Health and Safety: Legal Update

IOSH / AOSH – 14 January 2016

Kevin Bridges
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Health and Safety – Legal Update
Speaker

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8 years HSE Inspector (6 years major hazards)
Msc. Environmental Toxicology
2 Years Risk Management Consultant
Post Graduate Law Diploma
13 Years Lawyer
CDM Regulations 2015 – a reminder

• Apply to *all construction work*

• The carrying out of any building, engineering, civil engineering or construction work and includes:
  ○ Construction, alteration, conversion or fitting out
  ○ Preparation (site clearance, investigation, excavations)
  ○ Renovation, repair, redecoration
  ○ M&E installation, commissioning, *maintenance* and repair within or fixed to a structure
  ○ On-site assembly of prefabricated components
  ○ Demolition or dismantling of a structure
CDM Regulations 2015 – a reminder

• Came into force in April 2015
• Transitional period until 6 October 2015
• Key changes:
  ○ Replacement of CDM co-ordinator with principal designer role
  ○ Applies to all projects, including domestic ones
  ○ Additional client responsibilities and liabilities
  ○ Notify only if:
    – Over 30 days and 20 workers simultaneously on site; or
    – 500 man days
CDM Regulations 2015 – a reminder

- Key changes (cont.)
  - All projects must have written construction phase plan
  - Competency
    - Replaced with skills / knowledge / experience (SKE)
  - Where more than one contractor, must appoint in writing a principal designer (and principal contractor)
  - Criminal sanctions for non-compliance
Dutyholders

- There are 5 dutyholders
  - Client / principal designer / designer / principal contractor / contractor

- What about other entities?
  - Not recognised: Employer’s agent / contract administrator / client representative

- Client fulfils duties until he formally appoints the relevant dutyholder

- Delegation permitted
  - Duties, but not the responsibility

- Additional guidance notes
Duties

- Client responsibilities
  - Provide pre-construction information and set requirements for the H&S file
  - Lodge the F10 - sign the declaration
  - Responsible for H&S management
  - Responsible for formal written appointments

- Principal designer responsibilities
  - Control over the pre-construction phase
  - Co-ordinate the design team and process related information
  - Create, maintain and complete the CDM H&S handover file
Who can be a principal designer?

- Who can be a principal designer?

  - A **designer** is anyone who "prepares or instructs design in the course of business" who is "in control" of the pre-construction period

  - A **design** can include drawings, design details, specifications, bills of quantities and specifications

- If a principal designer is not appointed, the client assumes the role and duties by default
Principal designer options

- Existing projects: must have been appointed by 6 Oct 2015
- Example approaches that have been include:
  - Architects, quantity surveyors or project managers appointed
  - CDM co-ordinators appointed as principal designer
  - Creation of new ‘role’ - CDM adviser
  - Firms that provided CDM co-ordinator services recruiting talent in order to comply with the principal designer requirements
  - Principal contractors undertaking the principal designer role
  - Client assuming the principal designer role
CDM Regulations 2015 – a survey – Philip Poynter

- CDM 2015 Five Minute Survey was open between 9th and 29th November 2015 and asked three substantive questions:
  - *How does CDM 2015 compare to CDM 2007?*
  - *How does the Principal Designer (PD) role compare to the CDM Coordinator?*
  - *How is the Principal Designer (PD) role working?*
- *Majority believe Principal Designer role NOT working well*
- *Client Appointments* – project clients are: failing to appoint a PD
BIM and CDM

• Building Information Modelling (BIM) - 3 dimensional modelling – cradle to grave, design prepare, build, maintain, refurbish, demolish.

• 2016 government procurement programme

• BIM an opportunity for all (including accident investigation inspectors!)
New Sentencing Guidelines

• Full Title:
  ◦ The “Health and safety offences, corporate manslaughter and food safety and hygiene offences guidelines”

• Published on 12\textsuperscript{th} November 2014

• Consultation ended 18\textsuperscript{th} February 2015

• Definitive guidelines and consultation response published November 2015

• Applicable to all offences sentenced on or after 1\textsuperscript{st} February 2016
New Sentencing Guidelines – Important Context

• Removal of cap on Magistrates fining powers:
  o On 2\textsuperscript{th} March 2015, Section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into effect.
  o Effect:
    – Fines which were previously capped at £5,000 or more can now be sentenced with unlimited fines in England and Wales
• Importance:
  o The new guidelines will almost certainly raise the level of fines available. This combined with the new powers under LASPO 2012 effectively unharnesses magistrates.
  o Calls for a change in tactics for offences
Approach to Guidelines for health and safety offences

Organisations:

- **Step one:** Determining the offence category
  - Culpability
  - Harm: 1) Risk of harm created. 2) significant number exposed/ significant cause of actual harm

- **Step two:** Starting point and category range – financial information (turnover will be starting point), then consider aggravating and mitigating factors

- **Step three:** Check whether the proposed fine based on turnover is proportionate to the means of the offender (this provides some flexibility)

- **Step four:** Consider other factors that may warrant adjustment of the proposed fine. (e.g. innocent third parties) court should adjust to avoid any unjustified wider consequences (e.g. job losses).

