. The hospital had previously reviewed its window restrictors following an incident in 2007; however the reports recommendations had not been implemented at the time of the accident.

The Hospital Trust pled guilty to breaching section 3(1) of the Health and Safety at Work etc. Act 1974 and was fined £15,000, with £15,000 ordered in costs.

Haulage company fined £75,000 following death of worker

Haulier Ralph Coleman International Ltd was fined £75,000 and ordered to pay £25,316 in costs for a breach of section 2(1) of the Health and Safety at Work etc. Act 1974.

Marcin Rogala, 29, was gathering up fallen wooden pallets from a tall stack that had collapsed in the yard earlier that day. As he and his colleagues removed the pallets (under wet and windy conditions), another tall stack of pallets (each weighing 36kg) toppled over and struck him.

The sentencing Justice noted that the stacks were "disturbingly high" and that the absence of an established system for the stacked pallets meant that employees were left to do the best they could. The fine set was, he added, intended to punish the company but not put it or any jobs at risk (the company files accounts under a small company exemption at Companies House).

This follows two further prosecutions of a similar nature earlier this year. Such saw WE Rawson fined £100,000 and ordered to pay full costs of £15,839; and Merley Paper Converters fined £70,000 with £30,974 in costs. Both sentences were also in respect of a section 2(1) of the Health and Safety at Work etc. Act 1974.

Solar Panel installation firm fined for London skylight fall

A Midlands firm was fined after a worker fell through a fragile skylight at a warehouse in London, sustaining life-threatening injuries resulting in a seven month absence from work.

The exact circumstances of the accident are unclear, however an HSE investigation found that there were no precautions taken to prevent or mitigate a fall such as safety netting. The injured party, who had been assisting in the installation of solar panels on two warehouse roofs, fell nearly five metres. As a result he suffered a fractured skull, broken vertebrae, broken ribs and a hearing impairment.

Grenergy Solar Ltd pled guilty to two separate breaches of the Health and Safety at Work etc. Act 1974 and was fined a total of £12,000 and ordered to pay £9,041 in costs.

Global defence company prosecuted for death of worker

A worker for a global defence company died after being crushed by a metal press weighing 145-tonnes. The individual was working with a four man team servicing the large press. As he entered the machine to remove the equipment, one of his colleagues started the full test cycle of the press frame. The huge frame, 45 square metres in size, descended on the man who died from his injuries.

A subsequent HSE investigation discovered numerous safety failings, including a lack of engineering control measures to prevent entry by workers during testing or stop the machine if anyone did enter. In addition, there was an absence of a suitable assessment of the risks involved with the test process.

The company was fined £250,000 and ordered to pay £97,153 in costs after pleading guilty to a breach of section 2(1) of the Health and Safety at Work etc. Act 1974.

Dumfries and Galloway care home provider fined after dangerous gas work endangers residents

Harveys Healthcare were fined after allowing two gas boilers to be installed illegally by unqualified handymen in Sanquhar. A strong smell of gas was detected from the boiler room before the unit was evacuated.

The HSE uncovered that the "Gas Safe" registered engineer, whose name appeared on the gas safety certificates, had no knowledge of the work done. There were also inaccuracies regarding the engineer's postcode and registration numbers on the certificates. It was found that excessive amounts of paste was added to pipe joints, presumably in an attempt to prevent gas leaking, which was deemed completely unacceptable by a forensic expert after examination.

Harveys Healthcare Ltd was fined £55,000 after pleading guilty to a breach of Regulation 4 of the Gas Safety (Installation and Use) Regulations 1998 and section 3(1) of the Health and Safety at Work etc Act 1974.

Global recycling firm fined after death of worker

Linas Mataitis, aged twenty-five, was struck by the bucket of a wheeled loading shovel at a site in Willesden during a shutdown clean-up. Mr Mataitis was part of a team of workers using hand shovels to move dirt away from conveyors feeding a large shredding machine. He was pinned against a steel column by the large vehicle, suffering fatal injuries.

