Developments Impacting Costs/Outlay in Regulatory Prosecution Cases for Insurers

IMC Liability Insurance Conference 2026

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Dolmans – Legal 500, 2026

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"Peter Bennett is a master of the game. An encyclopaedic knowledge of H&S law. He knows all the right people too, barristers, experts etc. Peter will give it to you straight, whether good or bad news, and break down complex subject matter so it is easily understandable for us lay people."

Legal 500, 2026

Regulatory Event: Issues for Insurers

Background: Role of Insurers in Regulatory Prosecution 1

- Legal Expenses Insurance is frequently an "add on" in both EL and in some PL Policies (SUBJECT to policy terms). "It is there", in the background.
- Some Polices provide prosecution costs coverage.
- In EL serious injury cases, obviously confluence of interests between Insurer and Insured.
- Arguably the same, if not more so, in Fatal Accident cases.

Background: Role of Insurers in Regulatory Prosecution 2

- In a well-run commercial organisation, an HSE Investigation or (worse) Prosecution is a “once in a generation event”.
- In a Fatal Accident context, in 2026/2026, more so (126 fatalities last year according to RIDDOR figures)
- It is VERY RARE that I see “repeat business” for the same Insured.
- An incident is therefore hugely impactful and disruptive.
- Management time, reputational impact, press impact, stress

Background: Role of Insurers in Regulatory Prosecution 3

- Immediate potentially serious financial impact to the business.
- Collateral potentially serious risk of personal impact on senior managers within the business (risk to liberty).
- Hugely disruptive to a harmonious staff/management relationship.
- International dimension in multi-national firms.

The Emergence of Larger Fines

The Very Large Organisation Problem

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The Very Large Organisation Problem

Amendment to the Definitive Sentencing Guideline
June 2025

Amendment to DG – June 2025

- Amendment to the DG for H&S Offences – June 2025
- Wording has been amended and expanded in respect of "VLOs" – at STEP 2
- **REMINDER** – VLO threshold is plus **£50M turnover** or equivalent
- Consultation regarding VLOs in November 2024

Financial Size: DG Levels

Large organisation

Turnover **£50 million or over**

Medium organisation

Turnover between **£10 million and £50 million**

Small organisation

Turnover of between **£2 million and £10 million**

Micro business

Turnover or equivalent of **less than £2 million**

Amendment to DG – June 2025

- **Former wording** –
- *"Where an offending organisation's turnover or equivalent very greatly exceeds the threshold for large organisation, it may be necessary to move outside the suggested range to achieve a proportionate sentence."*

Amendment to DG – June 2025

- **Revised wording –**
- *"Where an offending company's turnover or equivalent **very greatly exceeds** the threshold for large companies, **courts should consider fines outside the range for large companies (and) it may be necessary to move outside the suggested range to achieve a proportionate sentence.**"*
- *"There is no precise level of turnover at which an organisation becomes 'very large'. In the case of most organisations, it will be obvious if it either is or is not very large."*

HSE v

Transport for London and TOL

27.07.2023

Sentence on guilty pleas. Following acquittal of driver following multiple fatalities in Croydon Tram derailment in 2016 (7 deaths).

Systemic failures in relation to management of health and safety in respect of tram operations in Croydon London over a period of years.

Net fine TfL: £10 million
Net fine TOL: £4 million

HSE v

Transport for London and TOL

NB TfL explicitly found to be a Very Large Organisation (£9Bn turnover) – so the start point for the fine was increased from £10 million to £15 million.
High Culpability was found.
Harm Category 1 was found.

Almost all the arguments by the Defendants were rejected entirely in sentencing.

(Any organisation with a turnover of more than £250M risk very large organisation status now)

Financial Size/Fine Range

Large Organisation (Turnover £50 million or over)

Fine Range: £10,000 to £10 million

Medium Organisation (£10 million and £50 million)

Fine Range: £3,000 to £4 million

Small Organisation (£2 million and £10 million)

Fine Range: £700 to £1.6 million)

Micro Business (less than £2 million)

Fine Range: £200 to £450,000

Large **Turnover or equivalent: £50 million and over**		
	Starting point	**Category range**
Very high culpability		
Harm category 1	£4,000,000	£2,600,000 – £10,000,000
Harm category 2	£2,000,000	£1,000,000 – £5,250,000
Harm category 3	£1,000,000	£500,000 – £2,700,000
Harm category 4	£500,000	£240,000 – £1,300,000
High culpability		
Harm category 1	£2,400,000	£1,500,000 – £6,000,000
Harm category 2	£1,100,000	£550,000 – £2,900,000
Harm category 3	£540,000	£250,000 – £1,450,000
Harm category 4	£240,000	£120,000 – £700,000
Medium culpability		
Harm category 1	£1,300,000	£800,000 – £3,250,000
Harm category 2	£600,000	£300,000 – £1,500,000
Harm category 3	£300,000	£130,000 – £750,000
Harm category 4	£130,000	£50,000 – £350,000
Low culpability		
Harm category 1	£300,000	£180,000 – £700,000
Harm category 2	£100,000	£35,000 – £250,000
Harm category 3	£35,000	£10,000 – £140,000
Harm category 4	£10,000	£3,000 – £60,000

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HSE v

Staffordshire FRS (13.07.2022)

Very serious injury – “life changing”.
Incorrect/Unvetted Training Venue
‘Insufficient’ Risk Assessment
Incorrect location
Weather conditions
System of Work issues – edge protection

HSE v

Staffordshire FRS (13.07.2022)

Prosecution contended for a start point for the fine “towards the upper end” of the fine range - £50,000 - £300,000, based on this being a “high medium culpability” case.

