

Presentation:

– ‘In Defence of the Safety Adviser’ Chris Hopkins, Associate, Barrister for Pinsent Masons LLP



Chris began by explaining that he is a member of Pinsent Mason's Regulatory Law Team. Chris has been coming to BHSEA meetings for a year or so now and is an active Member of BHSEA Council. Chris is keen to use his knowledge and experience in support of BHSEA and its Members.

Issues:

Chris outlined the issues he intended to cover in his presentation:

- What is the risk?
- Guidance on post incident actions
- Handling HSE interviews
- HSE enforcement process
- Criminal process
- Maximum penalties
- Costs

The Safety Adviser - What is the Risk?

Chris described two recent court cases which help to demonstrate the risk:

1. R (Nottinghamshire and City of Nottingham Fire and Rescue Service) v Liu and O'Rourke (2011).

Chris outlined the details of the case involving Liu, who owned two hotels in Mansfield. A fire inspection revealed that the fire arrangements were in a very poor state, and the Fire Rescue Service decided to prosecute Liu.

O'Rourke was a consultant Safety Adviser. Liu had previously asked O'Rourke to carry out a fire risk assessment and they had agreed a sum of £75 for each hotel. O'Rourke cut and pasted details from fire risk assessments carried out on other premises to produce the Fire Risk Assessments for Liu.

The Fire and Rescue Service said that the risk assessments were totally unacceptable and inappropriate, and they decided to prosecute O'Rourke as well.

The case was brought to the Crown Court in Nottingham in 2010. The judge said that in actual fact, there was no risk assessment because what documents there were, did not relate to either of the properties. Further, Liu had put profit before safety. Liu was given 8 months imprisonment and £15K costs, and O'Rourke was given 8 months imprisonment with just short of £6K costs to pay. O'Rourke appealed to the Court of Appeal which upheld the sentence.

2. R v Alan Ager (11 June 2010):

This Local Authority prosecution was brought by the City of London. Two technicians were carrying out some electrical work when a flashover occurred and caused severe burns to the hands and face of one of them. Ager was the Safety Manager and responsible for giving health and safety advice. He failed to ask the building owners to isolate the electrical supply to the conductors. Under Section 2 of HASAWA, a fine of £25K was imposed and under Section 37 Ager was fined £2,500.00 with £5,500.00 costs.

The investigating EHO later said:

“It is very rare to bring a prosecution against an individual but it was deemed that if you cannot rely upon the health and safety manager of a company to protect employees from harm, who can you rely on? For this reason, health and safety professionals are not immune to prosecution and must ensure that they have full regard to the law.....”

Chris added that personal prosecutions are still very rare, and it's generally only in the worst cases that the court will pursue the individual and then only if there is good reason. Chris showed us a slide which highlighted individual prosecutions for Directors and Senior Managers between 2000/01 and 2010/11. The number of prosecutions hovered around the 20 mark until 2008/09, when the total jumped to 36. In 2009/10 the figure was also 36 and the provisional figure for 2010/11 is 43.

Post Incident Procedures:

Chris explained that the employer should have certain plans/procedures in place. Some of these will be called for by the enforcing authorities and/or others in the investigation of the incident. They include:

- Crisis Management Plan / Business Continuity Plan:
- Internal Communications: What are the weekend arrangements? Who can be contacted and when?
- Press Involvement: Nominated people, trained to deal with the Press.
- RIDDOR Reports.
- Internal Investigations: The concept of Legal Professional Privilege. Under the Management Regs there is an implied requirement towards carrying out internal investigation. Inspectors may wish to see that internal investigation report. Legal Professional Privilege can allow the company to refuse this request but specialist legal advice should be sought first.
- Document Control: Inspectors may also want copies of documents. It is therefore a good idea to keep a record of documents that are going out of the organisation.

When an Inspector Calls.....

Chris went on to draw attention to Section 20 of HASAWA, and reminded us of the powers of inspectors. For example, a police constable can attend an incident and has the power of arrest. The inspector can take document copies but not originals.

HSE Interviews:

Chris explained that principally, there are two different types of interview:

- Witness
- Under Caution (PACE i.e. as a suspect)

And there are two different types of witness interview:

- Voluntary
- Section 20 HASAWA under which the inspector has the right to compel. The answers given to questions posed can be used against another person e.g. the employer, BUT can't be used in a case against you personally.

The voluntary witness interview is the norm. Most inspectors will agree to a trade union representative or a colleague being present in support. There should **not** be anyone from line management present or a lawyer.

When an interview 'Under Caution' (PACE) is called for, it is fairly certain that things are heading down the enforcement route. It is serious and the individual needs to seek legal representation. The individual will be invited to attend, and indeed doesn't have to go along, but can send a letter setting out personal perception of events. This information is admissible in court.

Enforcement Process:

The decision to proceed with the enforcement process can only be made if it is in line with the HSE's Enforcement Management Model, the Enforcement Policy Statement, as well as the Crown Prosecution Service (CPS) Code. The Code requires a two-stage test to be applied:

- Is there a realistic chance of conviction?
- Is enforcement action in the public interest?

