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Albion Chambers REGULATORY NEWSLETTER

Fee for what?

The Health and Safety Executive's ("HSE") new cost-recovery scheme, Fee for Intervention ("FFI"), came into force on 1 October 2012. What is FFI, how does it work and what should businesses be doing about it?

What is FFI?

Under the FFI scheme, businesses found in 'material breach' of health and safety law are now liable for the HSE's related costs, including, inspection, investigation and taking enforcement action. The Government has said the FFI scheme will shift the cost of health and safety regulation from the public purse to businesses and organisations that break health and safety laws.

Does FFI apply to you?

FFI applies to dutyholders where the HSE is the enforcing authority. This includes employers, self- employed people who put others at risk and some individuals acting in a capacity other than as an employee (e.g. partners). FFI covers public and limited companies, general, limited and limited liability partnerships and Crown and Public bodies.

There are various exemptions to FFI. FFI does not cover self-employed people who only put themselves at risk or employees. Also, certain legislation and regulations are exempt from the scope of FFI including, amongst others, the Control of Asbestos Regulations 2012 and the Control of Major Accident Hazards Regulations 1999. The rationale being that these regimes have their own cost recovery methods.

How does FFI work?

The HSE will only recover the costs of its regulatory work from dutyholders that are found to be in 'material breach' of health and safety law. A material breach is when, in the opinion of the HSE inspector, there is or has been a contravention of health and safety law that requires them to issue a notice in writing of that opinion to the dutyholder.

Written notification from a HSE inspector may be by a notification of a contravention, an improvement or prohibition notice, or a prosecution, and must include the following information:

- The law that the inspector's opinion relates to;
- The reasons for their opinion;
- Notification that a fee is payable to the HSE.

When deciding whether a dutyholder is in material breach of health and safety law, the HSE inspector must apply the HSE's guidance on the application of FFI and the principles of the HSE's existing enforcement decision making frameworks. There are two long-standing frameworks in place to guide HSE inspectors in deciding on appropriate enforcement action: (1) the Enforcement Policy Statement (EPS); and (2) the Enforcement Management Model (EMM).

The underlying principle of EPS is that enforcement action should be proportionate to the scale of the health and safety risks identified and to the seriousness of the breach of law. EMM helps HSE inspectors to decide whether a verbal warning or advice is sufficient or whether a written notification, improvement or prohibition notice is more appropriate.

The HSE have provided a non-exhaustive list of examples of FFI in practice which is available in a free publication that can be downloaded from the HSE website.

What is the fee?

The HSE's inspector's rate for 2012/2013 will be £124 per hour. VAT will not be chargeable on top of this amount. Where third-party involvement is required (for example, experts) the actual cost of that work will be recovered.

The total amount to be recovered will be based on the amount of time it takes the HSE to identify and conclude its regulatory action, multiplied by the relevant hourly rate. This will include part hours.

FFI will see costs associated with the following stages of work being recovered:

- Site visits / information gathering / fact finding;
- Taking witness statements;
- Specialist assistance, for example, from the Health and Safety Laboratory or expert witnesses;
- Recording conclusions and inspections, investigation and enforcement information;
- Writing notifications of contraventions and reports;
- All work to ensure the breach has been remedied, for example, further site visits;

Only time will tell what the level of the fees will be, but initial suggestions seem to be that fees could be:

- £750 for a letter informing the offender of contravention;
- Up to £1,500 for an Enforcement Notice;
- Tens of thousands of pounds for a full investigation.

Administering FFI & Appeals

The HSE is responsible for the administration of the FFI scheme, including issuing invoices and, if needed, debt recovery. This is done by a central administrative team, and the individual inspectors will not have any role in deciding how much can be recovered or dealing with queries over invoices. The HSE will also be responsible for enforcing non-payment in accordance with its own debt recovery procedures.

There is also a procedure for settling queries over disputed invoices, initially involving a senior HSE manager (who has not been involved in the case) and then by a panel of HSE staff and an independent member. Where an appeal is successful

the business will recoup the fee incurred and not have to pay for the HSE's costs of the appeal. The business will not, however, be entitled to recover any legal costs it has incurred in the process. The costs of a failed appeal will all fall to be paid by the business.

