

Legal Matters

Regulatory, Health & Safety

Our bi-annual newsletter aims to highlight developments and recent case law in this area in a concise and readable style.

The newsletter will be published twice a year with the next issue due in December.

For further information on any of the articles in this issue please see the contact details on the back page.

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CPS taking no chances with first corporate manslaughter charge under the new Act

On 23 April 2009, the Crown Prosecution Service (CPS) authorised a charge of corporate manslaughter against Cotswold Geotechnical Holdings Limited (CGH) in relation to the death of Alexander Wright on 5 September 2008. This is the first application of the Corporate Manslaughter and Corporate Homicide Act of 2007. Mr Wright, a junior geologist employed by CGH, was taking soil samples from inside a pit which had been excavated as part of a site survey. Mr. Wright was killed when the side of the pit collapsed.

CGH has also been charged with failure to discharge its duty contrary to section 2 of the Health and Safety & Work Act 1974. Peter Eaton, a Director of the Company, has been charged with gross negligence manslaughter and an offence contrary to section 37 of the Health and Safety at Work Act 1974.

An organisation is guilty of corporate manslaughter under the 2007 Act if the way in which its activities are managed or organised causes death and amounts to a gross breach of duty of

care to the person who died. A substantial part of that breach must have been in the way its activities were organised by senior management.

Kate Leonard, reviewing lawyer for the CPS Special Crime Division, said that the CPS had concluded there was "sufficient evidence for a realistic prospect of conviction for this offence".

The CPS has taken no risks with this first prosecution. CGH is a small family firm where the Directors have close involvement with the day to day running of the Company. According to Companies House, the Company had a turnover of £330,000 in 2008.

The prosecution is unlikely to assist in understanding how the law will be applied to larger companies and is unlikely to provide any guidance on the new elements of the Act such as "senior management" or "management failure". One of the purposes of the new Act is to make it easier to prosecute large firms for corporate manslaughter without a requirement to identify a controlling mind of the business. This was difficult to establish,

particularly with larger companies with more diverse management structures. Successful prosecutions were usually confined to smaller businesses with one or two directors. In the case of CGH, the prosecution would have little difficulty in establishing the controlling mind of the Company, and as such the Company could have been charged with a common-law corporate manslaughter offence had the accident occurred prior to the 2007 Act coming into force.

If convicted, the Company face an unlimited fine and a possible publicity order. The maximum sentence for an individual convicted of gross negligence manslaughter is life imprisonment.

Mr Eaton appeared before Bristol Crown Court on 23 June when the matter was adjourned to 19 August for pleas to be entered. Mr Eaton remains on unconditional bail.

CORGI scheme replaced by Gas Safety Register

From 1 April 2009 Capita Group Plc will provide a new registration scheme for gas engineers. Capita were awarded a 10 year contract by the Health and Safety Executive (HSE) on 8 September 2008. The new Gas Safety Register replaces the scheme run by CORGI for the last 17 years.



In 2006 the HSE conducted a review of domestic gas safety involving gas engineers and consumer groups. Whilst the number of domestic gas-related fatalities has fallen significantly over the previous 17 years, it was felt that the current system needed to be overhauled. The Gas Safe

Register will, it is hoped, deliver improvements to gas safety and provide added value for customers and gas engineers.

The aim of the new scheme is to raise awareness of domestic gas safety risks. There will be significant investment in a new gas safety brand aimed at becoming the 'hallmark' of gas safety and a new gas safety charter specifically to promote gas safety. At present, evidence suggests that less than 50% of customers understand the risks associated with gas and how to manage them properly.

Measures will be introduced to reassure the public of the competence of registered gas engineers and the safety of gas work. There will be a new risk-based inspection

approach aimed at finding and reducing unsafe gas work.

The Gas Safe Register focuses exclusively on gas safety and promoting the competence of registered engineers. The scheme will be ring-fenced from other commercial activities. The new Gas Safety brand will be owned by the HSE on behalf of engineers to ensure it is only associated with gas safety.

The commitments given by Capita are set out in a formal 10 year contract with the HSE and will be closely monitored to ensure Capita are delivering on objectives. The HSE has discretion to open up the scheme to other competitors or terminate the contract after 5 years.

Pet food firm fined for machinery guard bypass

Naturediet Pet Food has been fined £157,500 after an employee died while trying to clear a suspected jam in packing machinery. The accident occurred on 1 February 2006 at the company's premises in Surrey. Marcus Snow crawled into a semi-automatic "offload machine" used to transfer trays of finished dog food cans onto a conveyor after suspecting a jam. He was suffocated when the pneumatic pick up unit descended and pinned him against a stack of trays.

