Safety, Health and Environment ("SHE") Regulatory

CLYDE&CO

SHE Regulatory News

Our new Twitter account

We appreciate that the demands on your time and the commitments of your business mean that immediate and easily accessible information is key. With that in mind and having listened to our clients' needs, we have launched a Twitter feed.

Follow us **@ClydeCo_SHEReg** for the latest news, legal updates and insights in the sphere of regulatory law.

Welcome

Welcome to Clyde & Co's Safety, Health and Environment Regulatory Newsletter.

Our SHE Regulatory Team specialises in regulatory defence work and is '*one of the largest health and safety offerings in the UK market*' according to Chambers and Partners UK 2013 whilst we are ranked as a first tier firm by Legal 500 2012, who believe that our practice is '*in the top flight of firms working in this area*'.

We are only too aware of the difficulties that face businesses today with an ever increasing burden of regulation and legal duties. A workplace incident or a breach of those duties often culminates in an investigation and potentially criminal prosecution of a business, its management or staff.

With the stakes so high, it is essential that you and your organisation are kept up to date with changes in the law to protect the reputations of your business, its directors and employees.

Our quarterly newsletter provides a topical update on recent key developments in our areas of specialism:

- **Corporate Manslaughter**
- **Health and Safety**
- **Food safety**
- **Road traffic and transport**
- **Environmental**
- **Fire safety**
- **Trading law**
- **Meet one of the team**

If you wish to subscribe to an electronic version of this newsletter, or if you have any comments or queries regarding the topics covered in this bulletin – please email SHERegulatory@clydeco.com.

Corporate Manslaughter

*STOP PRESS

Clyde & Co represented one of the Directors of Lion Steel Equipment Ltd who was charged with the offences of gross negligence manslaughter and a breach of Section 37 of the Health and Safety at Work Act 1974. We successfully defended both charges and the Director was acquitted on all counts after submissions of no case to answer were made on his behalf.

*For more information about the Lion Steel case please click here to read our article "**Corporate Manslaughter – Are Directors the Bait?**"*

Is the old law still good?

Only days after Lion Steel Equipment Ltd ("Lion Steel") became the third company to be sentenced for the new offence of corporate manslaughter, created by the Corporate Manslaughter & Corporate Homicide Act 2007 ("the 2007 Act"), the Crown Prosecution Service ("CPS") announced that it had charged Esso Petroleum Ltd's ("Esso") maintenance contractor, Austin and McLean Ltd, with the old common law offence of corporate manslaughter.

This article looks at the reasons why Austin and McLean were charged under the old law, and whether this is something likely to occur regularly in the future.

What were the facts of the case?

Austin and McLean had been engaged by Esso to undertake maintenance on a jib used to suspend large fuel pipes during the loading and unloading of cargo from tankers at Esso's oil refinery in Fawley, Southampton.

The incident involved a fatal accident on 30 August 2008 when the jib suspending a fuel pipe collapsed (due to a badly-corroded connector bolt failing) and struck a 40 year old man working on the deck of a fuel tanker which was berthed at the marine terminal.

Prosecution Decision

Following an investigation by Hampshire Police and the Health and Safety Executive, the CPS took the decision to charge Austin and McLean with the old corporate manslaughter offence despite the fact that the accident occurred after the new offence under the 2007 Act became effective in 2008.

A spokesperson for the CPS stated that the firm had not been charged with the new offence because a large part of the company's conduct in relation to the incident occurred prior to the 2007 Act coming into force.

However, this decision may also have been influenced by a Defence application in the Lion Steel case, which the Trial Judge agreed with, that the Prosecution could not rely on conduct which occurred prior to the inception of the 2007 Act as evidence of a breach of the new offence.

What does the future hold?

It will be interesting to see what approach the CPS take to future prosecutions where the conduct which led to the fatal accident occurred predominantly before the inception of the 2007 Act and whether we will see more prosecutions brought, for the time being, under the old law.

Corporate Manslaughter

A warning to Directors

Following the conviction of George Collier for the offence of gross negligence manslaughter, the Crown Prosecution Service ("CPS") stated it had considered charging Mr Collier's defunct company with the new offence of corporate manslaughter but did not feel that it would be in the public interest to do so, especially where the person responsible for running the company had been charged with individual gross negligence manslaughter.