What should businesses be doing about FFI?

Businesses should not accept and pay FFI costs without question given the risk that such payment could be used as evidence in subsequent health and safety prosecutions and/or in personal injury cases. Businesses should consider:

- Whether their insurance policies cover FFI costs.
- Whether their insurance policies cover costs associated with appeals.
- Whether they are required to notify their insurers if they receive a notice that FFI has been triggered.

In the event that FFI is invoked, businesses might consider appealing on the basis that: (i) a material breach has not been committed. In particular, it may not be clear who the defaulting duty holder is on a site where there are multiple parties at work. [In its guidance, the HSE says it will attribute a proportion of the fee to each defaulting duty holder it identifies. Notwithstanding that any time spent in seeking to identify who is the duty holder in "material breach" will be charged, businesses will clearly need to consider whether to appeal where there is genuine uncertainty as to who is responsible for the breach.]; and (ii) that the HSE's costs are unreasonable or disproportionate.

Cause for concern

There is a real concern that HSE inspectors will be under pressure to generate income under the scheme and will formalise their opinion in writing where in the past they would have given informal verbal advice. While this may be something which is out of a business' hands, the main concern may be to reduce the cost to them when the scheme is triggered. The simplest step businesses can take is to remedy any material breach identified by an inspector as soon as possible. In short - the less work the HSE has to do, the less the business will pay.

As a longer-term plan, particularly for larger organisations, it could be helpful to monitor the level of fees paid to the HSE through the scheme and the nature of the breaches that are attracting the fee. This will enable an assessment to be made of any trends across the business and for health and safety resources to be focused to address any vulnerable areas. This will be especially important for multi-site businesses as, presumably, they will wish to guard against being hit with a fee (or a prosecution) for the same breach in more than one location.

Jason Taylor

Calculation of fines in Health and Safety prosecutions

As practitioners, we all know that advising our professional clients is more an art than a science. Though no individual, organisation or company will wish to be tarnished with the brush of a 'conviction', when advising the pragmatist, the issue of and calculation of fines may well be important, especially if the relevant breaches are substantial and an EGP may be on the cards.

Except in a case where death has occurred (guidelines exist for 'Corporate Manslaughter' and 'Health and Safety Offences Causing Death') the difficulty faced by practitioners is that in order to calculate the likely fine we can't simply turn to the back of Archbold, click on the *JSB* Guidelines or look at one of the helpful tables in Banks - we are not assisted by the grid form of other sentencing areas, that we all moan about, but secretly rely upon.

Therefore, just like a Findus' value Lasagne, the meat of this article is straight from the horse's mouth, rather than giving you my overview, my opinion – set out below is an illustrative collection, a snapshot of case law, in one handy article, that will hopefully provide a steer in the right direction.

Starting Point

The closest the law has come to a grid iron sentencing policy was set down in the now aged case of *R v F Howe & Son (Engineers) Ltd (1998)*. When examining later case law, the importance of Howe is readily apparent, referenced time and again. Therefore it is worth sacrificing at least a few words, giving a brief overview of this authority where a young man was electrocuted and later died of his injuries. In essence, the Court set down a non-exhaustive tick list to be considered when sentencing in H&S-type cases.

Of general application

- how far short of the appropriate standard the defendant fell in failing to meet the reasonably practicable test;
- whether death or serious injury result from the serious breach, any penalty should compensate the level of public disquiet or loss of life;
- the size of a company and its financial strength or weakness could not affect the degree of care that was required in matters of safety;
- the degree of risk and extent of danger created by offence;
- whether or not it was an isolated incident.

Mitigating factors included

- prompt admission of responsibility;
- timely plea of guilty;
- steps to remedy deficiencies after they were drawn to the defendant's attention;
- a good safety record.

Particular aggravating factors included

- a failure to respond to warnings
- where safety had been compromised by a profit motive.

However, what shines through Howe is the importance of the Court taking into account the financial circumstances of the organisation, on one hand to impinge upon the profitability of the company and therefore to highlight the importance of H&S to investors and shareholders (and observers) – a posh version of deterrence, and on the other, balancing the viability of the organisation into the future.

