

---

HAWCE

Health and Safety Hot Topics  
It's a Fine thing

Sean Elson  
Partner  
Pinsent Masons LLP



# Topics for today

- HSE Statistics update
- Learning points – the cases and the Sentencing Guidelines
- Things to do going forward
- Looking ahead – what does the future hold for H&S?

# The context

## HSE Statistics for 2015/16



# Ill health / Injury 2015/16

- 144 fatal injuries to workers in 2015/16
- 72,702 non-fatal injuries to employees reported by employers under RIDDOR in 2015/16
- 2515 mesothelioma deaths in 2014, with a similar number of lung cancer deaths linked to past exposures to asbestos
- 1.3 million workers suffering from a work-related illness (new or long standing) in 2015/16
- 30.4 million working days lost due to work-related illness and non-fatal workplace injuries in 2015/16

# Enforcement – 2015/16

- 660 cases prosecuted, or referred to COPFS for prosecution in Scotland, by HSE that resulted in a conviction in 2015/16
- £38.3million in fines resulting from prosecutions instituted, or referred to COPFS for prosecution in Scotland, by HSE in 2015/16
- 11,403 notices issued by all enforcing bodies in 2015/16

# Fee for Intervention (FFI)

- Now over 4 years old
- FFI now £129 per hour
- HSE's Annual Report and Accounts 2015/16:
  - FFI income increased by £4.6 million through consistent levels of proactive inspection and increased incident investigation activity in accordance with HSE's enforcement decision-making frameworks
  - Income from FF1 £14.7m but cost of recovery £17.5m!

# CDM 2015 – How was it for you?

- Regulations bedding in
- Issues have included:
  - Role of principal designer
  - Broad requirement for construction phase plan for all construction works

# HSE Enforcement Expectations

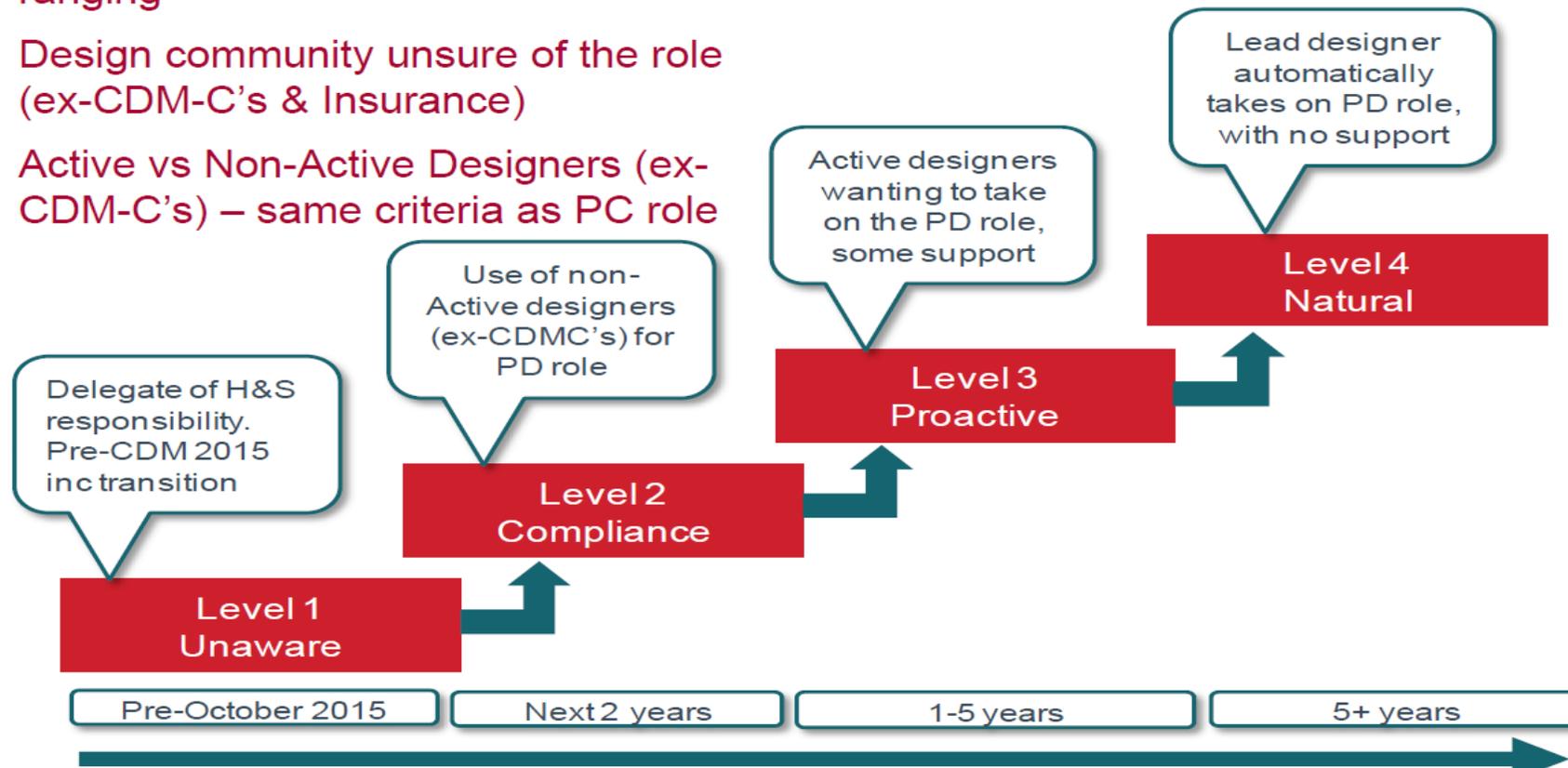
- For larger projects regulation of the project – not just construction sites
- Where failures are identified inspectors encouraged to look at underlying causes – going beyond the site gate at Clients/PD and designers
- Relevance of construction sector draft strategy?