An investigation by the HSE and Surrey Police found that the company had bypassed the photo electric light curtains

guarding the entrance and access to the machine and the interlock on the machine's enclosed hinged access gate. This allowed Mr Snow to crawl into the machine.

Naturediet were charged with manslaughter and a breach of section 2(1) of the Health and Safety at Work Act 1974 for failing to ensure the safety of its employees. The Chairman of the Company, Robert Orrow and Production Director, Andrew Orrow were charged with manslaughter and a breach of section 37 of the Health and Safety at Work Act.

Evidential difficulties resulted in 3 manslaughter charges being dropped. The Company

pleaded guilty to the section 2 (1) offence and all other charges were dropped. There was no application for costs.

Naturediet is a small family company and while there are no details available of pre tax profits or turnover the fine represents a significant penalty reflecting the fatality and the common practice of bypassing machinery guards. The investigation discovered several other machines on the site had disabled guarding.

R v Naturediet Petfood Ltd, Central Criminal Court, March 2009

HSE accuses directors of ‘credibility gap’ in health & safety

According to HSE commissioned research only a quarter of organisations with 5 or more employees have board level awareness of official health and safety guidance for directors and of these only half have directors who have read the guidance. This study, ‘Evaluation of Guidance for Directors & Board Members’ has, according to Judith Hackett, Chair of the Health & Safety Executive, identified a credibility gap with many directors claiming safety as a main priority.

At the annual Rivers lecture on 18 March 2009 Hackett said, “I have been told on numerous occasions by very senior directors that safety is our number one priority and is first on every board agenda. I have yet to be really convinced by

anyone who has told me that. Safety is very unlikely to be your number one priority – staying in business and being successful is – and good health and safety management is integral and fundamental to business success. But it is not your number one priority and saying it is creates a credibility gap”.

She also raised doubts as to whether in reality health and safety is treated as a priority at board meetings even when appearing as the first item on the agenda.

In October 2007 the HSE and the Institute of Directors issued joint guidance on the responsibilities of directors and senior managers for health and safety. The HSE have commissioned further research

and will assess whether the current voluntary approach should be replaced by greater regulation of directors’ health and safety duties. Construction union UCATT said the survey showed a “complete failure” of the HSE’s voluntary approach and directors’ “contempt” for the code in general.

The results of further research is anticipated towards the end of the year but it will come as no surprise if the HSE supports a move towards greater regulation of directors duties particularly in view of the views expressed by its Chair.

“Dreamspace” artist fined £10,000 for safety failures

Artist Maurice Agis has been fined £10,000 following a conviction for failing to ensure the safety of members of the public. Two people were killed and 27 injured on the 23 July 2006 at Chester-le-Street when a gust of wind lifted his “Dreamspace” art work 30 feet into the air, taking the people inside with it. The structure, which was made of plastic, formed a number of cubes allowing people to wander inside the structure.

The artwork had been closed several times when on display in Liverpool because of problems with the wind. At Chester-le-Street it was attached by a number of pegs, which proved to be inadequate.



Maurice Agis
“Dreamspace” creator

A similar incident happened in Germany in 1986 when an earlier and smaller version of the Dreamspace structure came loose in strong winds.

Maurice Agis was charged and convicted of a breach of section 3 (2) of the Health and Safety at Work Act 1974. He was also charged with 2 counts of manslaughter upon which a jury failed to reach a verdict. The CPS will not seek a retrial as it considers there is no longer a realistic prospect of success.

Chester-le-Street District Council was fined £20,000 after pleading guilty to exposing the public to risks from its undertakings pursuant to section 3(1) of the Health and Safety at Work Act. Brouhaha International, a

charity that organised the event, was fined £4,000 after admitting failure to ensure the safety of its employees. A charge against the Council’s Director of Development Services was not pursued.

R v Maurice Agis and others, Newcastle Crown Court, March 2009



Stone importer fined £4,000 following death of employee

S Ltd, a small company involved in the importation and sale of marble, limestone and granite was prosecuted following a fatal accident involving an employee on 2 November 2005.

The deceased was assisting 3 other employees in unloading a delivery of granite slabs, tiles and skirting from a closed container.

During the unloading process, one of the slabs became unstable and fell towards the central of the container. The deceased became trapped between the slabs and was crushed. Attempts were made to free him but he died before he could be released.

Following an investigation by the HSE, S Ltd were prosecuted for a breach of section 2(1) Health & Safety at Work Act 1974 for failing to ensure so far as is reasonably practicable the health, safety and welfare at work of all its employees. It was alleged that the Company failed to discharge its obligations in that it had failed to implement sufficient measures to control the risks involved in the handling and unloading of the stone. It was reasonably

practicable for S Ltd to have introduced further significant control measures. It was further alleged that the Company had failed to properly assess and plan the unloading of the container in such a way that the risks to employees would be properly controlled.

