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Health and Safety

CMS Cameron McKenna Newsletter

May 2011

Foreword

CMS Cameron McKenna LLP is recognised as a leading firm in the area of Health and Safety. We provide specialist advice on regulatory compliance, prosecutions, investigations and corporate governance.

Incident response

Our dedicated team is on call 24 hours a day to provide assistance and respond to incidents on site. Our lawyers are qualified to practise in England, Wales and Scotland but we also regularly advise clients in relation to health & safety matters in other jurisdictions and can draw on the expertise of CMS' network of European offices.

The steps a company takes immediately following an incident can be pivotal and, depending on those steps, significantly increase or decrease the likelihood of a subsequent prosecution or conviction. We provide immediate advice on dealing with the aftermath of an incident, from liaising with the regulatory authorities to assisting with the support of witnesses.

If your company has a health and safety emergency, you can contact us on:

020 7367 3000 - London
01224 622 002 - Aberdeen
07811 362 201 - Out of hours

News

Update: Potters Bar Rail Accident Prosecution

In our last Newsletter, we reported that the Office of Rail Regulation (ORR) was prosecuting Network Rail and Jarvis Rail Limited under the Health and Safety at Work etc Act 1974 for the Potters Bar derailment in 2002, which resulted in seven fatalities and many more injuries. The ORR reopened their investigation following a 2010 Inquest in which it was found that poor maintenance and inadequate inspections to a set of points were causes.

At the time of the incident, overall responsibility for the track lay with Railtrack plc. Network Rail subsequently acquired Railtrack, including its liability for the incident. The prosecution of both Network Rail and Jarvis began on 21 February 2011 in Watford Magistrates Court, where Network Rail submitted a guilty plea to the charges against it under the 1974 Act. A spokeswoman for Network Rail stated "*we have indicated a guilty plea today as Network Rail took on all of Railtrack's obligations, responsibilities and liabilities when it took over the company*".

Following Network Rail's guilty plea, the ORR announced that it would not proceed to trial against Jarvis alone. While the ORR considered there to be a realistic prospect of convicting Jarvis, they stated that it was not in the public interest to do so. In particular the ORR cited Jarvis' insolvency, Network Rail's guilty plea and the views expressed by victims' families.

Sentencing Network Rail to a fine of £3 million on 12 May 2011, Judge Bright remarked that Railtrack's procedures and standards were "seriously inadequate" and that "overall responsibility for the breach of duty lay with Railtrack at senior management level and their failures were significant and extensive".

HSE Publishes Delivery Plan for 2011/2012

The Health and Safety Executive recently published its Delivery Plan for the period 1 April 2011 to 31 March 2012. The 2011/2012 Plan follows the strategic framework laid out in the 2009 HSE strategy *Be Part of the Solution* and acknowledges the work that has been and needs to be done to implement Lord Young's 2010 review of health and safety at work. A particular feature of the Plan is its consideration of adjustments that will need to be made to accommodate the 35% reduction in HSE's budget following the 2010 Comprehensive Spending Review.

In the Plan, the HSE recognise that it must transform its approach in response to the budget cuts. In particular, it introduces the prospect of costs penalties where HSE intervene after having identified a material breach of the law requiring remedial action. It also suggests that the current charges levied on high hazard industries be extended to other hazardous industries that currently do not pay regulatory costs. Perhaps most worryingly, the HSE will consider "initiatives to seek more value from providing HSE's expertise and involvement for those who wish to use it". That suggests the introduction of charges for advice. The Health and Safety Laboratory may also be allowed to provide services to non-HSE customers.

Dealing with specific sectors, the HSE plan to conduct a review, jointly with DECC and the Maritime and Coastguard Agency, of the UK offshore oil and gas regulatory regime against issues emerging form the investigation into the Deepwater Horizon incident. More specific regulatory duties may also be introduced for higher hazard emerging energy technologies, such as Carbon Capture and Storage (CCS), offshore wind and waste to energy.

The Delivery Plan makes provision for a number of HSE performance indicators, measured in terms of value for money, work outcome and Great Britain's efficiency relative to other EU member states. The HSE seeks to maintain the UK's position as one of the leading health and safety performers.

To view the HSE's 2011/2012 Delivery Plan, please go to: www.hse.gov.uk/aboutus/strategiesandplans/delivery-plans/plan1112.pdf

Crown Censure for MOD

An agency of the Ministry of Defence was given a formal Crown Censure by the HSE on 21 February 2011 in relation to the death of Terry Jupp in 2002. The censure followed an inquest carried out in 2010 – eight years after Mr Jupp's death.