- **Step five to nine:** standard steps including reduction for early guilty plea.
Step 1: Culpability categories - Organisations

- **Very high** – deliberate breach / flagrant disregard.
- **High** – offender fell far short of standard e.g. ignoring concerns raised by employees / allowing breaches to subsist over long period of time. Systematic failings.
- **Medium** – fell short of the appropriate standard. Systems in place but not adhered to.
- **Low** - did not fall far short of appropriate standard e.g. significant efforts made to address risk although they were inadequate / no prior warning.
Step 1: Harm – 2 stages

First – risk of harm created by the offence:

• The seriousness of the harm risked by the offenders breach (level A, B or C).

• The likelihood of that harm arising (High, Medium, Remote).

Second:

• Exposed a significant number of people to the risk of harm.

  AND

• Whether the offence was a significant cause of actual harm (more than minimal, negligible, trivial contribution).

Victims actions highly unlikely to be looked at
Categories of organisations

Large – Turnover or equivalent: £50 million and over
Medium – Turnover or equivalent: £10 million and £50 million
Small – Turnover or equivalent: between £2 million and £10 million
Micro – Turnover or equivalent: not more than £2 million

Charities

Where a fine falls on public or charitable bodies, the fine should normally be substantially reduced.
## Step 2: Starting point

<table>
<thead>
<tr>
<th>Large</th>
<th>Starting point</th>
<th>Category range</th>
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<tbody>
<tr>
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<td><strong>Very high culpability</strong></td>
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### Step 2: Starting point

#### Medium

**Turnover or equivalent: between £10 million and £50 million**

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#### Category range

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Step 2: Starting point

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Step 2: Aggravating and mitigating factors for individuals and organisations – Movement within range

- **Factors increasing seriousness** – previous convictions, cost cutting, obstructions of justice, poor record, falsification of documents / licenses, deliberate failure to obtain / comply with licenses

- **Factors reducing seriousness or reflecting personal mitigation** – no previous, steps taken to remedy, cooperation, good record, acceptance of responsibility
Steps 3 – 5:

- **Step 3:** Proposed fine based on turnover is proportionate to the means of the offender – court to ‘step back’ and adjust e.g. profit margins, economic benefit, put out of business.

- **Step 4:** Other factors that may warrant adjustment of the proposed fine – public or charitable bodies e.g. impact on employment, customers and local economy (but not shareholders or directors).

- **Step 5:** Consider any factors which indicate a reduction for assistance to the prosecution – e.g. assistance given to the prosecutor.
Steps 6 – 9:

- **Step 6**: Reduction for guilty pleas

- **Step 7**: Compensation and ancillary orders – corporate manslaughter, includes publicity and remediation orders

- **Step 8**: Totality principle

- **Step 9**: Reasons
Sentencing – How will it work in practice?

• Guidelines are not yet in force – 1\textsuperscript{st} February 2016 will see their first official use
  ◦ NB – Judges have been heard to use or refer to the guidelines already, much to the disapproval of defence lawyers.

• Until then, it would be difficult to say how they will be used; BUT
  ◦ A similar process exist in the form of the Environmental Offences Sentencing Guidelines
## Sentencing Similarities

### Culpability

Where there are factors present in the case that fall in different categories of culpability, the court should balance these factors to reach a fair assessment of the offender’s culpability.

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<thead>
<tr>
<th>Culpability</th>
<th>Deliberate</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>Intentional breach of or flagrant disregard for the law by person(s) whose position of responsibility in the organisation is such that their acts/omissions can properly be attributed to the organisation; OR deliberate failure by organisation to put in place and to enforce such systems as could reasonably be expected in all the circumstances to avoid commission of the offence.</td>
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<thead>
<tr>
<th>Culpability</th>
<th>Reckless</th>
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<tbody>
<tr>
<td></td>
<td>Actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken by person(s) whose position of responsibility in the organisation is such that their acts/omissions can properly be attributed to the organisation; OR reckless failure by organisation to put in place and to enforce such systems as could reasonably be expected in all the circumstances to avoid commission of the offence.</td>
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<thead>
<tr>
<th>Culpability</th>
<th>Negligent</th>
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<tbody>
<tr>
<td></td>
<td>Failure by the organisation as a whole to take reasonable care to put in place and enforce proper systems for avoiding commission of the offence.</td>
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</table>

