

# H&S fine levels soar for UK plc

New sentencing guidelines represent “sea change” in health & safety law

Health and safety fines are soaring, with four UK companies incurring fines of more than £1m in the space of six days in January.

Fines of £4.8m were imposed between 21 and 26 January 2016. Meanwhile, tough new sentencing guidelines for health and safety and corporate manslaughter took effect on 1 February. Under the guidelines, large UK companies face unlimited fines with a starting point of £7.5m on organisations with a turnover of more than £50m, for corporate manslaughter. Smaller organisations with a turnover of up to £2m could face a fine of £450,000 or more.

Last month, C.RO Ports London Ltd was fined £1.8m

following an incident where an employee caught his arm in a rotating machine. National Grid Gas plc was fined £1m after an engineer became trapped between two gas pipes. Balfour Beatty was fined £1m after a fatal crane incident. UK Power Networks (Operations) Ltd was fined £1m following the death of a runner who was electrocuted by a low-hanging high voltage power cable.

Gerard Forlin QC, of Cornerstone Barristers, who told *NLJ* in November that the new guidelines would “send a chill through corporate UK”, says: “Many parties may well have been trying to get cases to court before the guillotine date of 1 February 2016 heralding the new guidelines. The above listed



Forlin: “fine levels set to explode”

fines appear to be a barometer or precursor of what is to come.

“Fine levels (and terms of imprisonment) are set to explode, and will inevitably lead to more trials. For those cases where guilty pleas will be entered,

complicated preliminary hearings dealing with culpability bandings and turnover utilising experts will become the norm. Only time will tell, but how easily will courts be able to manage these additional, potentially lengthy hearings in already clogged up calendars? These guidelines represent a real challenge to everyone concerned.”

Danny McShee, partner at Kennedys, says: “The new sentencing guidelines represent a sea change in health and safety law. We anticipate that as the courts become familiar with the guidelines over the coming months, we will be increasingly advising corporate clients that they face a level of fine which, until very recently, would have been almost unfathomable.”

## NEWS IN BRIEF

### Court of Protection access

The media and public are being given access to Court of Protection hearings under a new six-month pilot scheme. The court makes decisions about the personal welfare, property and affairs of persons who lack capacity to make them themselves, applying a best interests test. Under a new Pilot Practice Direction, which took effect on 29 January, the default position will be that hearings are held in public with reporting restrictions to protect identities.

### First into Iran

CMS Cameron McKenna is the first law firm off the blocks to set up a dedicated office in Iran, following the relaxing of EU and UN sanctions against the country last month. The firm is opening an office on Nelson Mandela Avenue in North Tehran, which will be led by partners of CMS Germany. The lifting of sanctions potentially opens up a multi-billion dollar market in oil, software and other goods. Cornelius Brandi, executive chairman of CMS, says: “We see many opportunities, especially in energy, technology and automotive.”

## Corporates spend less on law firms

Corporate law departments are spending more on internal budgets than on external law firms, according to research by the Association of Corporate Counsel (ACC), a global organisation of more than 40,000 in-house lawyers.

Complex litigation is the most common work

to outsource. One-in-five general counsel who expect a reduction in outsourcing said they will increase the number of in-house lawyers in the year ahead.

Moreover, the percentage of general counsel whose companies have designated legal operations staff has more than doubled, and

one-third of chief legal officers around the globe say their companies have been targeted by regulators. These regulatory concerns were particularly high for chief legal officers based in EMEA (Europe, Middle East and Africa) and Latin America/the Caribbean, where 44% and 41% have been targeted.

## Ruling restricts civil liberties

A Court of Appeal ruling could restrict legal aid funding for false imprisonment claims, law firm Hodge Jones & Allen has warned.

The decision in *R (Oo Sunita Sisangia) v Director of Legal Aid Casework* prevents legal aid funding for claims against public bodies unless the claimant can show the defendant intended to act unlawfully or acted dishonestly. Lord Justice Laws held that the police did

not deliberately arrest Sisangia unlawfully, therefore legal aid should not have been granted.

Hodge Jones & Allen says the decision applies not just to loss of liberty cases but also claims involving assault, battery and other torts. Sasha Barton, a partner at the firm and solicitor for Sisangia, describes the decision as “a considerable blow for civil liberties in this country”.

She added: “The judge’s

suggestion that claimants in Miss Sisangia’s position could find a solicitor to represent them pro bono, under a conditional fee arrangement or represent themselves as a litigant in person, is, with respect, fanciful. Due to other funding changes it is no longer possible in practical terms to fund cases under CFAs unless there is a personal injury element, which in cases like this there are not.”

# Fixed costs cause alarm

Lord Justice Jackson stirs up controversy with latest proposals

Lawyers have given a mixed response to Lord Justice Jackson's call for fixed costs in all claims valued at up to £250,000.

