

H&S Spring Seminar Series 2022

March 2022



- Building Safety Bill
 - Rob Biddlecombe
- Health and safety duties and working from home
 - Rob Biddlecombe
- The HSE's Business Plan 2021/22
 - Gary Lewis
- Future Protect Duty
 - Beth Thompson
- Sentencing update
 - Gary Lewis



Building Safety Bill

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- Part 1 – Overview
 - Part 2 – Building Safety Regulator
 - Part 3 – Amendments to Building Act 1984 (including the design and construction of Higher-Risk Buildings)
 - Part 4 – Occupation of Higher-Risk Buildings
 - Parts 5 and 6 – Supplementary and General

- A division of the HSE operating in shadow form since Jan 2020.
- Role:
 - Regulation of higher-risk buildings.
 - Duty to keep safety and building standards under review.
 - Provide assistance and encouragement to improve competence in the building industry.
 - Power to recommend that the SoS introduce regulations.
- Enforcement powers:
 - Power to prosecute for breaches under Building Act 1984 – time limits relaxed.
 - Power to serve compliance or stop notices.
 - Power of entry to investigate suspected breaches.
 - Power to recover fees from regulated parties.

- “Higher-Risk Building” defined (for purposes of design and construction) as a building in England that:
 - is at least 18m in height or has at least 7 storeys; and
 - contains at least two residential units or is care home or hospital.
- Part 3 sets out a framework for the introduction of regulations. Two important sets of draft regulations:
 - The Building (Appointment of Persons, Industry Competence and Dutyholders) (England) Regulations (“Dutyholder Regulations”); and
 - The Building (Higher-Risk Buildings) (England) Regulations (“Higher-Risk Buildings Regulations”).

- Apply to all buildings not just Higher-Risk Buildings
- Mirror CDM Regulations:
 - Roles (Client, Contractor/PC and Designer/PD).
 - Competency requirements (duties on persons appointing, persons being appointed, and persons ceasing to be competent).
- However:
 - Overriding principle is not that work is carried out safely, but that the building is safe and complies with the Building Regs; and
 - Duties of client, PC and PD are not qualified by what is “reasonably practicable” – absolute to ensure compliance.

- “Golden Thread” of information.
- Gateway 1
 - At planning stage.
 - Outside of these regulations – introduced 1 August 2021.
- Gateway 2
 - Before construction work starts on a Higher-Risk Building, client must gather and submit information to BSR, including:
 - declarations as to the competence of contractor (or PC) and designer (or PD);
 - a construction control plan setting out how dutyholders will comply with their duties under the Dutyholder Regulations;
 - a design and build approach document setting out approach taken in designing the Higher-Risk Building and building standards to be applied; and
 - a fire and emergency file setting out the proposals adopted in design to ensure compliance, and the measures, strategies and policies the building owner should adopt.
 - If satisfied, BSR will issue Gateway 2 approval and development may commence.

- Changes during development
 - All changes to design or construction control plan must be recorded, plus:
 - details of whether any professional advice was sought (and what the advice was); and
 - how the requirements of the Building Regs will be met.
 - Major changes will require prior consent from BSR (4 weeks to determine).
- Mandatory Occurrence Reporting System
 - Obligation on contractor/PC and designer/PD to:
 - ensure appropriate frequency of inspections of Higher-Risk Building for safety occurrences throughout the construction phase; and
 - report safety occurrences upon becoming aware of them.
 - Safety occurrence:
 - a design fault relating to the structural integrity or fire safety that is likely to present a risk of a significant number of deaths, or serious injury to a significant number of people; or
 - an incident or situation relating to the structural integrity or fire safety that is likely to present a risk of a significant number of deaths, or serious injury to a significant number of people.

- Gateway 3
 - At end of construction, application (signed by or on behalf of client) must be made for completion certificate.
 - Must include:
 - updated versions of the documents submitted at Gateway 2;
 - as-built drawings;
 - certificate (signed by or on behalf of the client) confirming that to the best of their knowledge the building, as built, complies with Building Regs;
 - declarations by contractor/PC and designer/PD that they have complied with their duties under the Dutyholder Regulations; and
 - A statement that the golden thread information has been passed on to the persons with appropriate responsibility under the occupation phase.

