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Health and Safety Prosecutions and Litigation in UK Schools

By Paddy Swan

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A Head Teacher's Safety Management Toolkit Article

HEALTH AND SAFETY PROSECUTIONS AND LITIGATION IN UK SCHOOLS

Introduction:

This article sets out some of the background some and examples of prosecutions and litigation against UK schools.

Whilst Scottish Law and its' Legal System differs from that in England and Wales the writ of the enforcing and regulating body the Health and Safety Executive(HSE) runs across the border and matters are decided in the Criminal Courts.

Litigation takes place in the Civil Courts and, in the case of Health and Safety usually revolves around aspects of the LEA. Owner, school and teachers' duty of care to children. Almost all of these cases are civil actions taken by parents on behalf of the child for damages for injuries subsequent to accidents.

Prosecutions:

The Health and Safety Commission is the actual agency of which HSE is the executive branch have published an Enforcement Policy which sets out very clearly the parameters for, and circumstances in, which the HSE should take action to enforce the Health and Safety Law and Regulations.

Enforcement of H&S law in the past targeted "Directors" and "Company Secretaries" and clearly this had a business and

commercial bias.

The current HSC Enforcement Policy appears to be targeting enforcement action against managers as well as Directors and now seems to be focused on both the public and private sectors equally. This is also clarified in the Guidance to the Management of Health and Safety at Work Regulations which talks about "organisations" being schools, colleges, voluntary bodies, councils etc. as well as companies. Personal liability to prosecutions under the safety law has been extended to person who exercise a similar role to directors and company secretaries. This would certainly include Heads as the CEO of their schools

but could also be interpreted to mean Directors/Assistant Directors, or those persons in the school employer's organization directing and organising the H&S function.

In short any person or any organisation can be liable to prosecution under H&S laws and regulations for a range of offences.

Staff, or others can be liable for putting the health and safety of others at risk by acting negligently or interfering with safety equipment. Others can be liable for advising or conniving to promote unsafe acts.

However, the main area where a cold chill runs down the spine for teachers and schools is the potential for a child to be killed and a manslaughter charge to be brought.

Three points here are worth considering:

1. All the manslaughter charges so far made have been on the basis of gross negligence.
2. HSE does not bring this charge it has a protocol with the police where both of them run TWO investigations side by side and the police hand a completed file to the DPP or the Procurator. In England and Wales it is the DPP who makes any charge of manslaughter and gross negligence is acknowledged by lawyers to be difficult to prove.
3. An old lawyer's adage adopted by H&S professionals is that no one has ever been prosecuted for following good practice. Follow good practice and you will be secure.

Almost all the manslaughter charges made against teachers have been involved with offsite visits. I estimate about 1–2,000,000 school visits have been made over the same period that there have been about 6 prosecutions for manslaughter.

HSE actions are much more likely to be for breaches of the law and regulations.

Primary Schools and breaches of the H&S law.

The actual numbers of prosecutions from 1999 –2003 are actually very small only about 25 in total are recorded as relating to Primary Schools on the HSE Database. The following is a breakdown of what these prosecutions were for:

Breach Against Number 1999 –2004

HASAWA 8

Electricity Regs 3

Manual Handling Regs 2

Management HSW Regs 5

Construction

Design Regs 3

Work Equipment 3

Other 3

So you can see that the main features of prosecutions is for offences under the Act itself and for breaches of the Management of Health and Safety at Work Regulations. An important aspect is that many of these breaches involved contracts, so it is clear that your control of these needs to be secure.

If you are visited by an inspector they will not generally prosecute immediately. Though they say that they do use prosecution as an important lever to help drive the HSC's targets forward.

Inspectors are much more likely to give advice and information or in the case of breaches to issue improvement or prohibition orders

Good news about enforcement

Out of 75 breaches prosecuted by HSE in Primary Schools 1997 – 2003 for which records are available in HSE's Database, none

nominated the Headteacher as the defendant. In all of them an LEA or other Employer/Contractor was the defendant. The picture for the make up of breaches is given below.

