

Monthly Meeting - 9 June 2014



Legal Update – Members’ Forum Chris Hopkins, Pinsent Masons LLP

Chris has been a Member of BHSEA for a number of years and is also on the Council and Management Committees. He is a barrister in a regulatory law team at Pinsents and specialises in Health, Safety, Environment and large vehicle Licensing. He recently completed a seven month secondment at Jaguar Land Rover.

Chris started by saying he would today be discussing legal updates on key topics, ie:

- Corporate manslaughter;
- Overview of recent relevant H&S cases;
- New environmental offence sentencing guidelines;
- Asbestos update;
- CDM

Corporate Manslaughter

Chris gave us an update on some high profile manslaughter cases which have been brought to Court since the Corporate Manslaughter (for England and Wales) and Corporate Homicide (for Scotland) Act of 2007 was introduced. At least 50% of cases currently being investigated by the HSE are for Corporate Manslaughter. Chris explained that, initially, there was a lot of interest and organisations were actively seeking specialist legal advice to protect them against prosecution following a death in their workplace. However, things quietened down when, after a period of time, there did not appear to be many prosecutions. But, following publicity of cases brought to Court more recently, it is once again very much a hot topic.

Overview of recent relevant H&S cases (Including penalties and fines imposed)

Corporate Manslaughter and Corporate Homicide Act 2007

- *R v Cotswold Geotechnical (Holdings) Ltd (Feb 2011) (in Liquidation)*
 - Fined £385,000 in equal instalments over 10 years
- *R v JMW Farms Ltd (Northern Ireland) (May 2012)*
 - Fined £187,500 payable in 6 months
- *R v Lion Steel Equipment Ltd (July 2012)*
 - Fined £480,000 over 3 years
- *J Murray & Sons Ltd (Northern Ireland) (October 2013)*
 - Fined £100,000 over 5 years



Corporate Manslaughter and Corporate Homicide Act 2007

- *Princes Sporting Club Limited (November 2013)*
 - Fined £34,579.69 (equating to the entirety of the assets of the company) plus costs of £100,000 within 28 days.
 - First ever Publicity Order!
- *Mobile Sweepers (Reading) Limited (February 2014)*
 - Fined: £8,000 plus costs of £4,000 and Publicity Order
 - Sole director
 - Fined: £183,000 and costs of £8,000
 - Disqualified as a director for 5 years



As you will see, some significant penalties have been awarded to reinforce the gravity of these cases. Even when companies have had little in the way of assets, the Judge has found a way to impose the penalty, for example by permitting repayment over a lengthy period of time.

There had been a case in Scotland which had attracted a fine of £1.7 million. Chris commented that it has been a long time since there had been a fine at that level. The Court found “an enduring failure ...”, since previous incident reports required by the HSE revealed the same issues had occurred on earlier occasions (see Powerpoint presentation on the website: www.bhsea.org.uk).

A case in mid-Staffs Hospital highlighted the difficulties of awarding large fines where money is coming out of public funds and thus impacting on public services. An example of this was a case where a diabetic patient had died as a result of a failure to administer insulin. The Trust pleaded guilty and was duly fined. The Judge pointed out that had the Trust been a profitable commercial company the fine would have been significantly higher.

Chris noted the fact that there has been an increased willingness by the HSE to investigate hospital cases.

Company Reputation

There can also be Publicity Orders made. This is where companies are “named and shamed”. This adverse publicity can sometimes have a detrimental effect on a company which far outweighs the monetary fine.

However, not all cases brought to Court result in a straightforward prosecution, as in the case of P S and J E Ward:

- Worker at a Norfolk flower firm killed after the trailer he was towing touched an overhead power line;

- Following a contested trial, the Jury cleared P S & J E Ward of manslaughter; BUT
- Jury convicted the company of a breach of health and safety law;
- Company was due to be sentenced on 6 June 2014.

In addition to fines, a director can also be disqualified from holding directorships for a number of years, with obvious significant personal consequences.

There are four more high-profile cases still going through the courts, including one concerning a mining disaster in South Wales where the mine manager is himself at risk of prosecution.