Terry Jupp was part of a British-American team experimenting with homemade bombs that might be used by terrorists. He was employed by the Defence Science and Technology Laboratory (Dstl) and on 14 August 2002 was conducting classified tests at a site in Shoeburyness, operated by the MOD and QinetiQ Ltd.

During the tests, a compound that Mr Jupp had been experimenting on ignited, injuring Mr Jupp and causing him to suffer 85% burns from which he later died.

By accepting the censure, the MOD agency accepted that there had been health and safety failings. Risk assessments had not adequately addressed the risk of ignition or explosion, despite the risks of explosive compounds being clearly foreseeable. In addition, Mr Jupp and his colleague were not wearing adequate personal protective equipment and the inquest in 2010 heard that authorisation had not been given to mix the substances which caused the explosion.

In 2005, two of Mr Jupp's managers were charged with manslaughter in relation to the incident and brought before the Old Bailey. The charge against one man was thrown out due to insufficient evidence. The second man denied the charge against him and the case dragged on for years before being abandoned by the Crown following a review of the case by the Attorney General.

In a statement, the HSE highlighted that Dstl had adequate safety procedures but that the procedures were simply not followed at the time of the incident. While the nature of the case contributed to the delay of the inquest and censure, this case – and the recent prosecution of Network Rail for the Potter Bar derailment – both serve as a reminder that regulatory action may be taken many years after the event.

HSE publishes Impact Evaluation on CDM Regulations

The Construction (Design and Management) Regulations 2007 (CDM Regulations) apply to all construction work carried out in the UK and areas to which the 1974 Act extends, such as offshore wind farms in the Renewable Energy Zones. Because of its broad applicability, it impacts a wide range of projects, from small-scale building extensions to huge capital projects, such as the London Olympics.

The CDM regulations have been criticised by some on the basis that a 'one-size-fits-all' approach is inadequate. The pressure has been such that the government committed to review the regulations in 2010. To that end, the HSE commissioned an external consultancy in 2010 to carry out an initial impact

evaluation of the CDM regulations and on 4 April 2011, published a 158 page report on its findings. The rationale of the CDM regulations was, amongst other things, to introduce simplicity, shift the focus away from plans towards planning and management and strengthen the co-operation and co-ordination between designers and contractors.

The 4 April report suggests that the CDM regulations are largely meeting their intended objectives. However, nearly half of respondents complained that the CDM regulations did not minimise bureaucracy, as intended. Similarly, the report suggests that opinion is divided as to whether the regime has introduced greater integration between designers and contractors. A cost-benefit analysis by respondents indicated that on average the benefits of the regulations were moderate and the costs were viewed as moderate or lower.

The pilot study does not identify any serious failings with the CDM regulations. However, it does indicate areas where the regulations do not currently meet their intended objective. Those areas are likely to be the focus of any future review.

To view the HSE's Pilot Study, please go to: www.hse.gov.uk/research/rrpdf/rr845.pdf

Greenpeace Challenges Oil and Gas Licenses

In February 2011, Greenpeace was successful in obtaining permission from the High Court to bring an application for judicial review of DECC's decision to grant exploration and production licences for deepwater areas. The latest round of licence offers (26th Round) involve a further 144 licences, although these have yet to be formally granted. While only around 40 licences relate to deepwater areas, Greenpeace are challenging the entire award.

The application seeks to quash the licences and/or obtain a declaration that the granting of such licences would be unlawful. The High Court has ruled that there is sufficient argument in Greenpeace's written application to warrant a full hearing.

Greenpeace argues that no deepwater licences should be issued pending completion and assessment of the ongoing investigation into the causes and implications of the Gulf of Mexico incident. It claims that in light of that incident, a DECC decision of 22 October 2010 that there is no need for an environmental assessment under Article 6 of the Habitats Directive for the licences offered in October is unlawful and that it is also unlawful for DECC to continue to rely on the conclusions reached in the Strategic Environmental Assessment of June 2009 – at least insofar as these relate to exploiting deepwater oil reserves.

One argument which DECC may raise in these proceedings is that the licence process is not the process under which the implications of the incident would be addressed and that refusal to grant any licences at all in deepwater areas would (given the UK's history of successful offshore drilling) be a disproportionate response.

In particular, DECC may argue that licensees are subject to controls by other bodies, such as the Health and Safety Executive, which controls are better suited to addressing any concerns arising from the incident.

Given the potential impact on oil and gas licenses, Operators are likely to monitor the case closely. We shall continue to report as the case develops.

Government cuts HSE inspections

The Government has announced a package of changes to the UK's health and safety system, including a large cut in the number of at-work inspections.

