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# Health & Safety Newsletter

June 2020

# Contents

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## **3 Foreword**

## **5 News**

- 5 COVID-19 in Focus: Health and Safety Considerations
- 5 UK Government issues guidance to building sites operating during COVID-19
- 7 HSE issues new guidance about the management of the risks of lone working

## **8 Cases**

- 8 Company fined GBP 1.1m after worker injured in fall from height
- 8 Company fined after worker suffers fatal crush injuries
- 8 Manufacturing company fined after agency worker injured in press roller
- 9 Companies fined following fire risk to residential home
- 10 Waste management company fined after worker suffered leg amputation
- 10 Entertainment Company under prosecution after accident at a theme park
- 10 Health Board fined after three instances of suicide at Psychiatric Hospital

## **13 Oil and Gas News**

## **16 What we do**

## **18 CMS Locations**

# Foreword

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CMS Cameron McKenna Nabarro Olswang LLP is recognised as a leading firm in the area of Health and Safety. We provide specialist advice on regulatory compliance, prosecutions, investigations and corporate governance.

## Emergency Response Service

The steps a company takes immediately following an incident can be pivotal and can significantly increase or decrease the likelihood of a subsequent conviction. Health and Safety Inspectors have substantial powers to enter and examine premises, remove articles and demand documents necessary for them to carry out their investigations. Immediate, on the spot advice and support can therefore prove to be invaluable in the event of an emergency.

Our dedicated team is on call 24 hours a day to provide assistance and respond to incidents on site. Our lawyers are qualified to practice in England, Wales and Scotland; but we also regularly advise clients in relation to health and safety matters in other jurisdictions and can draw on the expertise of our CMS network of European offices.

We are available for health and safety emergencies and advice; along with any other related urgent matters. In the event of an emergency the team will ensure a swift and efficient response to client queries, irrespective of the time of day or day of the week.

If your company has a health and safety emergency, you can contact us on:

**0333 20 21 010 – Emergency Response Hotline (available 24 hours a day, 7 days a week)**

020 7367 3000 – London

01224 622 002 – Aberdeen

0114 279 4000 – Sheffield

0781 136 2201 – Out of hours (ask for Jan Burgess)

0797 049 7274 – Out of hours (ask for Lukas Rootman)

## Kelvin TOP-SET

A number of our team are qualified as approved Senior Investigators under the Kelvin TOP-SET incident investigation system. They are also able to assist in conducting an incident investigation itself, in order to ascertain the 'root cause' of an incident with a view to future preventative measures and improvements to health, safety and welfare.

## Offshore environmental issues

Our team has considerable experience in advising in relation to offshore oil and gas issues – ranging from defending prosecutions by BEIS to appealing enforcement notices – along with general advice in drafting of OPEPs and complying with the extensive range of offshore environmental regulation, including those introduced by the European Union Offshore Safety Directive ("OSD") in 2015. Changes introduced by the Offshore Safety Directive are extensive and have significant impact on oil & gas operators, FPSO operators, drilling companies and contractors engaged in offshore activities. We are able to assist in any transitional measures that may be required.







## COVID-19 in Focus: Health and Safety Considerations

### **COVID-19 outbreak**

The coronavirus pandemic first reported from Wuhan, China in late 2019 has had an unprecedented global effect on the UK in the past months. As of 27 May 2020, there have been over 36,000 COVID-19 related fatalities in the UK and schools, restaurants, certain shops and leisure facilities remain closed to the public. The fallout from this virus has been wide ranging and no sector has remained unaffected.

The Coronavirus Act 2020 came into force on 25 March 2020 as emergency legislation to help slow the spread of the outbreak.

The Department of Health & Social Care and Public Health England are leading the UK government response to the coronavirus outbreak. The Health and Safety Executive is working alongside the UK Government to provide support, guidance and when required, including advice on the protection of workers, updated guidelines about the correct specification and use of Personal Protective Equipment (PPE).

Health is a devolved power in Scotland, Wales and Northern Ireland and so the respective approach of each country has varied considerably. However, with certain lockdown restrictions beginning to ease, for example the re-opening of certain non-essential shops from 1 June and the encouragement from the UK government to “return to work where it is not possible to work from home” health and safety considerations are at the forefront to ensure a safe return to work and social normality. It is important to note that HSE have re-affirmed their right to issue Improvement and Enforcement Notices if employers are found to be in breach of Government advice, including social distancing measures.

