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Health and Safety Duties and the Surveyor

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Health and Safety Duties and the Surveyor

Seminar will cover

- ▶ Personal and corporate responsibility
- ▶ Legal considerations and duties
- ▶ Assessing risks and hazards
- ▶ Visiting premises and sites
- ▶ CDM Regulations
- ▶ RICS guidance

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Personal & Corporate responsibilities

Organisations

- ▶ Policy – Section 2(3) HSWA – [Aspirational]
- ▶ Management of Health and Safety at Work Regulations 1999 (The "Management Regs")
 - ▶ Reg 3 – Risk assessment
 - ▶ Reg 5 – Arrangements
 - ▶ Reg 7 – "Competent Person" provision

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Organisations

Not rocket science: -

1. Is the H&S Management System fit for purpose?

Note – the “Competent Person” provision under Reg 7 of the Management Regs

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Organisations

2. Is it being applied in practice?

Note – monitoring and review function advocated by HSG65 (Check and Act)

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Personal

- ▶ Ensure you are competent to do what you are asked to do
- ▶ Follow safe systems of work/procedures
- ▶ Ensure safe systems of work/procedures are implemented in practice (supervision or monitoring)
- ▶ Feed into the monitoring function by reporting accidents, near misses and/or breaches of H&S legislation

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Generic

- > Asbestos
- > Fire
- > Work at height
- > Legionella (ACoP L8)

Specific

- > Health & Safety at Work etc. Act 1974 (HSWA)
- > Management of Health and Safety at Work Regulations 1999 (Management Regs)
- > Construction Design & Management Regulations 2007 (CDM Regs)
 - > Guidance L153

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Guidance

- > Not compulsory to follow guidance
- > If do follow guidance normally you will be doing enough to comply with the law

Approved Codes of Practice (ACoP) – if it can be proved that a Defendant has not followed the ACoP, a court can find the Defendant at fault, unless the Defendant can demonstrate compliance with the law in some other way – *implied breach and reverse burden of proof*

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Health & Safety at Work etc Act 1974 (HSWA)

Section 2 – Duty on **Employer** to devise and implement a safe system of work for his **Employees**, so far as is reasonably practicable

Section 3 – duty on **Employer** to conduct his undertaking (business activity) in such a way as to ensure **Non-Employees** are not exposed to risks to their health and safety, so far as is reasonably practicable

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HSWA

Section 4 – Duty on persons in control of premises (to any extent) used as a workplace by non-employees to take such measures as are reasonable to ensure the premises are safe and without risks to health, so far as is reasonably practicable.

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“Reasonably practicable”

Back to the beginning

Edwards v National Coal Board – Court of Appeal – 1949

- ▶ Risk v Sacrifice
- ▶ Cost benefit analysis approach
- ▶ Concept of gross disproportion

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Gross disproportion

- ▶ Edwards v NCB
- ▶ The greater the risk, no doubt, less weight will be given to the factor of cost

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HSWA

- ▶ **Section 7** – HSWA – General duties of **employees** of work
 - ▶ It "shall" be the duty of the every employee while at work:-
 - ▶ Take reasonable care for health and safety of himself and others
 - ▶ To co-operate with employer and other duty holders to enable them to comply with health and safety legislation

- ▶ **Section 37** – HSWA – Offences by **directors or managers**
 - ▶ **Derivative offence**
 - ▶ Consent
 - ▶ Connivance
 - ▶ Neglect

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Penalties

- ▶ Sections 2, 3 & 4
- ▶ Breach of Regulations
- ▶ Unlimited fine by reference to Sentencing Guidelines which came into force on 1 February 2016

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Penalties

- ▶ Sections 7 & 37
- ▶ Unlimited fine and/or up to six months' custody in the Magistrates' Court or 2 years' custody in the Crown Court
- ▶ By reference to Sentencing Guidelines which came into effect on 1 February 2016

 **Legal consideration and duties** 

Corporate Manslaughter

Essential components of the offence

1. Owe duty of care
2. Breach of duty of care
3. **Gross breach** of duty of care occurs at **senior management level**
4. Gross breach **causes** death – breach made a more than minimal contribution to the accident

 **Legal consideration and duties** 

Corporate Manslaughter



DEFINITIONS

“Senior Management”
“Those that play a role in making management decisions about, or actually managing, the activities of an organisation as a whole or a substantial part of it.”

“Gross breach” – conduct that falls far below what could reasonably be expected.

NB. This specifically includes management at a regional level within a national organisation.