A solicitor agent appointed by the HSE, will generally take a case if it serious e.g. involving a fatality. In less serious cases e.g. where there is no risk assessment, it is more likely that the case will be prosecuted by an Inspector in a magistrate's court. The process is as follows:

- PACE interviews complete;
- Inspector produces report for his/her Principal;
- HSE consider its Enforcement Management Model, Enforcement Policy Statement and the CPS Code for Crown Prosecutors;
- Enforcement decision;
- HSE instructs an agent prosecutor;
- HSE applies for a summons;
- Summons is issued by local Magistrates' Court and served on Defendant.

Criminal Trials Process:

- The First Hearing:
 - Initial details of HSE's case (possibly some disclosure e.g. of witness statements), must be served first.
 - Plea before venue (Magistrates Court / Crown Court?).If it is a serious enough matter the case may be referred to the Crown Court. The Crown Court is more formal, and wigs and gowns are worn. If there is a plea of 'not guilty', the case is more likely to be sent to the Crown Court for trial.
- Plea and Case Management Hearings (PCMH), only take place if the case is sent to the Crown Court.

Maximum Penalties:

- Magistrates Court:
 - Generally, £20,000 and/or 6 months imprisonment;
 - Section 7, £5000 and/or 6 months imprisonment.
- Crown Court:
 - Unlimited fine and/2 years imprisonment
- Gross Negligence Manslaughter (applies to individuals):
 - Life imprisonment

Chris commented that there is a degree of certainty regarding fines in the magistrates' courts however, if something serious comes to light during the hearing, the magistrate may send the case up to Crown Court to be sentenced.

Funding Legal Costs:

Can be provided in a number of ways

- Legal Aid (for individuals only)
 - the state effectively foots the bill.
- Insurance
 - most insurance policies will provide cover for certain legal costs, including defending health and safety prosecutions.
- Self-Funding
 - You can defend yourself or pay someone.
- Recovery of legal costs
 - In the case of an acquittal, the legal cost will be refunded from the Government. This will no longer apply to companies charged with offences after 1st October this year.
- Recovery of related Fees For Intervention (FFI)
 - Can be fully recovered or apportioned where there is an acquittal at trial on all or some of the charges.
- Liability for HSE costs

Members' Questions

Mark Hoare, Health and Safety Manager at the University of Birmingham, and BHSEA Management Committee Member commented that the legal process for those who acted negligently/irresponsibly was fine, but what about the genuine health and safety professionals who are trying to do a good job? Chris said that his reading confirmed that Ager was a 'good guy' and his failure to ask the building owners to isolate the electrical supply to the conductors was a genuine oversight. However, the Inspector would have to carefully consider the mistakes (genuine or otherwise) before deciding whether enforcement action is in the public interest. Chris added that the Ager case was unusual because Section 37 cases normally involve a senior manager.

Roger Bibbings, Director of Operations, R.o.S.P.A. suggested that there might be a conflict here between duty and right? Where the disclosure of investigation reports is concerned, should the individual be free and open or should information be withheld? Chris replied that following an incident, emotions are generally running high and there is a need to have legal privilege in place whilst the investigation is underway. In the case of internal investigations, it can be decided later on whether to allow the HSE to have copies of any documents. Alternatively, it may be appropriate to produce two reports: one tailored for the HSE and the other for internal investigation purposes only.

Ed Friend, BHSEA Management Committee Member, commented that in his estimation, 95% of what we have heard from Chris this afternoon, is delivered to HSE Inspectors on their law course. Ed agreed that the Ager case was unusual, however, he would question the competence of the two technicians, and whether they were qualified to work on live electrical equipment. Moreover, was there a risk assessment in place? The answer to these questions might throw a different 'slant' on the case, and in turn affect the Inspectors proceedings. Chris made a final comment: Local Authorities are generally keener to go for individuals than the HSE.

George Allcock, BHSEA Management Committee Member commented that for him, there are four essential components for any investigator, and they are: the investigator has to be trained, competent, unbiased and willing to share and learn from the lessons given. Chris reflected on RIDDOR reports and the information supplied in some cases, essentially damning themselves!

Duncan Carthy of Sensible Risk Solutions Limited, agreed in his experience, that people and organisations can damn themselves.

Ian Dunsford of Birmingham City Council's Environmental Health Department asked whether the statistics Chris used in his presentation included both the HSE and the Local Authority? Chris confirmed that he believed both enforcing authorities were included.

Ed Friend asked why it takes so long (sometimes years), to bring a case forward. Could this be an abuse of process in some cases? Chris said that delays tend to be in the cases which involve a fatality. The HSE wait for the Coroner's inquest before proceeding. The HSE has suggested that two years is normally the average 'waiting time'.

David Hughes reflected on the level of training required to carry out incident investigations? David added that he had produced a procedure for completing investigations. The investigator follows the relevant parts of the procedure and where there are a number of potential investigators, a procedure helps to maintain consistency.

Roger Bibbings referred Members to the RoSPA website where there is information about investigation procedures, including a definition of the 'Operational Readiness to Investigate'.

This concluded Member's Questions and the audience were asked to show Chris their appreciation in the usual way.