## UK Government issues guidance to building sites operating during COVID-19

In light of the global COVID-19 pandemic, the UK Government initially announced that “essential projects” including creating or repurposing facilities to be used directly in the UK virus effort, for example the construction of the NHS Louisa Jordan and Nightingale Hospitals should continue but work on non-essential services sites such as domestic housing projects, office buildings and retail projects “should be halted”. Exceptions to the “non-essential” construction works include energy work (including on and offshore infrastructure maintenance), works for roads and transport purposes and maintenance of the transport networks. However, the government guidance as of 27 May 2020 is that in the case of work which cannot be done from home (construction work being a clear example), individuals should be encouraged to return to work.

In light of this revised stance, the Government have been issuing regular guidance in conjunction with BEIS, Public Health England and the HSE as to how construction activity on construction sites can continue to operate safely. This guidance has been regularly changed and adapted, but as of May 2020, the current UK guidance is that 2m social distancing rules should be implemented wherever possible on construction sites but where social distancing rules cannot be adhered to for reasons of safety or practicality, individuals should engage in the following behaviours;

- Increase the frequency of hand washing;
- Reducing the activity time as far as is possible;
- Screens or physical barriers should be used where possible to minimise the potential of droplet spread;
- Consider back-to-back or side-by-side working as an alternative to face-to-face working (where safe to do so);
- Consider consistent “partnering” of individuals to minimise the number of individuals coming into contact with each other;
- The use of one-way systems and floor markings to reduce “congestion”;
- Break times should be staggered and taken outdoors wherever possible;
- Equipment and job rotation should be reduced, for example “one task per day”;
- Alternatives to touch entry and exit keypads should be explored, for example showing a security guard a security pass at a distance rather than using a “swipe” or touch pad;
- Hand washing and sanitising facilities should be provided on entry and exit to the site, and at regular intervals throughout the day.

### **RIDDOR Reporting of COVID-19**

Under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (RIDDOR), COVID-19 reporting of occupational work-related exposure must take place in the following scenarios:

- An unintended incident at work has led to someone’s possible or actual exposure to coronavirus. This must be reported as a dangerous occurrence under Regulation 7 Schedule 2. Laboratories, for example, must be aware of this risk, as an example of the COVID-19 application of Schedule 2 may be a vial of COVID-19 being damaged. This will likely be applied only in limited circumstances e.g. in virology research labs.
- A worker has been diagnosed as having COVID 19 and there is reasonable evidence that it was caused by exposure at work. This must be reported as a case of disease under Regulation 9 as COVID-19 is identified as a biological agent. The employer must make a judgement, based on the information as to whether or not the COVID-19 diagnosis is likely to have been caused as a result of occupational exposure and whether there is reasonable evidence that the instance of infection was due to workplace exposure;
- A fatality is suffered as a result of occupational exposure to coronavirus. There must be reasonable evidence that the work-related exposure caused the death, for example a specific, identifiable incident which resulted in COVID-19 exposure and whether PPE was routinely used in the workplace.

### **HSE specialist PPE Unit established**

The Health and Safety Executive (HSE) has assembled a specialist group to assist the Government with the nationwide procurement of safe PPE which meets the correct specification and standards. The HSE’s PPE unit is comprised of regulatory inspectors, policy makers and scientists with expertise in areas of PPE “material science” and the management of workplace risk. This unit has been assembled in response to the exponential global increase in demand for PPE equipment and to ensure that novel suppliers’ produced PPE is of sufficient quality and durability for use. Recently, a shipment of protective gowns procured from Turkey were rejected by the NHS as the equipment was of sub-standard specification and not fit for purpose. The HSE have created this specialist unit to avoid any re-occurrence of this and ensure that the PPE provided is “suitable for the task in hand” and will “actually protect people”, providing assurance that the PPE obtained from new sources is fit for purpose.

## HSE issues new guidance about the management of the risks of lone working

The HSE have issued new [guidance](#) about the management of lone workers – this is particularly relevant in light of the COVID-19 pandemic whereby a large number of individuals may be working from home. This guidance is also applicable where staff numbers may have been reduced in compliance with social distancing measures, for example shifts may now be “split” which may have resulted in an increased number of individuals undertaking tasks and duties alone.

