

21 NOVEMBER 2019



# LEGAL UPDATE

# IOSH Chiltern Branch

Oliver Campbell QC | Alison Newstead

SHOOK  
HARDY & BACON

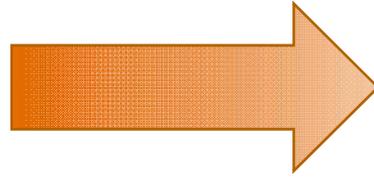
# **Navigating the Legal Landscape**

**Recent Developments and Case Law**

# **Navigating the Legal Landscape**

# Injury in the workplace

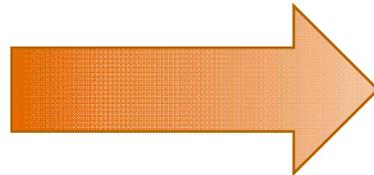
## 3 Distinct Legal Processes



**Inquest**

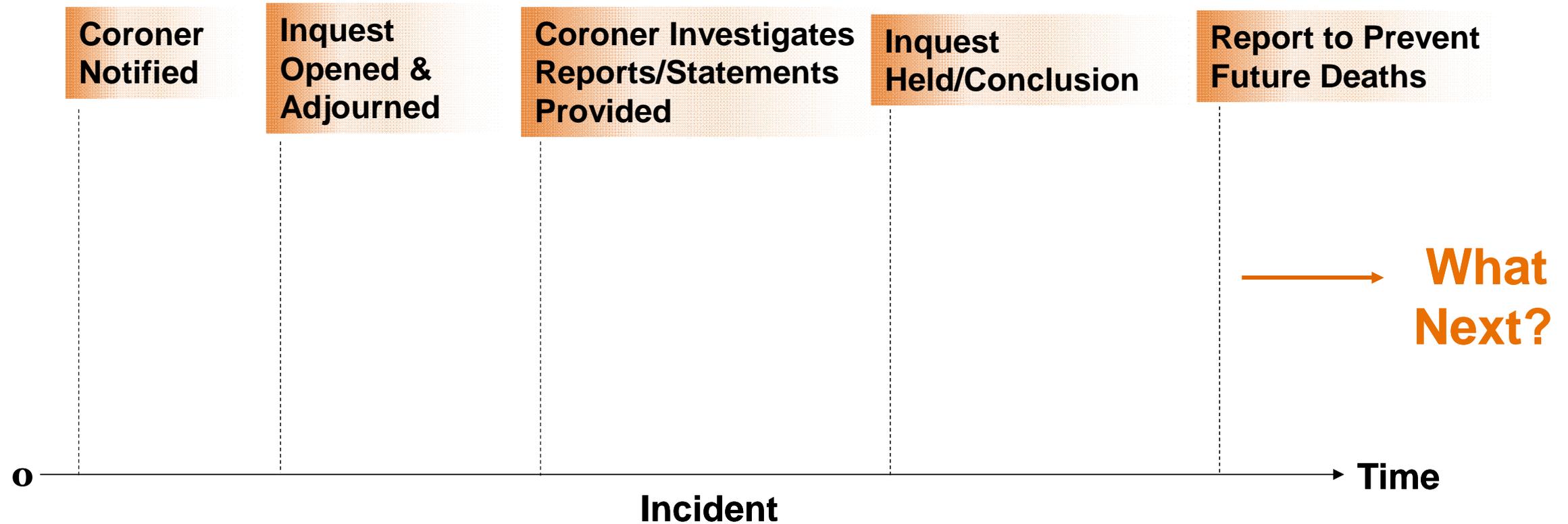


**Regulatory  
Investigation/Prosecution**



**Civil claim**

# Inquest Timeline



# When will a claim for damages be made?

## **If fatal incident:**

- ◇ Civil Claim is unlikely to commence until after an Inquest
- ◇ No fault finding at the inquest, but evidence will inform Claimant of potential chances of success
- ◇ 3 years from date of death

