



Working at Height Seminar

The Kube, Leicester Racecourse – 4 October 2018

Keoghs



Introduction



Keoghs

- › National defendant-focused, top 100 law firm, acting for leading insurers, businesses and suppliers to the insurance industry.
- › 7 offices in London and Scotland.
- › 1,800 staff and £95m turnover.



Keoghs Regulatory Team

- › Key product areas cover
 - › Health and Safety
 - › Motor Crime
 - › Care / Nursing
 - › Inquests
 - › Food Safety
- › We dovetail with specialist personal injury and commercial lawyers who practice in various sectors including:
 - › Retail
 - › Care
 - › Transport
 - › Construction
- › Bolton: 3 Partners and 6 solicitors
- › Glasgow: 2 partners
- › London: 1 partner and 3 solicitors



Health and Safety – the Regulatory Landscape

› Health and Safety at Work etc. Act 1974

- › places a duty on all employers to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all their employees and non employees who may be affected by the undertaking (sections 2 and 3)
- › duties on employees (section 7) and directors (section 37)
 - › Section 37: “Where an offence under any of the relevant provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.”
- › offence to fail to discharge a duty or contravene certain sections and regulations



Work at Height Regulations 2005

- › Reg. 4 Organisation and planning
- › Reg. 5 Competence
- › Reg. 7 Selection of work equipment for work at height
- › Reg. 9 Fragile surfaces
- › Reg. 10 Falling objects
- › Reg. 11 Danger areas
- › Reg. 12 Inspection of work equipment
- › Reg. 13 Inspection of places of work at height



Manslaughter

› Corporate Manslaughter

- › An organisation will be guilty of corporate manslaughter if:
 - › the way in which its activities are managed or organised causes a person's death;
 - › the person's death is the result of a gross breach of a relevant duty of care owed to that person;
 - › the way in which senior management managed or organised the organisation's activities is a substantial element of the breach.

› Gross Negligence Manslaughter

- › An individual will be guilty of gross negligence manslaughter if:
 - › they owe a duty of care to the deceased
 - › their breach of duty causes (or significantly contributes) to the death of the victim; and
 - › the breach should be characterised as gross negligence, and therefore a crime.



Incident Response



Practical tips for handling the investigation

- › Set a strategy
- › Notifications – HSE; LA; Coroner; other insurers; broker
- › Check policy cover
- › Internal investigation
 - › preserve evidence
 - › privilege



External Investigation

- › External investigation
 - › lead person
 - › provision of documents
 - › manage interview process
 - › representation and conflicts
- › Press and reputational damage
- › Injured Party and/or family



Sentencing Guidelines



Sentencing Guidelines

- › Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene
- › A stepped approach to sentencing
 - › Determine offence category – culpability and harm
 - › Starting point for fine and range
 - › Proportionality, guilty plea reduction and other orders



Sentencing - Culpability

Very high

Deliberate breach of or flagrant disregard for the law

High

Offender fell far short of the appropriate standard; for example, by:

- failing to put in place measures that are recognised standards in the industry
- ignoring concerns raised by employees or others
- failing to make appropriate changes following prior incident(s) exposing risks to health and safety
- allowing breaches to subsist over a long period of time

Serious and/or systemic failure within the organisation to address risks to health and safety

Medium

Offender fell short of the appropriate standard in a manner that falls between descriptions in 'high' and 'low' culpability categories

Systems were in place but these were not sufficiently adhered to or implemented

Low

Offender did not fall far short of the appropriate standard; for example, because:

- significant efforts were made to address the risk although they were inadequate on this occasion
- there was no warning/circumstance indicating a risk to health and safety

Failings were minor and occurred as an isolated incident



Sentencing - Harm

Seriousness of harm risked			
	Level A <ul style="list-style-type: none"> Death Physical or mental impairment resulting in lifelong dependency on third party care for basic needs Significantly reduced life expectancy 	Level B <ul style="list-style-type: none"> Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day-to-day activities or on their ability to return to work A progressive, permanent or irreversible condition 	Level C <ul style="list-style-type: none"> All other cases not falling within Level A or Level B
High likelihood of harm	Harm category 1	Harm category 2	Harm category 3
Medium likelihood of harm	Harm category 2	Harm category 3	Harm category 4
Low likelihood of harm	Harm category 3	Harm category 4	Harm category 4 (start towards bottom of range)



Sentencing

Large Turnover or equivalent: £50 million and over		
	Starting point	Category range
Very high culpability		
Harm category 1	£4,000,000	£2,600,000 – £10,000,000
Harm category 2	£2,000,000	£1,000,000 – £5,250,000
Harm category 3	£1,000,000	£500,000 – £2,700,000
Harm category 4	£500,000	£240,000 – £1,300,000
High culpability		
Harm category 1	£2,400,000	£1,500,000 – £6,000,000
Harm category 2	£1,100,000	£550,000 – £2,900,000
Harm category 3	£540,000	£250,000 – £1,450,000
Harm category 4	£240,000	£120,000 – £700,000
Medium culpability		
Harm category 1	£1,300,000	£800,000 – £3,250,000
Harm category 2	£600,000	£300,000 – £1,500,000
Harm category 3	£300,000	£130,000 – £750,000
Harm category 4	£130,000	£50,000 – £350,000
Low culpability		
Harm category 1	£300,000	£180,000 – £700,000
Harm category 2	£100,000	£35,000 – £250,000
Harm category 3	£35,000	£10,000 – £140,000
Harm category 4	£10,000	£3,000 – £60,000



Plea in mitigation

- › Basis of plea
 - › culpability and harm
- › Causation
- › Previous convictions
- › Evidence of steps taken to voluntarily remedy problem
- › Co-operation with CPS/HSE
- › Good health and safety record
- › Effective health and safety procedures in place
- › Self-reporting, co-operation and acceptance of responsibility
- › Impact on service users
 - › accountancy evidence
- › Timely guilty plea



Sentence – options include

› Corporates

- › fine
- › victim surcharge
- › costs
- › publicity order

› Individuals

- › unlimited fines (for offences committed on or after 12 March 2015)
- › community sentence and/or a custodial sentence (up to six months in the magistrates' court and two years in the crown court for health and safety offences; life for manslaughter)
- › director disqualification (maximum period is 15 years)
- › victim surcharge
- › costs



Case Study



Lion Steel Equipment Ltd

- › Third company to be convicted of corporate manslaughter
- › The deceased Stephen Berry (employee) fell through a fragile roof panel on 29 May 2008 at the company's site in Cheshire
- › The company pleaded guilty and was fined £480,000 after admitting corporate manslaughter and ordered to pay £84,000 in costs (costs reduced by almost 50% due to delay).
- › Average turnover of £10 million with profit of between £180,000 and £370,000 per annum
- › Level of fine under the new sentencing guidelines?



Overview



Overview

- › Companies need a defence strategy to deal with accidents
 - › Regulators have wide powers
 - › Protect your investigation
 - › Importance of regulatory interviews
 - › Interplay with civil claim
 - › Fines substantially up



Steps to take now

- › Discuss health and safety at Board level
- › Ensure safety management is a top priority
- › Review the crisis management policy
- › Assess immediate areas for improvement
- › Be pro active with audits
- › Document good safety practices
- › Respond to near misses and learn from them
- › Make sure adequate insurance cover is in place
- › Build a rapport with your inspector
- › Do not be afraid to consult with outside professionals



Early intervention

Crisis response



Any Questions?



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