# HSE & the PD - Evolution

Designer definition in CDM is wide ranging

Design community unsure of the role (ex-CDM-C's & Insurance)

Active vs Non-Active Designers (ex-CDM-C's) – same criteria as PC role



# CDM Enforcement examples

- Jehu Projects Limited (CDM2015)
- St James Group/RGF Construction/Mitchellson Formwork and Civil Engineering Limited (CDM2007)

# Jehu Project Services Limited

- Turnover £28.3m
- GP to Regulation 13(1) CDM 2015 and 6(3) WAH
- Fined £143k
- Specialist contractor fell into a basement lift pit under construction. Shattered bones and punctured lung
- Numerous failings
  - Lack of effective site management & supervision
  - Lack of TW management system
  - Inadequate construction plan

# St James & others

- St James - £345 turnover
- Fined £600k
- GP – Regulation 22(1)(a) CDM 2007
- Mitchellson – turnover £35.3m
- Fined £400k
- Worker killed and another seriously injured when temp platform gave way – fall of 16m (third worker injured by debris)
- Not built to an agreed safe design and not checked since built
- RGF Construction - site agent fined £20k

# Which leads us to....

Definitive sentencing guidelines for H&S offences

# What the definitive guidelines cover?

- Applicable - **1 February 2016** – retrospective effect
- Apply to organisations AND individuals
- Definitive guideline applicable in all courts in E&W
- Introduced to ensure more transparency & consistency
- Apply to
  - ALL H&S offences
    - fatal and non-fatal
    - corporate and individual offenders
  - Corporate manslaughter

# The 9 Step Approach

- **Step One** – Determine offence category: **culpability** and **harm**
- **Step Two** – find the starting point and range of the fine based on the organisation's **turnover**
- **Step Three** – is the proposed fine proportionate
- **Step Four** – consider other factors that might require adjustment – e.g. Impact on employees and service users
- **Plus others** – including credit for guilty plea