<table>
<thead>
<tr>
<th>Culpability</th>
<th>Low or no culpability</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>Offence committed with little or no fault on the part of the organisation as a whole, for example by accident or the act of a rogue employee and despite the presence and due enforcement of all reasonably required preventive measures, or where such proper preventive measures were unforeseeably overcome by exceptional events.</td>
</tr>
</tbody>
</table>

### Culpability

**Very high**
- Deliberate breach of or flagrant disregard for the law

**High**
- Offender fell far short of the appropriate standard; for example, by:
  - failing to put in place measures that are recognised standards in the industry
  - ignoring concerns raised by employees or others
  - failing to make appropriate changes following prior incident(s) exposing risks to health and safety
  - allowing breaches to subsist over a long period of time
- Serious and/or systemic failure within the organisation to address risks to health and safety

**Medium**
- Offender fell short of the appropriate standard in a manner that falls between descriptions in ‘high’ and ‘low’ culpability categories
- Systems were in place but these were not sufficiently adhered to or implemented

**Low**
- Offender did not fall far short of the appropriate standard; for example, because:
  - significant efforts were made to address the risk although they were inadequate on this occasion
  - there was no warning/circumstance indicating a risk to health and safety
- Failings were minor and occurred as an isolated incident
## Sentencing Ranges - HSE

<table>
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<tr>
<th>Culpability</th>
<th>Starting point</th>
<th>Category range</th>
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## Sentencing Ranges - Environment

<table>
<thead>
<tr>
<th>Category</th>
<th>Level 1</th>
<th>Level 2</th>
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<tbody>
<tr>
<td><strong>Deliberate</strong></td>
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<tr>
<td>Category 1</td>
<td>£1,000,000</td>
<td>£450,000 – £3,000,000</td>
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<tr>
<td>Category 2</td>
<td>£500,000</td>
<td>£180,000 – £1,250,000</td>
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<tr>
<td>Category 3</td>
<td>£180,000</td>
<td>£100,000 – £450,000</td>
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<tr>
<td>Category 4</td>
<td>£100,000</td>
<td>£55,000 – £250,000</td>
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<td><strong>Reckless</strong></td>
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<tr>
<td>Category 1</td>
<td>£550,000</td>
<td>£250,000 – £1,500,000</td>
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<tr>
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<tr>
<td>Category 1</td>
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<td>£140,000 – £750,000</td>
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<td>£140,000</td>
<td>£60,000 – £350,000</td>
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<td>Category 3</td>
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<td>Category 4</td>
<td>£35,000</td>
<td>£22,000 – £100,000</td>
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<tr>
<td><strong>Low / No culpability</strong></td>
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<tr>
<td>Category 1</td>
<td>£50,000</td>
<td>£25,000 – £130,000</td>
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<tr>
<td>Category 4</td>
<td>£10,000</td>
<td>£7,000 – £25,000</td>
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</tbody>
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Sentencing Similarities - Process

- Both Guidelines work through a similar process of:
  - Culpability x harm = seriousness;
  - Seriousness provides the starting point and range;
  - The starting point varies depending on the turnover of the company;
  - The starting point is then moved upwards or downwards by aggravating/mitigating circumstances;
  - Reduction of fine by up to 1/3 with guilty plea and
  - Ancillary orders (i.e. disqualifications, asset forfeiture, compensation) can be made in addition
Sentencing – the Thames example

• Whilst no cases are available under the HSE guidelines;
  ○ There are cases that have been sentenced under the Environment guidelines

• The Environment Agency brought the prosecution after waste from a sewage works leaked into the Grand Union Canal

• The company pleaded guilty at Watford Magistrates' Court in May to two charges under the Environmental Permitting (England and Wales) Regulations 2010, relating to repeated discharges between July 2012 and April 2013.

• The court heard that poorly performing inlet screens caused equipment at the works to block, leading to sewage debris and sewage sludge being discharged into the canal.