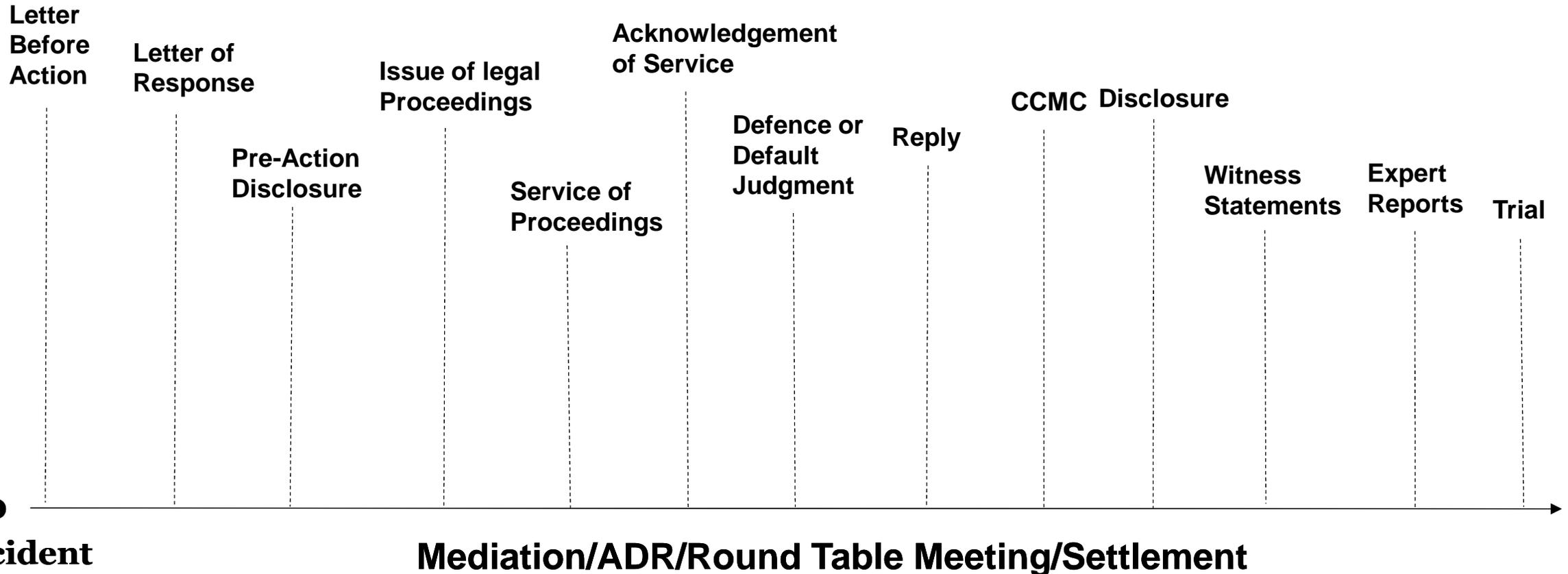
## **If not a fatal incident:**

- ◇ Injured party has 3 years from:
  - The date on which the cause of action accrued; or
  - The date (if later) of Claimant's knowledge

# Timeline – Civil Claim

Pre-Action

Formal Proceedings



# Questions, questions ...

What is disclosure?

Our expert is giving evidence for us, isn't he?

What damages will my employee receive?

How much will this cost?

Will I need to provide a witness statement?

What will solicitors need from us?

How long will this all take?

How do civil, regulatory and criminal proceedings interact?

Can we settle the claim at any time?

# Pre-Action

- Must follow “*Pre-Action Protocol*”
- Aim to minimise cost and delay
- Co-operation/sharing of information between parties encouraged
- Sanctions?



# Letter Before Claim

- ◇ Details of nature of claim and date, location
- ◇ Summary of the facts/circumstances of the accident
- ◇ Reason why liability is alleged
- ◇ Outline of Injuries sustained
- ◇ Details of loss of earnings/other losses
- ◇ Possibly request documents
- ◇ Request that letter be sent to your insurer

# Letter of Response

- ◇ Sent after allegations investigated
- ◇ Usually within 3 months (if sufficient time to investigate)
- ◇ Set out the Defendant's position on liability
- ◇ Set out any defence on limitation
- ◇ Provide documents requested, e.g.,
  - accident book entry, accident reports, CCTV footage, RIDDOR report, service/maintenance records, risk assessments, health surveillance records...