Sir Rupert, whose 2010 review of civil litigation led to sweeping reforms, made the proposal last week in a speech to insolvency practitioners.

However, Professor Dominic Regan, of City Law School, who describes Sir Rupert's proposals as "staggering" in their audacity, points out that fixed costs would apply to clinical negligence—"perceived as the safest and potentially most lucrative of injury work"—and would include the fees of counsel.

Writing in *NLJ* this week, he

predicts instructions of counsel will diminish: "In injury, where some fast-track cases are already captured by fixed costs, law firms are increasingly reluctant to involve counsel."

Prof Regan says that Sir Rupert is convinced that "many legitimate claims are not pursued because of the fear that costs would cripple or annihilate the claimant".

He adds that Sir Rupert "has long viewed [the hourly rate for determining costs between the parties] as a reward for the incompetent and an incentive to make a meal of everything".

Bar Council chair, Chantal-Aimée Doerries QC warns:

"Large corporations and governments may well be willing to spend large sums of money—beyond what is recoverable—on legal disputes with individuals or smaller corporations whose costs are fixed at a much lower rate. Lawyers may not take on complicated, low value cases, thus preventing legitimate claims from being pursued."

However, she praised Sir Rupert's acknowledgment to build in regular reviews. Law Society president Jonathan Smithers also expressed concern about the impact on access to justice for highly complex cases.

See further p 7.

## Feelings tax

Income tax may be levied on payments made for injury to feelings, the Upper Tribunal has held.

*Moorthy v HMRC* [2016] UKUT 13 TCC concerned the extent to which a payment made by an employer to settle a claim for unfair dismissal and age discrimination following termination by redundancy could be liable to income tax.

The employee, Moorthy, received from his employer statutory redundancy pay of £10,640 and, following mediation over his claim, £200,000 compensation for loss of office and employment.

A dispute arose between Moorthy and HMRC over whether compensation for injury to feelings was taxable.

Delivering her judgment, Mrs Justice Rose held that, while payment made "on account of injury to an employee" is tax-exempt, the "injury" must be a medical condition not injury to feelings.

## The future is...

More solicitors will work in-house or in specialist firms by 2020, a Law Society report has predicted.

In *The Future of Legal Services*, the Law Society-commissioned report looks ahead to a future where more clients unbundle to find the most cost-effective solutions and, in private law, fewer individuals are able to afford legal advice.

This bleak picture encompasses City and US and UK-headquartered global firms, which will start to feel the pinch as law firms in emerging markets begin to challenge their dominant position. Increasing globalisation will also increase the need for in-house counsel who understand the global requirements of their business. With so many different legal landscapes to look after, the breadth of responsibility of in-house counsel will expand.

Clients now wield more power in the relationship with their lawyer, as they have benefited from greater access

to information about cost, greater ability to unbundle services and an expanding array of alternative law firms from which to source work. The impact of the "Big 4" accountancy firms offering legal services should not be underestimated, the report warns.

Technology has led to commoditisation of routine work in the past, a trend which will continue. Online dispute resolution will also come to the fore by 2020 and has "enormous potential", according to the report.

Law Society chief executive Catherine Dixon says: "Individuals and businesses seek and depend on excellent, affordable legal advice at critical times. Solicitors are innovators and are responding to changes in a highly competitive legal services market. As the government consults on the future of regulation and the market, we will call for a fair regulatory playing field for all legal services."

## THIS WEEK ON THE WEB

### MOST READ ON NLJ ONLINE

- ▶ Insurance fraud report "hijacked" (News)
- ▶ M&S PROFILE: Philippa Connaughten
- ▶ Heterosexual couple lose out on civil partnership (News)
- ▶ For the good of the profession (Geoffrey Bindman QC)
- ▶ Agreeing to disagree (Thomas Roe QC)

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### NEWS IN BRIEF

#### Make-up of the Bar

The Bar Standards Board (BSB) has published its annual report for 2015 on the diversity of the profession. It notes that women are even with men at the point of pupillage but under-represented at the practising Bar. It also cites evidence that black and minority ethnic barristers are also under-represented at the Bar, and not progressing to QC status at the same rate as white barristers. BSB director of regulatory policy Ewen MacLeod says: "We are complementing [this report] with further projects such as the recent women at the Bar survey which has been designed to provide evidence about the challenges and experiences of different segments of the Bar."

#### Reserved activities

The Solicitors Regulation Authority (SRA) has welcomed the decision by the Legal Services Board to approve proposals to remove unnecessary burdens on law firms carrying out reserved activities. The previous rules meant that the SRA could revoke or suspend a firm's authorisation if it did not carry out the reserved activities it was authorised to do. The removal of this rule means that once a firm has shown it meets the standards to be entitled to carry out reserved activities, it will not need to demonstrate that it is actively doing so.