• The Court found the offence was negligent, and caused a category 3 harm
Sentencing – the Thames example

- On the large company table the negligent/category 3 harm case starting point is £60,000, with a range of £35,000 to £150,000
- But, the large company table applies to companies with a turnover of £50 million plus
  - According to most recent accounts, Thames has a turnover of over £2 billion
- In these instances the guidelines suggest that a fine should be big enough to “bring home the message” to the shareholders and directors of the company.
- Ultimately the case resulted in a fine of…
Sentencing – the Thames example

- £1,000,000
  - Plus costs (of ~£18,000)

- The sentencing judge said the £1 million punishment underlined the need for "very large organisations" to "bring about the reforms and improvements for which they say they are striving."

- The sentencing judge applied a multiplier of 20 to the starting point to reflect the size of the company; but

- Accepted extensive mitigation arguments without which the fine may have been 2-3x as much
Sentencing – the Thames example

- That said, what can we learn from Thames?
  - Linking fines to turnover is likely to increase fines
    - Thames is an extreme example, but the turnover tables seems designed to increase fines
  - Substantial mitigation will be even more important than usual
    - Thames reduced it’s potential fine by over £1,000,000 by having systems in place and by showing voluntary improvement (even though it didn’t prevent the offence itself)
  - If this is the effect of the environmental guidelines, the impact of the HSE guidelines are likely to be similar.
THEN AND IN THE FUTURE

Review of recent cases and fines imposed.

What might those fines look like under the new regime?
Recap

• Thames Water – Court of Appeal (3 June 2015)

• For very large organisations “This may result in a fine equal to a substantial % and up to 100% of the company’s pre-tax net profit for the year… even if it results in fines in excess of £100m”
Case Study - R v Costain Ltd (July 2014)

- HSE V Costain Ltd
- Telehandler overturned - restricted space & poor segregation
- “someone will be killed”
- 4 offences
- T/o of £960m
- PBT of £31m
- Fine = £525,000 (after trial)
- What do you think?
• Fine in 2016??
• Turnover of £1billion
  – For a Large Company:
    – *High culpability/Harm cat 1* - starting point £2.4m – range £1.5m - £6m
    – *Medium culpability/Harm cat 1* - starting point £1.3m – range £800k - £3.25m
  – For V Large company:
    • Pre tax profit of £31million??
Hugo Boss UK Limited

- Four year old boy died in 2013 when a 7ft high, 18 stone unsecured mirror fell on him in retail outlet
- Mirror not fitted as per instructions and specifications
- Not an isolated incident and previous warnings ignored
- Pleaded Guilty to offences under the Health and Safety at Work Act 1974 and the Management of Health and Safety at Work Regulations 1999
Hugo Boss UK Limited

• Sentenced in 2015:
  - Turnover £192.8 million
  - Pre-tax profit was £23.8 million
  - Fined £1.1 million for HSWA and £100,000 for MHSWR (guilty plea)

*What would the fine be post February 2016?*
Total UK Limited

• 2011 fire at oil refinery killed worker
• Guilty to breaching regulation 4 of the Control of Major Accident Hazards Regulations 1999 (COMAH)
• Turnover - £761 million / pre-tax profit of £17 million
• Fined: £1.4 million (guilty plea)
• Prosecution said well established principles of risk assessment were not followed, incident preventable

Post February 2016?
Hanson Packed Products Ltd

- Worker pulled into conveyor and crushed
- Conveyor lacked fixed guarding to moving parts
- Guard not in place for a few days
- Guilty plea
- Turnover was £222 million / operating profit £16 million
- Fined £750,000
- “Death of a young worker could and should have been prevented. Where safety depends on guards, employers need to regularly inspect them and be confident they are properly in place and that they are effective.”

What would the fine be post February 2016?
National Grid Gas PLC

• 11 year old boy, fell from an exposed pipeline over canal into the water below and drowned
• Company’s records incorrect, crossing not subject to inspections and no access prevention measures fitted
• Failed to protect the exposed pipeline
• Guilty plea
• Turnover £3billion and pre-tax profit was £1billion
• Judge described pipe as “an accident waiting to happen” and National Grid did nothing to prevent or deter access
• Fine £2,000,000
Ernest Doe & Sons Limited

- Tyre technician working to re-fit and re-inflate tyres of a customers’ 4-wheel-drive agricultural vehicle
- During re-inflation, one of these tyres exploded
- Severe head and face injuries - blind in one eye
- Numerous failings: instruction, training, supervision
- Guilty plea
- Turnover £122 million / pre-tax profit was £1 million
- Fine: £750,000 and costs of £9,155

What would the fine be post February 2016?
Tata Chemicals Europe Limited

- Worker suffered chemical burns & another fell through a walkway at height
- Sub-contractors engulfed in hot caustic lime dust and sustained chemical burns - dust levels too high
- No adequate inspection or maintenance regime
- Guilty plea
- Turnover £192 million but pre-tax loss of £35 million
- Fine: £349,850 with costs of £58,392:

