Welcome to Pinsent Masons’ Health & Safety team bulletin. This month’s headlines are as follows:

- Sentencing Council’s draft guideline encourages early guilty plea
- Health, Safety and Brexit
- EU fitness for purpose consultation focuses on health and safety in the construction sector
- Company forced to publicise safety failings in trade press
- HSE strategy – an update
- Construction (Design and Manufacture) Regulations (Northern Ireland) 2016
- DSHAR consultation outcome
- The Criminal Justice Act 2003 (Surcharge) (Amendment) Order 2016

We are also summarising:

- Corporate Manslaughter Prosecutions
- Recent enforcement activity

Sentencing Council’s draft guideline encourages early guilty plea

With the new Definitive Guideline for sentencing in health and safety, corporate manslaughter and food safety and food hygiene offences barely two weeks old, the Sentencing Council launched (on 11 February 2016) a further consultation in England and Wales this time on its proposed guideline for reduction in sentence for a guilty plea (“the draft guideline”). Research into sentencing and the use of the previous guideline, produced in 2007, suggests that it is not always applied consistently and that levels of reduction in some cases appear to be higher than those recommended. The draft guideline introduces stricter guidance for courts when they sentence offenders who have admitted their guilt. It aims to

- set out ‘a clearer, fairer and more consistent approach to managing guilty pleas that will incentivise offenders to admit their guilt as early as possible in the court process’
- speed up the system and improve its efficiency, enabling police, prosecutors and courts to focus their resources on other cases.

Whilst the draft guideline recognises an accused’s right not to admit the offence and to put the prosecution to proof of its case, it points to the clear benefits of a guilty plea not only to victims and witnesses but also on public time and money; the earlier the plea is made, the greater the benefits. In order to maximise these benefits and to provide an incentive to those who are guilty to indicate a guilty plea as early as possible, the draft guideline makes a clear distinction between a reduction in the sentence available at the first stage of the proceedings and a reduction in the sentence available at a later stage of the proceedings. It also provides that the level of reduction should not take into account the strength of the prosecution case.

The approach set out in the draft guideline is unchanged from that currently in use:

**Stage 1:** Determine the appropriate sentence for the offence(s) in accordance with any offence specific sentencing guideline.

**Stage 2:** Determine the level of reduction for a guilty plea in accordance with this guideline.

**Stage 3:** State the amount of that reduction.

**Stage 4:** Apply the reduction to the appropriate sentence.

**Stage 5:** Follow any further steps in the offence specific guideline to determine the final sentence.

Briefly, the draft guideline provides that:

- where a plea is indicated at the “first stage” of proceedings a maximum reduction of one third should normally be allowed. The first stage is the point at which the charge is put to the offender in court and a plea (or indication of plea) is sought. This marks a tightening of the current, more subjective, ‘first reasonable opportunity’
- if a guilty plea is entered thereafter, the maximum reduction which can be given is normally one fifth – under the current guideline it is one quarter
- the time period when that (one fifth) reduction is available has also been restricted. In magistrates’ courts it is available only up to 14 days after the first hearing. In the Crown Court it is available only at the first hearing for either way offences; and for indictable only offences until 28 days after the prosecution serves disclosure
- the reduction should be decreased from one-fifth to a maximum of one-tenth on the first day of trial proportionate to the time when the guilty plea is first indicated relative to the progress of the case and the trial date; the reduction may be decreased further, even to zero, if the guilty plea is entered during the course of the trial. A trial will be deemed to have started when pre-recorded cross-examination has taken place.

Exceptions to the general rules are provided for where there are special circumstances, for example where the offender is convicted of a lesser or different offence or for exceptionally time consuming or complex cases before the Crown Court. There are slight variations too for offenders under 18 years.

The draft guideline will apply to all offences in the Crown Court, magistrates’ courts and youth courts. It applies to individual offenders and to organisations and provides ‘a clear incentive for offenders to co-operate as early in the process as possible’. Clearly, it could have profound consequences for those accused of regulatory offences, particularly in light of the increasing fines being handed down on conviction for such offences.

The Sentencing Council’s consultation is open until 5 May 2016.
Health, Safety and Brexit

Bookmakers are offering odds strongly in favour of a vote for the UK to remain in the European Union on 23 June. Pollsters show a neck-and-neck race. The two sides, and the media, offer us competing visions of doom and delight should the UK vote to leave the EU. But what effect, if any, would a Brexit decision have on health and safety law in the UK?