HSC/HSE says exactly what they mean and are transparent. They also produce masses of clearly written information free. References are given to a large selection of these which are relevant. No one has ever been prosecuted for following good practice. You may not have the formal documentation but if you have taken care that you have records this always helps.

Your school must be safe "so far as is reasonably practicable" This simply means that you cannot work miracles and that safety has to be judged against what is achievable. However, lack of money is not an adequate excuse if a Risk Assessment shows that something needs to be done. But it does mean that if the costs of protecting completely against a particular risk is too expensive measured against possible outcomes or not possible, then you have a defence. However, all of this a judgement and must be measured against good practice. Unilateral decisions about what is or is not reasonably practicable should be guarded against. Take advice

or at least research the matter.

You can aim for perfection over a measured time scale. It all depends on the base that you are starting from. HSE generally aims to encourage and advise. They generally prosecute only in extreme situations.

Litigation

A good Safety Management System protects you from Litigation and also ensures any HSE is a very remote possibility.

The courts are far more frequently used nowadays but even if you are involved in an action if you have taken the prior precaution of having a documented system the chances of success of any claimant are much reduced.

Litigation in the courts has demonstrated that teachers and the school/employer cannot be held responsible for every accident in school hours, or at any time that the children are in the control of schools e.g. during educational visits. The courts accept that some accidents happen no matter how much care is taken or how well planning and supervision is carried out.

Where an accident happens in such cases, the teacher/school cannot be held liable.

Good Practice is a defence and the Headteacher's Safety Toolkit provides you with proof of your good practice and guidance on what is acceptable. Some important points flowing from the following cases which can give a good general guide to the headteacher are:

- Is an accident "foreseeable" or not ?
- Is the risk very low and are the costs of mitigating the risk reasonable and proportionate?
- In any accident involving games or "horseplay" there is consent and it needs recklessness or a high degree of carelessness to breach the duty of care.
- Does the school have systems in place to reduce risk and is it following good or accepted practice ?
- Was the activity leading to the accident "play" or something else.

Areas most frequently addressed by the court during litigation include:

- Checks on staff competence and training
- Assessment of what is generally accepted as good practice

- Cross checking that suitable preparations and precautions been put in place.

The following are a few important court cases regarding good practice and duty of care in H&S matters which may, by example illuminate some of the matters decided in the courts.

Court Cases:

2003 Simonds v Isle of Wight LEA A five year old returning to school from lunch at home went to play unsupervised on swings in the school grounds and broke his arm.

The LEA/school won and the judge held that :

- there was no "causative event" for the accident.
- the child was playing alone and that the school had an adequate way of managing the swings.
- no playground could be free of hazard and it was as unreasonable for the school to lock the swings as it was to rope off trees in a playing field.
- since the mother had not delivered the child back into the care of the school there was no breach of duty on the

part of the school.

1997 Wilson V the Governors of the Sacred Heart RC Primary School

A child going home at end of school day was struck in the eye by another child's coat .

The Governors won and the judge held that:

- Whilst the school supervised at break and lunchtimes it was not common practice for children to be tightly supervised at end of day.
- The accident could have happened just as easily outside the school gates
- The school had not breached it's duty of care or acted negligently.

1998 Mullin v Richards

Two children had a "swordfight" with plastic rulers.

One of the rulers broke entering a pupil's eye and causing permanent damage. The claim for damages was dismissed on the basis that:

- There was insufficient evidence to prove that the accident was foreseeable in what had been no more than a childish game.
- The teacher had not breached their duty of care

Other areas for Litigation:

Litigation over the years has clarified some of the boundaries of duty of care and in complex litigation led areas more and more schools/LEAs/employers are investing in insurances to cover issues such as breach of duty of care in:

- Bullying
- Actions of poorly or unsupervised pupils
- Undiagnosed or misdiagnosed special needs
- The alleged adverse health effects of drinking, smoking, or drug taking
- Failure to achieve the expected results at Common Entrance, GCSE or A level
- Inadvertent breaches of European Union legislation
- Breaches of the Health and Safety legislation, Data Protection, the Children Act
- Inadequate sports and outdoor activity supervision
- Failure to teach the correct syllabus
- Libel or slander
- Incorrect advice given in an official capacity
- Unfair dismissal
- Infringement of copyright

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Enforcing School Safety In The UK.