**Resolution?**

# How are damages calculated?

General Damages



“PSLA” Pain, Suffering  
and Loss of Amenity  
Loss of future earnings  
Loss of earnings capacity

Special Damages

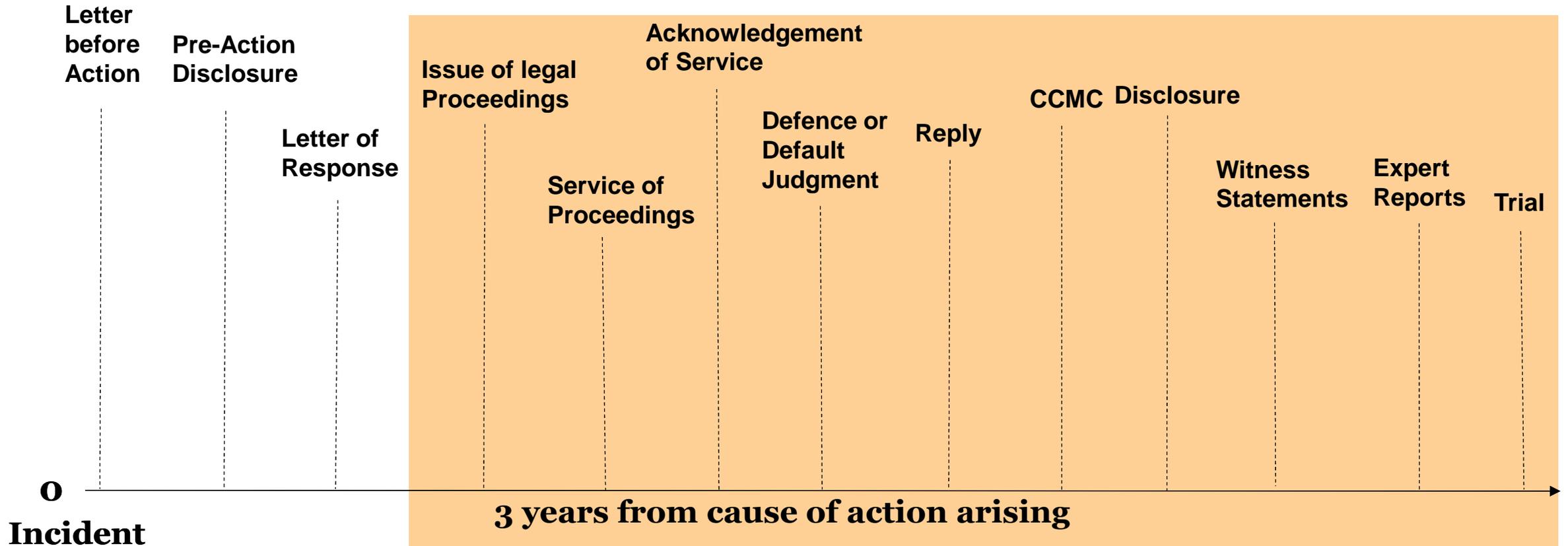


Quantifiable sums up  
to trial

# Formal Litigation

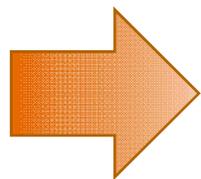
Pre-Action

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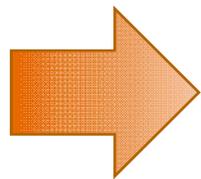


# What are “Pleadings?”

- ◇ Claim Form and Particulars of Claim
- ◇ Schedule of Loss
- ◇ Defence and Counterclaim/Claim against a third party
- ◇ Reply to Defence/Defence to Counterclaim



Facts on which the Claimant and Defendant intend to rely



Basis on which the claim will proceed – will inform decisions on disclosure, witness evidence and expert reports.

# What is disclosure?

*“In plain language, litigation in this country is conducted ‘cards face up on the table’. Some people from other lands regard this an incomprehensible.*

*‘Why’ they ask, ‘should I be expected to provide my opponent with the means of defeating me? The answer, of course, is that litigation is not a war, or even a game. It is designed to do real justice between opposing parties and, if the court does not have all the relevant information, it cannot achieve that.’”*

*Sir John Donaldson M.R.*

*Davis v Eli Lilly & Co [1987] 1 WLR 428*

# What does disclosure involve?

- ◇ Search for, and disclosure of, list of documents in your “control”
- ◇ Those that you intend to **rely upon** or which **adversely affect your case**
- ◇ *“Cards on the table”*
- ◇ Concentrates minds