This case should act as a stark warning to Directors to ensure their company has the appropriate health and safety arrangements in place – failure to do so can impact on them as well as their company!

What are the facts of this case?

In October 2012 Mr Collier, a North Wales builder, was found guilty of gross negligence manslaughter following the collapse of a wall which killed a three year old girl.

The wall was designed by Mr Collier and was constructed by his company, Parcol Developments Ltd. It collapsed on 26 July 2008 when the girl was walking past the wall, with her mother, in the Welsh coastal resort of Prestatyn.

The Court heard that the wall was not sufficiently strong to support the weight of the earth stacked behind it. A Principal Inspector for the Health and Safety Executive stated that the primary reason for the failure was the lack of anchorage into the footings. The infill of soil, clay and builder's rubble put behind the wall exerted excessive pressure causing it to collapse.

The Jury's Verdict

The trial of Mr Collier, which lasted three weeks, concluded with a jury at Mold Crown Court returning a guilty verdict of manslaughter by gross negligence and Mr Collier being sentenced to two years in prison.

Parcol Developments Ltd had previously pleaded guilty to a breach of section 3(1) of the Health and Safety at Work Act 1974. No additional fine or costs were awarded against the company because it had ceased trading and had no funds.

> "Mr Collier was found guilty of manslaughter by gross negligence and sentenced to two years in prison."

A warning to Directors

A spokesperson for the CPS stated: "I did consider whether Parcol Developments should also be charged with corporate manslaughter. There is sufficient evidence to prosecute the company for this offence but it would not be in the public interest to do so." It was also said that there would be nothing to gain from prosecuting a defunct small company for corporate manslaughter when the person directly responsible for running that company was facing a charge of gross negligence manslaughter.

It is clear that the CPS may decide not to prosecute a company for corporate manslaughter (even where there is, in their opinion, clear evidence that the offence has been committed) if the company has ceased trading, or been wound up, and a decision has been taken to prosecute one, or more, of its Directors for gross negligence manslaughter.

This should act as a stark warning to Directors that they need to take their health and safety responsibilities seriously. With this in mind, Directors would be well advised to review/revisit the joint Institute of Directors and Health and Safety Executive guidance "*Leadership Actions for Directors and Board Members*" (INDG 417) which can be found at www.hse.gov.uk/pubns/indg417.pdf.

> "Stark warning to directors that they need to take their health and safety responsibilities seriously."

Corporate Manslaughter

Fourth UK company charged with the new corporate manslaughter offence

The CPS has recently announced that it has charged a fourth company, a Norfolk garden centre, with corporate manslaughter following an accident which occurred on the 15 July 2010 resulting in the death of one of their employees. Given the size of the company, a substantial fine could cause the business to close with the loss of up to 50 jobs.

How did the accident happen?

The fatal accident occurred when a metal hydraulic-lift trailer came into contact with an overhead power line. The employee, Grzegorz Pieton, died from an electric shock. The incident occurred at Belmont Nursery, based in Kings Lynn, which is run by PS & JE Ward Ltd.

The Health and Safety Executive attended the site on the day of the accident and served the company with two Prohibition Notices which related to the operation of vehicles in the vicinity of the overhead power lines in a field adjacent to the nursery buildings, and also the movement of metal irrigation pipes under the overhead power lines without a suitable risk assessment or safe system of work being in place.

Only one month later, a further Prohibition Notice was served to prevent the use of a trailer after VOSA found that the brakes were defective. An Improvement Notice was also served relating to information, training and instruction to be provided to employees.

The Defendant

PS & JE Ward Ltd is a small company with fewer than 50 employees with the most recent accounts suggesting it to have net assets of £740,000 and a turnover in 2010 of £4,277,310.

This company is smaller, in terms of both profit and size, than Lion Steel Equipment Ltd, which was the third company to be convicted under the Corporate Manslaughter and Corporate Homicide Act 2007.

We will continue to monitor this case and report on further developments.

> "This company is smaller, both in terms of profit and size, than Lion Steel Equipment Ltd."

