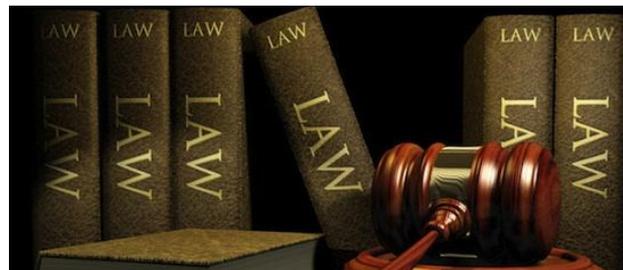


IOSH / AOSH

Health and Safety – Legal Update 6 February 2014

Kevin Bridges

Partner and Vice-President of IOSH



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Topics

- **Corporate manslaughter**
- **S.37 HSWA**
- **Sentencing trends**
- **Risk**
- **Non delegable duties**



Corporate Manslaughter



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Corporate Manslaughter and Corporate Homicide Act 2007

- Introduced new manslaughter offence for organisations
- In force - **6 April 2008**
- 6 prosecutions to date (1 trial; 5 guilty pleas)
- 4 further charges;
 - *PS & JE Ward Ltd; trial 31 March 2014*
 - *MNS Mining Ltd; 4 charges trial 24 March 2014*
 - Sterecycle (Rotherham) Limited, *trial 2 October 2014*
 - Cavendish Masonry Limited – *trial 12 May 2014*

Penalties for Corporate Manslaughter and Corporate Homicide Act 2007

- **Penalties**

- unlimited fine

- **Sentencing Guidelines Council -**

- appropriate fine will seldom be less than

- £500,000** and may be measured in **millions of pounds.**

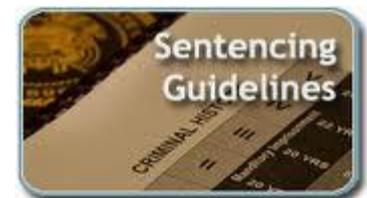
- remedial order; and / or

- publicity order



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



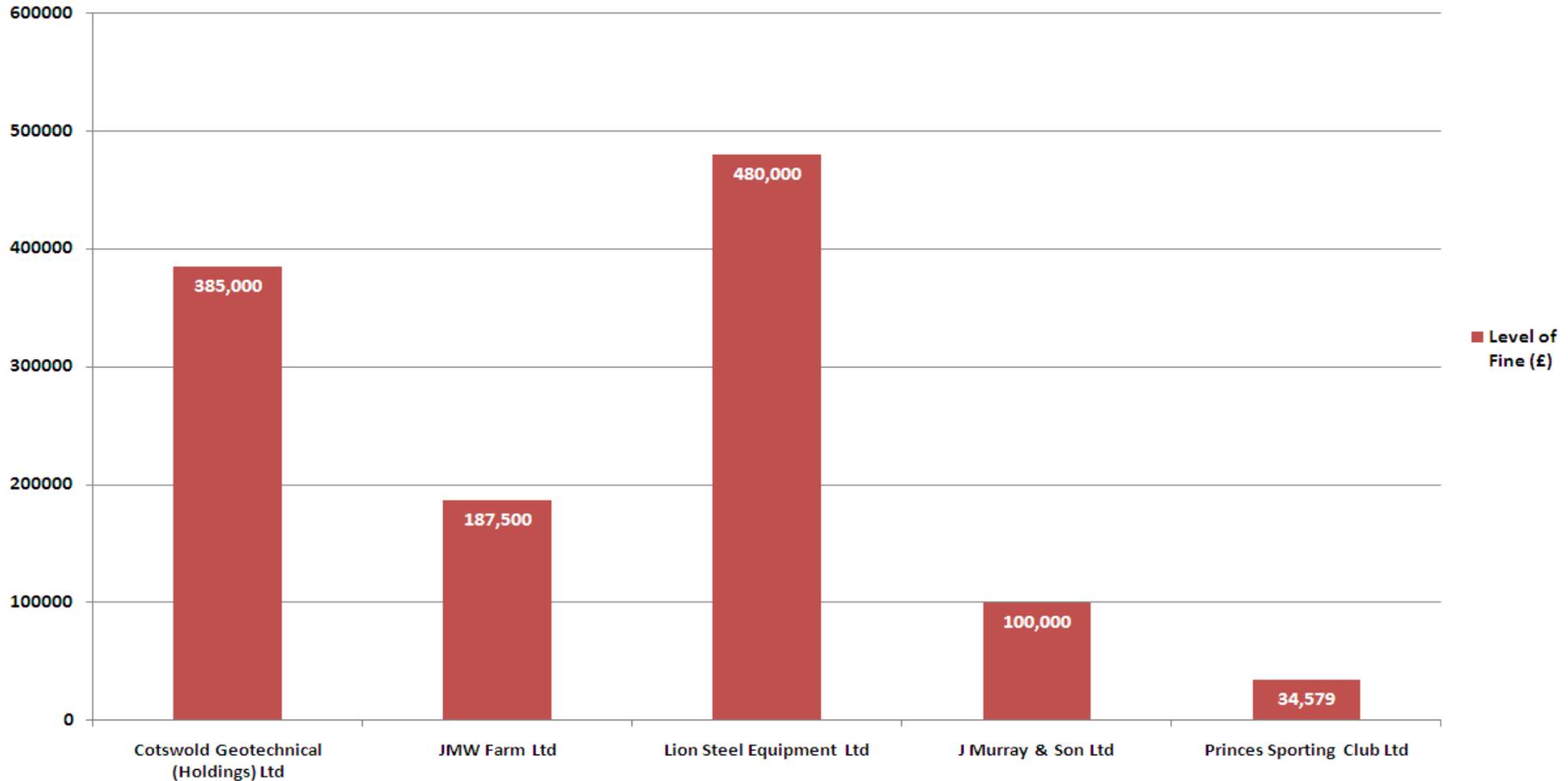
Corporate Manslaughter and Corporate Homicide Act 2007