# Exceptions?

- ◇ Document is privileged
- ◇ Disclosure would harm public interest
- ◇ Disproportionate

# Is disclosure a big task?

- ◇ Can be enormous!
- ◇ Document includes anything in which information of any description is recorded – including electronic.
- ◇ Papers, DVDs, CDs, emails, voicemails, WhatsApp, texts ...
- ◇ Make sure documents are preserved!
- ◇ Continuing obligation of disclosure
- ◇ Order for specific disclosure

# Witness Evidence

- ◇ What facts must be proved and how will this be done?
- ◇ Party who asserts a fact must prove it
- ◇ Witness statements prepared and exchanged before trial
- ◇ May not be the first statement – employer, Police, HSE may have already taken statements
- ◇ No property in a witness



# Expert Reports

- ◇ Likely that experts will be appointed
- ◇ Overriding duty is to the Court
- ◇ Will prepare a written report
- ◇ Reports will be exchanged
- ◇ Meetings will be held between the experts to narrow the issues

# Preparation for Trial

- ◇ A Pre-Trial checklist will be completed.
- ◇ Revisit all Statements of Case and evidence of witnesses and experts
- ◇ May need to issue a witness summons
- ◇ Trial bundles, Skeleton arguments, reading lists
- ◇ Trials are extremely costly
- ◇ Resolution before trial is nearly always preferable for all involved.

**Always try ADR**

“

*“The message which this court sent out in PGF II was that to remain silent in the face of an offer to mediate is, absent exceptional circumstances, unreasonable conduct meriting a costs sanction, even in cases where mediation is unlikely to succeed. The message which the court sends out in this case is that in a case where bilateral negotiations fail but mediation is obviously appropriate, it behoves both parties to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction.”*

Thakker –v- Patel [2017]



# How will a civil claim impact the business?

- ◇ Litigation is time-consuming
- ◇ Detracts from day-to-day running of business
- ◇ Stressful – especially for witnesses, employee involved
- ◇ Costly – financial, reputational, emotional

# Managing a regulatory investigation

- **Interviews**
- On what basis are you being questioned?
- What does this mean in practice?
- Do you have any legal protection?
- **Interviews Under Caution**
- What are the pros and cons of attending such an interview?



## Immediate aftermath of an incident

- Reporting obligation under Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 ('RIDDOR')
- Obligation on 'responsible person' (normally the employer) to report significant injuries, including where employee incapacitated for more than 7 days.



## Inspector's powers under s. 20 HSWA

Inspector has a range of powers under s. 20 when investigating an incident including:

- enter and examine premises;
- take samples and undertake tests;
- take copies of books, documents etc;
- direct that premises be left undisturbed.

NB powers different from those of the police, and not circumscribed by the need to obtain a search warrant.

Can't compel production of documents which are privileged.



## Inspectors powers under s. 20 to require answers to questions.

Inspector also has power to require any person he has reasonable cause to believe has relevant information to answer questions and sign a declaration of truth of his answers.

-no answer given is admissible in evidence against that person, or his spouse or partner.

-person being questioned has the right to have another person present.

Typically results in a statement being produced in the form of a series of questions and answers.



## Voluntary / s. 9 interviews

HSE will take voluntary / s. 9 statements at a variety of stages through the investigation including:

- From witnesses in the days after an incident.
- Following voluntary interviews.
- Following a s. 20 interview.

Key differences from a s. 20 interview are:

- No protection against self-incrimination.
- No right to representation.
- No obligation to answer questions or attend the interview.



## Voluntary statements taken by inspectors and the police

- Witnesses giving statements in the immediate aftermath of an accident can be distressed, affecting their concentration etc. Statements can be incomplete, inaccurate or even misleading.
- Depending on the circumstances, it may be appropriate to give advice and support to witnesses before giving their statements.
- Witness entitled to a copy of the statement.



## Statements taken by the employer

- Often sensible for the employer to take its own statements from witnesses, particularly witnesses present at the scene of an accident.
- Should be done while the events are fresh in the witness's memory, and before they become a prosecution witness.
- Should be signed, so the statement can, if necessary, be put a witness when he or she gives evidence.
- There is a risk that the statement will become discloseable.