The Chancellor, George Osborne, confirmed in his latest budget that the recommendations in Lord Young's report Common Sense, Common Safety would be implemented in full. In terms of Lord Young's recommendations, employers will no longer face automatic health and safety inspections. Instead, health and safety inspectors will be instructed to focus on high risk locations and industries, such as major energy facilities and 'rogue' employers. Such an approach will cut the number of inspections carried out in the UK by at least a third. The inspection cuts coincide with a sharp reduction in the HSE's budget (approximately 35% over five years) under the Comprehensive Spending Review. Rogue employers who endanger public and employee safety will also have to pay for the costs of investigations into their activities.

Work and Pensions Minister, Chris Grayling MP, stated that "*Of course it is right to protect employees in the workplace, but Britain's health and safety culture is also stifling business and holding back economic growth. The purpose of health and safety regulation is to protect people at work and rightly so. But we need common sense at the heart of the system, and these measures will help root out the needless burden of bureaucracy*".

The Government is also launching a review of all existing health and safety laws, with a view to scrapping regulations perceived to be unnecessary and burdensome on businesses. Professor Ragnar E Lofstedt of King's College London will chair the review and publish findings this autumn.

Judith Hackitt, the HSE Chair, commented that "*The HSE remains focused on preventing death, serious injury and ill health to those at work and those affected by work activities. With even better targeting of our activities we will further help small businesses to understand what they need to do. This will enable us to give the highest level of attention to those areas with the potential to cause most harm and where we can have the greatest impact.*"

Fukushima disaster prompts UK review and creation of new regulator

The Health and Safety Executive has announced that it will provide a report on the implications and lessons to be learned for the UK nuclear industry arising out of the events in Japan following the earthquake, and resulting tsunami, of 11 March 2011.

The decision to write the report was prompted by a request from Chris Huhne, the Secretary of State for Energy and Climate Change, in a letter to Dr Mike Weightman, Chief Nuclear Inspector of the Health and Safety Executive's Nuclear Directorate. The interim report is due to be published by mid-May 2011 and followed by a final report within six months.

Dr Weightman has indicated that the report will be wide in scope, but will not address nuclear or energy policy issues. It will address design provision relating to natural hazards, the natural hazards that threaten UK nuclear installations and the lessons that ought to be learnt from events in Japan.

Dr Weightman commented that "*The nuclear regulatory standards in the UK ensure our nuclear power reactors are robust against all the external hazards that may be reasonably foreseen in the UK and I agree with advice that seismic and tsunami events of such extreme magnitude as seen in Japan are not foreseeable for the UK. However, it is important that we consider the implications and learn any lessons to ensure we continue to secure the protection of people and society*".

Separately, a new Office for Nuclear Regulation (ONR) was created in March 2011 following worldwide and domestic concern with nuclear power generation. Former chief executive of Powergen, Nick Baldwin, was confirmed on 01 April 2011 as the interim Chair of the ONR which is intended to become a separate statutory body. Until suitable legislation is passed, the ONR will operate as an agency of the Health and Safety Executive.

Shale gas hits the headlines

The debate surrounding the impact of unconventional gas production (including shale gas) in the UK is gaining strength as DECC's 14th Landward Licensing Round approaches. There has been significant parliamentary and press interest in shale gas drilling in the UK.

Shale gas production is a means of liberating gas from underground rock formations using 'hydrofracturing' which involves fracturing gas-containing rock by the injection of water at high pressure along with a proppant (e.g. sand) to sustain fissures and permit the flow of gas.

Two wells have already been drilled in the UK – Grange Hill and Preese Hall, near Blackpool, Lancashire, by Cuadrilla Resources. The shale gas pioneer completed its first phase of exploration in December 2010, which involved the opening of a 9,000ft vertical exploratory well at Preese Hall. Hydrofracturing is expected to commence in the first three months of 2011 and last three to six months. Natural gas quantities and the commercial viability of the site will then be evaluated.

As a UK shale sector begins to emerge, so too has public opposition. Researchers from the Tyndall Centre at the University of Manchester published a report in January 2011 calling for a moratorium on shale gas development until there is a more thorough understanding of the extraction process and its impact.

The Health and Safety Executive's (HSE) Offshore Division Wells Group has been in discussions with Cuadrilla since May 2010. This has been done with a view to ensuring compliance with the Offshore Installations and Wells (Design and Construction, etc) Regulations 1996 as amended, although this regulation is not specific to shale gas production in the UK. Indeed there is no specific regulatory regime for shale gas production and the 'tried and tested' formula applicable to any other oil and gas venture will apply. In this context, the power to grant licences to search, bore for and retrieve unconventional gas (including shale) is vested in the Crown. Attached to the licence are the terms and conditions that must be met by the licensee. DECC regulates compliance with those terms and conditions while the risks to health and safety from licensed activities are overseen by the HSE.

