

THE LAWYER
AWARDS 2018
LAW FIRM OF THE YEAR

Control of Asbestos Regulations 2012

BHSEA/WWT Asbestos
Event

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Pinsent Masons

Duty to manage asbestos

- Those who manage **non-domestic premises** have a duty to manage asbestos – reg 4 CAR 2012
- What premises are affected?
 - Industrial, commercial or public buildings
 - Also includes ‘common’ areas of certain domestic premises (foyers, corridors, lifts, garages etc)

Who is the dutyholder?

- Every person who has an obligation in relation to the ‘**maintenance or repair**’ of non-domestic premises under the terms and conditions of a lease or management agreement – could be a landlord, tenant or managing agent
- If there is no such lease or agreement, the **freehold owner** or any person who has **control** over that part of the premises
- Dutyholder does not have to be an employer
- Can be more than one dutyholder
- Anyone who is not a dutyholder, but has asbestos information or control of the premises must help the dutyholder comply with the duty to manage

Dutyholder duties

- Take reasonable steps to identify the presence, amount and condition of Asbestos Containing Materials (ACMs)
- Duty to manage ACMs (Reg 4)
 - if existing asbestos containing materials are in good condition and are not likely to be damaged, they may be left in place; their condition monitored and managed to ensure they are not disturbed
- Assume that materials contain asbestos unless there is strong evidence to the contrary

Dutyholder duties cont...

- Carry out a suitable and sufficient assessment
 - checking all documentary information
 - Asbestos survey
- Keep asbestos register up to date
- Keep Asbestos Management Plan up to date
- Licencing and notification requirements
- Maintain health records and provide medical surveillance
- Ensure work with asbestos is done by a licensed contractor
- Make workers aware of presence of asbestos
- Notification

Employer duties (separate to dutyholder duties)

- Identifying and Protecting employees from exposure to asbestos – regs 5 and 11
- Preventing or reducing the spread of asbestos – reg 16
- Information, instruction and training – reg 10
- Maintaining health records and providing medical surveillance for employees exposed to asbestos – reg 22
- Arrangements to deal with accidents and emergencies – reg 15

Licensing and Notification

- Most higher-risk work with asbestos must be carried out by an HSE-**licensed** contractor. This includes:
 - work on asbestos lagging, loose fill insulation and asbestos sprayed coating, work on asbestos insulating board, cleaning up significant quantities of asbestos dust
 - Must be notified to HSE at least 14 days before work commences
- Some asbestos remedial tasks, involving lower risk ACMs do not require a licence. There are two categories:
 - exempt work, e.g. encapsulation of ACMs in a good condition (referred to as **non-licensed** work).
 - **notifiable non-licensed** work (NNLW), e.g. removal of asbestos roof sheeting or short duration work on asbestos insulation. This work is subject to extra requirements:
 - notification of work to the relevant enforcing authority before work starts
 - marking work areas with warning notices
 - medical examinations and record keeping

RIDDOR

- Dangerous occurrence - Hazardous escapes of substances – Schedule 2 (27) - The unintentional release or escape of any substance which could cause personal injury to any person other than through the combustion of flammable liquids or gases.
- Reportable if accidental release or escape of asbestos fibres into the air in a quantity sufficient to cause damage to the health of any person.
- HSE guidance - most incidents require judgement. Various factors are relevant including: the nature of the substance and its chemical, physical and toxicological properties, the amount which escaped and its dispersal, and whether people were, or could foreseeably have been, exposed to a significant risk as a consequence of the escape.
- Control limits / sporadic / low intensity – not relevant!