## Accident Investigation Reports

- Employer has a duty to learn from any accidents, and to seek to prevent recurrences. Therefore the employer clearly has a duty to investigate any accident or near miss.
- HSE / prosecution may well ask to see an employer's accident investigation report.
- If the report is not produced employer may be criticised; though equally the contents of the report may be damaging. Reports giving a root cause analysis can be particularly damaging evidence.



## Accident Investigation Reports

- Lawyers should ideally be involved in the commissioning of the report, and certainly copied into it. Increases the likelihood of being able to maintain privilege in the report.
- In relation to a serious incident, may be appropriate to produce more than one category of report.



## Interviews under caution

Main options on being invited to a PACE interview:

- Decline invitation.
- Provide a signed statement seeking to answer the HSE's questions, and making any representations as to why a prosecution is not appropriate.
- Attend.



## Interviews under caution

Factors relevant to decision whether to attend:

- Duty of a public body of candour and to co-operate with another public body's investigations.
- Would allow you to say in mitigation that you have fully co-operated with the investigation.
- However care has to be taken in making assertions that employer has done nothing wrong, in circumstances where that may well prove to be mistaken, and give the appearance of the employer not having learned from the accident. Think very carefully before blaming the injured party (or giving that appearance).



## Interviews under caution

- Opportunity for employer to put forward its position and possibility of persuading the HSE not to prosecute.
- Risk of being obliged to give answers which will give assistance to the prosecution and be damaging.

Producing a detailed statement often the best option for a corporate employer invited to attend an interview, but will depend on the circumstances.



Who should attend on behalf of the employer? Options:

- Someone with no first hand knowledge of the circumstances, who may be able to deflect questions, but state an overall / corporate position.

- Someone with detailed knowledge of the circumstances, who is able to correct misapprehensions under which the HSE is labouring.

Whoever is chosen, preparation is important.



## Preparation:

- Ask HSE for a list of issues they intend to cover, and any documents they intend to put to the witness.
- If necessary, clarify whether the witness is being interviewed in their own capacity or on behalf of the company / employer.
- Discuss with interviewee areas that are likely to be covered.



HENDERSON  
CHAMBERS

# RECENT DEVELOPMENTS IN HEALTH & SAFETY LAW AND PRACTICE

Oliver Campbell QC

## Overview of Recent Developments in H&S Law and Practice

- Increase in the level of fines, particularly for larger organisations, following the Sentencing Council's Guideline which came into force in Feb 2016.
- Greater tendency to prosecute individuals.
- Increased risk and use of custodial sentences for individuals.



## Over view of Recent Developments in H&S Law and Practice

- More contested trials
- Longer sentencing hearings.
- More evidence deployed at sentencing hearings.
- Greater significance attached to inquests.



Old law: Edwards v NCB (1949)

- gross disproportion test

- defendant only discharges obligation on him to prove that he has taken all reasonably practicable steps if could establish there was a gross disproportion between measures necessary to avert the risk (in money and trouble) and the risk.



## Test of what is “reasonably practicable”

Test re-considered by Supreme Court in civil case of Baker v Quantum (2011)

- Safety is a relative concept. What can be regarded as safe changes over time.
- Lord Mance (para 82): “The criteria relevant to reasonable practicability must on any view very largely reflect the criteria relevant to satisfaction of the common law duty to take care. Both require consideration of the nature, gravity and imminence of the risk and its consequences, as well as of the nature and proportionality of the steps by which it might be addressed, and a balancing of the one against the other. Respectable general practice is no more than a factor, having more or less weight according to the circumstances”.
- Therefore test similar to civil test in negligence.



## Test of what is “reasonably practicable”

Baker v Quantum considered by Court of Appeal in the criminal law context in R v Tangerine (2011)

-Analysis in Baker does apply to health and safety prosecutions.

-Hughes LJ (para 36): “We note that this defence does not impose on an employer the duty to take every feasible precaution, or even every practicable one; it imposes a duty to take every reasonably practicable one. What is reasonably practicable no doubt depends on all the circumstances of the case, including principally the degree of foreseeable risk of injury, the gravity of injury if it occurs, and the implications of suggested methods of avoiding it.”



Also established in R v Tangerine:

- Foreseeability of risk potentially relevant to both the existence of a material risk (proof of which rests on the prosecution) and whether defendant has taken all reasonably practicable steps (where burden of proof rests on defence).
- However employers have a duty “to think deliberately about things that are not obvious”.
- Further, prosecution does not have an obligation to prove that the accident which occurred was foreseeable.



