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H&S

# Legal Review and Case Update

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## **“Top Ten Topics”**

A review of legal developments  
and trends 2020-2022

## 10. The Grenfell Inquiry

- Module 6 – Evidence concluded 7<sup>th</sup> April 2022: The Rt. Hon. Eric Pickles MP – Insight into the workings of government
- Module 4 – Ongoing
- Module 7 – Further Expert Evidence
- First Progress – Building Safety Act 2022 – Together with the Fire Safety Act 2021
- Conclusion of Inquiry and possible prosecutions?

## 9. Fire Safety Enforcement

### The Fire Safety Act 2021

- Not yet in force
- Clarifying parts of premises that fall under the Regulatory Reform (Fire Safety) Order 2005
  - External walls, windows, cladding, balconies;
  - Doors between domestic premises and common parts.
- Providing a power to change the premises to which the Order applies by Statutory Instrument
- Use of applicable risk-based guidance where *"tending to establish"* a contravention or a lack of one.

## All new or overdue?

- Exterior and doors has long been source of debate.
  - Makes responsibilities clear for Responsible Persons
  - Will have to include external features in fire risk assessment.
- Risk-based guidance: guidance already in use in prosecutions and at trial but given statutory footing.
  - If defending a prosecution at trial, likely to require expert support in any event.

## 8. New Law

- Building Safety Act 2022 – Given Royal Assent on 28<sup>th</sup> April 2022 but most provisions yet to come into force (12-18 months anticipated) not yet published in full.
  - Creates of the role of a Building Safety Regulator – Role initially to be carried out by the Health and Safety Executive;
  - New role of Accountable Person – Can be an individual or organisation - Duty to take all reasonable steps to:
    - prevent a building safety risk happening, with building safety risk defined as ‘spread of fire and/or structural failure’ .
    - reduce the seriousness of an incident if one happens.

- New Responsibilities for Existing CDM Duty Holders – Clients, Designers, Principal Designers, Contractors and Principal Contractors:
  - Their new duties will be to Plan, Manage, and Monitor their activities in relation to building regulations.
  - These duty holders will keep their existing duties, including:
    - co-operating with other duty holders;
    - communicating and sharing information;
    - co-ordinating and putting systems in place to plan and manage work;
    - ensuring competence – appointing people with the right skills, knowledge, experience and behaviours for the work they need to do.

- Personal Protective Equipment at Work (Amendment) Regulations 2022 - Came into force 6<sup>th</sup> April 2022 amending PPER 1992
  - Extends employers' and employees' duties to limb (b) workers;
  - If a risk assessment indicates that a limb (b) worker requires PPE to carry out their work activities, the employer must carry out a PPE suitability assessment and provide the PPE free of charge as they do for employees.
  - Limb (b) - describes workers who generally have a more casual employment relationship and work under a contract for service – they do not currently come under the scope of PPER 1992.

## 7. Inquests

- *R (Maughan) v HM Senior Coroner for Oxfordshire* [2020]  
UKSC 46 : now 18 months old.
- Predictions at the time and impact on unlawful killing conclusions and prosecutions.
- *R (Ture) v Senior Coroner for Manchester North* [2022]  
EWHC 1027 (Admin) – 4 May 2022 - not grossly negligent  
*“even applying the balance of probabilities”*.
- Impact on inquests into work-related deaths where issue is “gross-ness”.

- Judicial Review and Courts Act 2022 – Royal Assent 28 April 2022.
- May 2021: Report on the Coroner Service by Justice Committee.
  - Geographical variation, limited support services to bereaved, shortfall in pathology, lack of PFD report oversight, limits of legal aid.  
*“We call for a new body that will oversee risks to public safety discovered by coroners and inquest juries and monitor and enforce action to reduce these risks, acting in concert with other regulatory bodies such as the Health and Safety Executive and the Quality Care Commission” (sic); also easier online searchable access to PFD reports and responses.*
- September 2021: Government First Response. Re Prevention of Future Deaths: Government *“recognises that there is more that can be done in this space”* but *“not in a position to accept the recommendation at this stage”*, *“considering options”* and *“appropriate resources”* and working with Chief Coroner’s office.

## Judicial Review and Courts Act 2022

- Discontinuance of investigation where cause of death becomes clear.
- Measures to permit inquests in writing, video-links.
- Suspension of jury requirement for covid for another two years.
- New Coroner areas.
- Publicly funded legal representation for bereaved people at inquests where public bodies represented.

## 6. Disclosure

### HSE and Other Regulators vs CPS

- Increased burden on HSE now that H&S documentation is increasingly held electronically and email / text communication of increased importance.
- Focused s.8 applications and detailed defence statements will be of increasing importance and may yield more material for consideration.