Penalties

- Dutyholders who breach CAR 2012 may be prosecuted under section 33 of the Health and Safety at Work Act 1974
- **Criminal offence:** can be dealt with summarily or on indictment
 - Corporate defendants: fines (varying depending on culpability and turnover)
 - Individuals: fine or imprisonment
- **Civil liability:** those affected can take civil action against the dutyholder (limited to claims in negligence)

Prosecution - Hoteliers (Devon)

- March 2019
- Hoteliers fined after failing to assess the presence of asbestos during refurbishment
- Construction work undertaken to refurbish a hotel
- Employee raised concerns about potential presence of asbestos containing materials (ACM)
- No physical testing carried out until Feb 2017
- Hoteliers pleaded guilty to health and safety breaches
- Fined **£80,000** and ordered to pay costs of **£14,999.60**

Prosecution - Ashe Construction Limited

- December 2018
- Fined £100,000 after asbestos released by sub-contractors during school refurbishment
- Failed to effectively plan, manage and monitor the work to prevent the accidental removal of the asbestos containing tiles
- Failed to effectively communicate information about the asbestos, leaving the storage room open without barriers or signage warning of asbestos.
- Work was then not suitably managed or monitored to ensure that nobody came into contact with the asbestos.

Prosecution - Kent County Council

- Council **fined £200k** for exposing primary school staff to asbestos
- Asbestos survey revealed flue pipe as a medium risk
- No notice given to employee (school caretaker) prior to carrying out work
- Failed to ensure employees liable to be exposed to asbestos had been trained adequately

Prosecution - General Motors UK Limited

- July 2016
- Work at Ellesmere Port site exposed contractors to asbestos risks
- Contractors cut holes in asbestos insulating board
- The Company were found to have failed to provide the contractors with the asbestos register for the site
- Fined **£120,000** and ordered to pay **£11,779 in costs**

Prosecution - Marks and Spencer plc

- Exposure during two store refurbishments in 2006 and 2007
- September 2011
- Prosecuted and convicted after 3 month trial
- Company guidance on removal of asbestos was not fully followed by the contractors
- **Fined £1 million** for health and safety offences relating to asbestos removal

Individual defendants

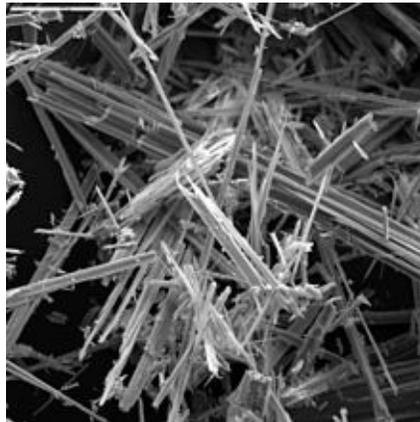
- June 2014 - 64 year old man was sentenced to 12 months' imprisonment after his company illegally supplied roofing panels containing asbestos.
- January 2017 - a demolition contractor was sentenced to 24 months imprisonment after ignoring the recommendations in an asbestos demolition survey and removing asbestos without taking precautions.

Disposal Duties

- Waste containing asbestos must be double-bagged and placed in a covered locked skip.
- You must not mix asbestos waste with other types of waste.
- You must clearly label raw asbestos and asbestos waste
- You must store and transport raw asbestos and asbestos waste in a sealed container
- Can only be handled by a licensed disposal site



Questions?



Case Study - 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

Case Study - 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)

Case Study - Harm

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.

Case Study - Fine

Medium		
Turnover or equivalent: between £10 million and £50 million		
	Starting point	Category range
Very high culpability		
Harm category 1	£1,600,000	£1,000,000 – £4,000,000
Harm category 2	£800,000	£400,000 – £2,000,000
Harm category 3	£400,000	£180,000 – £1,000,000
Harm category 4	£190,000	£90,000 – £500,000
High culpability		
Harm category 1	£950,000	£600,000 – £2,500,000
Harm category 2	£450,000	£220,000 – £1,200,000
Harm category 3	£210,000	£100,000 – £550,000
Harm category 4	£100,000	£50,000 – £250,000
Medium culpability		
Harm category 1	£540,000	£300,000 – £1,300,000
Harm category 2	£240,000	£100,000 – £600,000
Harm category 3	£100,000	£50,000 – £300,000
Harm category 4	£50,000	£20,000 – £130,000
Low culpability		
Harm category 1	£130,000	£75,000 – £300,000
Harm category 2	£40,000	£14,000 – £100,000
Harm category 3	£14,000	£3,000 – £60,000
Harm category 4	£3,000	£1,000 – £10,000