NB. An organisation is only guilty, if the way its activities are managed or organised by its **SENIOR MANAGEMENT** is a substantial element of the breach

 **Legal considerations and duties** 

Corporate Manslaughter

PENALTIES

- Unlimited fine by reference to Sentencing Guidelines which came into force on 1 February 2016
- Remedial order
- Publicity order [norm not exception]

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Gross Negligence Manslaughter (individual offence)

Essential components

1. Owe duty of care
2. Breach of duty of care
3. Breach so bad that it amounts to gross negligence
4. Gross breach causes death

See example – Paul White – IoD guidance INDG 417 (Rev 1) – Page 8

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Gross Negligence Manslaughter

- ▶ Penalties
- ▶ Unlimited fine and/or up to life imprisonment

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The Company Directors Disqualification Act 1986

- ▶ Indictable offence
- ▶ In connection with management of a company
- ▶ Penalties
 - ▶ 5 years maximum in the Magistrates' Court
 - ▶ 15 years maximum in the Crown Court

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To summarise – The Prosecution Arsenal: -

- Prosecution for "old style" Gross Negligence Manslaughter of a director or employee
- Prosecution of organisation for corporate manslaughter
- Prosecution of offences under existing health and safety legislation (employer/directors/managers/employees)
- The Company Directors Disqualification Act 1986

N.B. NOT MUTUALLY EXCLUSIVE

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Regulation 3 of the Management Regulations – every employer shall make a suitable and sufficient assessment of the risks to health and safety of his employees and/or non-employees to enable him to identify the measures he needs to take to comply with the relevant health and safety legislation

See HSE guidance – "A brief guide to controlling risks in the workplace"

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- ▶ A suitable and sufficient risk assessment is the foundation of any safe system of work
- ▶ Conversely a poor risk assessment regime generally leads to non-compliance and enforcement action by a regulator

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It is important that risk assessments are done by someone who is competent to identify hazards and to identify the necessary control measures to be put in place to either eliminate the risk or control it to as low as is reasonably practicable (ALARP)

NB – the risk assessor must understand that system of work or process and therefore a collaborative approach involving those who normally perform the work and the risk assessor is best practice.

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Principles of prevention - Reg 4 of the Management Regs – Schedule 1

Avoiding risks
↓
Giving instructions to employees

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Examples of hierarchy of control measures that implement the principles of prevention: -

- ▶ Reg 11 – PUWER – preventing access to dangerous parts of machinery
- ▶ Reg 6 – Work at Height Regs – avoidance of risks from work at height

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Review of risk assessments: -


1. If material change to system of work
2. In response to an accident or near miss
3. Change in legislation
4. Set a long stop review date (annually)

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To carry out an inspection, survey or investigation


of

Land, structures or occupied buildings

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Knowledge of

- > Condition of property or land is key to planning any visit
- > Condition of property should be fed into risk assessment process which should be central to planning of visit
- > If condition of property or land is different on arrival, that should trigger a review of the risk assessment

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Key considerations

- ▶ Is property derelict?
- ▶ Are there hazards associated with the land – e.g. shafts, rough or uneven ground etc?
- ▶ If construction site – co-ordination of visit with the client and/or Principal Contractor
- ▶ Is property occupied – what is nature of occupation? E.g. Warehouse – vehicle and pedestrian segregation will be a factor

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Key considerations

- ▶ Work at height
- ▶ Asbestos
- ▶ Confined spaces
- ▶ Structural stability
- ▶ Slips, trips and falls
- ▶ Adverse weather conditions
- ▶ PPE

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The "CDM Regs"


Note – wide definition of "Construction Work" – Regulation 2(1) – interpretation

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Key role holders: -


1. Client
2. Principal Designer
3. Principal Contractor
4. Contractors

No one should seek appointment to hold a CDM role unless they are competent to do so


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If you are taking on a CDM role or roles, you need to be aware of what the role entails and then decide on your competent person to fulfil that role in practice.

See Table 1 – pages 6 & 7 of the CDM Guidance Note – L153


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- ▶ If you are involved in selecting a CDM role holder, make sure that you can justify the selection if their competency is challenged.
- ▶ **Ask yourself the question** – If there were to be an accident involving this role holder's activity, would I be able to evidence that a robust and effective competency check was made at the point of appointment?


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Are you responsible for monitoring work?


If so there must be an evidence trail to show that monitoring was taking place and action taken in relation to non-conformance.

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If preparing a report, ensure that all foreseeable hazards/adverse site conditions are properly identified and communicated to the right role holders at the right time.


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Effective co-operation and co-ordination with other role holders is a fundamental objective of the CDM Regs.

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Surveying Safely – 1st Edition (GN74/2001)

- ▶ Same status as HSE guidance note
- ▶ Due to be updated

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It is currently out of date in the following material respects: -

- ▶ Penalties for offences – does not take into account changes to Magistrates’ Court jurisdiction in respect of offences committed on or after 12 March 2015 or the Sentencing Guidelines which came into force on 1 February 2016
- ▶ HSE Guidance on risk assessment – “Five steps to risk assessment” (2006) has been replaced by “Risk Assessment – A Brief Guide to Controlling Risks in the Workplace” INDG163 (rev 4) published 2014
- ▶ CDM Regs – reference is made to the 2007 Regulations as opposed to the Regulations that came into force on 6 April 2015

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QUESTIONS?

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