In mitigation

As an example of the mitigation list in action - the authority of *R v Clifton Steel Ltd* (2007) provides a cogent example of the effectiveness of 'playing ball'. In this matter, the Defendant's employee was maneuvering extremely heavy coils of steel. Due to breaches of H&S, one of the coils was squeezed from a stack, crushing the victim, who died of his injuries. The company had pleaded guilty and the Court below imposed a fine of £150,000.

The Appeal court noted that only in the most serious cases, in terms of culpability, should a fine exceed £100,000. Unusually, the Court cited statistics showing that only in 3.6% of cases did the fine exceed that threshold. The Court substituted the figure of £100,000, noting that the Health and Safety Executive itself had not identified the risks

associated with the practice, the company had co-operated fully with the HSE, that the company had taken steps, post accident, to minimize the risk, it had pleaded guilty at an early opportunity and had a good H&S safety record – a clear example of 'actions not words' being influential in the sentencing process.

Also a 2007 authority, *R v AGC Automotive (UK) Ltd* exemplifies the balancing exercise where the ramifications of breach were significant but the cause stemmed from a one-off breach. The breach appears minor – the company failed to set out a diverted pedestrian walkway around a temporary storage area. Unfortunately, an employee was struck by a forklift truck, sustaining significant injury, as a result of the walkway not being in place. The HSE had previously issued an improvement notice as to the dangers posed to pedestrians by forklift trucks in this workplace. Describing the company as 'reckless' the Court below imposed a fine of £150,000.

The CoA overturned the decision, substituting a fine of £60,000, commenting that the description 'reckless' connoted a particularly high level of culpability that was not supported by the facts of this case. The case was described as a 'one-off failure' in a company that did not have a culture of disregarding its H&S obligations.

In aggravation

As a counter point to *AGC Automotive* and *Clifton Steel* above, the very recent authority of *R v Tuffnells Parcels Express Ltd* (2012) shows the Court's displeasure in those organisations, especially large, profitable organisations, that have little regard for H&S. An employee, involved in directing a trailer, suffered serious head injuries when he was crushed between the trailer and a wall. The only aspect of real mitigation was a guilty plea.

On the other hand, a HSE investigation identified widespread failures in the H&S processes dating back to 2007, a similar conviction in 2009 and a markedly deficient approach to H&S. The Court below imposed a fine of £150,000. The CoA agreed with the level of fine, describing the company as having 'a longstanding disregard for health and safety' the responsibility for which reached at least regional level and permeated the company's head office.

What if?

As is apparent from the case law set out above, the Courts have been willing to look at the overall criminality when assessing the level of fines in H&S cases. On occasion, such assessments can seem to appear to devalue the impact of breaches on an injured employee. However, this apparent tension is at least partially explained by the case of *R v Draper* (2011) – a powerful example where the seriousness of the breaches and the consequential question of 'what if' were paramount.

The company pleaded guilty to a number of significant breaches relating to fire safety. The Defendant owned a number of tenanted properties, contained within a single building. There was a fire, fortunately no injuries were sustained. Similarly, there were no concerns as to the company's general approach to H&S, no evidence that corners were cut to increase profits and, the company was of 'good character'. Nevertheless, the Court below assessed the risks associated with the breaches as so grave that a fine of £135,000 was imposed. The CoA did not disagree as to the level of fine or the overall assessment as to the seriousness of the breaches.

Assets

Importantly, stemming from Howe, the Courts are not blinkered as to the overall picture when assessing the level of fine to impose. When an assessment is made as to whether a Defendant is 'playing ball' as per *Clifton Steel* above, this applies not only to the breaches and H&S itself, but the organisation's dealings across the board.

In the 2012 authority of *R v MM Contracting Ltd* (2012). The Defendant company was a relatively small operation. Due to the method by which certain fibre boards were stacked, an employee was crushed to death. Post accident, the company had repaid a loan to its sole Director, reducing the company assets by £26,000. The company argued that its ability to repay a fine, in such circumstances, was greatly diminished.

