

Minutes of Safety Group Fife Meeting

Held 12th October 2008 at

**Dunfermline Building Society, Caledonia House
Carnegie Avenue, Dunfermline.**

Present

Davie Cant	Carnegie College
Colin Sparling	Carnegie College
Andy Martin	Fife H&S Consultants
Gary Gibson	Colorado Group
David McGinigal	Colorado Group
John Johnston	FMC Technologies
William Millar	Strath Safety
Dot Smith	Broxburn Bottlers
Tim Young	McGrigors LLP
Tom Stocker	McGrigors LLP

Apologies

Apologies were received from Martin Brown, Annemarie Smith, Mark Russell ,

Minutes of last meeting

The minutes of the previous meeting dated 14th September 2009 were approved.

Chairman's Opening Remarks

DC commented on the low turnout and attributed it to the school October break.

DC expressed his thanks to Gary Gibson and David McGinigal of the Colorado Group for arranging the Nu-Phalt demonstration of the road repair system. Group members were able to witness the infra-red road repair technology working.

DC went on to introduce Tom Stocker and Tim Young from McGrigors Solicitors, Tom was going to give a Health and Safety Legal update.

Presentation

Tom started by introducing himself and explaining his role with McGrigors, whom he has recently joined as a Partner.

He opened by explaining that the HSE had introduced a new legal prosecution team, a specialist health and safety division covering the North, West and East of Scotland.

They provide specialist prosecuting council for serious cases, with responsibility for prosecution and fatal accident inquiry. The objective is to provide a consistent approach to Health and Safety Law and sentencing.

Tom highlighted some recent Case Law Developments

[R v Northwest Hoist Construction Limited and Constain Limited \(2009\)](#)

- R v HTM argument – employees own fault
- Welder working on temporary platform under bridge
- Dismantling Tack welds
- Platform became unstable and he was crushed
- No evidence that the defendants could or should have foreseen the accident
- It was for the Crown to prove foreseeability
- Deceased was on “a frolic of his own”
- Only if foreseeable risk was established could the burden shift to the defendant to prove it wasn't reasonably practical to predict.

[R v Porter \(2008\)](#)

- Head teacher of Primary school charged as a result of an accident in the playground.
- Child jumped from a step, fell, hit head and died.
- Head Teacher acquitted.
- Must be a **real risk** caused by the particular undertaking
- Risk was part of the incidence of everyday life
- Risk was not caused by the conduct of the undertaking
- No question of reasonable practicability until it was established the risk was caused by the undertaking.

[R v P \(2008\)](#)

- 6 year old thrown from forklift truck
- Managing Director charged – “being the managing director of P Limited... Suffered that body corporate... to commit an offence pursuant to Section 2 (1) of the Health and Safety at Work Act.... With his consent and/or his connivance and/or by his neglect”
- S 37 – consent, connivance, neglect
- Argued – he was not aware of the risk
- What did the director know and what should he have known.
- Scope of the functions of office
- Surrounding circumstances.

[HM Advocate v Mitie Engineering Services Limited, 9th October 2008](#)

- Employee electrocuted and killed
- Company and senior employees charged
- S37 – consent, connivance, neglect of director, manager or secretary

- Concerned those persons charged with functions of management. Relevant factors.
- Not restricted to directors and senior management
- Budget or financial responsibility
- Policy and strategic responsibility – responsibility for commission of an offence by the company
- Proper process of delegation.
- No evidence of neglect by management linked to accident
- Learning points – Careful allocation of responsibilities, Delegation is allowed, Consider budgetary/financial limits and are directors aware of the Institute of Directors Guidance – Leading Health and Safety at Work?

[HMA v LH Access Technology Ltd and Border Rail & Plant Ltd 29 Jan 2009](#)

- Both companies convicted under Section 2 and Section 3 respectively
- Employee killed when attempting to manoeuvre a defective mobile work access platform
- Fines imposed £240,000 each (£300,000 with a 20% discount for a guilty plea)
- Appeals rejected despite being in excess of 9% of turnover
- English Sentencing Advisory Panel: recommendations only.

Tom commented on the matter of Enforcement notices, highlighting that Inspectors have discretionary powers under the 1974 Act to issue Prohibition Notices and Improvement Notices.

They can be appealed to the Employment Tribunal within 21 days of service. The HSE has argued for years that the correct test in reviewing the notices was whether the Inspector acted reasonably, even if with hindsight it was not appropriate. This was always a barrier to bringing successful appeals.

Tom went on to give a case law example of – [Chilcott v Thermal Transfer Limited](#)

- Inspector issued a Prohibition Notice following a fall from height on a construction site, he did not investigate the documentation and procedures on site.
- It became apparent afterwards that the procedures in place were adequate and the notice had been inappropriate.
- The correct test was for the Employment Tribunal to consider all of the evidence and decide if it would have issued the notice at the time.
- It considered the information not known to the inspector at the time of the notice
- The likelihood of repetition or exceptionality of the accident was the valid factor to take into account in making that judgement (contra [Railtrack v Smallwood](#)).

Conclusion?

- The courts seem to some extent concerned at attacking frivolous prosecutions by the HSE and relieving the burden on employers when defending them.

- Scope for arguing the Crown have to prove an accident was foreseeable and caused by an employer's undertaking
- Increased scope of arguing that the company did all that was reasonably practicable.
- Increase risk of personal liability post Mitie
- Increased fines
- Increased scope to appeal enforcement notices

Tom went on to detail the Legislative changes that have come in over the last year or so. He talked about the [Health and Safety Offences Act 2008](#): In force from 16th January 2009 . This brings increased penalties for Health and Safety offences, it also enables Directors to be imprisoned for breach of S 37 in some cases for up to 2 years.

Tom commented that there is Political will to increase the prosecution of directors.

[Environmental Liability \(Scotland\) Regulations 2009/266](#) – In force from 24 June 2009, any “operator” now has a duty to report any environmental damage that is caused as a result of their operations to the appropriate regulator (Scottish Ministers; SEPA; Scottish Heritage).

They have a duty to control, contain, remove or otherwise manage any environmental damage. The regulator will then come up with remedial measures , the cost of implementing which will be borne by the operator. Criminal sanctions will be applied if there is non co-operation.

[Regulatory Enforcement & Sanctions Act 2008](#) – Primary Authority, direct other authorities not to prosecute.

Four new civil sanctions (HSE, EA, SEPA, Local Authorities).

- Fixed monetary penalty
- Discretionary requirements
- Stop notices
- Enforcement undertakings

Costs to be borne by offender.

[Criminal Justice and Licensing \(Scotland\) Bill](#) – Prior witness statements to be admissible, Accident Investigation – Do you have witnesses sign witness statements – Why?

Tom concluded his presentation, there being no questions from the floor, DC thanked him and Tim for giving up their time to come through and present to the Group.

AOB

DC raised the subject of the proposed leaflets which would be used to publicise the work of the Group and advertise the speaker programme for 2009/2010. There being no objections to the leaflets DC stated that an order would be placed for the leaflets.

DC highlighted that a revised design for the banner had been issued by MR, again, there being no objections, an order would be placed for the banner.

DC highlighted the poor response to the Group Safety Awards, he encouraged as many companies as possible to enter.

Date of Next Meeting

The next meeting will be held at 7.30pm on Monday 9th November, speaker for the evening will be Mr Dougie Potter and Ms Shona Robertson from the Emergency Planning Department of Fife Council. They will present on their role and cover Business Continuity and DR.

Mark Russell
Secretary
Safety Group Fife.