Furthermore, shale gas operators will need to obtain a permit for activities associated with the surface works if these involve emissions to surface or groundwater. The permit will set limits on the activity, requirements for monitoring; and require the operator to operate a management system that identifies and minimises risks of pollution. More importantly, if the regulator considers that the operation of a regulated facility under an environmental permit involves a risk of serious pollution, it may serve a notice requiring that the operator cease that activity.
Shale gas has the potential to be an important part of the UK energy mix going forward. While

the debate will no doubt continue, it is up to the regulators and industry to ensure that the risks are assessed and managed, in order to maintain public confidence in the sector.

Inquiry into effectiveness of Health and Safety Regulation in Scotland

The Scottish Affairs Committee announced on 04 April 2011 that it has launched a new inquiry into health and safety in Scotland. The Committee is particularly interested in the effectiveness of regulation in Scotland relative to England and Wales, whether resources are appropriately targeted and how any reduction in human resources might impact the HSE north of the border.

The announcement of the inquiry comes after the National Audit Office reported that the cost of workplace accidents north of the border was about £187 million in 2010. The HSE also reported in March 2011 that one in five construction sites in Scotland were so dangerous that lives were being put at risk. Three construction workers died in Scotland during 2009/10 and the sector experienced more than 1,100 injuries.

It has been suggested that the higher rate of workplace deaths and serious injuries in Scotland relative to other parts of the UK may be because of the nature of Scotland's economy – a greater proportion of Scotland's workers are employed in high-risk industries such as agriculture. The Committee is welcoming written submissions from interested parties until Thursday 16 June 2011. The details of public oral evidence sessions will be announced in due course.

Decision on the Damages (Asbestos-related Conditions) (Scotland) Act 2009

The Damages (Asbestos-related Conditions) (Scotland) Act 2009 ("2009 Act") came into force on 17 June 2009 in response to the October 2007 House of Lords decision in *Rothwell v Chemical Insulating Co Limited*. In that case, the House of Lords held by majority that "*pleural plaques, either of themselves or "aggregated" with the risk of developing other asbestos-related diseases and the consequent anxiety, did not cause damage and did not therefore constitute an injury giving rise to an action in tort*", this notwithstanding the previously generally understood position that pleural plaques were sufficient in their own right as a basis for a personal injury claim for compensation.

Although that decision was not binding on the Scottish courts (being a decision in an English case), there was concern that it might impact upon similar claims north of the border and, indeed, the decision was followed in at least one Scottish case in late 2007. As a matter of policy (and somewhat controversially), the Scottish Government passed the 2009 Act to ensure those suffering from pleural plaques would "*continue to be able to raise an action for damages.*"

Concerned with the financial and commercial impact of the 2009 Act, which the insurance industry estimates could cost into the £billions and lead to "upwards pressure" on premiums in Scotland, a group of major insurers challenged the validity of the 2009 Act. They sought a judicial review of the legislation on two main grounds:

— That it infringed their rights under Article1 of Protocol 1 of the European Convention on Human Rights (which provides protection against interference with property); and

— That the legislation was irrational and therefore subject to review by the Court on the basis of its common law powers of review.

The insurance companies were initially ruled against and, on 12 April 2011, a panel of judges at the Court of Session in Edinburgh refused both grounds of appeal. The Court refused to overturn the legislation as it found that "*it cannot be said that the decision to place financial responsibility on the insurers was one which lay outside the margin of appreciation which the legislature enjoys in this sphere*". The Scottish Government's actions in passing the 2009 Act, even if contentious, were neither irrational or unjustifiable.

Insurers have indicated an intention to appeal to the Supreme Court. Meantime, many pleural plaques claims remain on hold.

To view the Court of Session decision, please go to www.scotcourts.gov.uk/opinions/2011CSIH31.html

Focus on: Corporate Manslaughter

The First Prosecution

Perhaps the most significant milestone in the last quarter was the conviction in February of Cotswold Geotechnical Holdings Ltd (Geotechnical), which is the first company to be convicted under the Corporate Manslaughter and Corporate Homicide Act 2007 (the 2007 Act). It was fined £385,000 – a sum equivalent to 115% of its annual turnover – which it is being allowed to pay over 10 years on account of what the judge described as its "parlous" financial position.
In some ways, the case is a landmark at a time when there is ever-increasing public demand for corporate accountability. However, it was also a bit of a disappointment to those who were hopeful for answers to some of the questions about the Act's practical application and scope. In fact, some commentators have gone so far as to suggest that the conviction offers little in the way of useful guidance on the legislation and, in particular, on how the large or complex corporate structures it was intended to snare might fare in similar proceedings.