“Both of these incidents could have been entirely prevented with regular assessment of risks, inspection of work equipment and ensuring correct safety procedures were in place.”
Cemex UK Operations Limited & Cape Industrial Services Limited

- Cape worker fell to his death struck by falling concrete
- Co-worker suffered wrist and arm fractures
- Cemex site
- Both criticised for failing to co-ordinate & plan high risk work
- Cemex pleaded Guilty to S3 HSWA
- Turnover £772.7 million / pre-tax profit £143.6 million
  - Fined £700,000
- Cape pleaded Guilty to S2 HSWA
- Turnover £310 million / pre-tax profit £2.8 million
  - Fined £600,000 = £1.3million!

What would the fine be post February 2016?
Mid Staffordshire NHS Foundation Trust

- Deaths of four patients between 2005 and 2014
- Trust placed into special administration - no longer provide services
- Pleaded guilty to breaching HSWA
- Mr Justice Haddon-Cave said widespread systemic failures within the organisation had “become the norm” at the time of the deaths
- Income of the Trust was £90.8 million, but operated at a £150 million loss.
- Fined: £500,000
- What would the fine be post February 2016?
Total E&P UK Ltd

- 2012 - rig workers attempting a ‘well kill’
- A sudden and uncontrolled release of gas
- Real risk of fire or explosion on platform
- Neighbouring platforms shut & exclusion zone put in place
- 51 days for the incident to be brought under control
- Failed to identify & implement sufficient control measures
- Guilty plea
- Turnover - £854 million / Year end profit £284 million
- Fine of £1.125 million plus costs
- Second largest fine in Scotland’s history

What would the fine be post February 2016?
Veolia ES (UK) Limited

- Employee sweeping up around stacks of baled
- Collapsed and fell on him
- Serious head and brain injuries including a fractured eye socket, back and skull
- Guilty plea
- Turnover £832 million / pre-tax profit of £8 million
- Fine: £450,000 with costs of £11,676
- Criticised for reliance on flawed, inadequate generic risk assessment.
Corporate Manslaughter
Corporate Manslaughter and Corporate Homicide Act 2007

- Prosecution must prove the way in which activities were managed or organised:
  - Caused a person’s death;
  - Amounts to a **gross breach** of a relevant duty of care owed to the deceased; and
  - **Senior management’s** role was a substantial element in the breach
Corporate Manslaughter and Corporate Homicide Act 2007

• Introduced “new” manslaughter offence for organisations
• In force – 6 April 2008 (nearly 8 years!)
• 24 cases to date:
  – 19 convictions to date (5 trials; 14 guilty pleas)
    • 19 in E&W/ 5 in NI / 0 in Scotland
  – 3 acquittals
  – 2 on-going cases
• CM Tracker document
Corporate Manslaughter – 2015 convictions

- **Pyranha Mouldings Limited** –
  - Date of Incident: 23 December 2010
  - A factory worker employed by Pyranha Mouldings Limited was burnt to death when he became trapped in an industrial oven at a canoe factory.
  - Date of Conviction: 12 January 2015
  - Company found guilty of CM following trial
  - Company guilty under Section 2 HSWA
  - Company guilty under Section 6 of the HSWA (breach of the general duties of manufacturers etc. as regards articles and substances for use at work)
  - Peter Mackereth, technical director and designer of the oven, was convicted of two charges under Section 37 HSWA.
  - Various charges under the HSWA against the managing director and senior manager were dropped during the trial.
  - Fine: £200,000 (CM) Peter Mackereth sentenced to nine months in prison suspended for two years and fined £25,000.
• **Huntley Mount Engineering Limited** –
  • Date of incident: 10 January 2013
  • A sixteen year old apprentice at Huntley Mount Engineering Limited died as a result of head injuries sustained while trapped in an industrial metal lathe.
  • Date of Conviction: 20 March 2015
  • Company guilty of Corporate Manslaughter (guilty plea)
  • Zafar Hassain guilty of gross negligence manslaughter and breaching the general duties owed by an employer to an employee (guilty plea)
  • Aqbar Hussain guilty of health and safety offences
  • Lime People Training Solutions Ltd, which places apprentices with employers, did not attend and were convicted under Section 3 HSWA for failing to ensure the health and safety of a person other than an employee
Corporate Manslaughter – 2015 convictions

- **Huntley Mount Engineering Limited** –
  Company Fined: £150,000.

- Zafar Hassain was jailed for 8 months and banned from acting as a Company Director for 10 years.

