

Regulatory Breach



ST. PAULS CHAMBERS

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Welcome..

The November edition looks at two core areas, Health and Safety and Toy Safety which continue to attract the attentions of the prosecuting authorities, with a number of recent high profile instructions received in chambers in both areas. This edition looks at the concept of risk, new penalties in HSE cases and the new Magnetic Toys Safety Regulations.

We also welcome what we hope will be the first of regular updates from our partners, Bureau Veritas, Carbon Ready and Ed Conybeare of Shulmans Solicitors.

Bureau Veritas who are recognised as the one of the leading Test Houses in the UK, they have recently participated in the 7th International Trade Fair for Toys , Hobbies and Baby Articles in China and also conducted the first validation of an Indian Sugar Company's plan to sell carbon credits under the UN Framework Convention on Climate Change. **Carbon Ready** have recently launched a service to calculate product and service carbon footprints in line with the guidelines published by the British Standards Institute PAS2050.

Environmental issues considered in this issue include a background to 'Clean Coal' and a thumbnail guide to the legal and regulatory issues which will arise when Carbon Capture Storage technologies are adopted around the world.

Chambers regulatory group have recently contracted with O'garra's Solicitors to prosecute cases for VOSA. This compliments our continuing work for FACT on behalf of Russell Cooke and Co. We are also currently representing a number of police officers in a long running Inquest before the Wakefield Coronor.

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Developments in Risk

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The Health and Safety at Work Act (HSWA) imposes a daunting task on the defence following a workplace incident. Almost the very fact that an employee has been exposed to risks to his or her health and safety, or has been injured or killed means that the prosecution can pretty much adopt an attitude of 'Well there was an accident at work so there must have been a real risk and therefore the prosecution must succeed.'

However recently, holes have started to appear in this approach and the courts have started to provide a little relief to the defence.

Firstly, it has become clear that there must be a real risk to safety and not merely a hypothetical one. The courts are increasingly saying that there are risks to just about everything we do in life eg crossing the road, playing sport etc etc, but there has to be a real risk from the activity concerned, and not just an everyday one. The death of a schoolboy from a hospital infection after he had fallen down some steps in a play area at his school resulted in a conviction at first instance of the school's headmaster, but was then successfully appealed in the case of **R v Porter [2008] All ER 249**. In a trenchant judgment Lord Justice Moses heavily criticised the prosecution, and made clear that to fall foul of the law, risk must be a relevant risk and not part of everyday life. In addition, Porter makes plain that unless the injured party is exposed to real risk, no question of reasonably practicable measures can arise, and logically therefore, there can be no question of a risk assessment being required.

Secondly, related to the above point, in the oft quoted case of HTM, the Court of Appeal has clearly established that foreseeability is an ingredient of the reasonable practicability test and that reasonably practicable measures to deal with the risk concerned are not a defence in their own right as many had previously thought but simply qualify the duties under Sections 2 and 3 HSWA.

This creates a particularly useful line of attack for the defence in cases where employees have ignored or flouted established policies and procedures to bring about the incident concerned. HTM clearly builds upon **Austin Rover v HM Inspector of Factories [1990] 1 AC 619** where the court made plain that reasonable practicable measures involved a test of foreseeability where the likelihood of risk eventuating has to be weighed against the practical measures (including cost) to eliminate it.

All this will be put to the test when the House of Lords hears the case of Chagot next month. In this case, a construction fatality, no reason was found for why a dumper truck fell on its side, resulting in the driver being buried in spoil. The lower courts have taken the line that the very fact there was a real risk is shown by the fact there was an accident. However, in the light of developments above, the judgement will be very keenly anticipated, with the possibility that the defence of health and safety cases will be clarified and made that much easier.

Increase sentence powers for Health and Safety Offences

On 16th October 2008 the Health and Safety (Offences) Act gained royal assent. It comes into force in January next year, and increases the sentencing powers that can be imposed for breach of health and safety regulations in the lower courts from £5,000 to £20,000 and the broad range of offences which carry imprisonment for directors and senior managers have also been widened.

It seems from press releases from the HSE and the Department for Work and Pensions, that the main intention is not necessarily to increase the tariff for this type of regulatory sentence, rather a desire to retain cases in the Magistrates Courts, in order to save money.