An HSE investigation into the fatality found that the documented procedure of European Metal Recycling Ltd for clearing dirt from around the conveyors did not cover shutdown operations when safety gates were open. Additional vehicles were also in operation in the vicinity and there was increased pedestrian movement. This resulted in there being inadequate arrangements for safely managing the movement of people and machinery.

In addition, it was found that the loading shovel was being driven by an operator who was not fully trained and may therefore have been unauthorised to use it. Conflicting records relating to this fact only highlighted failings by the firm to properly manage and regulate training supervision.

European Metal Recycling Ltd was pled guilty to breaching sections 2(1) and 3(1) of the Health and Safety at Work etc. Act 1974 and was fined a total of £300,000 with £72,901 ordered in costs.

Focus on: Civil Liability for Breach of Health and Safety Laws

On 22 April 2013, the House of Lords voted again on the Government's proposed changes to civil liability for employers who breach health and safety legislation. The Enterprise and Regulatory Reform Bill received Royal Assent on the 25 April 2013, and so the change has been included in the Enterprise and Regulatory Reform Act 2013 (the 'Act'). The provisions of the Act are subject to a staged implementation, with those relevant to civil liability scheduled to come into force in October 2013.

Current Law

As it currently stands, section 47 of the Health and Safety at Work etc. Act 1974 ('HSWA') states that "*Breach of a duty imposed by health and safety regulations shall, so far as it causes damage, be actionable*". In this context, 'damage' is defined as including "*death of, or injury to, any person (including any disease and any impairment of a person's physical or mental condition)*". The section therefore entitles claimants in personal injury cases to rely on a breach of health and safety regulations in making their claim. This is in addition to, or instead of, claiming under the common law of negligence.

Ultimately, where there is non-compliance with statutory health & safety regulations, the claimant can seek compensation on the basis of the employer's breach of those regulations. As long as claimants can prove that an employer had breached elements of a health and safety regulation, and that he or she suffered an injury directly as a result of that breach, their claim will succeed.

The fairness and suitability of section 47 was considered by Professor Löfstedt's report 'Reclaiming health and safety for all: An independent Review of health and safety legislation'. The reform of civil liability therefore originates from Löfstedt's recommendations for change; and the Government's general attack on "red tape" and campaign for better regulation.

During his review, Löfstedt expressed concern about what he perceived to be a "claim culture": where companies were so worried about being sued for personal injury, it caused them to be discouraged from developing their businesses and consequently from taking on new employees. He made it clear that, in his view, much of this stemmed from the "strict liability" nature of many health and safety regulations.

It should be borne in mind that not all health and safety regulations carry strict liability – many are qualified by words such as "*so far as is reasonably practicable"* or *"could not reasonably have been prevented"*. In these cases an employer has the opportunity to defend his position. Consequently, Löfstedt was not concerned about regulations that carry the opportunity of defence: he felt it was "strict liability" that encouraged a claim culture and which needed addressing.

How Civil Liability for Health and Safety Breaches will Change

The UK Government has illustrated a strong commitment and desire to implement the recommendations of Professor Löfstedt's report into health and safety regulation. This momentum has been clear in relation to changes to civil liability. As a result, Part 5 of the Enterprise and Regulatory Reform Act 2013 (aptly named "Reduction of legislative burdens") contains a provision which amends and replaces section 47 of the HSWA.

This section of the Act (section 69) amends section 47 so that *breach of a duty imposed by a statutory instrument containing health and safety regulations, or under an existing statutory provision, "shall <u>not</u> be actionable"*. Thus, once section 69 comes into force in October 2013, there will no longer be an automatic right to bring a corresponding personal injury claim for compensation for breach of any health and safety regulations. Where an accident constitutes a breach of health and safety regulations, a claim will only be possible where the claimant can be prove that the employer has also been negligent in his duties under common law. The overriding test at common law is that of "*the reasonable and prudent*

employer, taking positive thought for the safety of his workers in light of what he knows or ought to know" (*Stokes v Guest*).

It is important to note, however, that the changes *only* affect strict liability in relation to civil claims (i.e. personal injury claims). Criminal and other methods of enforcement of health and safety law will not be affected and strict liability, where it currently exists, will remain.