*STOP PRESS – New corporate manslaughter prosecutions

At the time of going to press there were two new corporate manslaughter prosecutions. The first is being pursued against MNS Mining Ltd, which owns Gleison Colliery, following a quadruple fatality at the mine on 15 September 2011. The mine manager has also been charged with four counts of gross negligence manslaughter. The second case involves a water sports centre following the death of an 11-year old girl who fell from an inflatable boat ride. We will keep these cases under review and update you when there are any developments.

A nasty sting in the tail – beware of Local Authorities' Planning Departments!

In the construction sector, there is quite rightly a focus on health and safety duties, but businesses and their leaders should beware that breaches of planning control also carry a sting in the tail.

Breaches are traditionally remedied by Planning Departments at local authorities using enforcement or stop notices, injunctions and/or fines.

However, a recent case highlighted that in addition to these sanctions, failure to remedy breaches identified in an enforcement notice constitutes a criminal offence. The same can be said of failure to comply with listed building consent or the carrying out of works to a listed building without consent.

Consequently, as well any fine or custodial sentence that might be imposed by the courts where a business and/or individual is convicted of committing a planning offence, they may also fall foul of the Proceeds of Crime Act 2002 (PoCA 2002), and be subject to confiscation proceedings. In a recent case (*R v Del Basso and Goodwin*), the amount to be repaid by an individual director amounted to £760,000.

Local planning authorities are becoming more savvy in using the full arsenal of their development control powers. This article looks at what constitutes proceeds of crime and the facts of this recent case.

What is "Proceeds of Crime"?

Under PoCA 2002, any financial benefit obtained as a result of a committed offence can be treated as the proceeds of crime. However, if a course of criminal conduct is identified under schedule 2 of PoCA 2002, the whole profit of the business for the last six years could fall under scrutiny, and financial benefit not due to the breach could also be confiscated.

PoCA 2002 is extremely draconian in nature, as the law requires the defendant to prove that monies are not the proceeds of crime, "on the balance of probabilities". The disclosure required by the criminal courts to prove this requires provision of detailed explanation into financial records.

If a confiscation order is not paid, a custodial sentence must be served in default and the monies still remain payable. The length of the custodial sentence is determined by law in correlation with the amount of monies owed.

What are the facts of this recent case?

Del Basso and Goodwin concerned the chairman of a football club who, together with another director, was running a park and ride scheme from the football club car park. Planning permission had been granted for the use of the car park for visitors to the club, but refused in relation to the proposed park and ride scheme.

Nevertheless, the directors of the football club had commenced operation of the park and ride scheme. They continued to do so despite numerous written warnings from the local authority, culminating in an enforcement notice.

The park and ride scheme continued, and the directors of the business were convicted and fined for the breach of the enforcement notice. Undeterred, the scheme continued and was indeed expanded.

Proceedings under PoCA 2002 were instituted following the conviction for failure to comply with the enforcement notice.

It was submitted and accepted by the court that the directors had made no personal profit from the venture. It was also proved that the majority of the "proceeds" had been used to fund the football club. The Judge found this irrelevant in the context of the confiscation proceedings. The key factor was the benefit which had been obtained by the illegal operation of the scheme, not what happened to the monies.

One of the directors was bankrupt and therefore faced only a nominal fine, as he did not have any realisable assets. The other director faced a confiscation order of £760,000, with a default sentence of 18 months' imprisonment imposed.

An appeal was lodged and dismissed. The Judge presiding over the hearing remarked:

"They have treated the illegality of the operation as a routine business risk with financial implications in the form of potential fines or, at worst, injunctive proceedings….The law, however is plain. Those who choose to run operations in disregard of planning enforcement requirements are at risk of having the gross receipts of their illegal businesses confiscated. This may greatly exceed their personal profits. In this respect they are in the same position as thieves, fraudsters and drug dealers."

Businesses and directors – beware the sting in the tail!

Although this is a far cry from the original intention of PoCA 2002, it is clearly a tool that some local planning authorities are prepared to deploy. Not only do such proceedings act as a potential deterrent to offenders who have deliberately chosen not to comply with the law, any local planning authority that is successful in proceedings under the legislation is able to keep up to a third of the assets recovered, which may mean in these austere times there is an added incentive and we see an increase in PoCA 2002 applications.

The clear message from this case is for businesses and directors to ensure they have the relevant procedures in place to ensure they are not breaking planning laws. Failure to do so can impact on businesses and directors to a far greater extent than perhaps envisaged.