# Sentencing Council: Definitive Guideline

Applies to sentences imposed from 1 Feb 2016 in respect of:

Health & Safety Offences

Corporate Manslaughter

Food Safety Hygiene Offences

Separate sections for offences committed by organisations and individuals



## General principle to follow in setting a fine.

The level of fine should reflect the extent to which the offender fell below the required standard. The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; it should not be cheaper to offend than to take the appropriate precautions.

The fine must be **sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with health and safety legislation.**



## Definitive Guideline: Key Steps

1. Determine culpability: very high; high; medium or low)
2. Harm Category: 1-4 based on seriousness of harm risked and likelihood of harm. Then adjust if exposed many people or cause of actual harm.
3. Consider size of organisation.
4. Arrive at starting point based on 1, 2 and 3.
5. Adjust for aggravating and mitigating features.
6. Check whether proposed fine based on turnover is proportionate to overall mean of offender.
7. Consider wider impact (eg impact on staff, but not shareholders or directors).
8. Reduction for guilty plea.



## Sentencing Council's Assessment of the Impact of the Guideline

Impact assessment published in April 2019:

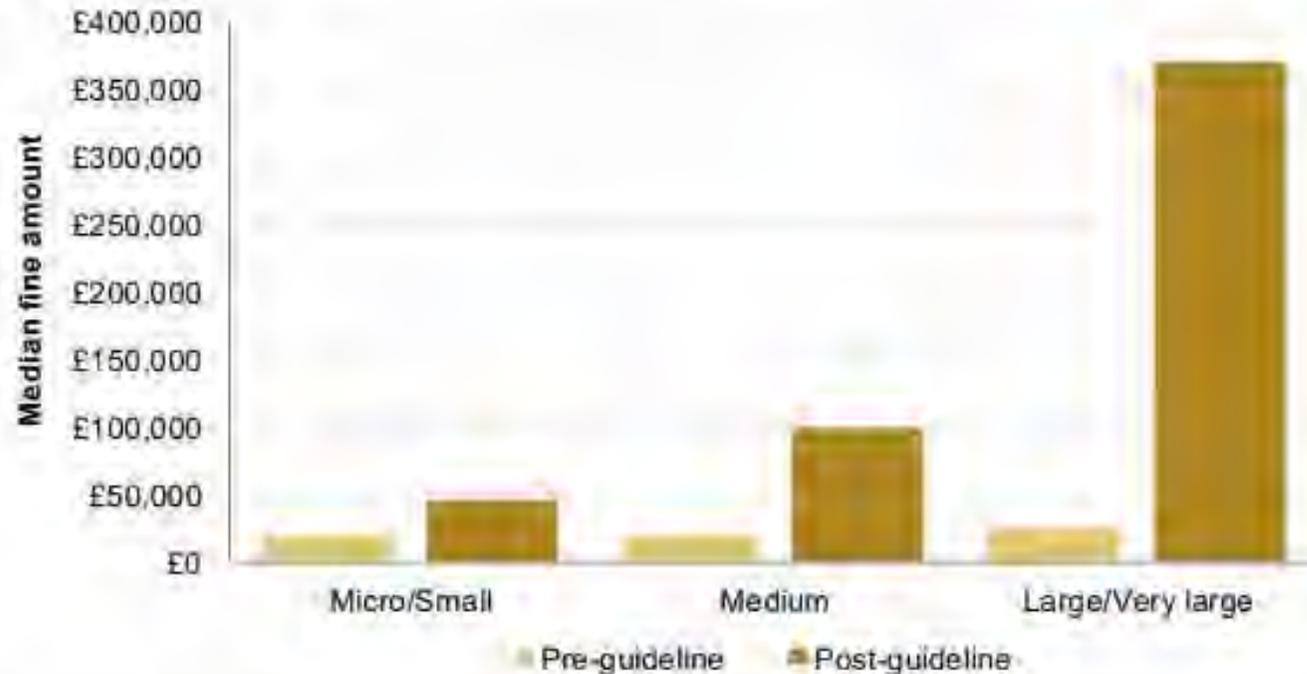
*“For health and safety offences, there has been a considerable increase in fine amounts for larger organisations since the guideline came into force, which was anticipated by the Council. Fines also appear to have increased (to a lesser degree) for smaller organisations, which was not anticipated.”*