# Step 1 - Culpability

- **Level of culpability extremely important**

## Very High

Deliberate breach or  
flagrant disregard of the  
law

## High

Fell far short of the  
appropriate standard

## Medium

Fell short of standard in  
a manner that falls  
between descriptions in  
high and low culpability

## Low

Did not fall far short of  
appropriate standard

# Issues relevant to culpability

- **High**
  - Failing to put in place measures recognised as standards in the industry / sector
  - Ignoring concerns raised by employees or others
  - Failing to make changes after prior incidents
  - Allowing breaches to subsist over a long period of time
- **Low**
  - Significant efforts were made to address risk but inadequate on this occasion
  - No prior event or warning indicating a risk

# Step 1 - Categories of harm

- Seriousness of harm risked + likelihood of harm = Harm Categories 1-4 (NB: Risk of harm – not actual harm)
- Seriousness of harm risked classified as:

## Level A

- Death
- Physical or mental impairment resulting in lifelong dependency
- Health condition resulting in reduced life expectancy

## Level B

- Physical or mental impairment not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day to day activities or on their ability to return to work
- A progressive, permanent or irreversible condition

## Level C

- All others not in A or B

# Categories of harm

- Establish **Harm category** from Matrix

		Seriousness of harm risked		
		Level A	Level B	Level C
		<b>Level A</b> <ul style="list-style-type: none"> <li>Death</li> <li>Physical or mental impairment resulting in lifelong dependency on third party care for basic needs</li> <li>Health condition resulting in significantly reduced life expectancy</li> </ul>	<b>Level B</b> <ul style="list-style-type: none"> <li>Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day-to-day activities or on their ability to return to work</li> <li>A progressive, permanent or irreversible condition</li> </ul>	<b>Level C</b> <ul style="list-style-type: none"> <li>All other cases not falling within Level A or Level B</li> </ul>
Likelihood of harm	<b>High</b>	Harm category 1	Harm category 2	Harm category 3
	<b>Medium</b>	Harm category 2	Harm category 3	Harm category 4
	<b>Remote</b>	Harm category 3	Harm category 4	Harm category 4 (start towards bottom of range)

## Step 2 - Categories of organisation

- Establish **financial position of offender** based on turnover:
  - **Micro** – not more than £2m
  - **Small** – Between £2m and £10m
  - **Medium** – £10-£50m
  - **Large** – £50m and above
  - **Very large companies** – turnover “very greatly exceeds” £50m (but no guidance beyond that)

# Step 2 - Categories of organisation

- Apply **Culpability** and **Harm Category** from Step 1 to relevant **Turnover** category to see **Starting Point** fine and **Category Range**

Large Turnover or equivalent: £50 million and over		
	Starting point	Category range
<b>Very high culpability</b>		
Harm category 1	£4,000,000	£2,600,000 – £10,000,000
Harm category 2	£2,000,000	£1,000,000 – £5,250,000
Harm category 3	£1,000,000	£500,000 – £2,700,000
Harm category 4	£500,000	£240,000 – £1,300,000
<b>High culpability</b>		
Harm category 1	£2,400,000	£1,500,000 – £6,000,000
Harm category 2	£1,100,000	£550,000 – £2,900,000
Harm category 3	£540,000	£250,000 – £1,450,000
Harm category 4	£240,000	£120,000 – £700,000
<b>Medium culpability</b>		
Harm category 1	£1,300,000	£800,000 – £3,250,000
Harm category 2	£600,000	£300,000 – £1,500,000
Harm category 3	£300,000	£130,000 – £750,000
Harm category 4	£130,000	£50,000 – £350,000
<b>Low culpability</b>		
Harm category 1	£300,000	£180,000 – £700,000
Harm category 2	£100,000	£35,000 – £250,000
Harm category 3	£35,000	£10,000 – £140,000
Harm category 4	£10,000	£3,000 – £60,000