- Aqbar Hussain was given a 4 month jail sentence which was suspended for 12 months, 200 hours unpaid work and fined £3,000.

- Lime People Training Solutions fined £75,000
Corporate Manslaughter – 2015 convictions

- **Dieci Limited and Nicole Enterprises Limited (Northern Ireland) and Andrew Milne**
- Date of incident: *February 2012*
- An employee was killed when a static caravan fell on him whilst he was working
- Date of Conviction: 26 March 2015
- Nicole Enterprise Limited guilty of Corporate Manslaughter and Health and Safety offences (guilty plea)
- Andrew Milne was acquitted of gross negligence manslaughter
- Fined: £100,000
Corporate Manslaughter – 2015 convictions

- **King Scaffolding Limited** –
- Date of incident: 13 September 2012
- Adrian Smith died after falling while working on the roof of the company’s Netherley headquarters.
- Date of Conviction: 28 April 2015
- King Scaffolding Limited pleaded guilty to a charge of Corporate Manslaughter.
- Fined: £300,000 to be paid at £30,000 a year for 10 years.
CAV Aerospace Ltd –
Date of incident: 26 January 2013
Paul Bowers, an employee, was crushed by several tonnes of heavy metal while working at CAV Cambridge, a subsidiary of CAV Aerospace.
Date of conviction: 24 July 2015
CAV Aerospace found guilty of corporate manslaughter and under section 2 HSWA.
Fined: £600,000 for Corporate Manslaughter (plus £400,000 for section 2 offence, but this will run concurrently i.e. an effective fine of £600,000).
Corporate Manslaughter – 2015 convictions

- **Linley Developments Limited** –
- Date of incident: 30 January 2013
- Gareth Jones died when a structurally unsound wall collapsed on him on site at Mile House Lane, St Albans.
- Date of conviction: 7 September 2015
- Linley Developments Limited pleaded guilty to a charge of Corporate Manslaughter.
- Trevor Hyatt, Managing Director, pleaded guilty to breaching Regulations 28 and 31 of CDM.
- Alfred Barker, Project Manager, also pleaded guilty to breaching Regulations 28 and 31 of CDM
- Company Fined: £200,000 to be paid over six years.
- Publicity order made – company ordered to take out an advert in the Construction Enquirer.
Corporate Manslaughter – 2015 convictions

- **Linley Developments Limited** –
  - Trevor Hyatt was sentenced to 6 months in prison suspended for two years, and ordered to pay a fine of £25,000 plus costs of £7,500. Judge Bright considered disqualification as a director but did not consider it "necessary, proportionate or just to do so".

- Alfred Barker was sentenced to 6 months in prison suspended for two years, and ordered to pay costs of £5,000.
Corporate Manslaughter – 2015 convictions

- **Cheshire Gates and Automation Limited** –
  - Date of incident: 28 June 2010
  - A six year old girl became trapped between electric gates and a retaining wall outside her home in Manchester. She sustained crush injuries and died later in hospital.
  - Date of conviction: 17 November 2015
  - Cheshire Gates and Automation Limited pleaded guilty to a charge of CM
  - 1 charge of gross negligence manslaughter was brought against director Kriston Kearns, however the Crown offered no evidence in relation to this.
  - Company fined: £50,000 to be paid in instalments of £8,000 per year
  - A publicity order was also made.
Corporate Manslaughter – 2015 convictions

- **Baldwins Crane Hire Limited** –
  - Date of incident: 15 August 2011
  - An employee of Baldwins Crane Hire Limited was killed when the heavy crane he was driving allegedly experienced a malfunction with its brakes, causing it to crash into an earth bank and fall from the road.
  - Date of conviction: 30 November 2015
  - After a five week trial, the company was found guilty of a charge of Corporate Manslaughter, a charge under Section 2 HSWA and a charge under Section 3 HSWA
  - Company fined: £700,000
  - Plus costs of: £200,000

- Case study coming up!
Corporate Manslaughter – 2015 convictions

- **Sherwood Rise Ltd** –
- Date of incident: 22 November 2012
- Ivy Atkin, 86, died shortly after being moved from Autumn Grange Care Home in Sherwood Rise, Nottingham.
- Date of conviction: 3 December 2015
- 1x summons for Corporate Manslaughter
- 3 x charges of Gross negligence manslaughter against the Managing Director, the Acting Managing Director and the Deputy Manager
- 3 December 2015 - Company pleaded guilty to corporate manslaughter. Yousaf Khan, Acting Managing Director, also pleaded guilty to gross negligence manslaughter.
- 5 February 2016 - Three remaining charges against the other Directors and the Deputy Manager to be heard. Along with the sentencing of the company and Mr Khan.
Corporate Manslaughter – 2015 acquittals