The Case

The prosecution of Geotechnical related to the death of Alex Wright, an employee who was killed when a 3.5 metre trench he had been working in collapsed, burying him. He died from traumatic asphyxiation. Geotechnical had not complied with best practice and guidance which advises against entry into excavations more than 1.2 metres deep without appropriate supports. A jury found that its system of work was unnecessarily dangerous.

At the time of the incident, Geotechnical was a small company, employing only 8 people. The sole director, Peter Eaton, was in overall control of Geotechnical's daily affairs. Indeed, he had been on site shortly before the incident.

The Charges

Geotechnical was charged with corporate manslaughter under the Act, which has abolished the common law offence of gross negligence manslaughter insofar as it applied to companies. Less publicised were the other common law and statutory charges levelled against Geotechnical and its director. Geotechnical had also been charged with failing to ensure the health and safety of one its employees, contrary to section 2 of the Health and Safety at Work etc Act 1974 (1974 Act) and Mr

Eaton was charged with manslaughter by gross negligence, a common law offence, as well as a statutory offence under s37 of the 1974 Act – namely that Geotechnical's breach of duty was committed with his "consent, connivance...or neglect".

Ultimately, the charges against Mr Eaton were dropped on account of his poor health (he was suffering from cancer). The charge against Geotechnical under the 1974 Act was also dropped because the CPS was concerned that proving the two separate offences – corporate manslaughter on the one hand and the general health and safety offence on the other – would confuse the jury. For the jury to convict Geotechnical of corporate manslaughter, the prosecution had to prove that there was a "gross breach" and that it occurred as a consequence of the way that senior management organised the company's activities. However, health and safety offences under the 1974 Act do not require such proof but simply look to establish whether a company has exposed individuals to risk. The prosecution's evidential burden would undoubtedly have been further complicated had the charge of gross negligence manslaughter remained against Mr Eaton.

The Corporate Manslaughter Offence

The corporate manslaughter offence introduced in the 2007 Act is composed of several parts. Simply stated, a company is guilty if the way its activities are organised causes a death and amounts to a gross breach of a relevant duty of care owed to the deceased. There are three parts to that proposition.

The first part, a "relevant duty", is defined in the 2007 Act and includes duties owed by a company to its employees and to third parties on its premises under the law of negligence. Secondly, there must be a "gross breach". That is defined as conduct falling far below what can reasonably be expected of the organisation in the circumstances. When considering whether or not there has been a gross breach, a jury will look at whether or not health and safety legislation, guidance and best practice have been followed. So the jury, in reaching its verdict, can have regard to almost any relevant health and safety publication, code of practice, Health and Safety Executive (HSE) guidance note or local authority direction. Clearly, with such a wide net, the potential for a jury to conclude that a company has not complied with the spirit of health and safety law is high.

Lastly, the way a company's activities are organised is relevant. Section 1(3) of the 2007 Act provides some explanation: what matters is the organisation by "senior management". "Senior management" means the people who play a "significant role" in the making of decisions about how activities are organised or the actual management of the activities. In contrast to the old law, this probably now includes those below board level and may extend to regional and divisional managers provided they are sufficiently involved in the organisation's decision-making process.

This is arguably the most crucial part of the offence – negligence and a gross breach were features of the old law. The "senior management" test widens the scope of the previous law and departs from the identification principle. But how much it departs is precisely the matter at issue; who are "senior management" and what does playing a "significant role" in decision making mean? In large organisations with tiered management structures and compartmentalised responsibilities, how wide does one cast the net? That is, in essence, what people really want to know and it was a question that the Geotechnical case was never going to address on account of the company's small size and basic management structure.

Until a large company finds itself in the dock, it will remain unclear whether the 2007 Act is capable of snaring a major company, which is its intended aim. That neatly sums up why the Geotechnical case disappoints – it fails to reveal anything about the way in which the new legislation will really work.

The Penalty

Despite initial suggestions, the Sentencing Council in guidance drawn up in 2010 rejected any fixed correlation between a fine under the Corporate Manslaughter and Corporate Homicide Act 2007 and an offending company's turnover or profit. It had been suggested that, for example, a figure of 5% of turnover might be used, which could result in fines in the many millions of pounds for major businesses. Amongst other things, the Sentencing Council cited concerns about manipulation of company structures designed to circumvent the impact of fines and the varying circumstances (such as business models) of defendant companies.