**Medium**

Turnover or equivalent: between £10 million and £50 million

	Starting point	Category range
<b>Very high culpability</b>		
Harm category 1	£1,600,000	£1,000,000 – £4,000,000
Harm category 2	£800,000	£400,000 – £2,000,000
Harm category 3	£400,000	£180,000 – £1,000,000
Harm category 4	£190,000	£90,000 – £500,000
<b>High culpability</b>		
Harm category 1	£950,000	£600,000 – £2,500,000
Harm category 2	£450,000	£220,000 – £1,200,000
Harm category 3	£210,000	£100,000 – £550,000
Harm category 4	£100,000	£50,000 – £250,000
<b>Medium culpability</b>		
Harm category 1	£540,000	£300,000 – £1,300,000
Harm category 2	£240,000	£100,000 – £600,000
Harm category 3	£100,000	£50,000 – £300,000
Harm category 4	£50,000	£20,000 – £130,000
<b>Low culpability</b>		
Harm category 1	£130,000	£75,000 – £300,000
Harm category 2	£40,000	£14,000 – £100,000
Harm category 3	£14,000	£3,000 – £60,000
Harm category 4	£3,000	£1,000 – £10,000

**Small**

Turnover or equivalent: between £2 million and £10 million

	Starting point	Category range
<b>Very high culpability</b>		
Harm category 1	£450,000	£300,000 – £1,600,000
Harm category 2	£200,000	£100,000 – £800,000
Harm category 3	£100,000	£50,000 – £400,000
Harm category 4	£50,000	£20,000 – £190,000
<b>High culpability</b>		
Harm category 1	£250,000	£170,000 – £1,000,000
Harm category 2	£100,000	£50,000 – £450,000
Harm category 3	£54,000	£25,000 – £210,000
Harm category 4	£24,000	£12,000 – £100,000
<b>Medium culpability</b>		
Harm category 1	£160,000	£100,000 – £600,000
Harm category 2	£54,000	£25,000 – £230,000
Harm category 3	£24,000	£12,000 – £100,000
Harm category 4	£12,000	£4,000 – £50,000
<b>Low culpability</b>		
Harm category 1	£45,000	£25,000 – £130,000
Harm category 2	£9,000	£3,000 – £40,000
Harm category 3	£3,000	£700 – £14,000
Harm category 4	£700	£100 – £5,000

**Micro**

Turnover or equivalent: not more than £2 million

	Starting point	Category range
<b>Very high culpability</b>		
Harm category 1	£250,000	£150,000 – £450,000
Harm category 2	£100,000	£50,000 – £200,000
Harm category 3	£50,000	£25,000 – £100,000
Harm category 4	£24,000	£12,000 – £50,000
<b>High culpability</b>		
Harm category 1	£160,000	£100,000 – £250,000
Harm category 2	£54,000	£30,000 – £110,000
Harm category 3	£30,000	£12,000 – £54,000
Harm category 4	£12,000	£5,000 – £21,000
<b>Medium culpability</b>		
Harm category 1	£100,000	£60,000 – £160,000
Harm category 2	£30,000	£14,000 – £70,000
Harm category 3	£14,000	£6,000 – £25,000
Harm category 4	£6,000	£2,000 – £12,000
<b>Low culpability</b>		
Harm category 1	£30,000	£18,000 – £60,000
Harm category 2	£5,000	£1,000 – £20,000
Harm category 3	£1,200	£200 – £7,000
Harm category 4	£200	£50 – £2,000

# Very large organisations

- **Very large organisation**
- “Where an organisation’s turnover very greatly exceeds £50m, it may be necessary to move outside the suggested range to achieve a proportionate sentence”

---

# **A rising trend – the new guidelines in action**



Pinsent Masons

---

# Travis Perkins Trading Company Limited

## Facts

- A customer was loading planks of wood onto the roof of his car when he fell backwards onto the yard service
- The customer was run over by a company vehicle operating in the yard and died from crushing injuries
- **Turnover:** £2.198bn
- **Profit before tax:** £125m