- Duties under of Responsible Person under Fire Safety Order continue.
- New duties relate to Higher-Risk Buildings – but definition is different compared to design and construction phase:
 - at least 18 metres in height or has at least 7 storeys; and
 - contains at least 2 residential units.
- New role under BSB - Accountable Person
 - a person who holds a legal estate in possession in any part of the common parts (unless that person has let out any part of the building on a long lease and there is a person who does not hold a legal estate in any part of the building but who is under a repairing obligation in relation to any of the common parts); or
 - a person who does not hold a legal estate in any part of the building but who is under a repairing obligation in relation to any part of the common parts.
- If there is more than one Accountable Person for a building, there will be a Principal Accountable Person (the person with responsibility for the structure and exterior).

- Duties of AP/PAP include:
 - Registering the building with the BSR before building is occupied.
 - Assessing the building safety risks (i.e. risk to the safety of people in or about a building arising from the spread of fire, structural failure or any other prescribed matter) and use it to prepare safety case report.
 - Appointing a competent building safety manager.
 - Putting in place a resident engagement strategy.
 - Putting in place a mandatory occurrence reporting procedure.
 - Putting in place a complaints investigation procedure.
 - Apply to the BSR for building safety certificate if requested by BSR to do so.
 - Application would include most recent safety case report, and evidence that a building safety manager has been appointed, engagement strategy, etc.
 - Certificate may include conditions.
 - Certificate must be displayed in a conspicuous position in the building.
 - Pass on information on change of AP/PAP.

- Offences
 - Occupying building without completion certificate.
 - Failure to register building, appoint building safety manager, submit mandatory occurrence report, etc.
 - Breach of any requirement under Part 4 which may give rise to risk of death or serious injury.
- Enforcement Options
 - Prosecution (max. penalty - two years imprisonment and/or unlimited fine).
 - Compliance notice.
 - Placing building in special measures.
 - Conditions within building safety certificate.
 - Actions against residents who create a significant risk of a building safety risk materialising.

- Amending Landlord and Tenant Act 1985
 - Limited protection for leaseholders from landlords charging cost of remediation works through service charge (e.g. take reasonable steps to see whether there is alternative grant or third party funding).
- Amending Fire Safety Order
 - All FRAs must be recorded (e.g. no requirement for 5 or more employees).
 - Anyone assisting RP must be competent.
- Powers to regulate construction products marketed in the UK, allowing them to be withdrawn from the market if they present a risk.

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- BSB expected to become law in April 2022.
 - Secondary legislation expected to be introduced within 18 months thereafter.
 - New regime expected to have taken effect by early 2024.
 - In general, the BSR applies England only, but rest of UK introducing or considering measures to improve building safety.



Homeworking/Hybrid Working

- Health and safety duties still apply to people working from home:
 - Sections 2 and 7 HSWA
 - Regulations 3 and 5 Management Regulations
- Risk assessment
 - Environment/light/heating/ventilation.
 - Electricity/PAT.
 - Slips, trips and falls.
 - Mental health/lone working.
 - Monitoring and review.
- Domestic violence?

- Musculoskeletal disorders are a priority for the HSE.
- HSE's position:
 - DSE regulations don't apply to workers who use DSE occasionally or only for short periods of time at home.
 - In most cases, employees may complete a self-assessment provided they have been given suitable training (e.g. by explaining how to use an ergonomic checklist or self-assessment tool).
 - Reduce the risks identified by assessment so far as reasonably practicable (i.e. balance the level of risk against the measures needed to control the real risk in terms of money, time or trouble).
- Range of solutions:
 - Transporting furniture.
 - Employee allowance.
 - Low-cost furniture.
 - Creative solutions.

Meanwhile, back at the office...

- Adequate supervision?
- Maintenance staff?
- Fire marshals?
- First aiders?
- Lone working?

The HSE Business Plan 2021/22

Introduction to the Plan:

"We are facing the biggest global health challenge of our generation and HSE is playing its part in reducing the risks of COVID-19 in the workplace. Our purpose to prevent work-related death, injury and ill health is more valid than ever."