There is a long tradition of health and safety regulation in the UK, dating as far back as the 19th century with the passing of the Factories Act in 1833 and even before that the Health and Morals of Apprentices Act. The foundation of the current health and safety regulatory system was established by the Health and Safety at Work Act (‘HSWA’) 1974. The legislation has at its heart a simple but enduring principle – those who create risks are best placed to control them. The system has stood the test of time and the UK has one of the best combined health and safety records in Europe and the world.

So having helped to set the European benchmark for workplace safety and health, would our Parliamentarians necessarily seek to significantly alter the status quo in the event of a vote for Brexit?

One of the fundamental arguments that ‘Leave’ supporters frequently advocate for backing a Brexit is the perceived sacrifice of national sovereignty that EU membership entails, leading, they say, to the imposition of overly burdensome regulations on UK businesses, and in particular on SMEs, which, it is said, ‘stifles competition’. The UK health and safety regime is currently made up of a combination of law that derives wholly from the UK – most notably the HSWA 1974 and the Corporate Manslaughter and Corporate Homicide Act 2007 – as well as laws made under EU directives. A directive is a legal act provided for in the EU Treaty. Directives are binding in their entirety and member states are obliged to transpose them into national law within a set deadline. In safety and health related matters, these directives are negotiated by the Health and Safety Executive on behalf of the British government, and incorporated into UK law often in the form of secondary legislation to the HSWA 1974.

Since achieving membership of the EU, a series of individual directives focusing on specific aspects of safety and health at work have been issued at the European level and transposed into UK law. For example, a key element of European occupational safety and health legislation is the Framework Directive, primarily implemented in the UK by the Management of Health and Safety at Work Regulations 1999. It establishes broadly based obligations for employers to identify, evaluate, avoid and reduce workplace risks. The UK, however, is generally seen as the ‘gold standard’ in health and safety matters (witess the minimal impact of the imposition of the Offshore Safety Directive), with the HSE generally agreed to be an effective regulator, whose expertise is sought overseas. Whilst the government here is committed to reducing regulation via its ‘Red tape challenge’, the ongoing ‘Regulatory Fitness and Performance Programme’ in Europe is reviewing whether regulation can be removed or consolidated there too, with its stated aim to make ‘EU law simpler and to reduce regulatory costs, thus contributing to a clear, stable and predictable regulatory framework supporting growth and jobs’.

In the event of a vote to leave, the UK would have to give at least two years’ notice of its intention to withdraw, in accordance with Article 50 of the Treaty of the EU. During that time, existing health and safety legislation derived from Europe would continue to apply. The UK government would also need to decide what form of relationship to seek with the EU. Options available to the UK include seeking to rejoin the European Free Trade Association (EFTA) (it left to become a member of the EEC) and becoming part of the European Economic Area (EEA) as a non-EU member state, like Norway, Iceland and Liechtenstein - this would be close to ‘business as usual’ - and seeking to rejoin the EFTA but without joining the EEA, like Switzerland, instead negotiating a series of bilateral agreements with the EU. This route could provide certain trading benefits but it would still entail compliance with many social and employment laws, which would be enforced by the EFTA Court.

Outside of the European trade structures, the UK would be free to regulate or deregulate as it sees fit; however, the impact on health and safety related legislation is likely to be limited due to political and social realities.

For comparative purposes only, it is interesting to note that Norway’s health and safety legislation, like that of the EU member states, accords with the Framework Directive. Conversely, Switzerland’s legislative framework for safety and health is not based on EU legislation, as the country is not obliged to adopt EU laws. However, it does largely comply with EU standards, albeit with some differences, such as the non-reporting of occupational accidents.

In addition to possible legislative changes, it is also worth noting that the rulings of the Court of Justice of the EU (CJEU) would no longer be binding in the UK in the event of Brexit. At present, the UK courts must interpret EU-derived legislation in accordance with CJEU rulings. It is arguable that the decisions of the European court would remain influential, in part due to the fact that the UK courts would likely find its rulings persuasive in respect of any EU-derived legislation that is retained.

As with any consideration of the possible consequences of fundamental political change, uncertainty is one of the few certainties to initially materialise and the effect of a possible Brexit from the EU on the UK health and safety regime is no exception. In the short-term, it is unlikely that UK health and safety law would be subject to drastic change in the event that a decision is taken to part ways with the EU, especially if the country was to remain in EFTA and the EEA. However, in the longer term disengagement from the EU could well involve a process of determining which primary and secondary health and safety legislation remains socially or economically useful to the UK, potentially leading to changes to some regulations and the stripping away of others.