As the Minister, Lord McKenzie said,

'Furthermore, by extending the £20,000 maximum fine to the lower courts and making imprisonment an option, more cases will be resolved in the lower courts and justice will be faster, less costly and more efficient'

The new Act has however been welcomed by Brian Nimick of the British Safety Council who says that it sends a clear message to those who cause serious harm or injury to workers that neglecting health and safety is not acceptable. The BSC has also called for improved sentencing guidelines for judges and magistrates in this field.

The Act amends s 33 of the Health and Safety at Work Act 1974

Current maxima:

- * £5k or £20k for summary offence in lower courts, depending on offence; unlimited fine for indictable offence;
- * imprisonment not available for most offences (but up to 6 months in magistrates court / 2 years in Crown Court for few offences eg failing to comply with a prohibition notice or breaching a licensing requirement).

New maxima:

- * £20k fines in lower courts for nearly all summary offences, unlimited fines in higher courts;
- * Imprisonment for sections 7, 8 and 37 of the HSW Act - up to 12 months in Magistrates Courts and 2 years in the Crown Court.

The Magnetic Toys (Safety) Regulations 2008

Jeremy Barnett
St Pauls Chambers

New guidance is now available from BERR on the Magnetic Toys (Safety) Regulations 2008. The Regulations implement a European Commission Decision which was adopted on 21st April 2008.

The Regulations apply to all magnetic toys placed or supplied on the market from 21st July 2008 including those already in the supply chain and on shop shelves. A magnetic toy is defined as a toy that consists of one or more magnets or one or two magnets that are of an ingestible shape and size [determined by the small parts cylinder test defined in European Standard EN 71 – 2005] and are accessible to children. The regulations require that a new warning must be displayed on the product or packaging, stating 'Warning, this toy contains magnets or magnetic components. Magnets sticking together or becoming attached to a metallic object inside the human body can cause serious or fatal injury. Seek immediate medical help if magnets are swallowed or inhaled.'

Although at first glance these new regulations seem to be another example of petty regulation, condemning old fashioned toys which have been on sale for generations, there is a real danger presented on occasions by magnets becoming detached when swallowed and causing serious injury. In March 2008, the Canadian manufacturer Mega Brands recalled 280,000 MagnaMan and Magstak toys after reports that 19 magnets had come loose from the action figures. The main difficulty is that if more than one magnet is ingested, they can attract each other and cause intestinal perforations or blockages which can be fatal. Examples that have emerged include one magnet that was removed from the nasal cavity of a 3 year old boy; another was found in the mouth of an 18 month old boy. Guidance released in April 2008 by BERR detailed a fatal accident in the USA, and 19 examples of major surgery being required to remove 2 magnets or a magnet and metal object.

Other major recalls include the recall by Mattel in August 2007 of 18 million toys including Polly Pocket sets, Barbie Dolls and Tanner Play sets containing small magnets because of fears that the magnets might come loose. The problem was caused by rare earth magnets which are 20 times more powerful than ordinary fridge magnets, allowing Barbie's dog to chase after her or Polly Pockets clothes easier to take off and put on.

There is very little evidence of such accidents occurring in the UK, apart from an incident in Sheffield in 2000 where children acquired industrial magnets which were used to mimic body piercing which led to 24 referrals to the Sheffield Children's hospital. Professor Mike Gibbs from Sheffield University and Rang Shawis a consultant from Sheffield Children's NHS Foundation Trust, led the call for regulation and described problems with jewellery sets causing Necrosis of the ear lobe causing permanent disfigurement.

It is anticipated that the new regulations will have a substantial effect on the toy industry. One manufacturer estimates that it will have to 'over label' 10 million items, for the EU market. It estimates that 5% of its entire toy range will be affected.

all information published by BERR on <http://www.tradingstandards.gov.uk/cgi-bin/newslist.cgi?area=safe>

The IEA urges a quick and global push to develop and deploy Carbon Capture and Storage (CCS) technologies.

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On 20.10.2008 the International Energy Agency released a major study on CCS. It concludes that CCS is one of the most promising technological solutions to curb greenhouse gas emissions and to salvage our climate. It points out however that to date, only four full –scale CCS projects exist in the world and none captures CO₂ from a coal fired power plant.