Neither the Court below, nor the CoA were impressed with this argument, nor were either impressed with the conduct of the Company (for which read Director). The Judge of the lower Court stated that but for these shenanigans, a fine of £10,000 would have been imposed; in its place, the Judge imposed penalties totalling £35,000. The consequential appeal made on the Defendant's behalf was resoundingly dismissed.

Conclusions

Howe is still good law. I have not referred to the levels of fines in Howe as to do so would be misleading – however, what is evident from our foray through the more recent case law is that the principles expounded in Howe still remain relevant and applicable today.

It appears that the 'seriousness' of the breaches has become the prominent barometer as to the level of fine. An initially counterintuitive but stark example of this is evident when contrasting the real effects of a given breach, see *Draper* as opposed to *AGC Automotive (UK) Ltd*. However, it would appear to this writer that once the breach 'seriousness' has been established or assessed, the aggravating and mitigating features as set out in *Howe* will come into play.

Richard Shepherd

Gangmasters

Abuse of process and confiscation

The Gangmasters Licensing Authority ("GLA") regulates the supply of labour into the agriculture and related sectors. In 2010, the GLA raided the offices of a sizeable Wiltshire-based labour supplier, Marden Management Limited. Marden had been providing labour to many farmers across the UK; in particular, they had supplied skilled Filipino labour to dozens of dairy farmers who were struggling to find interested local workers.

Under the contracts between Marden and the farmers, the farmers paid a monthly fee for each worker. Unknown to the farmers, however, Marden were taking a very significant part of that fee for themselves, resulting in the labourers being paid at a rate that fell below the minimum wage. There was strong evidence that the labourers were being financially exploited by Marden, and there were compelling grounds for Marden being prosecuted (as they eventually were).

Less obvious, however, was any sensible basis for prosecuting the farmers who had been provided with labour by Marden. Marden was a well-known and well-regarded labour supplier. There was widespread uncertainty over the application of the gangmaster licensing rules to this specialized area of farming (DEFRA's own website had at one time indicated that the rules did not apply). The UK Borders Agency appeared happy with the arrangements being made for the Filipinos to come into the country. So why did many of the farmers end up being prosecuted?

Initially, the GLA suggested that the farmers might have been complicit in Marden's exploitation (on the basis that the fees they paid Marden were too low to allow for proper wages), but that allegation was

eventually abandoned. Around twenty of the farmers ended up being prosecuted for a strict liability offence, simply on the basis that they had taken labour from an exploiting gangmaster. This, even though it was accepted by the prosecution that they could not prove against the farmers any complicity in or knowledge of the exploitation.

The lack of culpability on the part of the farmers meant that – after a year of legal toing and froing - they each eventually received an absolute discharge and a minimal contribution to costs, which meant that the prosecution recovered a tiny fraction of their overall costs. In real terms, the prosecution was a disaster, as well as a public relations catastrophe; it was widely perceived across the country that, at a difficult time for farming, the regulators were choosing to prosecute rather than to provide support and offer advice.

Several aspects of the case are of enduring interest. First, we ran an abuse of process argument, on the basis that the prosecution was oppressive and contrary to policy. The Administrative Court rejected that argument (*CPS v Moss* [2012] EWHC 3658 (Admin). It held that the recent high profile case of *R v A* [2012] EWCA Crim 434 had effectively placed a bar on challenges to the exercise of prosecutorial discretion when it said (inter alia): "provided there is evidence from which the jury may properly convict, it can only be in the rarest circumstances that the prosecution may be required to justify the decision to prosecute".

Interestingly, the Court did moot the suggestion that prosecutions by regulatory bodies might need to be more closely monitored by the courts than CPS prosecutions, since the independence of decision-making that characterizes the CPS is not necessarily present with those bodies. (In this case, that was not relevant, since the CPS had taken over and "adopted" the GLA's prosecution).

Second, and rather more troubling, the prosecution of the twenty farmers began with an indication by the prosecution that they would proceed with POCA applications against a number of them, totalling over £150,000. Increasingly, that seems to be the way with regulatory prosecutions. Given the "cut" of any confiscation order that is taken by the prosecuting authority, it is hard to avoid the conclusion that in these austerity times, the authorities are choosing to pursue confiscation when previously it would never have crossed their minds. The truly cynical would even contend that some of the prosecutions are only commenced with a view to securing a confiscation order.