In the face of such uncertainty, Pinsent Masons LLP has organised a cross-disciplinary EU Referendum Task Force to advise businesses and individuals on the possible effects a vote to leave the EU Brexit could have on them.

EU fitness for purpose consultation focuses on health and safety in the construction sector

As part of its ongoing Regulatory Fitness and Performance Programme (see above) (known as REFIT) the European Commission has launched a public consultation to gather the experience, views and opinions of interested stakeholders and the public on the impact of certain pieces of current EU legislation on the construction sector.
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Launched on 29 March 2016 the consultation is split into two main sections each asking questions on a group of EU legal acts; the first looks at the internal market and energy efficiency and is then followed by questions relating to the environment and health and safety. From a health and safety perspective, the consultation looks, in particular, at the impact of:

- the Occupational Safety and Health Framework Directive – primarily implemented in Britain via the Management of Health and Safety at Work Regulations 1999
- the Temporary or Mobile Construction Sites Directive – primarily implemented via the CDM Regulations.

Questions are also asked on the impact of:

- the Asbestos Directive and
- the Construction Products Regulation.

The consultation closes on 20 June 2016 after which the results will feed into the Fitness Check for the Construction Sector undertaken by the Commission which is expected to be completed by the end of 2016. The Fitness Check involves a ‘comprehensive, evidence-based assessment of whether the current regulatory framework is proportionate and fit for purpose, and delivering as expected. Specifically, it assesses the relevance, effectiveness, efficiency, coherence and EU added value of the abovementioned legislative framework’.

Not all commentators are happy at the prospect of deregulation, however, with some voicing concern that much of the legislative reduction appears to be in labour/worker’s rights and environmental protections and is based, they say, on a perception of over regulation rather than firm evidence of it. They say that in determining whether a law is proportionate and fit for purpose, there is too much emphasis on economic cost and administrative burden rather than looking at wider social or environmental protections. It is true that the consultation examines the economic cost of compliance, but it also questions the benefits in terms of, for example, improved worker health and safety as a result. Neither can exist in a vacuum. Whatever the opposing views of REFIT, there is a place for it.

**Company forced to publicise safety failings in trade press**

Throughout December last year, the Construction Enquirer ran an advertisement publicising the conviction of Linley Developments Limited for safety failings which led to the death of an employee. The company was convicted in September 2015 (following a guilty plea), along with a director and project manager, and was fined £200,000 and ordered to take out the advertisement. The director and project manager each received a suspended prison sentence. The significance of the case lies in the fact that it appears to be the first time such an advertisement has been ordered to be placed in trade press. Previously, advertisement in local press or the offender’s own website has sufficed. The Construction Enquirer is widely read in trade circles and the terms of the advertisement pulled no punches:

‘Linley Developments Ltd was convicted on 7 September 2015 of corporate manslaughter arising out of the death of Gareth Jones, a subcontracted employee, at a development in St Albans on 30 January 2013.

Linley Developments Ltd admitted acting in a gross breach of their duty by failing to take sufficient care for his safety. Failings included failing to prepare a risk assessment for the excavation works, failing to assess and monitor the stability of the wall and failing to ensure that the wall did not become unstable as a result of the excavation work’.

At a time when much of the focus is on the level of fines imposed for health and safety breaches, this case provides a timely reminder that the possibility of a hefty fine is not the only cause for concern for those who commit such offences. A publicity order may well hit harder and its pain linger longer.

**HSE strategy – an update**

We have reported before on publication of the six key themes the Health and Safety Executive’s (“HSE”) strategy for the next 5 years will cover. Since that publication, HSE have been speaking to a range of business leaders and key influencers to discuss the development of their new plans for workplace health and at the end of February it launched its new Helping Great Britain work well strategy document.

The document reiterates the six key themes previously identified:

- acting together
- tackling ill health
- managing risk well
- supporting small employers
- keeping pace with change

and confirms that the overall aim is to ‘to keep building a 21st-century, world-class occupational health and safety system that will help Great Britain work well’.

The document remains at this stage merely a statement of strategy, with no real plan for implementation except to say that ‘this is about being smarter - not simply doing more...’, but it gives an indication of where the HSE’s priorities will lie and importantly where its resources will be directed. Plans must now be drawn up by HSE and stakeholders to enable delivery.