- ***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.
 - Publicity order!
- ***Mobile Sweepers (Reading) Limited (February 2014)***
 - Sentencing hearing on 26 February 2014



Fines for Corporate Manslaughter

Fines Imposed for Corporate Manslaughter



Section 37 HSWA



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Personal Prosecutions



- **HSE statistics for prosecutions under s37 HSWA in 2013:**
 - 38 prosecutions of directors on average per year
 - Fines ranging from £300 to £32,000
 - Costs ranging from £340 to £50,000
 - Prison sentences ranging from 4 months to 8 months (suspended sentences)
 - Disqualification of directors for up to 5 years
 - Largest company = 25 employees

Examples of s37 Prosecutions

- **John Dunmore, Director of D & R Maintenance Solutions Ltd (November 2013):**
 - Company size = 10 employees;
 - Director fined £7,000 and £3,357 in costs.
- **Russell Armer, Director of BB Recycling Ltd (October 2013):**
 - Company size = 5 employees;
 - Four month prison sentence (24 month suspension);
 - Director and Company fined £380 and £340 in costs; and
 - Disqualified as a director for 5 years.
- **Michael Lustig, Director of Homenaturals Ltd (September 2013):**
 - Company size = <20 employees;
 - Six month prison sentence (18 month suspension);
 - 180 hours community service;
 - Director and Company fined £300; and
 - Disqualified as a director for 3 years.

Some More Examples...

- **Derek Hugh Barnes, Director of Paddle Ltd (July 2013):**
 - Company size = 25 employees;
 - Eight months imprisonment (24 month suspension);
 - £32,000 fine and £11,000 in costs; and
 - Disqualified as a director for 3 years.
- **Michael Febrey, Director of Febrey Ltd (May 2013):**
 - Company size = 8 employees;
 - Fined £20,000 and £5,000 in costs; and
 - No disqualification
- **Christopher Taylor, Director of North Eastern Maritime Offshore Cluster Ltd (May 2013):**
 - Company size = <20 employees;
 - Director fined £30,000 and £50,000 in costs; and
 - No disqualification

Sentencing Trends



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Sentencing Council Guidelines

- Definitive Guideline in England & Wales – *persuasive value in Scotland and NI*
- Apply only to organisations, **NOT** individuals
- Apply to Corporate Manslaughter and to fatal accident cases under HSWA where offences were a **SIGNIFICANT CAUSE** of the death
- Apply to cases sentenced after 15 February 2010

R v Watkin Jones & Sons Ltd [April 2013]

- Fall through hole in roof covered by plywood with no crash deck
- WJ was Principal Contractor
- There were cases where a main contractor was so far removed from the offence that it could not be found liable. This was not such a case
- **Although WJ had sub-contracted the work, it was directly involved in creating the circumstances that led to the victim's death and had to accept significant responsibility**



R v Watkin Jones & Sons Ltd [April 2013]

- **£450,000** fine (after conviction) upheld by Court of Appeal
- The fine imposed was substantial but in the circumstances WJ's culpability was high and a person died as a result.