Arguments presented For and Against the Change

The changes to the civil liability regime have attracted a significant amount of discussion and opposition. Indeed, the Bill faced a clear division in votes as it progressed through Parliament. Initially the House of Lords had voted against the proposal. However, this was overturned in the House of Commons and the matter was returned for further consideration by the House of Lords; where, as abovementioned, it was adopted definitively in April 2013.

The rise of a "compensation culture"

Those in favour of the change argue that it is not justifiable to hold employers' liable for incidents outside of their control and which could not reasonably have been prevented. Supporters also consider that the change is required to address a perceived and growing "*compensation culture*" and will help reduce the burden of red tape which it perceives as adversely affecting employers'.

In June 2013, the Department for Business, Innovation and Skills ('BIS') published a policy paper on the Act stating, for example, that this measure will "*address the potential unfairness that arises where an employer can be found liable to pay compensation to an employee despite having taken reasonable steps to protect them*". This builds on Löftstedt's observation that "*awarding compensation on the basis of a technical breach where there is no opportunity for the defendant to be aware of the danger*" may prevent employers from "*taking a common sense approach to health and safety*".

The reform therefore illustrates a real concern that a fear of civil suits is causing employers to over implement health & safety requirements. This position is reflected in the aforementioned BIS policy paper which views that this fear, coupled with an inability to defend themselves, may cause employers to insist on unnecessarily cautious work practices. Taken in combination, this over-cautious approach is arguably increasing costs and reducing business growth. The paper goes on to state that the change will help "*redress the balance of the civil litigation system in respect of health and safety at work legislation*" and will aid employers' confidence by "*allowing them to focus on a sensible and practical approach to health and safety and keep costs down by avoiding over-compliance*". The intention is therefore that this, and other de-regulatory measures, will in time ease the burden on businesses and encourage business development and expansion on a wider scale.

On the other hand, it may be questioned whether there is a real need for these changes given that the Government's own statistical evidence shows that claims arising from workplace accidents are actually going down (see e.g. HSE Annual Statistics Report 2011/12). This fear of a growing "compensation culture" may therefore be unwarranted. In a recent article, Barrister Catherine Grubb recognised arguments suggesting that it would have been more prudent to educate employers to understand the legal requirements, and how to implement the steps they need to take to comply. Grubb views that the changes will in fact make it harder to provide employers with clear, practical guidance.

Reduction in the protection afforded to employees

Concerns have also been raised generally about what impact the removal of civil liability for health & safety breaches will have on injured parties. At present, an employer can often defend a civil claim for breach of health & safety regulations on the basis that it has taken all reasonably practicable steps to comply with its duties. There are in fact limited circumstances where strict liability applies, allowing an employer no defence if a breach of the relevant regulation is established.

During the House of Lords' debate, it was recognised that the cases that will be most significantly affected by this change are "*those which would have previously relied on an absolute or strict liability duty*". This argument appears to be based on the assumption that the issues and evidence to be considered for a claim in negligence will still be broadly the same as those which currently apply in relation to claims brought for a breach of statutory duty where the "*reasonably practicable*" defence is available. Consequently, the change will not place any greater burden on claimants than they currently face. That said, the removal of strict liability would seem to move the risk of injury through simple misfortune from the employer to the employee, and seems to be a step away from the "no fault" approach to compensation which some have argued for.

Furthermore, Lord MacKenzie of Luton stated during debate on the changes that: "*promoting the changes ....will also send the wrong message to those employers who would undervalue health and safety and cut corners, safe in the knowledge that their chances of being held to account are diminished. This is to the detriment not only of employees, but to those many employers who do the right thing.*" It is additionally viewed that the reform will sweep aside aspects of personal injury law that have, in fact, existed for well over a 100 years: leaving claimants with the greater burden of proving negligence. Suggestions have also been made that this change will place too heavy a reliance on the Health & Safety Executive to ensure compliance, particularly given recent funding cuts there.

By contrast, the abovementioned BIS policy paper views that employees will still maintain the same level of protection. This is on the basis that: (a) there is no change to standards set at criminal level; and (b) they will still have the ability to claim compensation where the employer has been negligent and is in breach of their common law duty of care.