**Construction (Design and Manufacture) Regulations (Northern Ireland) 2016**

On 11th March 2016, the Department of Enterprise, Trade and Investment in Northern Ireland made the Statutory Rule entitled the Construction (Design and Management) Regulations (Northern Ireland) 2016 (‘CDM(NI) 2016’). CDM(NI) 2016 will replace the Construction (Design and Management) Regulations (Northern Ireland) 2007 (‘CDM(NI) 2007’) and will take effect on 1 August 2016. CDM(NI) 2016 brings Northern Ireland in line with Great Britain, where the equivalent legislation, the Construction Design and Management) Regulations 2015 (‘CDM 2015’), came into force on 6 April 2015.

We have produced a series of ‘At a glance’ guides for contractors, designers and clients but, briefly, the key changes introduced by CDM(NI) 2016 include:

- replacement of the CDM coordinator with the principal designer
- greater responsibilities on clients – CDM(NI) 2016 makes the client…

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accountable for the impact their decisions and approach have on health, safety and welfare on the project

- domestic clients are no longer exempt from the requirements of CDM(NI) 2016, although the domestic client’s duties can be transferred to other duty holders
- removal of the explicit requirement for individual and corporate competence and replacement with a general requirement for those appointing others to take reasonable steps to satisfy themselves that the appointee has the skill, knowledge and experience and, if the appointee is an organisation, the organisational capability, necessary to fulfil the role appointed to undertake. There is also an obligation on the appointee not to accept such an appointment unless they are able to fulfil these conditions. CDM guidance, produced in relation to CDM 2015 but adopted for use in Northern Ireland, states that what will amount to ‘reasonable steps’ will depend on the complexity of the project and the range and nature of the risks involved but that:

“a designer or contractor should be capable of understanding how to:

a) identify the significant risks likely to arise during either the design process or construction work; and
b) prevent those risks or manage or control them to acceptable levels...

Organisational capability is effectively the policies and systems that an organisation has in place to set acceptable health and safety standards which comply with the law, and the resources and people to ensure the standards are delivered.”

The CDM guidance makes specific reference to the questions incorporated in Publicly Available Specification 91, 2013: Construction related procurement - Prequalification Questionnaires (PAS 91)3 as being ‘a useful aid’ when considering competence, whilst the industry guidance also suggests the Safety Schemes in Procurement (SSIP) member-assessed scheme could be used. Both, however, are only examples of the way in which competence can be assessed and it remains the responsibility of those appointing others to show that they have taken ‘reasonable steps’ to satisfy themselves that their appointee is competent.

The CDM guidance also makes it clear that whilst designers and contractors (including individuals and sole traders) must be able to demonstrate they have the necessary skills, knowledge and experience and (where appropriate) organisational capability to carry out the work and may use the services of an independent (third party) assessor to demonstrate this, there is no legal requirement to use a third party service.

- the client’s duty to appoint a principal designer and a principal contractor is triggered where there is more than one contractor (or it is reasonably anticipated there will be more than one at any time) rather than the previous threshold (for principal contractors - 30 days or 500 person days). If the required appointments are not made the client must fulfil the duties of the principal designer/contractor himself, except in the case of domestic clients where the role of principal designer/contractor is deemed to be taken by the first designer/contractor appointed in the preconstruction and construction phases respectively
- a stand alone duty to notify projects lasting longer than 30 working days and on which more than 20 workers are working simultaneously or exceeding 500 person days. The requirements of CDM(NI) 2016 apply regardless of whether the project is notifiable.

Transitional provisions are provided in CDM(NI) 2016. Briefly:

- for on-going projects where the CDM coordinator has already been appointed, a principal designer must be appointed to replace the CDM coordinator by 1 August 2017, unless the project comes to an end before then
- in the period it takes to appoint the principal designer, the appointed CDM coordinator should comply with the duties contained in Schedule 5 in CDM(NI) 2016. These duties reflect the existing requirements under CDM(NI) 2007 for the CDM coordinator rather than requiring CDM coordinators to act as principal designers, a role for which they may not be equipped.

Organisations and individuals involved in construction projects must ensure that they are fully prepared for the implementation of the new rules. The regulations implement some of the requirements of the EU’s Temporary or Mobile Construction Sites Directive, and stipulate minimum standards of health, safety and welfare provisions during the construction phase of a project. Failure to comply with them may result in both criminal and civil sanction.