Scotland – R v Svitzer Marine Limited [November 2013]

- Tug boat operator
- Boat sank on the River Clyde in December 2007 killing 3 crew
- An “enduring failure to take proper account of the level of risk” as reported by the company’s own experts following an investigation in to an earlier incident
- **Section 2 HSWA - Fined £1.7 million**



Non-fatal

- **R v Smurfit Kappa UK Ltd [March 2013]**
- Employee lost four fingers and severed parts of two others whilst working on a power press
- Inadequate risk assessment and failure by company to provide proper training and supervision
- The employee had been changing part of the machine when it stamped down on his hands.
- Smurfit pleaded guilty to an offence under s.2 HSWA and was fined **£200,000** and ordered to pay £19,308 in prosecution costs.

What's the appropriate level of fine? Sellafield Ltd and Network Rail Appeal [January 2014]

- Joint appeal by two very large companies against “*manifestly excessive*” fines imposed for H&S / environmental breaches following early guilty pleas:
 - **Sellafield** = turnover of **£1.6bn** – fined **£700k** (for failures concerning the proper segregation of radioactive waste)
 - **NR** = turnover of **£6.2bn** – fined **£500k** (for very serious injuries sustained to a child at an unmanned level crossing)
- The Appellant companies argued that fines of this severity were only appropriate for fatal / major public disaster incidents
- The Court dismissed the joint appeal and upheld the fines

What's the appropriate level of fine? Sellafield Ltd and Network Rail Appeal [January 2014]

- The Court held that when sentencing companies turning over >£1bn, a careful examination of their *structure, turnover, profitability and remuneration of directors must be completed*
- Regard must be had to both the seriousness of the offence as well as the financial circumstances of the offender:
 - *“The fine must be fixed... with the objective of ensuring that the message is brought home to the directors and members of the company (usually the shareholders)”*
- **Sellafield** = ordinary dividend company – higher fine:turnover ratio to affect shareholders
- **NR** = no dividend company (i.e. profits re-invested into rail network) – lower fine:turnover ratio to protect public amenity

Risk – Sections 2 and 3 HSWA



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Sections 2 and 3 HSWA – material risk

- **R v Geoffrey Counsell**
- M5 Motorway crash involving 34 vehicles, November 2011
- Reduced visibility on the motorway because of smoke and fog
- 7 fatalities plus 51 injured
- January 2013 – 7 counts of Manslaughter dropped
- Section 3(2) HSWA remained
- December 2013
 - Acquitted at the direction of the judge



Sections 2 and 3 HSWA – material risk

- Why?
 - Sections 2 and 3 HSWA are concerned with risk
 - The risk must be a real / material risk, not fanciful
 - “The prosecution must show a risk that is more than fanciful and theoretical, one which would require a reasonable person to do something about it. It focuses on the important aspect of **foresight without the benefit of hindsight**”
 - *Baker v Quantum / R v Tangerine and Veolia* followed
 - Safety must be judged by the understanding and standards of the times.

Non-delegable duty of care



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Woodland v Essex County Council [2013]

- Issue: Use of contractors – civil and criminal liability for a contractors acts or omissions?
- The basic position is that civil liability for personal injury can usually be defended if a competent independent contractor is engaged to carry out a service
- NOT if the duty holder is under a statutory duty to provide the service i.e. in this case swimming lessons
- Relevant for any **public body** e.g. local authorities, prisons or healthcare providers etc who have responsibility for the care of any vulnerable member of the public

Woodland v Essex County Council [2013]

- **Supreme Court:** the public body may be liable for the negligent performance of the statutory functions delegated to the contractor
- Requires the same degree of care as if the public body was providing the service themselves – monitoring performance is not enough
- ***R v Associated Octel Ltd [1996]***. Lord Hoffman: Section 3 HSWA was not concerned with vicarious liability but *"imposes a duty upon the employer himself. That duty is defined by reference to a certain kind of activity, namely the conduct by the employer of his undertaking. It is indifferent to the nature of the contractual relationships by which the employer chooses to conduct it"*.

Questions



Kevin Bridges (Partner)

Tel: 0161 234 8364

Mobile: 07768 993666

kevin.bridges@pinsentmasons.com



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