

The increasing criminalisation of Health and Safety

Daniel McShee

Kennedys

Mitsui Sumitomo Insurance Group Seminar

21st September 2011

Introduction

- Increased fines for companies
- Custodial sentences for individuals
- Corporate Manslaughter
- Examples of criminalisation

Increased Fines for Companies

- Reasons for increased fines
 - Desire to punish “the guilty” for criminal offences
 - Disquiet about perceived inadequate sentences
 - Lack of corporate manslaughter convictions

Sentencing Guidelines Council

- Previously no guidance other than through precedent - leading to inconsistency in sentencing
- Introduction of Definitive Guidance in Jan 2010
- Application to “Corporate Manslaughter and Health and Safety Offences Causing Death”

Application of Guidance

- s.172 CJA 2003 - every Court must have regard to relevant guidelines
- Applies to the sentencing of organisations - NOT individuals/directors
- Relates to any sentencing hearing on or after 15th February 2010

Level of Fines

- Fines cannot be indemnified by insurance
- Fines should be “punitive and sufficient to have an impact”
- “Where offence is shown to have caused death, appropriate fine will seldom be less than £100k and may be measured in the hundreds of thousands of pounds or more”
- The importance of Causation
- Ability to argue Causation

Court assistance on the Guidelines

- Appeal by Bodycote Hip that their sentence of £533,000 with costs of £200,000 was excessive for a health and safety offence involving the death of two of its employees rejected.
- Failures described as “a dismal attitude towards health and safety and multiple systemic failures” .

Court Assistance 2

- Court of Appeal upheld a fine of £100,000 against a company called Marble City Limited
- But made it clear that £100,000 is not a tariff
- All of the circumstances to be considered in each case.

Factors likely to affect Seriousness

- “range of factors affecting seriousness... very wide”
- 4 steps to assess seriousness
 - How foreseeable was the injury?
 - How far short of the applicable standard did the defendant fall?
 - How common is this kind of breach in the organisation?
 - How far up the organisation does the breach go?

Effect of these factors

- Investigations will be wide-ranging to establish whether or not the factors apply. Investigations will look at:
 - Industry practice
 - Company practice
 - Previous incidents, their investigation and follow up
 - The management chain
 - Funding of safety

Factors which aggravate the offence:

- Death - more than one death or grave PI + death will aggravate further
- Failure to heed warnings
- Cost cutting at the expense of safety
- Deliberate failure to obtain/comply with licences
- Injury to vulnerable persons

Mitigating Factors

- Prompt acceptance of responsibility
- High level of co-operation with investigation
- Genuine efforts to remedy defect
- Good H&S record
- A responsible attitude to H&S

These will be for the Defence to establish,
requiring persuasive mitigation to be
prepared

Financial Information

- “Smallness does not by itself mitigate, and largeness does not by itself aggravate.”
- However, a large organisation may have less excuse for not dealing with matters affecting H&S
- Further, a fine should be one which defendant is capable of paying, if necessary over a period “up to a number of years.”
- Court should require financial information - 3 years

Assessing Financial Consequences

- The Court should consider:
 - Effect of the employment of the innocent
 - Effect upon shareholders/directors - not normally relevant
 - Fact prices might be raised - not relevant unless monopoly supplier of public services
 - Effect upon provision of services to the public is relevant: Milford Haven Port Authority
 - Liability to pay civil compensation - not generally relevant
 - Occasionally considered an “acceptable consequence” to put a company out of business

Importance of Causation

- SGC Guidance will not apply where no causative link to the fatality
- “Death” is then not an aggravating feature
- Causation = more than de minimis cause
- Example - HSE v SGB - £15k fine

Conclusion - Impact of the Guidance relating to companies

- Fines have unquestionably increased significantly for organisations with funds.
- However, the Courts are applying the Guidelines with care so that there are still a significant number of cases where fines of less than £100,000 are being imposed, usually due to the financial state of the company.

Kennedys research

- Fines since introduction of guidance involving death
- 35 sentences below £100k
- Of these 20 less than £30k
- 37 sentences at or above £100k
- Of these 21 over £200k including 8 over £300k

Sentencing of Individuals

- Offences
 - Employees s7 HSWA
 - Directors s37 HSWA
 - Gross Negligence Manslaughter
- Prosecution of individuals increasing
- Inconsistency of decision making

Sentencing of Individuals

- Health and Safety Offences Act 2009
 - Increased fines and possible imprisonment for most HSE offences
 - No new duties but greater incentive to look at individual culpability
 - More interviews under caution, more investigations, more prosecutions

Sentencing of Individuals

- Maximum Custodial Sentence - 2 years
- First prison sentence in February 2011 for breach of s7/s37 - suspended 4 month sentence
- Four prison sentences (three suspended) linked with community offences in last 5 weeks
 - Two asbestos regulations
 - Two gas regulations

Corporate Manslaughter Act

- 1st conviction - R v Geotechnical
- SGC guidance on fine
- Fine in Geotechnical
- Not a significant case legally
- Real effect of the Act so far is the longer involvement of the police
- Bound to be some more prosecutions

Fire Safety Order 2005



- *LFEPA v New Look Retailers Ltd*
 - Facts
 - April 2007, fire in store room
 - 400 people evacuated
 - 30 fire engines
 - Oxford Street closed for 2 days
 - Prosecution case
 - 35 counts, reduced to 2 (risk assessment and training)
 - Mitigation
 - No previous (600 stores)
 - Early guilty plea
 - Effective remedial steps
 - No injury
 - Non-causative
 - Sentencing
 - Fine £400K plus £136K costs
 - Court of Appeal dismissed appeal
 - Seriousness of breach (“lamentable”), ability to pay fine, and impact on shareholders and senior management
 - Other recent cases and enforcement approach
 - Shell International (£300K), Tesco Barnet (£95K), CO-OP Southampton (£210K),
 - LFEPA aggressive enforcement
 - Individuals

Final thoughts

- Guidelines for sentencing for companies have already had a significant effect where that company can afford to pay.
- Fines will keep rising and when the effects of the recession lift and companies become more solvent again for there to be a smaller proportion of fines below £100,000.
- Individuals at risk of custodial sentences and other community offences in worst cases.
- Corporate Manslaughter also increasing risk
- Overall clear evidence of increased criminalisation