The new study called **Carbon Dioxide Capture and Storage: a Key Carbon Abatement Option**, demonstrates that CCS can deliver cost – effective emissions reductions but governments and industry must come forward to finance large- scale CCS demonstrations and work together. The IEA in its 2008 study, projects that energy – related CO₂ emissions would grow by 130% until 2050 in the absence of new policies. There is a large consensus that a halving of energy related CO₂ emissions is needed by 2050 to limit expected temperature increase to 3 degrees, rather than the predicted range of 4 – 7 degrees.

At the G8 Summit, 20 large scale CCS demonstration projects were announced. It is recognised that broad commercial deployment by 2020 is needed. However, the IEA believes that up to \$20 billion is required for near term demonstrations, excluding plants base costs.

Importantly, the report concludes that, despite progress in one or two countries, no country has yet developed the comprehensive detailed legal and regulatory framework that is necessary to govern the use of CCS technology.

The report contains an updated analysis on cost and performance of CCS technologies, discusses various financial incentives that can be used by governments and also proposes a 'roadmap' of financial, political and international collaboration to bring about immediate action.



International Energy Agency
Agence Internationale de l'Énergie

Energy Security, Growth and Sustainability
through Co-operation and Outreach

Update from Carbon Ready

Jon Warren
Carbon Ready



EuP – Energy Using Products – Update

The EuP directive 2005/32/EC was published in 2005. The directive aims to improve energy efficiency of products starting with refrigerators, hot water/central heating boilers and fluorescent ballasts (a component in every strip light). The statutory instrument SI 2007 No. 2037 was implemented in August 2007 and consumers are becoming increasingly aware of the energy efficiency labels that are appearing on new appliances. The roll out continued in September with an EU tender to research refrigeration equipment, transformers, DVD/video systems and game consoles. The directive forms part of the CE marking and all new products sold within the EU must conform.

Climate Change Bill – Delayed

The Climate Change Bill, the government's ambitious, world first, long-term, legislation has been delayed! Having been reviewed by the House of Lords it was considered at the House of Commons Committee and received 54 amendments. Amendments included addressing the issue of single-use carrier bags, quantifying limits of internationally traded carbon credits, corporate disclosure of carbon emissions and agreement on the inclusion of emissions from aviation and shipping. The bill is expected to receive Royal Assent in the Autumn and large but non-energy intensive companies will be need to reduce their emissions or face greater taxation.

EPBD – Now in force for all buildings

Buildings are responsible for almost 50% of the UK's energy use and the government is introducing measures to improve efficiency. These measures include, introducing energy efficiency ratings for buildings, the requirement for public buildings to display their energy certificate, mandatory inspection of larger air-conditioning systems and providing extra advice. The EU's Energy Performance of Buildings Directive comes into force on 1st October 2008 and all properties homes, commercial and public buildings - when bought, sold, built or rented will need an EPC

Update from Bureau Veritas

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174 2008 EuP Committee Proposes First Energy Saving Measures Related to Standby and Off-Mode Losses

The Regulatory Committee established by the Ecodesign for Energy Using Products Framework Directive (EuP), has proposed its first Implementing Measure relating to standby and off-mode of household and office equipment. The standard would require reduction in maximum power levels, resulting in decreased electricity usage and resulting energy savings.

The proposal, after translation into all official Community languages, will be sent to the Council and European Parliament for further review. If the Parliament has no objections, it will be adopted by the Commission and published in the EU Official Journal in late 2008/early 2009. Producers and importers will need to be compliant with the requirements by late 2009, or within a year of the Official Journal publication

176 2008 European Directive on Batteries and Accumulators became Applicable on September 26, 2008

Directive 2006/66/EC, relating to batteries and accumulators, became applicable on 26 September 2008, at which time it replaced Directive 91/157/EEC. The Directive came into force on 26 September 2006 after publication in the Official Journal of European Union.

178 2008 Lacey Act Expands Import Requirements: Potential to Impact Multiple Consumer Products.

Starting December 15, 2008, all plant and plant products, including trees and tree by-products, that are imported into the U.S. will be subject to new reporting requirements. The requirements will apply across all product categories, ranging from toy and juvenile products, furniture, lumber, some cookware, and even certain textile products made from plant based fibres.

Under the amended Lacey Act, (part of Public Law No. 110-246, The Food, Conservation and Energy Act of 2008), it is required that a declaration be provided that gives the name, value, quantity, and country of origin of the plant being imported, or of the plant used to produce the goods being imported. At this time, details of enforcement and applicability of the Act have not been fully defined

Crackdown on Firework Sales

On 24th October 2008 BERR reported that the government is cracking down on the sale of fireworks to under 18s. The Consumer minister Gareth Thomas said 'our tough laws mean firework sellers who break the law face stiff fines or even prison. In the run up to bonfire night.'