**DSHAR consultation outcome**

We reported last time on the HSE consultation on proposals to replace the Dangerous Substances in Harbour Areas Regulations 1987 (and its associated ACOP and guidance) (‘the 1987 Regulations and guidance’). That consultation has now ended and its outcome was presented at the HSE board meeting on 9 March 2016. Readers will recall that the proposal is part of the UK government’s Red Tape Challenge to streamline and modernise regulation, whilst retaining current levels of protection and aimed to replace the 1987 Regulations with new, simpler versions, more relevant to today’s society.

It was reported that respondents have been largely supportive of the proposals, although a few raised some concerns:

- respondents disagreed with the proposal that there was now no need for red flags/lights on vessels carrying certain quantities of dangerous substances, citing the potential increased risk in harbours where necessary alternative technology was not available. Consequently the use of red flags/lights will remain
- the proposed new exemption for dangerous goods brought onto a harbour from inland and not loaded onto a vessel as cargo has also been dropped amid concerns that it could pose problems for explosives licensing. The new regulations and associated guidance will be reworded, however, to make it clear that fireworks displays on barges will normally be exempt from explosive licensing requirements.

Final regulations will now be drafted and it is expected will come into force, together with a new Approved Code of Practice, on 1 October 2016.

**The Criminal Justice Act 2003 (Surcharge) (Amendment) Order 2016**

Not only are organisations and individuals convicted of regulatory offences facing ever increasing fines as we have described before, but they are also...
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now set to be liable for increased amounts in victim surcharge. The Criminal Justice Act 2003 requires a court in England and Wales, when dealing with a person (individual or organisation) convicted of one or more offences, to order the person to pay a victim surcharge. From 8th April 2016, those rates will increase (in respect of offences committed after that date). Whilst the amount of the surcharge may seem small in comparison to the hefty fines being meted out by the courts (the surcharge payable by an organisation for a fine, for example, is 10% of the value of the fine, with the minimum amount increased to £30 and the maximum to £170), it is yet another sum to be taken into consideration in counting the cost of non compliance.

Corporate Manslaughter prosecutions

Baldwins Crane Hire Limited – convicted after trial of corporate manslaughter and health and safety offences and fined £700,000 following the death of one of their employees in 2011. Mr Easton died when the crane he was driving crashed on a steep bend. The crash was caused by failures in the crane’s braking system which had not been properly maintained by the company. The company was also ordered to pay the full CPS costs plus part of the HSE’s costs.

Sherwood Rise Limited – admitted corporate manslaughter following the death of Mrs Ivy Atkin as a result of neglect whilst resident in a care home operated by the company. This is the first conviction of a care home for corporate manslaughter. The company was fined £300,000. One of its directors was also convicted of gross negligence manslaughter and sentenced to three years and two months in prison. One of the company’s managers was convicted of health and safety offences and sentenced to one year in prison suspended for two years.

This was also the first case to be sentenced under the new Definitive Guideline for health and safety, corporate manslaughter and food safety and food hygiene offences. Although the company no longer trades it was classed as a micro company in terms of the Definitive Guideline (turnover up to £2million) with the seriousness of the neglect resulting in it falling within offence category A.

Maidstone and Tunbridge Wells NHS Trust – we reported previously on corporate manslaughter charges faced by the Trust after young woman died of a heart attack following a caesarean section – the first prosecution of a health service body. The case against the Trust and one of its doctors (who was accused of gross negligence manslaughter) was dismissed after the judge ruled neither had a case to answer after hearing prosecution evidence. Another doctor fled to Pakistan after the incident.

Recent enforcement activity

PV Solar UK Limited – 21 March 2016 – fined £153,000 after a worker was seriously injured in a fall through a roof light at a private home in Kent. An HSE investigation established that a scaffold tower, ladder and safety harness had been provided for the panel replacement work being carried out by the victim but that none of the installation team had received any formal training or instruction on how to use them. This effectively rendered the equipment useless. Other measures could also have been taken, such as providing full scaffolding or hard covers for the rooflights.

Falcon Crane Hire Limited – 15 March 2016 – fined £750,000 and ordered to pay costs of £100,000 after health and safety failings led to the death of two men when a crane collapsed. An HSE investigation following the incident found that the company had an inadequate system to manage the inspection and maintenance of its cranes and that their process to investigate the underlying cause of components’ failings was also inadequate.

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