They further contended that the sentencing judge should consider moving **above this fine range** because of the eventuation of harm.

HSE v

Staffordshire FRS (13.07.2022)

Fine: £10,000

Judge accepted this was a low culpability case.
Fine range – therefore - £3,000 to £60,000.
Fine start point - £50,000
Reduced to £30,000 to reflect good character and mitigation.
£30,000 further reduced – to reflect financial mitigation – to £15,000.
Early Plea reduction – fine becomes £10,000

HSE v

Staffordshire FRS (13.07.2022)

Factors of Importance

- Early admission of guilt (Before Prosecution)
- Pragmatic and open interaction with HSE (Judge's remarks)
- Extensive, well constructed mitigation evidence concerning financial position.
- "Buy in" from senior management at every level of the process.

HSE v

Staffordshire FRS (13.07.2022)

The ability to construct that framework comes at a significant financial cost, considerable work was required over a significant period of time to construct the mitigation framework and marshal evidence.

“Is this the part where I complain about your bill?” (Rob Barber, Chief Fire Officer, SFRS)

NOT an insurer instruction (Tension – Discuss)

The Impact of AIBs on Inquests

Inquests - AIBs

- Where an Inquest involves an earlier investigation by an AIB – their presence has a major impact on the "shape" of the inquest and thus the potential shape of prosecution (and therefore, legal costs).
- What do we mean by AIBs?
- Government (Min of Transport) Investigatory Bodies -
    - Air Accident Investigation Branch (AAIB)
    - Rail Accident Investigation Branch (RAIB)
    - Marine Accident Investigation Branch (MAIB)

AIBs in Inquests

The Air Accident Investigation Branch (AAIB)

The Rail Accident Investigation Branch (RAIB)

The Marine Accident Investigation Branch (MAIB)

Inquests - AIBs

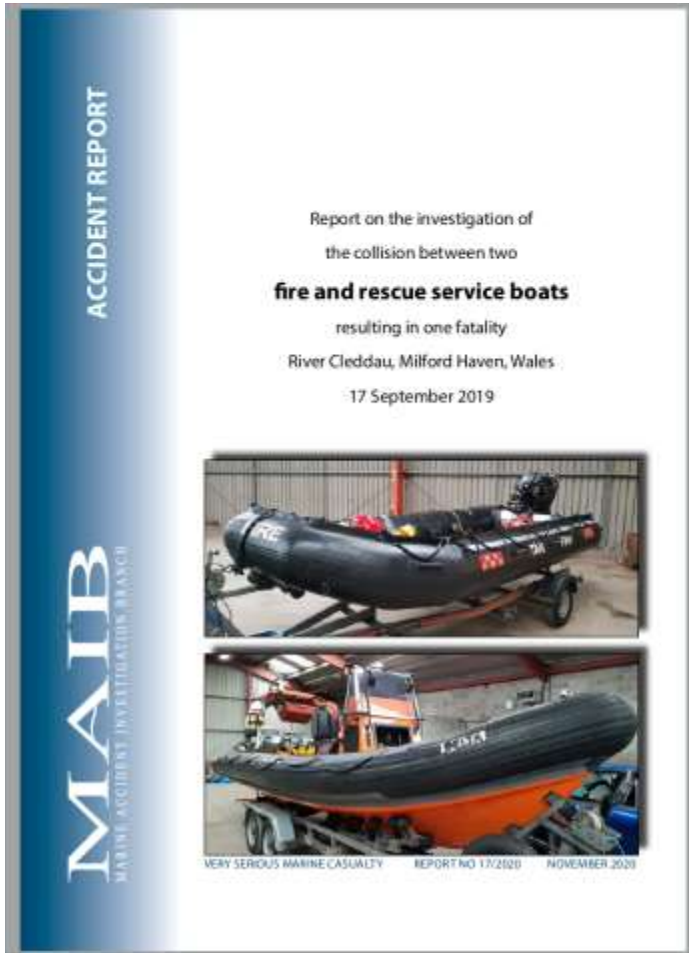
- **R (on behalf of the Secretary of State) v HM Senior Coroner for Norfolk (28.09.2016) [2016] EWHC 2279**
- Unless there is “credible evidence” that the AIB investigation is “incomplete, flawed or deficient” – the AIB report ***must stand as the evidence*** (and the <u>*only evidence*</u>) before the Inquest and/or Inquest Jury.
- No other evidence is required – as it would “duplicate” this statutory body investigation.
- NOTE: “credible evidence” threshold…..