- **G&J Crothers Limited (Northern Ireland)** –
  - Date of incident: **29 June 2013**
  - Michael Beston, an employee of G&J Crothers, died after stepping on a sheet that was not fixed in place and falling four metres from the roof of an agricultural building.
  - The Company pleaded guilty to Health and Safety offences under Article 4 (1) of the Health and Safety at Work (Northern Ireland) Order 1978 and not guilty to the Corporate Manslaughter charge – not proceeded with
  - Company fined £22,500 in respect of the Health and Safety Offences
Corporate Manslaughter – on going cases

- **McGoldrick Enterprises Limited (Northern Ireland)** –
  - Date of Incident – 8 April 2013
  - A patient, Mary Dowds, died suddenly at a private nursing home
  - 1 Charge of Corporate Manslaughter and 1 under the Health and Safety at Work (Northern Ireland) Order 1978
  - April 2016 – listed for trial at Antrium Crown Court

- **Maidstone and Tunbridge Wells NHS Trust** -
  - Date of incident: 22 November 2012
  - Frances Cappuccini, 30, a primary school teacher, died at Pembury hospital in Tunbridge Wells after giving birth on 9 October 2012. As a result of a caesarean, Mrs Cappuccini suffered heavy bleeding which resulted in a cardiac arrest.
  - The trial started this week
Corporate Manslaughter - guidelines

• Triable only on indictment – crown court
• Maximum fine is unlimited
• Offence range - £180K to £20million
• Step 1 – Determine the seriousness of the offence
• Step 2 – Starting Point and category range
• Steps 3 and 4 – is the fine proportionate / wider impact
• Steps 5 to 9 – guilty pleas and other orders etc
**Corporate Manslaughter - guidelines**

- **Step 1 – Determine the seriousness of the offence**
- Nature of offence such that every case will involve a death and corporate fault will be very high
- Consider:
  - How foreseeable was serious injury
  - How far short of the standard was the offending
  - How common was the breach in the organisation
  - Was there more than 1 death or a high risk of further deaths or serious personal injury
- Offence Category A = answers indicate high level of harm or culpability
- Offence Category B = answers indicate a lower level
Step 2 – Starting Point and category range
- SP is Turnover (or equivalent) based – micro / small / medium / large (and very large)
- Move up or down the range depending on aggravating and mitigating features

- Very large companies – may be necessary to move outside the range.
  - All bets are off!
Corporate Manslaughter - guidelines

<table>
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<th>Very large organisation</th>
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<tbody>
<tr>
<td>Where a defendant organisation’s turnover or equivalent very greatly exceeds the threshold for large organisations, it may be necessary to move outside the suggested range to achieve a proportionate sentence.</td>
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<table>
<thead>
<tr>
<th>Large</th>
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<tr>
<td>Turnover more than £50 million</td>
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<td>Offence category</td>
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<tr>
<td>-------------------</td>
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<tr>
<td>A (more serious offences)</td>
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<td>B</td>
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<th>Medium</th>
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<tr>
<td>Turnover £10 million to £50 million</td>
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<td>Offence category</td>
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</tr>
<tr>
<td>A (more serious offences)</td>
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<td>B</td>
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</table>
Corporate Manslaughter - guidelines

• Steps 3 to 9 – proportionality
  – Sufficient to have a real economic impact
  – Profitability
  – Impact on ability to trade
  – Impact of fine on employees, service users, customers and the local economy
  – Guilty plea
  – Publicity orders should ordinarily be imposed
Baldwin’s Crane Hire – Sentencing process

Summary:

• Found guilty of corporate manslaughter on 1\textsuperscript{st} December 2015

• Lindsay Easton died when the brakes failed on the mobile crane he was operating. Brake wheels were found to be inoperable, worn and contaminated. Engine braking systems were non-functional or disabled

• Several other cranes were inspected after the event, and found to also require immediate work. The Company was criticised for structural failings including lack of supervision and maintenance recording.
Baldwin’s Crane Hire – Sentencing process

- Baldwin’s have now been sentenced under the old regime
  - On 22\textsuperscript{nd} December the company was fined £700,000
    - The company was also ordered to pay all CPS costs, and half of the HSE’s costs (in excess of £200,000)
  - How does this compare to other Corporate manslaughter fines?
    - Cotswold Geotechnical - £385,000
    - Lion Steel - £480,000
    - A Diamond & Son Ltd - £75,000
    - SteriCycle - £500,000
- but:
  - How would the process follow if the hearing was adjourned, and fell on or after the 1\textsuperscript{st} February 2016?
Baldwin’s Crane Hire – Sentencing process

