



***Birmingham Health, Safety & Environment Association***

721 Hagley Road West  
Quinton, Birmingham B32 1DJ  
Email: [secretary@bhsea.org.uk](mailto:secretary@bhsea.org.uk)  
Website: [www.bhsea.org.uk](http://www.bhsea.org.uk)  
Tel. No. 07881 290 238

*Registered Charity No.: 255523*

*Secretary: Liz Prohett BA (Hons) CMIOSH CIPD*

# Newsletter

September 2012

## Monthly Meeting 10<sup>th</sup> September 2012

Dally Masaun, BHSEA Chair, welcomed Members to the meeting and extended a particular warm welcome to our new Members:

- Mike Ford, Health and Safety Adviser and
- Greg Pons, Director, Swallow Evacuation and Mobility Products Ltd.

Apologies were received from Tim Prestage and Roger Caleb.

Dally asked Members to advise the Secretary of any topics they would like BHSEA to cover within the Programme meetings in 2013, and also of any speakers/topics they had heard which may be of interest to other Members.

## *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 1<sup>st</sup> 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.

# September Members' Corner

## Health Risks at Work

### Roger Bibbings

### Director of Operations, RoSPA



Roger is an Occupational Safety Adviser, and an ex member of the TUC. Today, Roger is with us representing Safety Groups UK (SGUK), and is looking for 'Champions' to come forward from BHSEA Members to roll out the 'Health Risks at Work Initiative' within their own organisation, or indeed to promote the Initiative in any way they can e.g. in schools and as part of a Tool Box Talk

#### **What is Safety Groups UK (SGUK)?**

SGUK is a national network of groups meeting on a local basis to share and discuss safety issues. There are 70 plus safety groups under the SGUK umbrella. SGUK also covers Northern Ireland and Scotland.

#### **What's the Health risks at Work Initiative About?**

This is an SGUK Campaign which relies on 'Champions' coming forward to roll it out. It's about raising employee's awareness of health issues. It has the full support of the British Occupational Hygiene Society (BOHS), IOSH and organisations such as Deb UK and Arco.

The Initiative was piloted in Scotland and launched in England and Northern Ireland in May this year. It will run for at least the next two years.

#### **Which Risks are Included?**

- Risks to breathing
- Risks to the skin
- Risks to muscles, bones and joints
- Risks to hearing and touch
- Risks to wellbeing



## How did it all begin?

Roger confirmed that health issues are still generally underestimated. Occupational cancer is killing around 8,000 people each year. Damage to health can occur 'below the surface' and of course affects lives.

## So What Do I Do?

Volunteer to become a Champion. You'll have the backing of SGUK and can keep in touch with them for help and support and to monitor progress.

Those who volunteer to become a 'Champion' are given a presentation pack (to deliver to employees), including an excellent DVD aimed at SME's. There is both a long and a short version. The DVD uses actors to convey the messages and to bring it to life. The supporting information can be used flexibly to help the 'Champion' adjust the material to produce their own presentation gears towards their own particular workplace activities.

## How?

Contact Roger Bibbings, Occupational Safety Adviser RoSPA, Secretary SGUK 0121 249 2095 , or get in touch with BHSEA Secretary who can provide you with the Presentation Pack and who can make the connection with Roger and the SGUK Management Committee for you.

## ....and finally.....

### ▪ **Health and Safety Cost Recovery Scheme starts 1st October 2012:**

New, and detailed **guidance** has been published on HSE's website setting out how the scheme will work in practice. Developed in consultation with representatives from industry, it explains how FFI works and includes examples illustrating how it will be applied.

### ▪ **Books For Free...**

Andy McCluskey tells me he has been having a clear out of his library, and he has found some books that he will give to the 'needy', including:

- 'Health and Safety, Environment and Quality Audits', Asbury and Ashwell
- ISO 9000 Pocket Guide, David Hoyle.
- Understanding Quality Assurance in Construction, H.W. Chung
- Disabled Access, Access Audit Handbook
- Risk Assessment, Management of Machinery and Work Equipment BSI, John Glover
- Fire Risk Management in the Workplace, FPA, Lewis and Dailey.

Andy lives in Chelmsley Wood, Birmingham and he would prefer that any books are collected. Contact [\[mailto:andymccluskey@btinternet.com\]](mailto:andymccluskey@btinternet.com)

- **Job Opportunity:**  
 Tony Conlon, Director at Henshalls Insurance Brokers needs a replacement for one of their consultants who is leaving to join a global business. The post holder will be joining a new and growing health and safety division. The role will involve auditing and updating existing clients H& S policies practises & procedures and performing the same task for new clients, and will involve visiting clients' premises. Minimum Tech IOSH but preferably Grad IOSH. Email [aconlon@henshalls.com](mailto:aconlon@henshalls.com) Tel: 01952 820358. Details of Henshalls consultancy service can be found on their website [www.henshalls.com](http://www.henshalls.com).
- **Don't forget the Wellbeing Champions Conference....**on Wednesday 28<sup>TH</sup> November at the Hyatt Hotel in Birmingham.  
 Key Note Speakers

  - British Heart Foundation - How to Implement a Wellbeing Strategy
  - Bupa - The Importance of Wellbeing for Economic Recovery
  - Right Management - Champions for Success (what make a good wellbeing champion?)

Contact 0844 879 75 05 [enquiries@newleafhealth.co.uk](mailto:enquiries@newleafhealth.co.uk) or [www.newleafhealth.co.uk](http://www.newleafhealth.co.uk) for further information. This is a not for profit event with all proceeds going to the **British Heart Foundation**.
- **Hot off the press....**  
 Chris Hopkins wants Members to know that Pinsent Masons are holding a free seminar on Wednesday 31<sup>st</sup> October 2012, entitled  
**'HSE Costs Recovery – Practical Solutions for Business'**  
 This a breakfast seminar with specialist Lawyers from Pinsent Masons national Health and Safety Team based in Birmingham. For further details please contact Yasmin Mohidin at [Yasmin.Mohidin@pinsentmasons.com](mailto:Yasmin.Mohidin@pinsentmasons.com) or telephone 0121 260 4079.
- **We want to hear from you.....**with ideas / suggestions for BHSEA Programme meetings in 2013. Do you have an issue that you could talk about at one of our meetings? Or a shorter presentation that could fill the 10 minutes of the 'Member's Corner'? Do you have a particular health and safety topic that you would like BHSEA to address at a meeting? Have you heard a good presentation recently? Can you recommend a good speaker or a topic? Get in touch....

# **Date of the next Meeting**

**2.00 pm on Monday 8<sup>th</sup> October 2012  
at the Birmingham Medical Institute**

## ***Crucial Updates to Asbestos Legislation***

***Wayne Williams, Director,  
DMW Environmental Safety Ltd.***

**AND**

## ***Members' Corner***

***Steve Parton of Axa Insurance  
Topic – To Be Confirmed***

***Don't forget the buffet lunch at 1.15 pm!***