HSE say:

- They played a critical role in the national response by helping to reduce the level of transmission as well as supporting the country's economic recovery as restrictions were eased
- 160,000 interventions to check businesses compliance with COVID-19 control measures
- 10.5 million webpage views of COVID specific guidance
- Which has an 'impressive' 78% usefulness rating
- Secured additional £14m funding for 2021/22 to enable HSE to undertake further compliance spot checks

The challenge vs How HSE are tackling it

The challenge



Ensuring workplaces are COVID-secure



13,000
Occupational disease deaths each year linked to past exposures at work



1.6 million
Workers suffering from work-related illness



111
People killed at work



65,427
Employee non-fatal injuries reported



38.8 million
Working days lost



£16.2 billion
Cost to Britain

How we are tackling it



169,488
COVID-19 compliance spot checks*



9.5 million+
COVID guidance: webpage views with a 78% user satisfaction rating*



6263
Investigations



2754
Enforcement notices issued



178
Prosecution cases heard



95%
Success rate for convictions



90%
Dutyholders who took action following inspection



854
Major hazard sites contacted or visited



259
Biocide applications evaluated



986
Pesticide applications evaluated



12,973
Concerns about workplaces followed up or investigated

Our mission:

- Prevention of death, injury and ill health to those at work and those affected by work activities

Our objectives:

- Lead and engage with others to improve workplace safety
- Provide an effective regulatory framework
- Secure effective management and control of risk
- Reduce the likelihood of low-frequency high-impact catastrophic incidents

Health and work strategy will continue to focus on **three major causes of work-related ill health**:

1. Musculoskeletal disorders (MSDs) - MSDs are the second most common reported cause of work-related ill health (30% of all cases)
2. Occupational lung disease (OLD) - Estimated to result in 12,000 deaths each year. Hence targeting reducing the risk of lung disease in metal working
3. Work-related stress (WRS) - Stress, depression or anxiety is the most commonly reported cause of work-related ill health (51% of all cases)

Undertake a planned programme of proactive interventions, with specific emphasis on:

- Control of carcinogens and asthmagens specifically associated with welding fumes, flame cutting, paint handling processes and metalworking fluids
- Manufacturing risks - combined with consideration of reduction of accident and injury risks in the workplace by comparing new manufacturing technology against traditional manufacturing processes via the Advanced Manufacturing Forum (AMF)
- Healthcare - focusing on violence, aggression and manual handling
- Agriculture - continues to have a high rate of workplace fatalities
- Construction - prevention and control of occupational lung disease (especially asbestos and dust) and MSDs. Asbestos-related disease kills around 5,000 people per year. Allied to this a programme of inspections to ensure compliance with the Control of Asbestos at Work Regulations
- Fixed and travelling fairgrounds - emphasis on standards of inspection and maintenance

How will time be spent by reference to the targeted interventions

objective:

- 80% of time will be spent on fatal investigations, non-fatal investigations, prosecutions, concerns and training a large cohort of new inspectors
- Remaining 20% will be allocated to carrying out around 14,000 inspections (maintaining the same number as 2020/21). This will include inspections under the targeted intervention objective (Slide 6)

Investigate swiftly to tackle and reduce risks, securing accountability for victims and families

- Complete 80% of fatal investigations within 12 months of primacy
- Complete 90% of non-fatal investigations within 12 months

Establish the **Building Safety Regulator (BSR)** within HSE

- Enough said already!

Chemicals, product safety and explosives

- Initiate a programme of work to develop full operating capability, enabling HSE to deliver effective and efficient regulatory services for chemicals, product safety and explosives
- Deliver the functions of the UK's REACH Agency following its establishment on 1 January 2021

Transition to a carbon-neutral economy

- Review the regulatory framework as it applies to current and future **net zero activity** - Identifying policy, regulatory, operational and evidential steps needed to *support the innovation and development of new technology during the transition to net zero*

Reduce the likelihood of low-frequency, high-impact catastrophic incidents

- Plan to deliver around 650 major hazard interventions
- Continued assessment of safety cases and reports
- Create a targeted intervention plan focused on process safety and leadership principles
- Raise focus on cyber security to ensure appropriate protection against major incidents

The financials:

- Planned expenditure - £327m
 - £81m recovered through cost recovery and commercial income
 - £246m funded by taxpayer
- *Costs recovered from regulatory work will increase in future in line with recommendations made in the Regulatory Futures Review*