A “lone worker” is defined as ‘someone who works by themselves without close or direct supervision’ and exist in all sectors. Lone workers include delivery drivers, security staff and cleaners and warehouse operatives and petrol station staff. Staff who work away from a fixed base, for example social care workers, agricultural and forestry workers and often maintenance and construction workers. Under the Management of Health and Safety at Work Regulations, employers have a duty to manage the risks posed to lone workers and to mitigate them wherever possible. Employers must assess and control the risks arising in the workplace by way of a risk assessment, and if the employer employs over five people, this assessment must be in writing. There is no duty to undertake a specific lone-working assessment and an employer owes the same duty of care to lone and home workers as it does to on-site employees.

### **Specific risks of lone working**

- Increased stress and impaired mental health and wellbeing;
- Risk of violence in the workplace. This risk is increased, for example, by late-night working, security staff enforcing rules and having authority over individuals who may be under the influence of drugs or alcohol;
- Further increased risk if handling valuable equipment or substantial amounts of money whilst working alone (for example petrol station staff)

### **Stress and other health factors**

The HSE [Stress Management Standards](#) specifically identify and recognise the importance of relationships and support within the workplace and the inherent value of communication and interpersonal contact. By its very nature, lone working removes this support network of other people and individuals may feel isolated. Steps that employers should take to avoid the risk of lone workers becoming disconnected should include:

- Regular contact and “check-ins” with management to allow the lone worker to raise any concerns and to mitigate and manage any work-related stress factors. This could take the form of a telephone call or face-to-face Zoom, Teams or Skype call, for example.
- Lone working can aggravate existing mental health problems. If a lone worker has a pre-existing mental health condition, employers are required by the Equality Act 2010 to make reasonable adjustments to their workplace.

### **Medical Suitability and First Aid**

The medical suitability of workers to lone working should also be assessed and foreseeable emergencies in the course of routine work should be considered. If an employer is unsure of the medical suitability of a worker to work alone, medical advice should be sought. The risk assessment may include mitigating factors such as lone workers carrying first aid kits, receiving enhanced first aid training on how to self-administer first aid and ensuring that the worker has access to adequate first aid facilities. Emergency procedures should include the names and emergency contacts of the employer to be contacted in case of a medical emergency.

### **Training and Supervision**

Where employees are engaged in lone working, the appropriate level of training and supervision should be given, depending on the risk factors involved. Employees must also be monitored at appropriate regular intervals and should understand the monitoring process and procedures. For example, supervisors may visit the lone workers’ site, provide personal alarms or radios whether manual or automatic and should implement a reliable system to ensure that lone workers working away from a fixed base return at the expected time, and that a procedure for locating the worker is in place. The employer should know where the lone worker is at any given time, for example by holding a copy of any daily schedule and pre-agreed “check ins” are recommended.



# Cases

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## Company fined GBP 1.1m after worker injured in fall from height

An investigation by the HSE found that “reasonably practicable measures” had not been taken by a Contractor to prevent the injured party falling over three metres from an internal roof. The injured party, an engineer, had been inspecting a leak whilst on an extension ladder. The ladder became unstable, resulting in the engineer falling from height, sustaining head injuries requiring fourteen stitches, substantial blood loss and a fractured vertebrae. It was found that the principal contractor had failed in upholding their section 3(1) duty under the Health and Safety at Work Act 1974 after a five-week trial and was fined GBP 1.1m and ordered to pay costs of over GBP 68,000.

This case emphasised the need to implement stringent safety measures when planning and managing work-at-height risks. Falls and accidents as a result of working at height remain one of the most common causes of work-related injuries and fatalities and it was recognised that implementing even “basic” safety measures would help to avoid future occurrences.

## Company fined after worker suffers fatal crush injuries

A manufacturing company has been fined in excess of GBP 366,000 and ordered to pay GBP 23,993 in costs after a crush fatality at a site in Huddersfield. The worker had been working on the “stretch godet” section of a synthetic fibre manufacturing when he became entangled in the machine whilst undertaking the removal of a “lap” from around the rollers. A “lap” occurs when the synthetic fibres become attached to the machine rollers and tighten around them in a wrapping motion and requires to be untangled from the rollers.