By Paddy Swan

"A Headteacher's Safety Management Toolkit Article"

The Health and Safety Executive(HSE) as the body responsible for enforcing safety laws in our schools believes that up to 80% of accidents and incidents can be attributed to what they are calling now "Human Factors". An indication of how Human Factors integrate with the HSE's Regulatory function can be seen in the where they emphasise such as contributory factors. The list below shows where HSE have identified Human Factors as problems in priority areas for their action. This list is extracted from the HSC's Strategic Plan to 2010 and beyond and appears on HSE's Human Factors website. * Prevention of musculoskeletal disorders and manual handling injuries * Management of work-related stress * Preventing falls from height * Preventing slips and trips * Preventing workplace transport accidents * Human factors in design (e.g. alarm handling in control rooms, vehicle cab design etc) * The design and effectiveness of procedures * Human reliability - human error and systems failures e.g. maintenance error * Assessing organisational change and its implications * Effects of organisational culture * Communications and their effects on health and safety * Staffing levels and workload * Fatigue from working patterns – shiftwork and overtime * Training and competence You may wonder why I've started off with Human Factors but just look at this list again.

HSE never rush into enforcement and making prosecutions without informing and reinforcing the public. Now add up all the functions where management can make improvements on what HSE say is 80% of accidents and where their priority areas are. Got it? What this tells us is where HSE will be focusing over the next period of time – managing safety. This is confirmed by work which I have done on Head teacher's Safety Management Toolkit user's behalf by revisiting HSE's Database of Enforcement and this and a subsequent article gives information and analyses the information.

You can see information on this Toolkit and get access to the Analysis at

This article looks at the raw data and makes some

comments and observations on Enforcing School Safety. To be able to do this I have gone through HSE databases for the last 5 years and extracted all the Education related Enforcement actions.

These include : Enforcement Orders These are orders issued by Inspectors to: Prohibit an unsafe action or activity either immediately or within a specified time frame,(Prohibition Notice)

Or,

Improve an unsafe activity or condition again within a time frame.(Improvement Notice) These orders are the major part of HSE's enforcement activity;for example there were 214 Orders made against schools and employers over the time period of the Database,(approx. 5 years) whilst there were only 34 prosecutions. Enforcement Notices are Orders and need to be taken very seriously by anyone who gets one as HSE will prosecute if a Notice is ignored. Ignoring an Enforcement Notice is actually given as a criterion for prosecution in their Enforcement Policy document. Let us just look at what the situation actually is in schools as regards numbers of prosecutions and notices. Prosecutions In 2004/5 there were 712 prosecutions in total made by HSE in which they secured about 95% success of conviction. The total number of prosecutions over the time frame for the HSE

Database is just over 4000, which shows that schools and education with 34 prosecutions account for less than 1% of all prosecutions. However, some extremely high profile cases from the education sector do not appear on HSE's database. This is always the case for any work related death which would be prosecuted by the Crown Prosecution(England and Wales) or the Procurator Fiscal(Scotland). Thus, a teacher prosecuted for a death occurring on a school trip falls outside HSE's database. However,they have reported two prosecutions where children have been injured on trips and HSE has followed the incident up with a prosecution. One of these was a prosecution of both the Employer(Council) and the Head teacher. Looking at the actual figures of breaches involved in prosecutions gives us some indication of where actions are occurring now and later we shall look at the breaches involved in enforcement orders which may give us a clue to future actions. HSE reports Breaches against each prosecution or notice. A Breach indicates the specific law(s) or regulation(s) which is cited in relation to the offence. I have indicated the singular and plural above because one offence can breach several laws and regulations and HSE will report all the breaches against the offence. Prosecutions