We are now regularly seeing allegations of multi-million pound benefit in otherwise trifling cases. Defendants plead to minor regulatory breaches in the Magistrates Court, only to find the local authority or regulatory prosecutor requiring the court to commit the case to the Crown Court for POCA proceedings. The basis may be "criminal lifestyle"; it may be because of a tenuous connection between the offence in question and a financial benefit.

For example, I was recently instructed in a case in Dorchester Crown Court (*EA v JMW Farms*) where a pig farmer had pleaded guilty to exceeding the number of pigs allowed on his farm under his environmental permit. After the plea had been entered in the magistrates court, the prosecution indicated that they would pursue POCA proceedings. They argued that the guilty pleas meant that every pig on the farm was an illegal pig and the proceeds of sale of each pig should be confiscated. The £1 million plus claim was eventually dismissed, but only after three days of legal argument.

Often, it seems that the prosecutor believes that there is nothing for them to lose, however harsh, illogical or unreasonable their stance may be. If they win, they are quids in; if they lose they shrug their shoulders and walk away with no costs penalty. They appear encouraged by decisions of the higher courts, reluctant to suggest that there is any chink in the much-parroted "draconian" nature of the confiscation regime. It may be that the recent CA decision in *Sumal* [2012] EWCA Crim 1840 – presently en route to the Supreme Court – will mark the beginning of a retreat from the one size fits all approach to confiscation.

It is plainly in the public interest for criminals to be stripped of their criminal assets by the judicious use of the POCA procedure. That is what the legislation was introduced for and it has been highly successful. But it is surely time for the courts to discourage opportunist and indiscriminate windfall-seeking by local authorities and regulators. In appropriate cases, awards of costs for unreasonable conduct should follow, and the courts should be astute to cut through the "we are simply following the statutory procedure" argument with a robust response of "you are wasting the court's time on foolish applications".

For the record, the confiscation claims against the farmers were quietly shelved. Wisdom sometimes prevails.

Adam Vaitilingam

Horses for courses

A 19th century problem in the 21st?

Regulatory Law may be an ever broadening church, but its common purposes in any context involve the promotion of public safety and the protection of the public from "fraud". No better example of the marriage of these aims is presented than in the world of food law.

The history of food law and its application reflect the combined goals of seeking to ensure that food is safe to eat and that we know what we are eating. However, the news and events of early 2013 raise the question "Just what progress has been made?" A review of where the law began paints a picture not so far from today's reality.

The industrial revolution and migration into the cities meant that "food miles" became a problem as early as the 18th century. Coupled with a drive for greater profit, food adulteration, although not a new idea, rapidly became a popular solution. Whether it was the use of sawdust to bulk out bread or the use of strychnine to flavour beer and save on hops, food producers could be relied upon to cut corners. When chemist, Frederic Accum, stated in the 1820s "The man who robs a fellow subject of a few shillings on the highway is sentenced to death...[but] he who distributes a slow poison to the whole community escapes unpunished", he quickly gained enemies. It took another 40 years before the 'appetite' for legislation was truly raised when another chemist, Arthur Hill Hassell, showed that adulteration of foodstuffs had become the rule rather than the exception and that adulterated articles were commonly sold as genuine. Not so far from the modern conundrum, he wrote on the moral, social and financial effects of adulteration. He identified that the consumer was always the loser, with the lower classes most affected as cheaper foods were typically the most adulterated. In his opinion, the larger food manufacturers were most blameworthy and he had no difficulty seeing this as a dishonest practice. Unsurprisingly, those involved often struggled to share this view.

The Food Adulteration Act of 1860 was seen by Parliament as the answer. At the time, it was criticised for frightening everyone and achieving little and 150 years of revision followed. Of course, progress in this field has

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been tremendous and standards in food production bear no resemblance to those that troubled Hassell, but recent events are a sober reminder that similar pressures exist today that may cause some to resort to practices that have a social impact not so far from that which he wrote about.