The Company pleaded guilty to the offence at the first hearing at the City of London Magistrates Court. The matter was committed to the Central Criminal Court for sentence.

At the sentencing hearing the Company put forward a number of factors in mitigation including its good safety record and the fact that the Company had not selected the container or the method of packing that had been used in India where the stone had originated. There was no suggestion that S Ltd had cut corners for profit and put profit before safety. They had taken steps following the accident to make sure a similar accident did not happen again.

S Ltd were fined £4,000 and ordered to pay £2,000 costs.

The most important factor taken into account by the Court was the limited means of the Company. Financial accounts were disclosed together with a statement produced by the Company's accountant demonstrating the

very poor performance of the Company over the last 2 years and giving projections for the next financial year based upon actual and expected sales. It was submitted that any fine would have a significant effect on the Company's ability to continue trading and a significant fine would put the Company out of business.

A fine of £4,000 is clearly significantly below what would have been expected in any prosecution involving a fatality. The costs order of £2,000 was a small proportion of the costs claimed by the HSE and solicitor agents. The case highlights the importance of producing cogent financial information to demonstrate the ability of a company to pay a fine and the impact of any fine and costs order. In this case a fine exceeding £10,000 would have put the Company out of business.

Although S Ltd is a small family company the fine would have been considerably greater, possibly in the region of £100,000, had the Company's financial position not been put forward and properly considered by the Court.

HSE v S Ltd, Central Criminal Court, March 2009



Roundup of recent case law

Tesco prosecution – machine guarding

Tesco has been fined £20,000 after an employee lost the tops of 2 fingers in a dough dividing machine.

Anthony Nyboer was working at a Tesco branch in Gloucester when the accident occurred. An inter lock switch on the machine should have isolated the operation when the lid was

open but unfortunately this was defective and the blade sliced the employee's fingers.

Tesco admitted breaches of section 2 Health & Safety at Work Act 1974 and regulation 11 Provision and Use of Work Equipment Regulations 1998 which require that employers prevent access to dangerous

parts of machinery. The Cheltenham Magistrates' Court fined Tesco £20,000 and prosecution costs were also awarded in the sum of £20,000.

HSE v Tesco, Cheltenham Magistrates' Court, December 2008

Work at height

Laing O'Rourke were undertaking building work on Liverpool's flagship development for its year as the European Capital of Culture. An employee sustained injuries when he fell 3.5 metres from an apartment block in the £1 billion Liverpool One development in the city centre.

The HSE successfully contended that the risk assessments and method

statements the employees were working from were wrong as a different installation method was described and the documentation was therefore irrelevant. It was successfully argued that Laing O'Rourke had also failed to specify edge protection or sufficient safety equipment to arrest any fall.

The company pleaded guilty to a charge under section 2 Health & Safety at Work Act 1974 and

was fined £80,000 plus £10,000 costs.

HSE v Laing O'Rourke Ltd, Liverpool Crown Court, January 2009



Water fun ride fatality

Oakwood Leisure Park in Pontypool, Pembrokeshire, was fined £250,000 after a teenager fell 30 metres from a water ride.

The Hydro Ride was described as "Europe's fastest and wettest rollercoaster". Staff failed to lock the ride's safety restraints and unfortunately Hayley Williams fell out of the carriage as it was about to go down a steep water chute. The injuries were so severe that she died after being airlifted to hospital and another boy was treated for head injuries after Hayley

Williams hit him when she fell to the ground.

Obviously the HSE and Police undertook very thorough investigations and it was established that staff overseeing rides at the theme park had no proper safety training. CCTV footage also showed that failing to lock the ride's safety restraints was not a one off isolated incident. There was the potential for a gross negligence manslaughter case but, following the Coroner's Inquest, it was indicated that

there was insufficient evidence to pursue such a charge.

Oakwood Leisure pleaded guilty to a breach of section 3 Health & Safety at Work Act 1974 and were fined £250,000 with £80,000 prosecution costs.

HSE v Oakwood Leisure Ltd, Swansea Crown Court, January 2009



Roundup of recent case law

Supervision - first regulatory fine for M&S

A Marks & Spencer's employee had his toes amputated when his foot got trapped in a goods lift.

The HSE prosecuted under section 2 Health & Safety at Work Act 1974. This was the first such prosecution against M&S in over 100 years of retail trading, which is obviously an excellent safety record and a major point used in mitigation.

