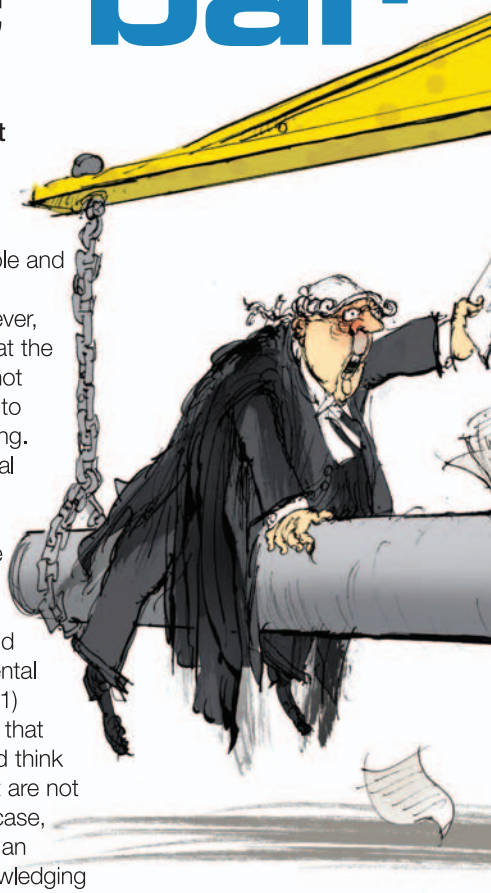
Lifting the bar

Courts are taking an increasingly tough line with lifting-related incidents, if plant managers cannot demonstrate due process, writes Crispin Kenyon



Consider the following: a trained engineer and overhead crane operator is lifting a relatively small component into position on a machine he is building. It weighs 30kg and is well within the capacity of the overhead crane. It is a simple lift from the factory floor to a height of about 3m, using two out of the four strops available. He is apparently watching the load and may even be guiding it with one hand as the other holds down the button on the pendant control.

Suddenly, there is a bang and he is struck in the face by the shackle on a spare strop. He sustains a major injury to his jaw, loses the sight in one eye and his sense of smell. The spare strop had caught on the base of the machine he was building. Tension had built up as he attempted to raise the load, but he had not noticed.

A full investigation was conducted and, luckily for my client, the HSE was satisfied that no breach of its duty as an employer had taken place. A civil claim ensued and was, in due course, settled – although with a large allowance for his contributory negligence. This was not an unusual lift and indeed the injured engineer had done it on many occasions, including once earlier on the same day that his life was changed so dramatically.

The point of this story is twofold. First, in any well-run organisation mistakes occur, even with simple procedures. And secondly, risk assessments and method statements need to go the extra mile.

Plant engineers and managers involved in lifting operations naturally dread the prospect of such an occurrence on their watch, not least because it results in a great deal of soul-searching and a natural tendency to accept that prevention was possible. Further, the injured employee must be taken to hospital, and the police and HSE will arrive on site. Relatives have to be informed and production is halted, with everyone is in a state of shock.

So often, accidents occur when something apparently unusual takes place – although those involved feel the situation is entirely usual. The case above was very routine, yet the outcome life changing. The requirements of LOLER (Lifting Operations and Lifting Equipment Regulations 1998) had been met, with the planning and supervision of a competent person, and a full method statement and risk assessment. Until disaster struck, it was thought to be both suitable and sufficient.

No one, however, contemplated that the operator would not pay full attention to what he was doing. And recent judicial comment in a fatal accident prosecution case (R versus Tangerine Confectionery and Veolia Environmental Services CA 2011) was to the effect that employers should think about things that are not obvious. In that case, it was the risk of an employee acknowledging the signal to press a stop button, then immediately entering a machine without doing so.

Those managing the operation of plant and lifting activities, and seeking to maintain and improve their safety record, will surely find little comfort in those words. Many may feel that the gap between law and reality is as wide as ever.