Future Protect Duty



1. Context – UK terrorist targets and threat level
2. Protect Duty / Martyn's Law
3. Consultation and findings
4. Next steps and how to prepare



UK terrorist attack targets



2017

London Bridge & Borough Markets



2017

Finsbury Park Mosque



2017

Westminster Bridge



2017

Manchester Arena



2017

Parsons Green tube station



2019

Fishmongers' Hall



2021

Liverpool Hospital



2021

Belfairs Methodist Church Hall

- Substantial or above since first published in 2006
- 800 live CT investigations
- 31 late-stage UK terror plots foiled in last 4 years

5 THREAT LEVELS

CRITICAL

An attack is highly likely in the near future

SEVERE

An attack is highly likely

SUBSTANTIAL

An attack is likely

MODERATE

An attack is possible, but not likely

LOW

An attack is highly unlikely

- Current position
 - Police and security services
 - No legislative requirement for organisations – voluntary
- Proposed duty
 - (1) Public spaces to have access to and engage with freely available CT advice and training
 - (2) Organisations to conduct terrorism vulnerability assessments of operating places and spaces
 - (3) Organisations to carry out actions to mitigate risks identified in a vulnerability assessment
 - (4) Organisations to have CT plan in place
 - (5) Local authorities to plan for the threat of terrorism

What is the Protect Duty?

A legal requirement for owners and operators of public places to be prepared for **terrorist attacks.**

Protect Duty consultation/findings

- Consultation in February-July 2021
- “Response” in January 2022
- 2,700 responses
- Consulting and seeking views of private and public sector partners
- 4 key areas
 - (1) Who or where should the legislation apply to?
 - (2) What should the requirements of the legislation be?
 - (3) How should compliance work?
 - (4) How should government best support and work with partners?



Who or where should the legislation apply to?

- (1) Public venues
 - E.g. entertainment/sports venues, tourist attractions, shopping centres
 - 100+ capacity
- (2) Large organisations
 - E.g. retail/entertainment chains that operate at PALs
 - 250+ staff
- (3) Public spaces
 - E.g. parks, beaches, thoroughfares,
 - bridges, pedestrianised areas



What should the requirements of the legislation be?

- Clear roles and responsibilities
- Risk assessments
- Liaison with Police
- Collaboration
- Adopting security behaviours
- Staff training
- Guidance products
- Legislative guidance



How should compliance work?

- Inspectorate regime
- Civil penalties (fines)



How should the government best support and work with partners?

- Information from CT Policing and CPNI
 - E.g. threat level, attack methodologies
- CTSA access
- Government training and advice products
- Risk assessment templates and guidance
- 'ProtectUK'

Challenges

- Scale of project
- Speed of approach
- Access and reliability of information
- Financial costs
- Proportionality



- Legislative
 - Civil service to advise Ministers
 - Draft Bill to present to Parliament
- Preparation for enforcement
 - Tracking legislative progress and guidance
 - Security systems
 - Risk assessments
 - Staff vigilance and training
 - Incident plans



Sentencing Update

- Causation in H&S prosecutions - *The Bosley Mill case*
- When does large become very large - *Places for People Homes*
- A bit of abuse - *Connors Building & Restoration*
- A bit of Coronial Law - Burden of proof for conclusion of suicide - *Maughan*
- Overview of top 10 large fines in the last year

For the vast majority of H&S offences, **causation is not a component of the offence.**

e.g. The general duties under Sections 2 & 3 HSWA + Subservient Regulations

Causation is a component of the sentencing exercise - The Sentencing Guideline:

- Where the offence is a significant cause of actual harm - the court must consider either moving up a harm category or substantially moving up within the category range.