*“A comparison of a sample of judgments for health and safety cases heard by the Court of Appeal (both before and after the guideline came into force) suggests that fewer appeals have been successful following the guideline’s introduction (although this finding is indicative only, due to the small sample analysed).”*



# Increase in median fines post Guideline

**Figure 3: Median fine amounts imposed on organisations prosecuted by the Health & Safety Executive, 16 months pre-guideline compared with 16 months post-guideline<sup>30</sup>**



Source: HSE prosecutions data, supplemented with information from Companies House

Tables for:

Micro: turnover less than £2m

Small: turnover of £2-10m

Medium: turnover of £10-50m

Large: “£50 million and over”.

“Very large organisations

Where an offending organisation’s turnover or equivalent very greatly exceeds the threshold for large organisations, it may be necessary to move outside the suggested range to achieve a proportionate sentence.”



## R v Thames Water (CA) (2015)

Thames Water: turnover of £1.9bn

Fine of £250,000 for environmental offences upheld.

Lord Thomas: following an attempt by the Crown to define very large organisations as anything with a turnover of over £150m, the Court of Appeal held: *“We do not think that there is any advantage to be gained by such a definition. In the case of most organisations, it will be obvious that it either is or is not very large. Doubtful cases must be resolved as and when they arise.”*

*“Even in the case of a large organisation with a hitherto impeccable record, the fine must be large enough to bring the appropriate message home to the directors and shareholders and to punish them.... We would have had no hesitation in upholding a very substantially higher fine.”*



## R v Whirlpool (CA)(2017)

Fine of £700,000 reduced on appeal to £300,000

Whirlpool with a turnover of c £600m treated a very large organisation.

*“No two health and safety cases are the same. The Guideline provides for very substantial financial penalties in appropriate cases, particularly when the offender is a large or very large organisation. Yet it is subtle enough to recognise that culpability, likelihood of harm and harm itself should be properly reflected in any fine, as well as turnover. The same degree of actual harm following a breach of section 2 or 3 of the 1974 Act can deliver very different fines depending on the circumstances. That is obvious when one considers the table we have reproduced in para 10, with its wide range of potential fines for the same offence.”*

*CA emphasise flexibility of the Guideline.*



## Guideline:

“Normally, only information relating to the organisation before the court will be relevant, unless exceptionally it is demonstrated to the court that the resources of a linked organisation are available and can properly be taken into account.”



## R v Tata Steel (CA) (2017)

Fine of £1.8m for two separate breaches of s. 2. Reduced on appeal to £1.4m.

Tata had a very high turnover (c£4bn), but was not profitable. Judge moved up a harm category to reflect the fact it was a “very large organisation”.

CA concluded judge had been entitled to take into account the resources of Tata Steel UK’s parent company.

CA relied in particular on a “going concern” provision in the subsidiary’s accounts, that subsidiary will be able to rely on support from parent.



## R v NPS London (CA)(2019)

Company with turnover of c £6m, wrongly treated as large because of its parent's resources. However:

“Whether the resources of a linked organisation are available to the offender is a factor which may more readily be taken into account at step three when examining the financial circumstances of the offender in the round and assessing “the economic realities of the organisation”. It may certainly be relevant at that stage, when checking whether the proposed fine is proportionate to the overall means of the offender, to take into account the economic reality – if it is demonstrated to the court's satisfaction that it is indeed the reality – that the offender will not be dependent on its own financial resources to pay the fine but can rely on a linked organisation to provide the requisite funds.”

CA again draw attention to the “going concern” provision in the subsidiary's accounts.



## R v Bupa Care Homes (CA) (2019)

Fine of £3m reduced to £1.5m (re outbreak of legionnaires disease in a Bupa care home)

Bupa Care Homes a large organisation in its own right, and not right to take into account resources of other companies within the Group.

“If it is generally wrong to take into account the parent's turnover so as to increase the subsidiary's turnover at Step Two (which it is) then it is wrong to take it into account to increase the fine at Step Three absent some special factor of the type identified in *Tata Steel Ltd*, supra, or *NPS London*, supra (although, as we have observed, these were cases where fines were not reduced because of the parental turnover; they were not cases where fines were increased because of it). We decline to speculate on what such special factors might be; the question will have to be determined as and when it arises.”