



NISG – Legal Update Sponsored By Carson McDowell

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Look Behind You!

Transport Accidents in the Workplace – risk of prosecution against the employee or employer?

HSENI has recently launched a campaign within the construction sector – Drive Danger Out. It is a campaign to improve driver and pedestrian safety in the workplace, particularly within construction environments in order to reduce accidents that can cause serious injuries or tragically, death.

Within Northern Ireland, in the last ten years 34 people have lost their lives through workplace transport incidents and 162 people were seriously injured¹. Workplace transport accidents often include an individual being struck by a moving vehicle, falling from a moving vehicle or being struck by a vehicle that has over balanced/rolls over.

More often than not, these types of accidents involve large heavy vehicles, such as tractors/fork-lift trucks, lorries etc. As a result, if a person were to collide with one, the injuries are likely to be catastrophic. This makes the safety of pedestrians and drivers paramount; thereby placing a significant expectation on the employer to ensure that all drivers and pedestrians know, are trained in, and abide by the site rules. Within a construction site in particular there is a lot of activity and often a large volume of vehicles operating within a contained area. Consequently, a high duty of care is imposed, and appropriate safeguards are expected to be in place.

The employer's duty is detailed within Articles 4 (1) and 5 (1) of the Health and Safety at Work (Northern Ireland) Order 1978, which advise that an employer is to ensure, so far as is reasonably practicable, not only the safety of their employees but also the safety of non-employees who may be exposed to a risk of harm from the way a business is carried out. Failure to satisfy this duty can amount to a criminal offence with a possible fine and/or possible prison sentences for directors.

The term 'reasonably practicable' is open to interpretation from one employer to the next and depends on the level of risk that a person is exposed to. The initial step of the risk assessment requires careful consideration to manage the level of risk against the cost involved.

¹ HSENI



In considering the risks onsite the employer must reduce the risk to as 'low as reasonably practicable' and will need to demonstrate that all risks have been considered. Below is a list of possible examples:

1. Vehicle/pedestrian segregation to limit interaction between the two;
2. Site layout/traffic routes around the site;
3. Specifically marked pedestrian routes around the site;
4. Supervision of drivers and pedestrians;
5. Visibility around the vehicle;
6. Limit on material contained in fork lift truck/digger buckets;
7. Tipping/loading and unloading areas;
8. Ways to limit driver distractions;
9. Training provided to drivers and pedestrians on driving routes/site rules;
10. Vehicle pre-use checks;
11. Regular maintenance checks on vehicles; and
12. Risks with working at height on vehicles.

Thereafter, as part of the risk assessment procedure, the employer must implement appropriate control measures so as to limit the risk identified. Failure to properly assess the risks and then put in place control measures also amounts to a criminal offence with a possible fine/prison sentence as the employer could be in breach of Article 3 of the Management of Health and Safety at Work Regulations (NI) 2000.

For an employer to defend a potential prosecution it shall have to prove that it was not reasonably practicable for it to do any more than was in fact done to ensure safety at work - in accordance with Article 37 (1) of the Health and Safety at Work (NI) Order 1978. Depending on the individual circumstances, the employer may be tempted to consider if the employee's actions were a contributing factor in causing the accident to occur.

There is though, a steep burden of proof for an employer to raise this defence as it must demonstrate that it was **solely** the employee's actions that caused the accident, whilst able to demonstrate that it has taken **all reasonably practicable steps** to ensure safety at work for all contributing factors which lead to the accident circumstances.

Often, the more serious the injury sustained within a workplace accident, the increase in scrutiny of the safety procedures by the HSENI and the Courts, in order to identify failings and potential improvements on the part of the employer, to prevent such an accident happening again.

For example, it has been found that a driver who operated a vehicle carelessly, thereby causing a serious workplace accident, could escape prosecution if a contributing factor for carelessness was due to issues such as: an employer's tight deadline or tiredness due to over long hours of work.²

If a gap in procedures, or a failing in working practices is identified, criminal prosecution is likely to follow against the employer. In such case, the employee who 'caused' the accident is likely to avoid prosecution entirely.

This may be a frustration for employers, particularly if diligent risk assessments, control measures, supervision, pedestrian/vehicle segregation, vehicle checks and staff training are already in place. It also seems incompatible with the presumption of 'innocence until proven guilty', as the high burden of proof in overcoming a health and safety prosecution is actually the opposite where the employer has to prove its innocence from the outset.

Within the case of *R v. British Steel PLC ICR 586* though the Court did state "we do recognise that there may be circumstances in which it might be regarded as absurd that an employer should even be technically guilty of a criminal offence, but so-called absurdities are not peculiar to this corner of law."

As a result, the responsibility on the employer is significant in ensuring workplace safety. It is not something that should be taken lightly, or viewed as an 'absurdity'. It appears unlikely that there will be any shift towards the investigation of employees/individuals who may, at first glance have 'caused' the accident from an employer's perspective. The focus on the employer in the first instance when a HSENI investigation is launched serves as a reminder for all employers to assess the risk and to put in place appropriate control measures, no matter how absurd they may seem. Should those measures avoid a catastrophic injury/death onsite with a subsequent prosecution, the absurdities may well have saved the day.



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² **R v British Steel PLC [1995] ICR 586**