## Fine

- £2 million



# Meldrum Construction Services Limited

- The company was the principal contractor for refurbishment work at a premises.
- The company had failed to plan for the requirement for temporary platforms to be installed in the service riser to provide a safe work area. Subsequently, temporary floors were installed to specifications they had not been designed for. A worker stepped onto the temporary wooden floor on the first floor riser which collapsed. The worker fell 4.5 meters to the floor below, spraining both ankles.
- **Turnover:** £29.7m
- **Profit before tax:** £2.6m
- **Fine:** £120,000



# J G Hale Construction Ltd

- HSE's unannounced inspection found that measures to prevent a fire starting and getting out of control had not been properly taken. 54 houses were under construction at broadly the same stage with little fire protection, a lack of site management control, insufficient means to detect a fire and raise the alarm, poor control of ignition sources and a general lack of emergency planning.
- Workers were also at risk of being struck or crushed by construction vehicles on site.
- Improvement Notices were served regarding fire and vehicle safety issues and these were complied with after two further inspection visits.
- **Turnover:** £15.7m
- **Profit before tax:** £1.7m
- **Fine:** £100,000



---

# Individuals



# Individual Culpability

- Determine the offence category:
  - Culpability
    - **Very High** - Intentionally breached or flagrant disregard for the law
    - **High** – actual foresight of or wilful blindness to risk, and risk taken
    - **Medium** - **an act or omission that a person exercising reasonable care would not do**
    - **Low** – little fault i.e. minor error of judgment

# Individuals

- Similar 9-step approach based on culpability & risk of harm

	Starting point	Category range
<b>Very high culpability</b>		
Harm category 1	18 months' custody	1 – 2 years' custody
Harm category 2	1 year's custody	26 weeks' – 18 months' custody
Harm category 3	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 4	Band F fine	Band E fine – 26 weeks' custody
<b>High culpability</b>		
Harm category 1	1 year's custody	26 weeks' – 18 months' custody
Harm category 2	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 3	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 4	Band E fine	Band D fine – Band E fine
<b>Medium culpability</b>		
Harm category 1	26 weeks' custody	Band F fine or high level community order – 1 year's custody
Harm category 2	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 3	Band E fine	Band D fine or low level community order – Band E fine
Harm category 4	Band D fine	Band C fine – Band D fine
<b>Low culpability</b>		
Harm category 1	Band F fine	Band E fine or medium level community order – 26 weeks' custody
Harm category 2	Band D fine	Band C fine – Band D fine
Harm category 3	Band C fine	Band B fine – Band C fine
Harm category 4	Band A fine	Conditional discharge – Band A fine

- **UNLIMITED FINES** – Magistrates / Crown Court

<b>Fine Band</b>	<b>Starting point</b> <i>(applicable to all offenders)</i>	<b>Category range</b> <i>(applicable to all offenders)</i>
<b>Band A</b>	50% of relevant weekly income	25–75% of relevant weekly income
<b>Band B</b>	100% of relevant weekly income	75–125% of relevant weekly income
<b>Band C</b>	150% of relevant weekly income	125–175% of relevant weekly income
<b>Band D</b>	250% of relevant weekly income	200–300% of relevant weekly income
<b>Band E</b>	400% of relevant weekly income	300–500% of relevant weekly income
<b>Band F</b>	600% of relevant weekly income	500–700% of relevant weekly income

# Kenneth Thewall of Thorn Warehousing Ltd (Dissolved)

- A worker died when a remote controlled Mobile Elevated Working Platform he was loading on to a truck fell from the ramps and crushed him.
- The gradient of the ramps were above the manufacturer's specification and they were not secured to the lorry.
- Manchester Crown Court heard how the worker had not been adequately trained on the use of the ramps, the lorry and the Mobile Elevated Working Platform. There was no risk assessment in place and no safe system of work had been created for the equipment. The gradient of the ramp was also above the manufacturer's specification and not secured to the lorry.
- This fatality followed a guilty plea from Mr Thewall over a separate incident in 2010 when an employee was crushed to death in a metal gate.
- Kenneth Thewall was found guilty of section 37 of the Health and Safety at Work Act
- 12 months in prison, £4,000 costs, disqualified for 7 years
- Appeal dismissed