The Sentencing Council recommended that fines for corporate manslaughter should seldom be less than £500,000 and might be measured in the millions of pounds. The actual sentence should take into account 'how far up' the breach went in the organisation, how widespread the non-compliance was and the foreseeability of serious injury. Aggravating factors might include cost-cutting at the expense of safety and failure to heed warnings. Similarly, good safety records and co-operation with investigations should be taken into account in mitigation.

While the £385,000 fine in the Geotechnical case was ultimately lower that the envisaged lower-end of £500,000, it was nevertheless quite staggering relative to the size of the business, representing 115% of its annual turnover. When size is considered, it was also consistent with the provision in the guidelines that a fine should be one which a defendant is capable of paying. However, the judge did consider that it might cause Geotechnical to be liquidated, which would clearly impact the four people employed by the company at the date of sentence.

The relatively high fine sends out a strong signal that fines for larger companies may be much higher – in the millions and perhaps tens of millions for some companies – and closer to those imposed for breaches of, for example, competition rules.

Case Law

Firm fined £225,000 for Death Of Agency Worker
An environmental services company has been fined £225,000 and ordered to pay costs of £95,000 following the death of an agency worker on 2 March 2007.

The fatal accident occurred during a litter-picking operation on the verge of the A228 in Kent. A contractor working for the environmental services company was driving a litter-picking van and pulled out from the verge into the main carriageway. The van was hit by an HGV which caused the van to go back down the verge, crushing the deceased. A court found that the environmental services company had failed to implement a safety zone around the verge.

In sentencing, the Judge held that the environmental services company were aware of the relevant guidelines which stated that a 1.2m safety zone should be maintained around the verge. Furthermore, the Judge considered the environmental services company's health and safety training to be inadequate and the company's risk assessment ineffective.

Following sentencing, HSE Inspector Caroline Penwill, said: "*The company was responsible for managing these works, but in this case did not properly protect the roadside crew from oncoming traffic. Other road users were also put at risk. This is unacceptable. Those responsible for managing roadside jobs must ensure that safe systems of work are in place, and measures are taken to safeguard workers and members of the public.*"

The case highlights the obligation on companies to follow published industry and HSE guidelines to ensure compliance with health and safety law.

R v Ravenfield & ORS –Employer Liabity
This case raised the issue of whether an employer is liable for the irresponsible acts of those within its employment or on its premises.

The deceased was not an employee of the defendant, but rather a friend of another employee who intermittently visited the premises of the employer. During one of these visits, the deceased accessed a pitch roof via a window, which he fell through causing fatal injuries.

The company was charged under section 3 of the Heath and Safety at Work Act 1974 for having exposed the deceased to a risk to his safety by failing to control his attendance on the premises that day or otherwise restrict his access to the roof. The Defendant argued that the risk in was the type of everyday risk that the Court of Appeal concluded should not be captured by the operation of the 1974 Act (in the 2008 *Porter* case). That defence was accepted by Judge Russell Q.C and the defendants were acquitted.

This case illustrates that, so far as prosecutions are brought under section 3 of the Health and Safety at Work Act 1974 are concerned, mere association with a risk is not enough. It is not enough to show that the risk arose whilst on an employer's premises or occurred to visitors or employees involved in its undertaking. It has to be shown that the risk was brought about, to a material degree, by the way in which the employer was conducting its undertaking, as distinct from an everyday risk that would arise irrespectively.

Automotive Manufacturing Company fined £400,000
A fine of £400,000 was levied on 18 March 2011 against Calsonic Kansei UK Limited following the death of an employee struck by a fork lift truck.

The incident occurred in 2008 when the employee had visited a factory floor to give instructions to the fork lift truck driver. As the employee finished issuing the instructions, the fork lift reversed, knocking the employee to the ground and causing fatal head injuries.

The company pleaded guilty to breaches under sections 2(1) and 3(1) of the Health & Safety at Work etc Act 1974. Swansea Crown Court fined the company £400,000 and ordered it to pay £44,790.14 in costs.

HSE inspector Stephen Jones commented: "*It's fairly routine for forklift trucks to operate within the same area as pedestrians in this industry. However, working procedures and systems need to be in place to prevent vehicles colliding with people. This tragic incident could have been avoided had all contractors and employees been aware of the risks, and had the safety procedures been taken to avoid such risks.*"

Crush death – Council ordered to pay £137,000

London Borough of Camden has been fined £72,000 and ordered to pay costs of £65,000 following the death of a two year-old after being crushed by a wall blown over on a Council estate.

Camden Council pleaded guilty to breaching section 3(1) of the Health and Safety at Work etc Act 1974. The wall collapsed due to a previous defective repair. The repair work was sub-contracted to Chattertons, who have since ceased to exist, though Camden Council was responsible for the work site. Judge Taylor described the overall inspection scheme operated by Camden council to be "wholly inadequate".