Section 37 HASAWA

In another case three senior directors were charged under Section 37 of the Health and Safety at Work Act – one of them was a finance director who was culpable because his financial decisions not to invest sufficiently into the area of health and safety had ultimately led to tragedy. One director was not even based on site where the incident happened. Only one director had given the actual instructions which led to the fatality.

Environmental Offence Sentencing Guidelines

Sentencing Council - Definitive Guideline for Environmental Offences

- Issued 27 February 2014;
- Apply to offences sentenced in England and Wales after 1 July 2014, regardless of the date of the offence;
- Compensation / confiscation / fines apply;
- Fines linked to offence category - culpability and harm factors;
- Within each category the court is given a starting point and range of possible fines;
- Different starting points and ranges apply depending on the size of the company (determined by reference to turnover or equivalent) but range from £100 to £3 million.

Chris said that the new Environmental Offences Sentencing Guidelines from 1 July 2014 have to be referred to by the Courts prior to sentencing. The Guidelines will address some inconsistencies that have occurred in the past where a small company and a huge corporation have received similar sized fines. In future, fines will range from £500,000 to many millions of pounds, depending on the turnover of

the company. The fine now has to be appropriate and large enough to impact on the company.

Companies can also be required to pay compensation as well as have any profits/proceeds of crime confiscated.

Asbestos

A revised ACOP was published in December 2013. There is also a new Mesothelioma Act of 2014. Government compensation in the region of £123,000 will be available to claimants where either the business or the Employer's Liability insurer cannot be traced, which may be the case given the long

incubation period of such diseases - sometimes up to 40 years. The record for the largest fine awarded for an asbestos-related disease is still held by Marks and Spencer, at £1 million in 2011.

CDM

These Regulations were introduced in 2007 and the review closed last week. They were mainly brought in to cover major infrastructure engineering projects as well as smaller scale non-domestic works. However, analysis has shown that 2/3rds of fatalities do not occur on the large projects, as thought, but on smaller sites. The Regulations are about to change following a consultation meeting held on 6 June and it is proposed that the new regulatory framework will be more applicable to smaller sites where the risks are higher.

The HSE are also proposing the replacement of the CDM Co-ordinator role with a 'Principal Designer' role and all contractors must be properly qualified. One major change is the effect the new regulations will have on the domestic market. Previously, a householder having work done on their house would not have had the responsibilities of the Client, as is the case for commercial projects. Now, the householder will have Client responsibility. However, as soon as they employ a builder or principal contractor, the responsibility for compliance as the Client will rest with that contractor with immediate effect.

Questions

Lee Dargue, of Invotec, queried why some manslaughter cases seem to come to Court very quickly, whilst others drag on for months or years and what processes are likely to extend the timescale. Chris pointed out that collating evidence and taking witness statements can be a lengthy process. Also, where there is a fatality the HSE would usually await the outcome of the Coroner's Inquest for additional intelligence gathering, prior to finalising their investigations. This approach has been heavily criticised and HSE will be adopting a different approach in future as they recognise it is important to conclude matters whilst events are relatively fresh in everyone's mind.

Another question related to the number of corporate manslaughter prosecutions of smaller concerns – the softer targets - that the CPS appear to be focusing on under this Act, when existing legislation is more than adequate. It was commented that it is often easier to reach smaller companies – 'one man bands' such as Geotechnical rather than large organisations such as Network Rail etc.

A question was raised with regard to CDM concerning how a householder self-managing his building project and employing the trades himself would now be affected. Chris advised that the HSE had not been in favour of going after ordinary householders but their hands are tied in that they have to be seen to be complying with the EC Directive.

With regard to the sporting tragedy which had led to a young person losing their life whilst on a banana boat adventure, a comment was made that the Publicity Order, apart from discouraging parents from allowing their child to be involved

with that particular company, had a wider message that the activity was highly dangerous and should be discouraged anyway. Since the assets of Princes Sporting Club Limited were small the Judge, feeling that his hands were tied but that he could not let them off, levied a fine in the region of £35,000 (see slide on page 3), which more or less equated to the entire assets of the Company.