# What does it all mean?

- Fines – especially for large organisations are going to be substantially increased
- Very large companies fall outside the ranges in the Guidelines and “all bets are off”
- More **individuals** are likely to receive **custodial sentences**
- Difficult to get fines reduced on appeal
- Battleground:
  - The extent to which failures were systemic v. isolated lapses
  - Establishing whether culpability was “low” as opposed to “medium” (or “high”)
  - Important to show safety management systems are in place and robust (and properly invested in), and what role was played by senior management and directors (leadership and direction)

# Takeaway

- Large/very large fines are going to be imposed based on failing to ensure against risk – not only where someone has been injured or killed

# RIDDOR

- Will HSE investigate?
- Incident selection criteria
  - Fatalities - WRDP
  - Industrial diseases
  - Specified major injuries (but not all RIDDOR majors)
  - Potential significant breach
  - May make 'Initial enquiries'
- When to report?
- Who to complete report?
- What to include?
  - Admit breach of law
  - Suggest on-going problem

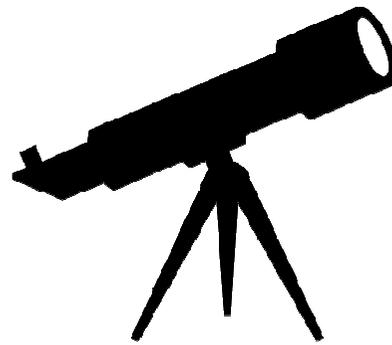
# Things to do going forward?

- Effective leadership from all senior / middle management
  - Fostering a positive safety culture
- An effective system for managing risk
  - Contractor management
  - Competent staff (information, training & supervision)
  - SSW, inspections and audits
- Personal responsibility at every level
- Importance of challenging FFI / improvement / prohibition notices (if justified)?

# Things to do going forward?

- How does H&S fit within the organisations':
  - Wider risk management / compliance processes
  - Board oversight
  - “It is very important – and we wish to make this clear – that in offences of the seriousness of the kind represented by this case it is incumbent on the Chief Executive and main board of the company – particularly one with a serious record of minor criminality which this company has – to explain to the court the cause of its offending behaviour, the current offence and its proposals for protecting the public from such further offending”. - Judge in Southern Water appeal

# Looking Ahead



# HSE priorities and strategy

- A clear intention to focus on occupational health
- Construction inspectors expected to select an OH issue for consideration during inspections
- If you take nothing else away think “HAV’s”!
- Strategy and plans in draft

# HSE draft Health and Work Strategy

- “Champion the need for prevention”
- “Through these actions we will create greater awareness of the harm, costs and preventability of ill health in the workplace....”
- HSE health priorities are:
  - Occupational stress and related mental health issues
  - Musculoskeletal disorders
  - Occupational lung disease
- There are draft strategies for each

# Draft Sector Plan - Construction

- 3 sector priorities
  - Reducing incidents of ill-health (focussing on the 3 wider health priorities)
  - Supporting small business to achieved improved risk management
  - Embedding CDM 2015 principles
- How?
  - Directing enforcement & investigation on health, refurbishment and asbestos removal
  - Visiting duty holders to review arrangements by using Construction Health Risks Toolkit lead indicators
  - Intervening with clients/PD's and designers to ensure proportionate CDM understanding and compliance

# Conclusion

- Fines are only going one way
- Think about risk rather than outcomes
- CDM – get ahead of the game on integrated design – How relevant is BIM?
- Occupational health is the new black in terms of SHE compliance

# Contact

[sean.elson@pinsentmasons.com](mailto:sean.elson@pinsentmasons.com)

0121 335 2907 / 07734 225317