Submissions for the Council centred on the appropriate approach to be taken when sentencing a public body. The Judge accepted that while the Sentencing Guidelines applied, case law made it clear that a different approach to sentencing applied in cases involving a public body. It was emphasised that in such a case, the Court should not be looking to 'send a message home' in the way it might do if the defendant was a corporate body whose aim was to maximise profit.

HSE inspector Michael La Rose commented that: "*This tragic incident should serve as a reminder to all organisations to keep their building stock safe, including boundary walls.*". The case demonstrates the extent to which fines may be reduced where the offender is a public body.

Roofing firm sentenced after worker's life put at risk

A roofing firm, M&D Roof Coatings Ltd, has been sentenced after a worker was spotted balancing dangerously on a house roof during a routine inspection by the HSE in the town of Lymm. The company was prosecuted as the employee was photographed power washing a roof nearly five metres off the ground without any safety precautions in place.

HSE inspectors issued an immediate prohibition notice ordering the work to stop until scaffolding, edge protection or other safety equipment had been provided. The employee had not suffered an accident of any kind. However, at Halton Magistrates' Court in Runcorn, the company was found guilty of breaching Regulation 4(1) of the Work at Height Regulations 2005 due to the fact that they had failed to make sure the work was planned and carried out safely. As a result, the company was fined £10,000 and ordered to pay prosecution costs of £7,269.

According to HSE statistics falls from height are among the biggest causes of workplace injuries and deaths in the workplace, with more than 4,000 workers suffering major injuries and 12 workers losing their lives as a result of falls from height. This case is a reminder that risk to the health and safety of workers – as opposed to actual harm – is the primary offence under the 1974 Act.

Cambridgeshire Power Company to pay £150,000 for crush death
ERP Ely Ltd, which operates a straw burning generator at its Elena power station was fined £120,000 and ordered to pay over £30,000 in cost by Cambridge Crown Court following the death of Gary Darnell, a 53 year old driver at the site. Mr Darnell was killed when struck by a 700kg bale of straw while performing an unloading operation using an overhead gantry crane.

The subsequent HSE investigation found a number of procedural failings in relation to the movement of straw bales around the loading and unloading area of the site. The HSE stated that the accident was "entirely preventable". ERP Ely Ltd pleaded guilty to the charges against them under sections 2(1) and 3(1) of the Health and Safety at Work etc Act 1974. The case serves as a reminder for companies to ensure that adequate procedures are in place for the movement of heavy loads and that those procedures are adhered to.

Firms fined £50,000 each for exposing workers to asbestos
An investigation by the Health and Safety Executive (HSE) found that a construction service company and its sub-contractor, put workers and the public at risk by failing to properly manage the presence of asbestos during the refurbishment of a residential block of flats, between 24 November and 8 December 2009.

The work was carried out in an occupied block of flats in the London Borough of Hackney. During the work, asbestos insulation board was disturbed and removed by the sub-contractor who was unlicensed. A previous survey, identifying the presence of asbestos insulation board in a number of the properties, had been provided to the construction service company, but had not been acted upon or passed to their sub-contractors.

The construction service company pleaded guilty and was fined £50,000 at the Old Bailey for breaching Regulation 22(1)(a) Construction (Design and Management) Regulations 2007. The sub-contractor pleaded guilty of breaching regulations 5, 8(1) and 11(a) of the Control of Asbestos Regulations 2006 Both companies were fined £50,000 and ordered to pay joint costs of £20,690.

HSE Inspector Dominic Ellis said: "*Despite recent high profile campaigns on the dangers of working with asbestos, this case sadly illustrates some companies are still failing to manage the risks robustly. The construction service company had information that asbestos was present, yet neglected to act on it, meaning a licensable asbestos material was removed in an uncontrolled manner.*"

Aerospace firms fined £75,000
Two aerospace companies, Brookhouse Composites Ltd and Brookhouse Tooling Ltd, were prosecuted and found guilty in March 2011 under sections 2(1) and 3(1) of the Health and Safety at Work etc Act 1974. The firms were fined a total of £75,000 and found liable for £70,000 in costs by Preston Crown Court, following an incident in December 2008 in which a worker was crushed to death.

Five workers were pushing a trolley carrying more than two tonnes of steel to an autoclave oven in a factory in Darwen. One of the pedestrian walkway panels collapsed while the trolley was being pushed, causing it to fall and trap two workers, Gerald Powderly and Allan Sanderson. Firefighters were need to free Mr Sanderson, but he later died from his injuries.