An industry perspective

One industry which has already voiced its concerns over the change is the UK's oil and gas sector. This month (July 2013) marks 25 years since the Piper Alpha disaster when 167 men lost their lives and many were seriously injured. It has been argued that the proposed change will remove the right to claim compensation based on breach of, *inter alia*, those regulations introduced following Lord Cullen's report into Piper Alpha (and which addressed the specific safety issues of the offshore oil and gas environment). After all, to remove civil liability from all health and safety regulations will, as previously mentioned, leave claimants with only the common law of negligence as a possible right of action.

Conclusion

In the House of Lords, business minister Viscount Younger stated that "*employers should always have the opportunity to defend themselves against a compensation claim when they have done nothing wrong and have taken all reasonable precautions to protect their employees*".

However, whilst some will welcome this change, others are still left wondering where this radical change has come from since it goes so much further than Löfstedt's proposals. Indeed, in his one year progress report published in January 2013, Professor Löfstedt considered the Government's approach to civil liability as "more far reaching" than he anticipated in his recommendation. The answer seems to be one

of mere expediency, with Government opting to make a single change to the Act by removing all civil liability across the board.

Whether this is the correct approach however is yet to be determined. Certainly, the Government has already identified one area, relating to pregnant workers, where it will have to make an exception to this approach to meet EU requirements. It will therefore be interesting to see in time what the true impact of the reform will be; and also what approach the Courts will take in relation to awarding compensation in claims arising from an underlying breach of health and safety regulations.

Oil and Gas News
Environmental and Health & Safety

Offshore operator defends prosecution for breach of Oil Prevention & Control Regulations

An offshore operator has been found not guilty in a prosecution for breach of pollution-prevention regulations on one of its Northern North Sea oil and gas platforms.

The company was charged with a breach of Regulation 3(1) of The Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations 2005. The breach related to a discharge of oil from the platform into the sea, which exceeded the terms of the relevant discharge permit. Such permits impose discharge limits and conditions in relation to discharges of oil during production and processing operations.

At trial, the company relied on the statutory defence provided under Regulation 16(2)(a) of the 2005 Regulations, which states that it is a defence to prove that the breach "arose as a result of something which could not reasonably have been prevented by him", and led evidence to that effect.

The court accepted that the equipment concerned had been checked shortly prior to the incident and had been found to be in good working order. It further recognised the reality that unfortunately those operating offshore installations must prioritise risks; and that whilst protection of the environment is important, crew safety must always be paramount. It was further acknowledged that the maintenance procedures in place on the platform were sound both theoretically and in the company's implementation thereof. The Sheriff concluded that there was no reason in this case not to accept that the statutory defence had been made out and the company was therefore found to be not guilty in relation to the charge. The court had also heard evidence of the considerable efforts and commitment of the operator (both in terms of time and money) in upgrading the facility. The environmental impact of the discharge had also been nil.

Prosecutions under offshore environmental regulations are very rare, and it is unusual to have the benefit of judicial interpretation of the words "could not *reasonably* have been prevented". The bench indicated that they meant "*in the greater scheme of things"*, taking all relevant factors into account.

New EU Directive on the Safety of Offshore Oil and Gas Operations

On 10 June 2013 the European Council adopted a new Directive on the safety of offshore oil and gas operations in the European Union and amending Directive 2004/35/EC. The Directive will come into force on 18 July 2013.

Sufficient resources to cover major accidents

Under the Directive, all operators will need to ensure that they have sufficient resources (physical, human and financial) to minimise the risk of, and thereafter rectify, a major accident. Decisions on granting or transferring licences will have to take account of the technical and financial capability of an applicant and in so doing must also consider the risk to the licensed area concerned. In respect of evidence on capability, there is a requirement for the provision of a major accident prevention policy and safety and environmental management systems. In addition, Member States are to facilitate the deployment of sustainable financial instruments and other arrangements in order to assist licence applicants. The licensing authority may in certain circumstances object to the appointment of an operator, on grounds of these requirements.