The lengthy supply chains in the European marketplace and the complex composite product that is typified by the frozen lasagne, mean that modern food production is just as vulnerable to a weak link in the chain, whether that link is in Poland, Romania, Ireland or the UK.

There is no question that the checks in place in the 21st century have failed the consumer when it comes to the horsemeat scandal. Is the law to blame? The vast majority of UK food law is now a product of Europe. It is detailed, diverse and complex, but arguably, if it had been properly and uniformly enforced, this situation would and should have been detected sooner.

The body now fully in the public eye is the Food Standards Agency (FSA), a Quango created at the time of the BSE scandal to try and re-instil public confidence in the nation's food. How well has it done its job? It is right to acknowledge that staffing and budget cuts since the 2010 general election have created their own challenges for the FSA, but it should not be forgotten that the organisation that uncovered the whole issue of horsemeat adulteration was the Food Safety Authority of Ireland, in a nation that has had financial issues of its own to deal with. For some while, the UK FSA has been criticised that it was too "cosy" with large producers and retailers and that "light touch" regulation has been to their benefit whilst smaller producers have been put under unworkable pressures. It remains to be seen how they will attribute responsibility and the sanctions that are attached. Early reports have sought to emphasise the involvement of criminal gangs, who have set out to defraud food manufacturers and retailers as much as the public. However, as the list of those retailers who have been "victims" grows on a daily basis, questions must arise as to the effectiveness of their due diligence systems.

The FSA has been at pains to calm public anxiety by portraying this as a labelling issue rather than one about safety. No deaths and no illnesses have been reported and the public are assured that there is "very little risk to human health" from phenylbutazone – the anti-inflammatory drug found in a number of horse carcasses that have been passed for human consumption in France. The concern remains, nonetheless, that if it is felt necessary to have a vet present for the anti and post mortem inspections of cattle slaughtered in a properly licensed slaughterhouse with full traceability, how it can be "safe" for food to contain unidentified and untraceable horsemeat?

The outcry, of course, goes beyond the main headline grabbing issue of horsemeat being introduced into the British diet. The revelation that foods labelled as beef have been adulterated with pork, whilst being a shock to Waitrose customers who placed the utmost faith in their brand, is a truly serious issue for the Muslim and Jewish communities. This is also further proof, if it were needed, that the issue is not simply the after effects of criminal gangs making a fast buck. This reveals wholesale shortcomings in the controls operated by the large retailers and the watchdog meant to police them.

To suggest that food adulteration has once again become the rule rather than the exception may be an exaggeration. That stated, these foods are being sold as genuine and it seems, as before, the large players are to blame. Furthermore, if there has been a "turning of a blind eye" then that is arguably not far from dishonesty. What is clear, and painfully similar to the position 150 years ago, is that it is those with the least money who are most affected. Whilst the chattering classes may stomp off to their local butcher in protest, thus snubbing the supermarket they had previously frequented; in a nation that has forgotten how to cook and while recession and unemployment hit hard, the pressure to produce cheap, convenience food is greater than ever. Regardless of whether the nation is converted into one of willing horsemeat eaters, the trust that can be placed in the food we eat has been rocked once more, as has our trust in those charged with enforcing rules that have been over 150 years in the making. Regulatory law can only take us so far.

Alan Fuller

Corporate Manslaughter in practice

It is now over five years since the Corporate Manslaughter and Corporate Homicide Act came into force; the provisions relating to deaths in custody (S.(2)(1)(d)) were delayed in being implemented to allow the relevant public bodies to prepare, but these came into force on 1st September 2011.

Review of the Offence

To be guilty of corporate manslaughter the following criteria must be satisfied:

- the organisation must have had a relevant duty of care to the fatally injured person;
- the organisation must have been in gross breach of its duty;
- that the gross breach must come about because of a senior management failing;
- the harm causing the death must be sustained in the UK;
- the death must be a foreseeable consequence of the breach.

1. Duty of Care

The concept of duty of care is defined by reference to the law of negligence. This deals with well-defined relationships such as those between employer and employee, but it will also cover third parties (subject to the issue of foreseeability) such as visitors or customers.