The goods lift was commonly

used by employees. Management were aware of this and did nothing to prevent it and therefore condoned an unsafe system. The lift also had a missing gate plate which would have protected the



employee's foot.

Marks & Spencers were fined £62,000 together with £11,000 prosecution costs and a Compensation Order for the employee of £31,000 was also ordered by the Court. Compensation Orders are often not awarded due to the fact there is a concurrent civil personal injury claim.

HSE v M&S, Milton Keynes Magistrates' Crown Court, March 2009

Recession – decreased fines due to financial hardship

An employee was crushed to death beneath a truck he was repairing whilst employed by Waveney Fork Trucks.

A mechanic, Carl Nunn, went to repair a forklift truck with a water leak at premises in Ipswich. Nunn must have used a jack to raise the forklift truck that was not adequately supported by wooden blocks and the jack was ejected. Unfortunately Carl Nunn was found under the truck having sustained a crush head injury.

Investigations by the HSE

revealed that Waveney Fork Trucks failed to provide a safe system of work and suitable support blocks for using a jack.

However, the precarious



financial state of the company meant that financial hardship was pleaded before the Crown Court Judge. Waveney had

made 17 people redundant in the previous 4 months and the fine was reduced from £90,000 to £50,000 due to the financial state of the company. Audit accounts and up to date management accounts are always necessary where financial hardship issues are being placed before the Court particularly in the current economic environment.

HSE v Waveney Fork Trucks, Ipswich Crown Court, February 2009

Slipping prosecution

Laundry operator Sunlight Service Group was fined after an agency driver slipped and broke his ankle whilst filling his vehicle with diesel at its Coventry depot.

The surface of the wooden decking where the accident occurred was found to be too slippery as the pump leaked diesel when it was not in use. Several other drivers had

slipped in the area. The HSE contended that correct flooring should have been installed rather than slippery wooden decking adjacent to a diesel pump which was subject to fuel spillage.

The Coventry Magistrates fined Sunlight Service Group £3,200 under regulation 3 Management of Health & Safety at Work Regulations 1999 for a lack of

an appropriate risk assessment and £2,400 for breach of regulation 12 for not providing suitable flooring at its premises. Prosecution costs were also awarded at £9,000. The area has now been concreted and induction training provided to new drivers.

HSE v Sunlight Service Group, Coventry Magistrates' Court, April 2009

Roundup of recent case law

Airbus - falls from height

Airbus were handed a £200,000 fine following the death of Horace Livell, a 71 year old man who fell 5 metres at a Concorde exhibition in Bristol.

There was a gap of 0.8 metres between the gantry and the plane's fuselage and Mr Livell fell through this and suffered fatal injuries.

Bristol Crown Court heard that

contractors and employees had expressed concern about the gap but no permanent bridge had been constructed and no



risk assessment was undertaken.

The Court found that there was an unsafe structure in place.

Bristol Crown Court fined Airbus £200,000 plus £58,000 prosecution costs.

HSE v Airbus, Bristol Crown Court, March 2009

Laing O'Rourke fined £135,000 following 2004 fatality

On 30 April 2009 at the Central Criminal Court Laing O'Rourke Construction South pleaded guilty to a breach of section 3(1) of the Health and Safety at Work Act 1974 accepting the Company exposed a person who was not an employee to risks to his health and safety. The Company was fined £135,000 and ordered to pay costs of £18,313.

Ron Deeney, a steelworker, fell 34 feet to his death at the Jemstock Project, a site on the Isle of Dogs on 9 August 2004. Mr. Deeney was standing on a concrete pillar within the structure of the building. A loud bang was heard. There were no witnesses but a colleague looked through a hole in the deck which was

covered with plywood and saw Deeney's body in the building's basement.

The HSE found that although risk assessments and method statements had been carried out, weekly and monthly checks identified as necessary by the assessments were not conducted adequately. Site managers were unaware the hole had been covered by poor quality plywood and not adequately covered. Systems in place failed to ensure sufficient protection was in place to prevent falls and the area was kept free from hazards.

On 30 April 2009 Judge Richard Hone said that the Company needed to eliminate a casual attitude to risk at site level and the

"whole Company from top to bottom should feel thoroughly ashamed."

The court also heard that 2 months earlier, Laing O'Rourke Construction South had been fined £80,000 under the Work at Height Regulations 2005. This fine followed failure that led to a sub-contractor falling 3 metres through an unprotected hole in the roof in a Surrey gatehouse in September 2006. In that incident the plywood covering was not secured and there were no warning signs on it. See 'Work at height' on page 5.

HSE v Laing O'Rourke Construction South, Central Criminal Court, April 2009

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