Financial liability for environmental damage

Licensees generally will in the future be held financially liable for the prevention and remediation of environmental damage caused by offshore operations "carried out by, or on behalf of, the licensee or the operator". This extends the current position in the UK, where environmental liability is imposed on operators rather than all licence holders. The term 'offshore' is also broadly defined and includes territorial waters, the Exclusive Economic Zone (extending to around 370km from the coastline) and the continental shelf over which the Member States exercises jurisdiction. Environmental liability under the current EU framework is restricted to territorial waters (approx. 22km offshore).

Ongoing obligations of the Commission

In this regard, the Commission is to conduct an ongoing analysis of the appropriate measures to ensure an adequately robust liability regime and the requirements for demonstrating financial capacity itself (including the availability of financial security instruments). In particular, the Directive places ongoing obligations on the Commission to report to the European Parliament and the Council: including that the Commission should to (a) undertake further analysis and report on the availability of financial security instruments/the handling of compensation claims, along with any appropriate proposals, by 31 December 2014; and (b) submit its assessment of the effectiveness of the liability regimes in place within the EU, again accompanied by any suggested amendments (two years after the date of entry into force of the Directive). The Commission shall also conduct an analysis of product safety standards applicable to offshore oil and gas operations.

Major hazards reporting

A further obligation will be the requirement for Member States to ensure that operators, both prior to commencement of operations and on a continuing basis, report on major hazards. Such reports will subsequently need to be reviewed and accepted by the competent authority. This reporting obligation is analogous to the safety case regime presently in place in the UK. However, safety cases focus on major accident hazards to workforce health and safety on the respective installation. They do not require dutyholders to report on the management of environmental risks, which will need to be covered within a major hazard report.

Independence and objectivity of Authorities

The text makes clear that Member States must ensure the independence and objectivity of the competent authority. In order to prevent conflicts of interest, the functions required under the Directive (i.e. safety and environmental) must be carried out by an authority which is independent of any functions regarding economic development (including licensing and collection/management of revenues from oil & gas activities). This requirement may demand restructuring of DECC's oil and gas division, whose ambit currently includes regulation of environmental matters.

Promotion of safety standards on an International scale

On a wider level the Commission, in conjunction with Member States, aspires to promote the implementation of high safety standards on an international scale. The recital to the Directive therefore includes a statement noting the desirability of operators in Member States applying major accident prevention policies in relation to their operations outside EU waters. Notably however, there is no corresponding enforcement mechanism or capacity. Separately, as part of the body of the Directive, Member States are given the ability to require companies registered in their territory and conducting, directly or indirectly, offshore oil and gas operations outside the European Union (as licence holders or operators) to, on request, report to them about the circumstances of any major accidents in which they have been involved. It is suggested that operators and owners of non-production installations should also consider the applicability of EU policy documents to non-EU operations.

Implementation by Member States

Once in force, Member States will have two years in which to adopt the required provisions of the Directive into national laws and for existing installations the transposition period will be 5 years. Member States with "offshore waters that have no offshore oil and gas operations under their jurisdiction, and landlocked countries with companies registered in their territories" will be required to transpose only limited parts of the Directive.

Comment

The fact that the underlying political agreement has proceeded by way of a Directive, rather than a Regulation (which would have seen EU-wide rules being directly imposed on all Member States), affords valuable flexibility and discretion to Member States as to how they implement its terms. This is an important point for the UK and means that the underlying safety regime, which is now well-developed, can remain in place.

A number of aspects within the Directive relate to standards and risks already regulated under UK domestic laws. Indeed Günther Oettinger, EU Commissioner for Energy, recognised that: "*these rules will make sure that the highest safety standards already mostly in place in some Member States will be followed at every oil and gas platform across Europe*". At the same time however, it is anticipated that some provisions – e.g. major hazard reports, independence of competent authorities and the extension of environmental liability to licensees – will, as highlighted above, necessitate amendments at a UK level.