An inquest held into his death in April 2010 recorded a verdict of accidental death. Nevertheless, the HSE pursued a prosecution against he two companies. In particular, the HSE were critical of inadequate repairs to the panel in questions carried out just months before the incident.

Oscar winner cleared of Health and Safety breaches
An Oscar-winning special effects expert was in March cleared of health and safety breaches in relation to the death of a cameraman during the filming of the most recent Batman film. Conway Wickliffe was killed during the filming of an action sequence for the film in 2007. The accident occurred when a vehicle that Mr Wickliffe was travelling in failed to make a turn and crashed into a tree. Mr Wickliffe had not been wearing a seatbelt and was hanging his head out of the vehicle when it was crushed between the vehicle and a tree.

The police investigations, and an inquest hearing in Woking in November 2008 into the death of Mr Wickliffe, both concluded that the death was a result of a tragic accident. Despite this, the Health and Safety Executive has decided to prosecute Christopher Corbould for failing to ensure Mr Wickliffe's safety. In Mr Corbould's defence it was stated that three rehersal runs had been executed without incident and that Mr Wickliffe owed a duty of care to himself, which included wearing a seatbelt.

First case to proceed in court by way of trial for COPFS Health And Safety Division
Robertson Construction Central Limited and Stirling Stone Limited been convicted of breaches of sections 3(1) and 33(1), and section 2(1) and 33(1) of the Health and Safety at Work Act 1974 respectively.

The case involved the death of stonemason's labourer on the 26th of April 2007. The deceased was working at height on scaffolding when he fell to the ground, sustaining injuries from which he later died. The case is of particular note as it is the first case to proceed in Court by way of trial since the Scottish Crown Office and Procurator Fiscal (COPFS) Health and Safety Division was created in 2009.

Elaine Taylor, Head of the COPFS Health and Safety Division, said: "*By building on our existing expertise and through enhanced working relationships with the Health and Safety Executive and other enforcing authorities, the Division is able to deal with the complex issues that can arise in cases such as this.*"

Health and Safety - what we do

Our expertise

CMS Cameron McKenna is recognised as a leading firm in the area of Health and Safety law. We provide expert advice on regulatory compliance, prosecutions, investigations and corporate governance. We have specialist knowledge of the offshore and energy sectors in particular, which face greater challenges and regulation than most. However, our client base and expertise spans a broad range of sectors, including:

— Aviation
— Construction
— Communications
— Energy
— Leisure
— Manufacturing
— Renewables
— Transport

Regrettably, accidents at work can be serious and sometime result in fatalities. Our clients appreciate the high level of attention and support we are able to offer during what can be a difficult time for any organisation. We are able to provide assistance with every aspect of incident response, including incident investigations, dealing with witnesses, defending prosecutions and advising senior management on relations with the Health & Safety Executive.

Emergency Response team

Our specialist team is on call to provide assistance and respond to incidents 24 hours a day. Our team is qualified to practise in England, Wales and Scotland but also regularly advises clients in relation to international working practices and health & safety matters in other jurisdictions.

Our clients come to us for advice on:

— Health and Safety prosecutions
— Accident Inquiries
— Formal interviews and investigations undertaken by inspectors
— Corporate Manslaughter investigations
— Inquests and Fatal Accident Inquiries
— Appeals against Improvement and Enforcement Notices
— Compliance with UK and European regulatory requirements
— Drafting corporate Health and Safety policies and contract documentation
— Safety aspects of projects and property management
— Due diligence in corporate acquisitions/disposals
— Directors' and officers' personal liabilities
— Management training Courses
— Personal injury defence
— Risk management and training

Recent experience

— Defending Health and Safety prosecutions of client companies.

— Appealing other types of enforcement action against companies (e.g. Prohibition Notices).

— Conducting numerous Coroners' Inquests and Fatal Accident Inquiries - including some of the most high-profile and complex Inquiries to have taken place in relation to offshore incidents.

— Obtaining the first ever award of expenses against the Crown in favour of a client company following a Fatal Accident Inquiry.

— Taking appeals to the High Court of Justiciary.

— Taking appeals on human rights issues to the Privy Council.

— Defending Judicial Reviews.

— Advising on forthcoming Health & Safety legislation.

— Assisting clients in consultations with the Health and Safety Executive and other regulatory bodies, including the Department for Energy and Climate Change.

— Advising clients in relation to Safety Cases, Corporate Governance issues and Directors' duties and liabilities.

— Undertaking transactional due diligence in relation to Health and Safety matters.

— Advising clients on incident investigation, legal privilege and dealing with HSE inspectors.

— Preparing and drafting incident investigation reports.

— Advising clients on media, public relations and reputational issues following incidents.

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