Organizations that can owe a duty of care include companies, partnerships , some government departments and (since 1st September 2011) organizations providing custodial services.

2. Gross Breach

Having established the existence of a duty of care, a jury will be asked to consider whether the conduct of the organization has fallen far below what could reasonably be expected in the circumstances. In carrying out this assessment the jury must consider whether there has been a failure to comply with health and safety legislation, if there was, how serious that failure was and how much of a risk of death was caused.

Significantly the jury may also consider the extent to which evidence shows that attitudes, policies and systems are accepted practices within the organization and are likely to have encouraged such a failure, or allowed it to become accepted practice. If it is possible to establish that there is a culture of complacency towards health and safety within the business, that may amount to a gross breach.

3. Senior Management Failing

Any established gross breach must be shown to have come about because of the way in which senior management has organized its activities. This must also be a substantial element of the breach.

In assessing what is a senior management failing it is important to note that the definition of senior management is not based on job titles. It will, rather depend upon and assessment of whether managers are responsible for all, or a substantial part of the operation of the organization.

The Act does not impose an explicit legal requirement for directors to manage safety; probably because any senior manager will already be subject to the implied requirements of the Health and Safety at Work Act which requires managers to show a commitment to managing safety.

4. The Corporate Manslaughter Act in Practice

The first prosecution brought under the Act was that of Cotswold Geotechnical Holdings Ltd. This was a small company that employed six people and had only one director called Peter Egan. It had an annual turnover in the region of £300,000 and at the time of the incident that led to the prosecution it was just about breaking even.

The company specialized in investigating building sites before construction got underway. On the day of the incident a geologist was assessing ground conditions at a site. A number of trial pits had been dug but there had been no risk assessment. One pit collapsed whilst the deceased was working in it and he was suffocated.

The company and Mr. Egan were then prosecuted. In many ways this was not an ideal test case for the new act. The company only had one director and accordingly even under the old law it would not have been difficult to identify the "controlling mind" of the company. Nonetheless charges were brought under the Act. Mr. Egan had been badly affected by what had happened and became mentally ill. After three separate applications proceedings against him were ultimately stayed as an abuse of process.

The case against the company continued. The prosecution was so keen to press on with the case that they took it upon themselves to prove the breach of relevant health and safety legislation. It seems unlikely that the prosecution will be so charitable in future cases and this approach should be regarded as being case specific.

At the conclusion of the trial the company was convicted and fined £385,000.

The fine was well in excess of the company's annual turnover. Relevant guidelines (see the SGC guidelines) say a sentence for corporate manslaughter will rarely be below £500,000. Giving sentence, the honourable Mr Justice Field commented: *"It may well be that the fine I am going to impose and the terms of its payment will put this company into liquidation. If that is so that is unfortunate, but it is unavoidable and it is a consequence of this serious breach of duty committed by the company."* For medium to large size firms convicted of the offence a fine into the millions could conceivably be imposed.

The Act also states that remedial and publicity orders can form part of the sentence. The judge made no remedial order, saying that the HSE was best placed to take any steps required. The question of a publicity order did not arise because the offence had been committed before that part of the Act had come into force.

Since the Geotech case there have been a very limited number of other prosecutions. The most high profile was heard at Manchester Crown Court and involved the prosecution of Lion Steel Equipment Ltd. A worker was killed when he fell to his death from a height of 12 metres. No risk assessment had been carried out. It was noted by police that there was a culture of "considerable neglect and apathy with respect to health and safety"

Three directors of the company were charged with gross negligence manslaughter, but were acquitted. The company pleaded guilty to an offence of corporate manslaughter and was fined £480,000 to be paid over four years with £84,000 costs. The fine was 20% lower than the recommended guidelines due to the good safety record of the company.

It is likely that prosecutions for corporate manslaughter will, for the time being remain infrequent. One reason for this is the current economic climate, but as time goes and prosecuting authorities become more comfortable with the legislation it seems inevitable that prosecutions will increase. The lesson for those involved with compliance in corporate bodies is to ensure that risk assessments and safety reviews are both rigorous and regular. Prevention is always better than cure.

Stephen Mooney