In short where the offence is a significant cause of actual harm it warrants an upward adjustment to the level of fine

Contrast the position in manslaughter prosecutions:

- Corporate Manslaughter - offence committed by an organisation
- Gross Negligence Manslaughter - offence committed by an individual

Causation is a component of the offence

Corporate Manslaughter

Requires gross breach at senior management level of the organisation that **causes or contributes to the death**

- Does not need to be the sole or main cause, as long as it was an operating cause which made more than a minimal contribution to death

Gross Negligence Manslaughter

Requires gross breach of duty by individual defendant that **causes death**

- Does not have to be the only cause nor the principal cause of death but it must have more than minimally, negligibly or trivially caused death

Causation in H&S prosecutions

In manslaughter cases it is for the prosecution to prove causation

*R v Wood Treatment Limited & George Boden -
Court of Appeal 28 April 2021*

Causation proved to be a critical factor in the case of

R v Wood Treatment Limited & George Boden - Court of Appeal 28 April 2021

The prosecution arose out of an explosion at Bosley Mill in Cheshire on 17 July 2015, as a result of which four employees of Wood Treatment Limited died.

The Mill operated various processes by which it ground and milled wood into various grades of wood dust or wood flour.

Wood dust is an explosive substance in certain conditions and is defined as a "dangerous substance" under the Dangerous Substances and Explosive Atmospheres Regulations 2002 (**DSEAR**)

It was common ground that the explosion was caused by the ignition of a cloud wood dust in air.

The prosecution expert identified three components required to achieve combustion:

- 1. Fuel** - wood dust
- 2. Air** - to provide oxygen to oxidise the fuel
- 3. Ignition source**

The Defendants:

*Wood Treatment Limited (**WTL**) - the Company that owned and operated the Mill*

*George Boden (**GB**) - Managing Director of WTL*

The charges:

WTL - Corporate Manslaughter

- **Caused** the deaths of the four *WTL* employees because the way in which its activities were managed or organised at senior management level amounted to gross breach of duty of care owed to the deceased employees

GB - Gross Negligence Manslaughter

- **GB** unlawfully killed the four *WTL* employees

The prosecution case:

- Explosion of wood dust caused the deaths of the four *WTL* employees
- Experts instructed by prosecution and defence agree that wood dust was the **only** fuel present in sufficient quantities to cause the explosion
- The experts agreed upon a range of credible mechanisms for the explosion (**The four scenarios**)

The four scenarios:

1. A primary dust explosion within the process stirring up **previously settled dust** within the Mill, leading to a large secondary dust explosion
2. A failure of a piece of equipment or pipe releasing a cloud of dust within the Mill which found an ignition source leading to an explosion and stirring up **previously settled dust** within the Mill, leading to a large secondary dust explosion
3. A large release from a piece of equipment within the Mill leading to settled dust and an explosive cloud which was then ignited, levitating the settled dust from the release into the explosion without a separate secondary explosion
4. An explosive failure of the high voltage switchgear within the Mill, stirring up **previously settled dust** within the Mill, leading to a large secondary dust explosion

Of significance - Scenario No.3 did **not** need **previously settled dust** to produce the explosion.

previously settled dust

- There was ample witness evidence referring to historic accumulation of dust (knee or even waist deep) accompanied by graphic photographs
- Accumulation of dust caused by leakage from process and machinery and poor cleaning regime
- Scenarios 1, 2 & 4 were supported by ample evidence which pointed to the Defendants' gross breach of duty

It was agreed that there were multiple sources of ignition at the Mill.

Expert evidence:

- Agree that cause of damage to the Mill was a large dust explosion
- The mechanism by which the explosion occurred could not be identified (because large parts of the mill were destroyed by the explosion)
- Agree that it is impossible to differentiate beyond reasonable doubt between any of the four scenarios - **significant because it meant that the experts could not differentiate Scenario 3 from the other three scenarios**

Scenario No.3

- Did not need historical accumulation of dust
- The necessary amount of dust could be generated by a single machine failure
- For the prosecution to succeed in respect of Scenario 3 - they would have to show that the failure of the machine was caused by the gross negligence of *WTL* and/or *GB*
- Negligence associated with historical accumulation of dust played no part in causing the explosion on Scenario 3

At the end of the prosecution case *WTL* and *GB* made a submission of no case to answer - in broad terms:

- Prosecution cannot prove the exact mechanism of the explosion
- Four agreed possible scenarios are put forward
- Prosecution have **presumed** that all four possible scenarios are consistent with the guilt of the defendants
- If any of the four scenarios are reasonably consistent with the innocence of the defendants the case cannot proceed
- Prosecution expert could not exclude Scenario No. 3, meaning that the explosion was not caused by the historical accumulation of dust at all, but was caused by a dust cloud created by machine failure during the course of the morning of 17 July 2015 (**Note**: a sifting machine had been re-started that morning after repair - prosecution expert accepted that if the machine malfunctioned it could have caused sufficient dust to become airborne to have caused the explosion)