Price of failure

Why then was the civil claim in our lifting case settled? Because, although the training was satisfactory, the British Standard for lifting such loads requires that spare strops are secured out of the way. The engineer was not given that instruction.

However, this case could easily have resulted in a fine of £50,000–100,000. That level is quite common for large companies where breaches are established, even in non-fatal cases. But the concept of an injured person's contribution to an accident – while alien to the criminal law – is taken into account by juries asked to deliberate on such cases.

That said, the price of failure is high. The imposition of fines in Corporate Manslaughter cases, such as Cotswold Geotech and Lion Steel, show how the courts are adhering to the requirements of the Sentencing Guidelines Council, and starting at

£500,000.

Despite the impecuniosity of Cotswold Geotech, the Court of Appeal refused leave to appeal against its sentence of £380,000, despite the firm's turnover being scarcely higher than a tenth of that sum. Likewise, Lion Steel was not a company with a large turnover and profits, but nonetheless received a fine of £480,000.

What's more, prosecutions of LOLER offences are often combined with alleged breaches of PUWER (Provision and Use of Work Equipment Regulations 1998). In one case of a load being dropped, due to a hydraulic failure – where the lifting operation had not been planned to keep other employees at a safe distance and there was a lack of training – a fine of £9,000 was imposed under each set of regulations, even though no injuries were sustained.

In some instances, the regulations are just a basis for an allegation of breach of Sections 2 and 3 HSWA (Health & Safety at Work Act), for which higher penalties are more than likely. Following a major lift accident at Heathrow Terminal 5, for example, Schindler Lifts was fined £250,000 for the Section 2 breach and £50,000 for the Regulation 8 LOLER breach.

Furthermore, the outlook remains bleak on sentencing, particularly with the removal of limits on fines in the magistrates' courts when the LASPO (Legal Aid, Sentencing and Punishment of Offenders Act 2012) comes into effect. Any primary (eg HSWA 1974) or secondary (eg LOLER/PUWER) actions, where the fine was limited to £5,000, will have that restriction lifted. The remaining provisions of the act will come into force in April 2013. However, a statutory instrument is also being promulgated to remove relevant fine limits at an earlier, although as yet unknown, date.

Increasing fines and disruptions to business, caused by accidents and the ensuing investigation, are such that plant managers and engineers need to up their game. They must strive to meet the constantly lifting safety bar. PE

Crispin Kenyon is lead partner in the London Regulatory Services Unit at Weightmans LLP and represented the defendants in the Veolia case mentioned in this article

Lifting regulations and practice update

The UK government's review of health and safety legislation looks set to leave LOLER (Lifting Operations and Lifting Equipment Regulations 1998) largely unchanged, writes Geoff Holden, chief executive of LEEA, the Lifting Equipment Engineers Association. LEEA, he says, welcomes this, because LOLER is a sensible and effective approach to safe and efficient lifting.

The fact that LOLER is increasingly being adopted as best practice in parts of the world lacking sector-specific health and safety legislation proves the point. That said, in common with other health and safety legislation, LOLER's Approved Code of Practice is currently the subject of review – the government's aim being to simplify these documents.

Common mistakes, in terms of compliance, include a failure to appreciate what constitutes lifting equipment. LOLER defines it as work equipment for lifting and lowering loads, and includes attachments used for anchoring, fixing or supporting them. Hence the requirement for an effective system of storage, control and issue to keep track of slings, shackles etc across a workplace – and the increasing popularity of RFID tagging for recording thorough examinations, servicing and maintenance.

Written plans for lifting operations have also become more common. However, too often they are mere 'box-ticking' exercises – meaning that the content falls short of what is required and/or is not followed in practice.

Further, the benefits of specialist and/or purpose-designed lifting attachments should not be overlooked. Failed attempts to use standard slings and attachments to handle awkward or unusual loads are a common feature of lifting-related accidents.

But compliance with regulations such as LOLER is only part of the story. Employers need to cultivate the right culture. Employees must have the confidence and authority to report problems and concerns with lifting equipment and operations – and be willing and able to suggest improvements.