- Corporate Manslaughter
  - Triable on Indictment (i.e. only in the Crown Court);
  - Unlimited fine available

- Sentencing stages:
  1. Seriousness (Harm + Culpability)
  2. Starting point and range (based on size and turnover of company)
  3. Aggravating and Mitigating factors
  4. Proportionality and other factors
  5. Ancilliary Orders
  6. Totality and Reasons
Baldwin’s Crane Hire – Sentencing - Seriousness

- The “standard” health and safety guidelines ask the Court to consider **harm** and **culpability**
- However, for corporate manslaughter, these are automatically high
- Instead the Court must consider:
  - How foreseeable was the injury
  - How far short of standards did the offender fall?
  - How common are breaches in the organisation?
  - How many deaths occurred (or was there a very high risk of more deaths?)
- All of these factors result in the offence being categorised as:
  - Category A (high levels of seriousness); or
  - Category B (lower levels of seriousness)
    - Worth noting that these categories are not well defined. What about borderline cases?
Baldwin’s Crane Hire – Sentencing – Starting Point

- The Court must then consider a starting point which will be based on a Company’s annual turnover.

- Baldwin’s turnover for 2014 was approximately £20,000,000, with a pre-tax profit of around £2,600,000 (a margin of around 13%).

- On that basis the starting point for:
  - A category A offence would be £3,000,000 with a range of £1,800,000 to £7,500,000
  - A category B offence would be £2,000,000 with a range of £1,200,000 to £5,000,000

- NB – the Court has the power to consider other factors including profit margin and director’s pay. Failure to provide accounts will result in adverse inferences.

- NB – Where an organisation is “very large”, the Court has the discretion to exceed the standard ranges. THAMES!!!
Baldwin’s Crane Hire – Sentencing

- What could the prosecution have said?
  - Failure of a critical and obviously important component (brakes). Clearly foreseeable that a serious injury could result if this component failed?
  - Fell very short of the appropriate standard – brakes were not just failing, but entirely inoperable or even disabled, which suggests deliberate tampering
  - Not an isolated breach – numerous other failings found across the company which indicated a more serious offence
  - High risk of further death in the company, given the other cranes found with defective brakes and other issues
Baldwin’s Crane Hire – Sentencing

• What could the defence have said?
  o Is there evidence of steps being taken to remedy the problem?
  o Does Baldwin’s have a good health and safety record otherwise?
  o Are there systems in place which have been ignored (rather than a complete failure to put in place systems at all?)
  o How far has Baldwins co-operated with the investigation?
Baldwin’s Crane Hire – Sentencing

- The Court then has to step back, and look at whether the fine is proportionate to the means of the offender.
- The fine must be sufficient to have a real economic impact to bring home the message to shareholders and directors.
  - A fine wiping out profits would do that (£2.6 million), but that would be less than the starting point of a Cat A offence (£3m)
- Organisations with a high profit margin may require “upward adjustment” – 13% is undoubtedly high. This seems likely to result in an increase
Baldwin’s Crane Hire – Sentencing

- The Court can then consider reductions including
  - Assistance to the prosecution (difficult for us to estimate)
  - Reduction for an early guilty plea
    - Baldwin’s pleaded not guilty to the offence, but were convicted following a full trial. A potential 1/3 discount on the final fine was been lost.

- The Court can then consider ancillary orders
  - Publicity Orders will be “ordinary imposed” in the case of corporate manslaughter
  - Compensation/remediation orders (extra costs on top of everything else)
Horizon Scanning

- Will the L153 guidance on CDM 2015 be replaced with an ACOP?

- Publication of the HSE new strategy to “replace and build upon” the existing “be part of the solution” strategy
  - “Recognising everyone’s role” was a key part of this 2009 strategy (and is reflected in the 2015 CDM re-write). Will there be a new focus?

- ISO 45001 – new standard for occupational health and safety management systems
  - Will replace OHSAS 18001 once published
  - Currently planned for release in October 2016
Horizon Scanning

• Security and Health and Safety
  o Are security incidents and terrorist attacks now reasonably foreseeable events?
  o Are they a risk that employers and companies should be protecting against?
    – Civil cases suggest individuals can recover for poorly planned security
  o The classic S2/3 HSWA duty
    – Is an employer ensuring the welfare of their employees/the public if they fail to plan for security incidents?

• New HSE sentencing guidelines will come into force on 1st February 2016
Questions

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