The HSE investigation found that there was no adequate screen or guard on the machine and it had become practice for employees to “work around” the inadequate guarding when untangling the fibre “laps”. The company pled guilty to breaching section 2(1) of the Health and Safety at Work Act and post-hearing the Inspector commented that *“this was a tragic and wholly avoidable incident, caused by the failure of the company to provide adequate guarding against dangerous parts of the machine...and companies should be aware that HSE will not hesitate to take appropriate enforcement action against those that fall below the required standards.”*

## Manufacturing company fined after agency worker injured in press roller

A manufacturing company pled guilty to a breach Regulation 11 of the [Provision and Use of Work Equipment Regulations \(PUWER\)](#) after an agency worker suffered a severe crush injury to his arm when attempting to clean and dislodge dirt from a press roller at a site in Chelmsford. The injured party was working on a production line and was tasked with removing component parts from a conveyor belt and transferring to a pallet when his right arm was dragged into the “nip point” of dual in-running rollers. The injured party was diagnosed with forearm compartment syndrome, and had surgery following a six-day stay in hospital.

The HSE investigation found that the company had failed in its duty to provide an adequate tunnel guard onto the press roller, which would have prevented anybody accessing the rollers.

After the hearing, the Inspector commented that such injuries are unfortunately commonplace but very easily avoided by the provision of appropriate tunnel guards. She commented that *“This incident could have been avoided had the company properly assessed the guarding arrangements on the machine when it was installed. Unfortunately access to in-running rollers is a common cause of injury but it can be easily avoided by providing effective control measures such as the provision of tunnel guards”*.

This case highlights the importance of taking simple, easily implemented steps to avoid such common injuries by the provision of effective guards.

## Companies fined following fire risk to residential home

Three companies have been fined following a failure to take adequate precautions against fire risk when building a timber frame extension to residential sheltered accommodation. The principal designer of the project and two further contracted companies installed a three-storey extension with a timber frame link to an occupied residential sheltered housing complex, without ensuring adequate fire prevention controls were in place and therefore posing a risk to members of the public.

The HSE Investigation found that all three defendants failed to fulfil their obligations to “to plan, manage and monitor construction work in a manner that prevents risks from fire and protects persons who may be affected by the project” and were therefore in breach of section 3(1) of the Health and Safety at Work Act. The fire risks should have been “designed out” by the implementation of a plan to incorporate measures to minimise the residual fire risk in accordance with accepted good industry practice.

The three defendants were fined a total of GBP 54,000 between them and pay total costs of over GBP 22,000. After the hearing, the Inspector highlighted the importance of managing fire risk to members of the public by emphasising that *“all duty-holders [need] to take proactive action to ensure they are not putting workers and others at risk from foreseeable fire risks by taking reasonably practicable actions, in accordance with industry standards, to comply with their duties under the respective regulations. Fire kills and members of the public have a right to be protected.”*



## Waste management company fined after worker suffered leg amputation

A waste management company has been fined GBP 140,000 after breaching section 3(1) of the Health and Safety at Work Act after an agency worker suffered life changing injuries after being struck by an excavator. The worker had been observing the activity in a "blind spot" and had his leg crushed after the machine reversed into him to move out of the way of another vehicle. The HSE investigation found that there was no safe system in place for agency workers to be shown the site layout and operating procedures. The injured agency worker was unaware that the site procedure was to stand in the designated safe refuge area whilst vehicles were moving around site, therefore avoiding the risk of blind spot accidents. After the hearing, the HSE Inspector commented that *"the company failed to implement an adequate system of monitoring of agency workers on site who were therefore, in effect, left to manage themselves without necessary oversight from the company"*. This case highlights that employers owe the same duty of care to agency workers as they do to their direct employees.

## Entertainment Company under prosecution after accident at a theme park

An entertainment company will face prosecution by the HSE after breaching section 3(1) of the Health and Safety at Work etc Act 1974 when a seven-year old child was ejected from the "Twister" rollercoaster at a theme park in Leeds.

## Health Board fined after three instances of suicide at Psychiatric Hospital

A Health Board has been fined GBP 120,000 after failing to remove ligature points from the psychiatric ward resulting in three women taking their own lives. Patients were acutely unwell and often not in a position to ensure their own safety, and the Health Board had breached sections 3(1) and 33(1)(a) of the Health and Safety at Work Act 1974 by not ensuring their safety.

The investigation by the HSE found that the Health Board had "failed to assess, manage and control the risk of severe injury and death associated with ligature anchor points." Private bedrooms had not been checked to ensure that all ligature points had been removed to reduce the risk to patients and the Board had also failed to communicate risks associated with the ligature points to the staff caring for the patients on the ward. A previous instance of an individual attempting to use ligature anchor points to take their own life had not been reported to the staff monitoring that individual on the ward.