Judge's ruling:

- I am not satisfied that the Jury would be able on the evidence to be sure of the causative link between the gross negligence on the part of the Defendants and the explosion causing the deaths
- The presence of Scenario 3 as a "highly credible" possible cause, taken together with the absence of evidence addressing the link between the breach of duty and the machine failure on the morning in question, means the Jury would be unable to rule out a possible cause consistent with the innocence of the Defendants

Prosecution appeal Judge's decision to Court of Appeal

In summary - grounds of appeal:

- Judge allowed the experts to determine the issue of causation, which should have been left to the jury
- Judge incorrectly proceeded on the basis that the defence version of Scenario 3 was consistent with innocence
- Judge was incorrect to conclude that there was insufficiency of evidence to link the suggested machine failure to the acts/omissions of the Defendants

Court of Appeal

Upheld the Judge's ruling:

- Accept the Defendants submission that it was necessary for the prosecution to examine Scenario No.3 and to evidence, if possible, the extent to which the machine failure must inevitably have involved negligence which could be proved on the part of *WTL* and/or *GB*
- There was no evidence about that point, still less any sufficient evidence capable of proving it

When is a Company deemed to be a VLO?

Not £150 million - Mitting J - Rejected submission that organisations with a turnover exceeding £150m should be deemed to be Very Large - [***Thames Water***]

No prescribed figure - Mitting J in [***Thames Water***]

"We do not think there is any advantage to be gained by such a definition. In the case of most organisations, it will be obvious that it either is or is not very large. Doubtful cases must be resolved as and when they arise."

Up until recently the 'tipping point' appeared to be around £600m-£700m by way of turnover, based upon cases involving *Electricity NW* and *Whirlpool* respectively.

HSE v Places for People Homes (PFPH) - Court of Appeal - February 2021

- Crown Court Judge categorised an organisation with an average turnover of approximately £300m as a VLO. The Court of Appeal confirmed that the Judge was correct to categorise PFPH as a VLO.

Why does being a VLO matter?

- Although a mechanistic approach to sentencing is to be avoided, the result has generally been to double the Starting Point to reflect the VLO status. That has translated to increases in Whirlpool and PFPH of £250k and £1m respectively.
- The bar for achieving VLO status appears to have been lowered considerably by virtue of the decision in PFPH resulting in more defendants being considered to be VLOs for sentencing purposes in the future.

HSE v Connors Building & Restoration Limited - Court of Appeal - July 2020

- Company convicted, following trial, of an offence under S2 HSWA and fined £20,000
- Employee seriously injured whilst operating a rip saw - offcut piece of timber kicked back and impaled his right leg

HSE v Connors Building & Restoration Limited - Court of Appeal - July 2020

- Prior to trial commencing Defendant made an application to stay the proceedings for abuse of process
- The abuse of process related to the HSE failing to properly apply the Enforcement Policy Statement and Enforcement Management Model when making the decision to prosecute
- In advance of the enforcement making process the HSE had requested written submissions from the Company
- The Company's main point, in the written submissions, was if the Company was convicted of a H&S offence it would lose its contract with Scottish Power putting 40 jobs at risk

HSE v Connors Building & Restoration Limited - Court of Appeal - July 2020

- The Judge in the Crown Court found that the HSE were entitled to reach the conclusion that there had been a serious breach **and** it was in the public interest to prosecute
- HSE had taken into account the Company's submissions
- HSE identified that there had been a serious breach resulting in a serious injury, which led to the assessment of an 'extreme' risk gap
- Consequently the HSE were entitled to conclude that the evidential and public interest tests were met
- Judge said no evidence was submitted re loss of the Scottish Power contract and therefore the stated position was speculative
- The application to stay the proceedings was refused

HSE v Connors Building & Restoration Limited - Court of Appeal - July 2020

- Defendant appealed to Court of Appeal
- In essence, the Judge was wrong to conclude that the HSE's enforcement decision was compliant with the EPS/EMM and/or was reasonable.