An interesting point that has arisen in a recent case conducted by the Regulatory breach team is whether or not the defence of due diligence applies to offences charged under s 6 of the Fireworks Safety Regulations 1997. The offence is of selling to persons 'apparently' under the age of 18. Due diligence systems are recommended for all businesses who sell fireworks and cigarettes – guidance is available in the case of Tesco Stores v Norfolk County Council, [2001]

Carbon Capture and Storage (CCS)

'Clean Coal'

Jeremy Barnett
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Background

Carbon Capture and Storage (CCS) is the use of new technology to reduce emissions of CO₂. It refers to the capture of the CO₂ produced by various industrial installations and storing it underground in natural reservoirs, such as depleted oil and gas fields or saline aquifers, where it will remain for a long period of time without leakage.

The Stern review concludes that no single technology will deliver the emission reductions necessary to keep climate change within targeted limits, but much attention is focussed on the potential of CCS technologies as they have the significant advantage that their large scale deployment can reconcile the continued use of fossil fuels (eg Coal) over the medium to long term with the continued need for deep cuts in emissions.

'Clean Coal' is an umbrella term which emphasises methods being used to reduce the environmental impact including chemical washing of minerals and impurities and gasification; treating flue gasses with steam to remove sulphur dioxide. It is anticipated that clean coal power stations may come on stream by 2020.

Once captured, the exhaust gasses can be either processed and compressed into liquefied CO₂ or chemically changed into solid carbonates. Captured CO₂ can be transported by ship or by pipeline and can also be used in a process called Enhanced Oil Recovery (EOR) where the CO₂ is used to push oil that would otherwise have been unobtainable, leaving the carbon dioxide safely underground – for example in Norway's Statoil project from the off shore Sleipner Oil field.

Regulatory and legal issues

There are several obstacles to the deployment of CCS, including technological and cost barriers. A number of projects have been established around the world, for example in Saskatchewan and Canada, the K12 project in the Netherlands, Victoria Australia and the Huaneng Beijing Co Generation Power Plant in China.

Other main obstacles include regulatory and legal barriers in the following areas.

- The ownership of CO₂ over long periods of time in geological storage sites which requires monitoring.
- The lack of safety standards and emission recording guidelines
- Concerns that the CO₂ will leak into the atmosphere requiring trained people to deal with the vapour. The main cause of accidents in existing facilities is equipment malfunction – others include corrosion, excavation, 3rd party damage and material and failed weld.
- The building of new pipelines or the use of existing under used gas pipelines to transport CO₂ often go through heavily populated areas, and require regular consideration of fatigue, operator assurance corrosion and other safety issues.

The UCL CCS legal programme concludes that there is an extraordinary amount of policy and legal development taking place at international, regional and national level. In the EU there are currently 16 – 18 CCS projects. The Commission has set up a Working Group and recently proposed a directive to deal with storage, risk assessment and management controls. Individual member states are also introducing their own legislation.

Many jurisdictions have regulation in place to deal with similar issues such as natural gas storage, EOR and deep – well injection of industrial wastes, and these are a useful starting point for CCS regulation. Others have considerable experience with Acid Gas Disposal for example the USA where deep – well injection began in the 1930's.

Other main areas of concern are Property issues such as the right to inject – for example many common law jurisdictions such as Canada and Australia have enacted statutory provisions vesting property rights in relation to all waters in the government or the crown, and the right to dispose of publicly owned rights ie the granting of licences (for example the EU is considering including the storage of CO₂ in the Hydrocarbons Licensing Directive).

It is important that regulation and policy framework issues are resolved quickly so that local development can begin. For example Yorkshire Forward recently convened a stakeholder group called the CCS partnership for Yorkshire and Humber which has proposed the building of a £2 billion network to transport CO₂ from 12 large, 20 medium and 14 small emitters in an area between Castleford, Beverley and Scunthorpe (which represents 10% of all UK's emissions) and a number of rapidly depleting gas reservoirs in the Southern North Sea . This is clearly a growth area where lawyers need to move quickly so as to provide the expertise and research capability necessary to support such complex and controversial projects.