After the hearing, the Inspector stated *"these tragic incidents led to the avoidable deaths of three women. These deaths could have been prevented if the Health Board had acted to ensure their ward met the required standards for acute mental health facilities."*











# Oil and gas news

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Health protection scotland publishes guidance relating to the prevention and management of covid-19 offshore.

Health Protection Scotland (“HPS”) has, on 20 May 2020, published [guidance](#) for the owners and Operators of offshore installations during the “delay” phase of the UK COVID-19 pandemic. The UK “delay” phase is characterised by social distancing measures and travel restrictions but it is acknowledged that some essential sectors, such as the offshore oil and gas sector, cannot function effectively and safely whilst maintaining two-metre social distancing rules and that a tailored, offshore-specific COVID-19 risk assessment will need to be undertaken by Operators and owners of Offshore Installations. Social distancing rules and reduction in density of individuals on an offshore installation may negatively impact the safe execution of offshore tasks, for example a reduction in the number of individuals on the installation may increase the likelihood of accidents as some tasks are inherently “two-man” tasks and require individuals to be in close proximity with each other.

The owner or Operator of any offshore installation or structure will be the Duty Holder for the purposes of this guidance. The HPS guidance states that there is an assumption that an offshore installation, provided there are no suspect cases on the installation, is a low-risk environment for the transmission of COVID-19 to those boarding or visiting the installation (for example offshore crew rotations).

The advice covers the following five areas:

- Preparation before the occurrence of any incident in order to reduce risks to employees and staff before an incident arises;
- Safe assessment and management of potential COVID-19 cases;
- Management of COVID-19 patients and the associated risks during helicopter transit;
- Management of cases of COVID-19 offshore, including severe cases;
- Management of cases once the infected individual returns onshore to the UK.

## **The risk factors**

The HPS guidance advises the following in relation to individual risk offshore:

- Individuals categorised as vulnerable (for example with an underlying health condition) should generally not be employed offshore but should instead the guidance of self-isolation or shielding onshore.
- Important factors which will affect the risk factor for those working offshore will include the level of adherence to **hand and respiratory hygiene**, the **density of persons** on board and the **sleeping and catering arrangements** on the installation, **how early symptoms can be recognised** and reported to allow for effective safeguarding and treatment and finally the **quality of the steps taken to minimise the risks** of COVID-19 on the installation.



### **The Guidance**

The HPS guidance recommends that the duty holder should take the following steps to safeguard offshore workers as far as is possible from the risks of COVID-19 in response to the risk factors discussed above.

- Ensure that all persons on board receive guidance in relation to effective hand-washing and hygiene and are aware of the importance of good respiratory hygiene;
- Close contact between persons on board should be minimised as far as is possible – for example the sharing of cabins and social facilities should be avoided;
- The duty holder should ensure that there are clear processes that will ensure any suspected case of COVID-19 is isolated from other persons on board quickly, even if that individual is only displaying mild symptoms;
- The appropriate PPE should be provided for individuals who are required to be in close contact with suspected cases (for example an offshore medic);
- Immediate medical evacuation should be “considered mandatory” where any suspect case requires advanced medical care or hospitalisation. The offshore medic should contact the nearest onshore tertiary hospital and advise all involved at every stage that they will be dealing with a suspected COVID-19 case;
- If an individual with mild or moderate symptoms is aged over 50 years or has underlying health issues, it is recommended that such individuals do not isolate offshore but instead are transported to the mainland;
- Helicopter transfer of suspected cases which do not require hospitalisation may be considered to maintain the safe operation of the installation and early offshore removal is preferred in this case.

### **Active versus Passive Monitoring**

It is recognised that offshore isolation of every individual who has encountered a suspected COVID-19 case may present operational, technical and safety difficulties to the continued running of the offshore installation. The guidance states that, where practicable, the onshore isolation of high-risk close contacts (significant face to face contact or >1m close contact in the absence of PPE) should be considered. However, where this is not possible to maintain the safe operation of the installation, the individuals exposed to the suspected case should be placed under “active monitoring”. Active monitoring includes the notification to contacts of the risk of exposure and infection and requesting that those contacts self-monitor and report daily to the Installation Medic. Where symptoms develop, the individual should report this to the Installation Medic and immediately self-isolate.