HSE v Connors Building & Restoration Limited - Court of Appeal - July 2020

Court of Appeal

- Only in exceptional circumstances will the Court disturb a decision to prosecute
- It is not sufficient for the Defendant to establish that relevant guidance or policy was not followed
- Defendant **must** go on to establish **misconduct or oppression**
- Judge was right to conclude there was no abuse of process
- Judge was right to conclude that the Defendant's position re loss of contract was speculative - noting the Defendant had not in fact lost the contract

HSE v Connors Building & Restoration Limited - Court of Appeal - July 2020

Conclusion

- Very high test to establish abuse of process
- Abuse of process is almost 'dead' as an option

R (on Application of Maughan) (Appellant) v HM Senior Coroner for Oxfordshire (Respondent)

Supreme Court - November 2020

- Considered the burden of proof for conclusions of **suicide** and **unlawful killing** at an inquest
- Previously the standard of proof for all conclusions, save for **suicide** and **unlawful killing**, e.g. Accident, industrial disease, natural causes etc. was the civil standard (*balance of probabilities* or *'more likely than not'*)
- Previously the standard of proof for conclusions of **suicide** and **unlawful killing**, was the criminal standard (*beyond reasonable doubt* or *'sure'*)

Maughan

- Case was predominantly concerned with the burden of proof required for a conclusion of **suicide**
- Recognising that suicide is no longer a crime
- With the criminal standard applied to a conclusion of suicide, absent a suicide note, often an open verdict was returned - This led to potential under reporting of cases of suicide

Maughan

- The common view is that the main driver for changing the burden of proof for unlawful killing was consistency across all conclusions.
- It is problematic because unlawful killing comes into play in Inquests involving health and safety regulation in the context of manslaughter offences
- Gross negligence manslaughter - individual offence
- Corporate manslaughter
- It is unsatisfactory to have different burdens of proof as between proceedings

Maughan

Procedural considerations

- The rules of evidence at an Inquest are not the same as in a criminal court - e.g. hearsay evidence is admissible at an inquest but not in a criminal court
- There is no opportunity to address the Jury at an inquest as to the evidence they have heard

Overview of top 10 large fines in the last year

Defendant	Narrative	Prosecutor	Offence	Turnover	Size of co.	Fine
Nexus	Employee fatally electrocuted working at height by overhead cables.	ORR	HSWA / 2 / 1	£56m	Large	£1.5m
F&R Cawley Limited	Employee killed under wheels of runaway lorry.	Local Authority	HSWA / 2 / 1	£27.8m	Medium	£1.5m
WH Malcolm Limited	Boy fatally electrocuted by overhead cables when trespassing to retrieve ball.	ORR	HSWA / 3 / 1	£207m	Large	£6.5m
Aster Healthcare Ltd	Care-home resident killed after being put into scalding bath.	HSE	Corp Manslaughter & Corp Homicide / 1 / 1	£7.7m	Small	£1m
Briar Chemicals Limited	Contractor killed by welding torch ignited flammable vapour inside vessel being repaired.	HSE	COMAH / 5	£30.5m	Medium	£1m

Overview of top 10 large fines in the last year

Defendant	Narrative	Prosecutor	Offence	Turnover	Size of co.	Fine
British Airways Plc	Employee crushed by tug vehicle at Heathrow Airport.	HSE	HSWA / 3 / 1	£13bn	Very large	£1.8m
Drayton Manor Park Limited	Child drowned on ride.	HSE	HSWA / 3 / 1	N/A	N/A	£1m
Enterprise Managed Services Ltd	Employee tripped and fatally crushed by lorry.	HSE	HSWA / 2 / 1	£355m	Very large	£1m
Essex Partnership Uni NHS Trust	Failure to prevent suicide leading to 12 avoidable deaths.	HSE	HSWA / 3 / 1	N/A	N/A	£1.5m
National Grid Gas Plc	Management of gas networks in HRMOBs (no incident).	HSE	HSWA / 3 / 1	£1.12bn	Very large	£4m

Questions



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Singapore
Sydney
Tampa
Tokyo
Warsaw
Washington DC

Africa
Brazil
Caribbean/Central America
India
Israel
Mexico

■ Office locations
■ Regional desks and strategic alliances