Primary Schools – Total 16

Secondary Schools – Total 18 Breaches in Primary Schools

HASAW Act Sect 2 – 3 HASAW Act Sect 3 – 6 Management of H&S Regs 4 Electricity at Work 1
Construction Design & Maint Regs 1 Construction H&S Regs 1 Gas Safety Inst &Use Regs
Workplace (H&S) regs Control of Asbestos Regs Breaches in Secondary Schools

HASAW Act Sect 2 – 3 HASAW Act Sect 3 – 10 Management of H&S Regs 4 Electricity at Work
Construction Design & Maint Regs Construction H&S Regs 1 Gas Safety Inst &Use Regs 1
Workplace (H&S) regs 1 Control of Asbestos Regs 6

If you check the figures above the secondary figures do not add up to 18. This is because, as I explained above, often more than one breach is involved in an offence or a enforcement notice.

All Enforcement Notices in Schools

Primary Schools Total 77 Secondary Schools Total 137

Improvement Notices

Primary School Total 63 Secondary School Total 102

Prohibition Notices

Primary Schools Total 14 Secondary Schools Total 35 Made up of Breaches(Primary Schools) HASAW Act Sect 2 38 HASAW Act Sect 3 41 Management of H&S Regs 42 Electricity at Work 6 Construction Design & Maint 1 COSHH 4 Prov&Use of Work Equipment 4 Manual Handling 3 Workplace (H&S) regs 26 Control of Asbestos Regs 7 This may not mean a lot to a non-safety professional but we can look at this another way. What breaches occur in small numbers? Well it appears to me that emphasis on CDM, COSHH and Manual Handling must have been dealt with fairly well by schools. Alternatively relatively few accidents may have happened to be reported under the RIDDORs Regulations i.e there may have been accidents or incidents but not frequent or serious enough to appear on the HSE radar. What isn't there at all? There are absolutely no Display

Screen Equipment Regulations notices let alone any prosecutions. I think most of us would not be too surprised not to see any references to the Personal Protective Equipment Regulations or those covering Noise. However, since there has been so much emphasis on DSE Regs and schools are now crammed with PCs and ICT it seems that DSE Regs are not high on HSE's priorities.

NB this does not mean there will never be enforcement and there is a requirement for a Risk Assessment to be carried out against these Regulations even if the RA says minimal or no significant risk and Action: No action! What is there a lot of notices issued for? Health and Safety at Work Act Sections 2 & 3 are "catch all" breaches and essentially Section 2 says "not ensuring employees safety" and Section 3 "not ensuring the safety of others(non employees i.e pupils and visitors/contractors)". The largest number of notices arise around the Management of Health and Safety at Work Regulations. This is relatively new and the focus is to make sure that dutyholders manage safety. This is where there is likely to be increasing emphasis for the future. There are also 26 notices around breaches of the Workplace(H&S) Regulations. This can be partly explained by a HSE initiative started in Kent to ensure regulation of site traffic and that pedestrians were separated from it.

So, quite a few of these Workplace Regs breaches are about site traffic, school buses whilst others are about unsafe structures in the school. Comments on Enforcement As I indicated above we can get inside the mind of HSE by looking at their Plans and Policies. They quite openly tell us that: a) Enforcement will be used to drive Plans and Policy. b) Enforcement will be targeted at the most serious risks. c) Enforcement will be targeted to improve standards. d) Their evidence shows and confirms that enforcement is an effective motivator and deterrent. e) They believe that enforcement plays an important role in securing compliance. f) That enforcement in the form of prosecutions comes about mainly from investigations into reports received on serious incidents.(about 90 –95%) We'll look at actual examples of all these in another article and see what specific offences are most and least common and what other lessons we can learn to maintain schools as safe learning environments and to ensure the health and safety of our children and staff.

Paddy Swan is a qualified teacher with senior management experience and also has almost 25 years safety experience in industry. He runs Swan Education which is an Accredited Centre of the College of Teachers. Open Learning materials for the College's Certificate of Educational Studies in School Safety (COES) at



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