In cases of lower risk close contact exposure (> 2m), passive monitoring should be adopted. This mirrors the obligations of notifying the contact of the risk of exposure and requesting that the contact self-monitors for symptoms. There is, however, no requirement under passive monitoring to report daily to the Installation Medic. If symptoms arise however, the individual must report this to the Installation Medic and self-isolate.

### ***Guidance for routine activity on an offshore installation***

The Guidance provides a number of steps that should be taken during the course of routine activity on an Offshore Installation including:

- All persons on board should be given appropriate advice on arrival and at regular intervals as to the risk of COVID-19, symptoms and prevention measures;
- Posters and information should be displayed prominently and should give instructions on how individuals should isolate themselves on recognising symptoms and how the Installation Medic can be notified;
- If it is considered that a suspected case required hospital admission, the appropriate helicopter operator should be informed and emergency transport arranged. The suspect case should be kept under close supervision by individuals wearing PPE;
- During the evacuation flight, only medical personnel should be in contact with the suspect case and should wear PPE;
- On arrival onshore, the individual should be transported to the appropriate hospital or to an appropriate place to allow self-isolation for 7 days after the onset of symptoms. Persons returning home should not use public transport.
- Any suspect case who remains on the Installation to self-isolate and does not require evacuation should remain in isolation for 7 days after symptoms are presented and should be monitored regularly during their period of isolation. After this 7 day period the individual may return to the workforce.



# What we do

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CMS is recognised as a leading firm in the area of Health and Safety. We provide specialist advice on regulatory compliance, prosecutions, investigations and corporate governance.

We have specialist knowledge of the offshore and energy sector in particular, which faces greater challenges and regulation than most. However, our client base and expertise spans a broad range of sectors, including:

- Construction
- Health and healthcare
- Energy
- Global health and safety advice
- Hotel and leisure
- Manufacturing
- Renewables
- Transport
- Technology
- Infrastructure
- Waste
- Real Estate

Regrettably, accidents at work can be serious and sometimes result in fatalities. Our clients appreciate the high level of attention and support we are able to offer during what can be a difficult time for any organisation. We are able to provide assistance with every aspect of incident response, including incident investigations, dealing with witnesses, defending prosecutions and advising senior management on relations with the Health and Safety Executive.

## Emergency response team

Our specialist team is on call to provide assistance and respond to incidents 24 hours a day, every day of the year. Our team is qualified to practise in England, Wales and Scotland but also regularly advises clients in relation to international working practices and health and safety matters in other jurisdictions.

## Our clients come to us for advice on:

- Emergency response
- Health and safety prosecutions
- Crisis management
- Accident inquiries
- Formal interviews and investigations undertaken by inspectors
- Corporate manslaughter investigations
- Inquests and Fatal Accident Inquiries
- Appeals against Improvement and Enforcement Notices
- Compliance with UK and European regulatory requirements
- Drafting corporate health and safety policies and contract documentation
- Safety aspects of projects and property management
- Due diligence in corporate acquisitions/disposals
- Directors' and officers' personal liabilities
- Management training courses
- Personal injury defence
- Risk management and training



## Recent experience

- Defending health and safety prosecutions of client companies
- Appealing other types of enforcement action against companies (e.g. Prohibition Notices)
- Conducting numerous Coroners' Inquests and Fatal Accident Inquiries – including some of the most high-profile and complex Inquiries to have taken place in relation to offshore incidents
- Obtaining the first ever award of expenses against the Crown in favour of a client company following a Fatal Accident Inquiry
- Taking appeals to the High Court of Justiciary
- Taking appeals on human rights issues to the Privy Council
- Defending Judicial Reviews
- Advising on forthcoming health and safety legislation
- Assisting clients in consultations with the Health and Safety Executive and other regulatory bodies, including the Department for Energy and Climate Change
- Advising clients in relation to Safety Cases, corporate governance issues and directors' duties and liabilities
- Undertaking transactional due diligence in relation to health and safety matters
- Carrying out health and safety audits
- Advising clients on incident investigation, legal privilege and dealing with Health and Safety Executive inspectors
- Preparing and drafting incident investigation reports
- Advising clients on media, public relations and reputational issues following incidents
- Advising clients in the immediate aftermath of an incident and providing emergency response services
- Successfully defending environmental prosecution

## For more information, please contact:



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