## 5. CQC Prosecutions

- Continued increase in prosecution activity and some significant fines
  - Charging Practice
  - Approach to sentence

## The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014

### **Safe care and treatment**

**12.**—(1) Care and treatment must be provided in a safe way for service users.

(2) Without limiting paragraph (1), the things which a registered person must do to comply with that paragraph include—

(a) assessing the risks to the health and safety of service users of receiving the care or treatment;

(b) doing all that is reasonably practicable to mitigate any such risks;

(c) ensuring that persons providing care or treatment to service users have the qualifications, competence, skills and experience to do so safely;

(d) ensuring that the premises used by the service provider are safe to use for their intended purpose and are used in a safe way;

(e) ensuring that the equipment used by the service provider for providing care or treatment to a service user is safe for such use and is used in a safe way;

(f) where equipment or medicines are supplied by the service provider, ensuring that there are sufficient quantities of these to ensure the safety of service users and to meet their needs;

(g) the proper and safe management of medicines;

(h) assessing the risk of, and preventing, detecting and controlling the spread of, infections, including those that are health care associated;

(i) where responsibility for the care and treatment of service users is shared with, or transferred to, other persons, working with such other persons, service users and other appropriate persons to ensure that timely care planning takes place to ensure the health, safety and welfare of the service users.

## CQC Charging Practice

- Additional charge to reflect unnamed patients.
- Separate charges reflecting different individuals.

*CQC - v - Dudley Group NHS Foundation Trust*

19<sup>th</sup> November 2021, Dudley Magistrates Court

- Two charges to reflect harm to two individuals.
- Harm caused death in one case, not in other.
- Total fine of £2.53m, £1.27 for each offence.

## Approach to sentence

- CQC and Definitive Guideline
- Enabling Act states: Health and Social Care Act 2008, (2008 Act). Section 35 of the 2008 Act provides:

*“Regulations under this Chapter may provide that a contravention of or failure to comply with any specified provision of the regulations is to be an offence, but may not provide for an offence to be triable on indictment or to be punishable with imprisonment [or, except in the case of regulations under section 20, with a fine exceeding level 4 on the standard scale.”*
- NB: Sentencing Council declined to include RRFSO and Housing Act offences despite requests in consultation.

- 1. Should the Guideline fine bands apply where offences are summary only?
- 2. If separate offences are charged:
  - 2) **Next, the court must consider if the following factors apply. These two factors should be considered in the round in assigning the final harm category.**
    - i) **Whether the offence exposed a number of workers or members of the public to the risk of harm.** The greater the number of people, the greater the risk of harm.
    - ii) **Whether the offence was a significant cause of actual harm.** Consider whether the offender's breach was a **significant cause\*** of actual harm and the extent to which other factors contributed to the harm caused. Actions of victims are unlikely to be considered contributory events for sentencing purposes. Offenders are required to protect workers or others who may be neglectful of their own safety in a way which is reasonably foreseeable.

If one or both of these factors apply the court must consider either moving up a harm category or substantially moving up within the category range at step two overleaf. If already in harm category 1 and wishing to move higher, move up from the starting point at step two on the following pages. The court should not move up a harm category if actual harm was caused but to a lesser degree than the harm that was risked, as identified on the scale of seriousness above.

## 4. Prosecutions

- As many mitigations are being removed the use of video link for hearings and even evidence hopefully here to stay. Huge benefits in all cases – any costs impact?
- Anecdotally – Increased use of cautions?
- Changes to how prosecutions are authorised and decisions made – will this have an impact?

### 3. Covid

- Courts are still being impacted by the backlog and Nightingale Courts still in use. Ideal for health and safety cases.
- Dedicated Courts or Practice Direction in relation to regulatory offences?
- Unexpected / unintended consequences of Covid – Increase in bovine related deaths!
- Covid Inquiry underway – Announcement of 11 QCs.
- Investigations for breach of Covid regulations continue...

## 2. Sentencing Update

- Covid and continued impact on sentencing – Individuals / Companies:
  - BA fined £20m by ICO – Initial fine of £183.39m reduced to £30m then further to £20m including £6m reduction for cooperation with investigation and £4m for covid impact.
  - Attorney-General's Reference, R v Manning [2020] 4 WLR 77 - Has no application to the sentencing of a company for health and safety offences, given that it relates specifically to the imposition of immediate custodial sentences upon individuals.

- The Little Guys – R v Gross [2021] EWCA Crim 845
  - Offence contrary to s.37 HSWA – Fine AND Community Order Imposed – The guideline acknowledges that it may be appropriate in some cases to impose a community order in addition to a fine, although in usually these will be alternatives.
- The Big Guys – R v Places for People Homes Ltd [2021] EWCA Crim 410 –
  - CACD re-visited guidance given in R v Thames Water [2015] EWCA 960 and R v Thames Water [2019] EWCA Crim 1244.

- Conscious choice by the Sentencing Council not to define VLOs and it is not for the CACD to seek to impose one.
- No precise level of turnover at which an organisation becomes “very large”. In most cases it will be obvious. *R v Bupa [BNH] Ltd [2019] EWCA Crim 1691*: unless exceptional circumstances, it’s not the parent company.
- Starting points and category ranges do not apply to VLOs – The Court should ensure the penalty is proportionate to the means of the offender and bring home to management and shareholders the need for compliance.
- Start with Step Two for large organisations and move up – Not mechanistic. It is a spectrum.
- Environmental Offences. New record of £90m.

# 1. The Future:



- Charges brought in Croydon Tram crash
- Just beginning: Covid Inquiry
- Ongoing: Grenfell Inquiry, Shoreham Air Crash
- Not yet in force: Building Safety and Fire Safety Acts
- Increase in court activity?