Inquests - AIBs

- **HM Coroner in Croydon Tram Crash declined to allow any other evidence – Ruling 28 June 2021 (Sarah Ormonde-Walshe)** – not appealed (but families of victims very unhappy)
- **HM Coroner for West Sussex v Secretary of State for Transport, Chief Constable for Sussex Police and Mr Andrew Hill [2022] EWHC 215 (QB) (Shoreham Air Crash)**
- The "credible evidence" threshold for flawed, incomplete or deficient is "a very high threshold".

R (ex. Parte Mid and West Wales Fire and Rescue Service) v HM Coroner for Pembrokeshire [2023] 7 WLUK 189

- Fatal Accident MWWFRS – 17 September 2019
- Two FRS boats collided during training – River Cleddau, Pembrokeshire.
- Larger boat (6m RIB), travelling at speed, “drove over” smaller boat (3m inflatable), causing catastrophic head injuries to one firefighter in the smaller boat from which he tragically died.
- Dolmans represented MWWFRS via its Insurers.



- MAIB Report concluded there had been an “erosion of training” in respect of boat use within FRS in the lead up to the accident.
- Conclusions drawn without wider triangulation of evidence across the Service and arguably based on allegations (only) from one Fire Station.
- MAIB investigator qualifications to comment on FRS training?

R (ex. Parte Mid and West Wales Fire and Rescue Service) v HM Coroner for Pembrokeshire and Marine Accident Investigation Branch (Eyre J – July 2023)

- HM Coroner for Pembrokeshire ruled he **must** adopt the findings of MAIB Report, and **NOT admit ANY evidence from MWWFRS on alleged training failures**.
- MWWFRS had tendered **3 witness statements** on this point.
- MWWFRS under investigation from HSE in relation to the incident – **probable charge under section 2 of HSWA**.
- Pilot (and passenger) of 6m RIB under investigation by MCA.
- Both had been dismissed for gross misconduct from MWWFRS.

R (ex. Parte Mid and West Wales Fire and Rescue Service) v HM Coroner for Pembrokeshire and Marine Accident Investigation Branch (Eyre J – July 2023)

- Senior Management of MWWFRS and Fire Authority resolved to commence a **Judicial Review** of Pembrokeshire Coroner's Ruling on MAIB evidence.
- The perception was that this Ruling "gagged" the FRS at Inquest and gave them no voice.
- Further, any prosecution would take place through the prism of the Inquest findings as to systemic failures (e.g. training)
- **Insurance Policy DID NOT COVER THE JUDICIAL REVIEW**.

Inquests - AIBs

- **R (ex. Parte Mid and West Wales Fire and Rescue Service) v HM Coroner for Pembrokeshire and Marine Accident Investigation Branch (Eyre J – July 2023)**
- RESULT - FRS *are not permitted to call ANY evidence at inquest in respect of those matters or in regard to ANY of the conclusions of the MAIB report.*

Inquests - AIBs

- **Impact of AIB Reports on Inquest – SUMMARY**
- Consequent upon *Norfolk, West Sussex and Mid and West FRS* an AIB report conclusion is effectively not open to challenge at Inquest. **Moreover, that report will be the SOLE EVIDENCE before a jury**.
- Thus, an entity facing subsequent regulatory prosecution (FRS –see above) HAS NO VOICE at inquest due to the imposition of an AIB conclusion on the inquest process.
- "Credible evidence of…..AIB investigation being flawed, deficient or incomplete…." [Discuss]

Mid and West FRS – What Happened?

- Inquest – 2 days, June 2024 – Inquest jury “instructed” to record MAIB findings (verbatim) as inquest conclusion – so cause of death was contributed to by an “erosion of training” with regard to boat handling.
- HSE Issued detailed Notice of Contravention/Statement of Intent as to Prosecution – November 2024.
- January 2025 – MWWFRS Response to that.
- March 2025 – Boat Handling Expert retained and conference with counsel in London.

Mid and West FRS – What Happened?

- October 2025 – HSE confirmed "no further action" (prosecution discontinued).
- Undoubtedly the JR decision (and the costs involved) had "discouraged" HSE from prosecution.
- JR was a clear statement of intent that these issues would be "re-run" before the Crown Court Jury – having been silenced in the inquest environment.
- 4-6 week Crown Court Trial avoided.
- Significant 6-7 figure regulatory fine avoided.

Summary of Today 1

- Regulatory investigations and prosecutions present unique challenges and implications **which always enhance legal costs**.
- **Insurers will face immediate challenges** both in terms of delivery to the insured and cost of that delivery.
- Insurers MAY face **difficult questions as to indemnity** (JR situation in MWWFRS).
- Insurers MAY face **difficult questions as to representation** (panel v non-panel team).

Summary of Today 2

- There is always a **tension between legal costs outlay and delivery** in the sense that costs outlay is required to reduce fine outlay – "is this where I moan about your bill?"
- Arguably, however, MWWFRS is a most extreme exemplar of that.
- In most EL claims today – **the fine (non-insurable) will FAR EXCEED any dependency claim(s).**
- Often **the aim is to conclude the EL claims first**, before prosecution/sentence.

Questions & Discussion