Health and Safety – the cost of getting it wrong

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A reminder – Health and Safety at Work etc Act 1974

• **Section 2** - Duty of employer to ensure so far as is reasonably practicable the health, safety and welfare of its employees.

• **Section 3** - Duty of employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that non-employees who may be affected thereby are not exposed to risks to their health and safety

• **Section 7** – Employees duties
A reminder – Health and Safety at Work etc Act 1974

Section 37(1)

• “director, manager, secretary or other similar officer” can be prosecuted where the NHS body has committed an offence and the offence was as a result of “consent”, “connivance”, or “neglect” on the part of that individual

• “Those who are in a position of real authority, the decision makers with the Company who have both the power and responsibility to decide corporate policy and strategy”

R v Boal
Health and Safety (Offences) Act 2008

• Came into force on 16 January 2009
• Imprisonment now a penalty following conviction for breach of duty under sections 2, 3 and 7 and for section 37(1) offences
• Increased penalties for breach of regulations - £5,000 to £20,000 per offence
• Magistrates’ Association Guidance
• Importance of representation for individuals
HSE v Royal United Hospital 2007

• “Guidance was available for more than 10 years but this was blatantly not followed. RUH management was inadequate. Mr Eyles died as a result of those failings and many other vulnerable patients were put at risk”

• “The guidance… was clear and unambiguous. The reasons for those failures, I’m told, was ultimately a question of costs”

• “Funds are limited and accordingly they have to be prioritised. In my judgement those who allocated these funds seem to have ignored the health of patients between 2001 and the time of Mr Eyles death”

• “…there is a high degree of culpability because the risk assessment of Legionnaire’s disease was well documented.”
Forum 28
Corporate Manslaughter Act 2007 (6 April 2008)

- An organisation is guilty of an offence if the way in which any of its activities are managed or organised:
  (a) causes a person’s death; and
  (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased”

- An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach.
Relevant Duty of Care – for the Judge

Section 2(1)

• Duty owed by employer to employees and to others working for or performing services for it
• Duty owed as occupier of premises
• Duty owed in connection with:
  ▪ the supply by the organisation of goods or services
  ▪ the carrying on of construction/maintenance operations
  ▪ the carrying on of any other activity on a commercial basis
  ▪ the use or keeping of any plant, vehicle or other thing
Gross Breach of Relevant Duty of Care

• “…if the conduct…..falls far below what can reasonably be expected of the organisation in the circumstances.”

• Jury must consider whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the breach

• Jury may consider “attitudes, policies, systems or accepted practices” within the organisation that were likely to have encouraged any such failure or to have produced tolerance of it

• Catch all – “Any other relevant matter”
Senior Management – who will be included?

Persons who play **significant roles** in:

- the making of decisions about how the whole or a **substantial** part of its activities are to be managed or organised; or
- the actual managing or organising of the whole or a substantial part of those activities.
leading health and safety at work

LEADERSHIP ACTIONS FOR DIRECTORS AND BOARD MEMBERS

www.iod.com/hsguide
www.hse.gov.uk/leadership
R v Paul White and MW White Ltd

• Managing Director, Paul White, pleaded guilty to manslaughter following the death of foreman Kevin Arnup in 2003
• Mr Arnup climbed into ‘paper hogger’ machine to clear blockages when the machine started.
• The mains current should have been switched off but it was common practice for the rule to be ignored by workers and by White himself.
• Cost of preventing accident
• White was sentenced to a 12 month custodial sentence; s3 HSAW Act 1974 against Company.
Under investigation

• Are you prepared for an investigation by the Police and/or the Health and Safety Executive?

• Will your systems and procedures stand up to the scrutiny of the Investigators?

• Joint Protocol on work related deaths

• To ensure the effective liaison between the parties in relation to the investigation and prosecution of offences following a work related fatality

• Police will conduct an investigation when there is an indication of the commission of a serious criminal offence and HSE will investigate health and safety offences in a joint investigation
What will the investigators look for?

• Failure to heed warnings
• Profit before safety
• Failure to assess risks
• Poor/inadequate communication
• Poor leadership
• Lack of enforcement
• Lack of monitoring and review
Interviewing witnesses

Section 9 Voluntary Witness Statement

• Can be used in evidence
• May turn into an interview under caution

Section 20 Compulsory Witness Statement - HSE only

• Any person who the inspector has reasonable cause to believe is able to provide relevant information. Giving false information / refusing to answer questions is a criminal offence
• Privilege against self incrimination
You do not have to say anything. But it may harm your defence if you do not mention when questioned something you later rely on in Court. Anything you do say may be given in evidence.
It could be you!
Critical Incident investigation

- You must be prepared - the investigators will be!
- Manage and co-ordinate your response to an investigation
- Critical Incident Protocol
- Accident investigation
- Preserve documentation
- Early/contemporaneous statements
- Separate legal representation for employees – early decisions
Conclusion

• Investigations will be continue to become complex, invasive and lengthy

• Prosecution of NHS bodies for Corporate Manslaughter will be far easier

• NHS Bodies will need to demonstrate:
  ▪ an appropriately structured health and safety management system
  ▪ which is actively enforced and monitored/reviewed on an ongoing basis

• Health and Safety must be engrained in every aspect of the your business
Corporate Manslaughter

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