The full text of the Directive can be accessed at:
http://register.consilium.europa.eu/pdf/en/13/pe00/pe00008.en13.pdf

HSE to integrate its Offshore Safety Division

Earlier this year the Health and Safety Executive ('HSE') announced plans to integrate its Offshore Safety Division ('OSD') within a new, broader "Energy Division". The announcement appears to have come as a surprise to both industry and trade unions, particularly given the upcoming 25th Anniversary of the Piper Alpha tragedy.

Robert Paterson, Oil & Gas UK's health and safety director, has been reported stating that "there has been both surprise and concern expressed widely across the industry about the organisational changes planned for the OSD". The industry body is also said to be considering what effect the practicalities of this change will have on the offshore oil and gas industry.

RMT – the National Union of Rail, Maritime and Transport Workers – has similarly publicised its concerns over the restructuring exercise. RMT General Secretary Bob Crow said: "*We fail to see how these changes will improve the efficiency of the regulator in a sector where new technologies are being developed and where there is significant investment forecast for the next decade and more*." Further stating, "*In a goal setting industry where the objective is 'continuous improvement' there has to be a robust regulatory regime and a regulator able to apply strong influence in achieving that objective. Diluting that effort by stretching an already under resourced department cannot hope to deliver the aims of Lord Cullen all those years ago*."

HSE Deputy Chief Executive Kevin Myers responded to concerns, stating that the "*HSE's reorganisation of its major hazard directorate through the creation of an Energy Division will not weaken offshore regulation. On the contrary, HSE has been, and will remain, committed to strengthening it.*" He went on to note that 75% of the Energy Division's staff will work on offshore safety; and that they remained committed to strengthening regulation and making the North Sea a safer place to work.

The public enquiry into Piper Alpha, chaired by Lord Cullen, laid down 106 recommendations. A key part of his proposals was for a single regulatory body to govern health and safety offshore: leading to the establishment of the OSD within the HSE. Since then, the OSD has been specifically devoted to regulating health and safety risks in the offshore oil and gas industry within the UK Continental Shelf.

Contractor liability for US Offshore Health, Safety and Environmental law

The US government agency, the Bureau of Safety and Environmental Enforcement ('BSEE') is increasingly taking action against offshore contractors as well as operators, for breaches of health, safety and environmental law, in a move that mirrors the approach taken by regulators in the UK.

In August 2012, the BSEE published an interim policy document setting out guidance on the issuance of "Incidents of Noncompliance" ('INCs') to contractors. INCs are enforcement notices and depending on the severity of a breach, take the form of a "Warning INC" or a "Shut-in INC". The BSEE policy states that "*while the primary focus of BSEE's enforcement actions will continue to be on lessees and operators, BSEE will in appropriate circumstances, issue INCs to contractors for serious violations... in instances in which INCs are issued to a contractor, INCs will also be issued to the lessee or operator*". In March 2013, reports indicated that six INCs had been issued on offshore contractors in the Gulf of Mexico in relation to oil and gas operations.

In the UK, the statutory framework for health & safety law has already provided for potential liability for offshore safety to extend to "every organisation". The more "control" over the activities that an organisation has, the greater the risk of the HSE taking action against that entity. Historically, the HSE has tended to look specifically at an operator or licensee, however if evidence points to any other entity having breached its legislative duties and creating an exposure to risk, then the possibility of prosecution of those other entities exists.

In 2011 changes to the Offshore Petroleum Activities (Oil Pollution Prevention and Control) (Amendment) Regulations 2011 and the Offshore Chemicals (Amendment) Regulations 2011 extended the scope of environmental liability. Prior to the 2011 changes, offshore environmental laws focused heavily on the operator or licensee, however the amended regulations provide the regulator (DECC) with wide powers to investigate all incidents and if required take enforcement action against "any person", depending on the circumstances. As such, action may be taken by DECC not just against a permit holder but any third party contractor.

Liability for criminal fines incurred under health, safety and environmental legislation may not be insured, indemnified or otherwise transferred under the provision of a contract; no valid indemnity agreement can be reached with any other third party. As such, a tendency to direct enforcement action at parties other than the operator will have a significant impact on the industry.

With increasing scrutiny of offshore activities, further changes are anticipated.

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
- Communications
- Energy
- Global Health and Safety Advice
- 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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