What is the future for inquests? An overview of the Coroners and Justice Act 2009

The first substantial reform of the law on Coroners and inquests in England and Wales in over 100 years, set out in the Coroners and Justice Act 2009 ("the Act"), promises a raft of new proposals. Some merely tweak existing rules, whilst others depart significantly from the previous position. This article considers what impact these changes will have in practice and what the future holds for inquests.

Who is the Chief Coroner and what will he do?

One of the most significant provisions of the Act is the appointment of the Chief Coroner. On 17th September 2012 His Honour Judge Peter Thornton QC was appointed to this position.

The Chief Coroner has a number of roles but his main responsibilities will be to:

- Provide support, leadership and guidance for Coroners in England and Wales
- Set national standards for all Coroners, including new inquest rules
- Oversee the implementation of the new provisions of the Act
- Put in place suitable training arrangements for Coroners and their staff
- Approve Coroner appointments
- Keep a register of Coroner investigations lasting more than 12 months and take steps to reduce unnecessary delays
- Monitor investigations into the deaths of service personnel
- Oversee transfers of cases between Coroners, and direct Coroners to conduct investigations
- Provide an annual report on the system to the Lord Chancellor, to be laid before Parliament, which is publicly available and promises a greater degree of scrutiny
- Monitor the system where recommendations from inquests are reported to the appropriate authorities in order to prevent further deaths

What are the other key changes?

The introduction of the provisions of the Act has been slow and is not nearly complete. Of the 51 sections in Part 1 of the Act, only three have been brought into force.

Whilst the Government does not intend to implement certain of the outstanding provisions, the remaining sections will come into force on dates to be notified.

The key provisions to note in the Act are:

- Coroners will remain funded by their relevant Local Authorities
- The Coroner will become known as the Senior Coroner
- Historically a Coroner was either a doctor or lawyer but going forwards will be required to be legally qualified, perhaps reflecting the changing nature of the position
- There will also be the possibility for a Senior Coroner following a death in his or her own jurisdiction to request a Senior Coroner for another area to conduct an investigation
- The requirement to summon a jury in cases in which the death was caused by a notifiable accident, poisoning or disease is retained. A Coroner still has the discretion to summon a jury if he or she "thinks that there is sufficient reason for doing so"
- The Coroner has the power to require evidence to be given or documents produced, as well as the power of entry, search and seizure with the authority of the Chief Coroner

The power to report a matter to persons who can prevent, or reduce the risk or a recurrence of a fatality remains.

> "Ensure a more consistent approach with a national framework where Coroners are held accountable for their practice."

Right of appeal – a missed opportunity?

Section 40 of the Act provided for a new system of appeal against some decisions made in connection with investigations and inquests into deaths. This section has now been repealed meaning there is no right of appeal from an inquest.

The only way of challenging a Coroner's decision remains an application under section 13 of the Coroners Act 1988 for another inquest to be held (whether by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, the discovery of new facts or evidence or otherwise), an application for judicial review (having acted unreasonably, outside of powers or failing to do something) or an application under the Human Rights Act 1998.

Has an opportunity been missed to overhaul the appeals process to offer a clearer system of review or do the remaining methods provide a sufficiently rigorous process? You could speculate on the reasons for the abandonment of what may have been a simpler, straightforward appeals system or is it envisaged that a consistent set of raised standards across the board is preferred?

"Has an opportunity been missed to overhaul the appeals process to offer a clearer system of review?"

What are the implications?

There is much to digest in the Act; however we anticipate the key developments will have the following impact:

- The appointment of the Chief Coroner will hopefully ensure a more consistent approach with a national framework where Coroners are held accountable for their practice
- Coroners must notify the Chief Coroner of all investigations not completed or discontinued within 12 months, and the Chief Coroner will produce an annual report to the Lord Chancellor including an assessment of consistency between areas, actions to prevent future deaths, and appeals. This could result in delays to inquests, and the distress this causes families and interested persons, being reduced
- The opportunity for Coroners to refer inquests to other Coroners could produce centres of coronial excellence
- Coroners with a more legal bias could also affect the extent and impact of investigations undertaken
- Inquests may be heard quicker but will not be any less thorough
- The powers to report the matter to persons who can prevent, or reduce the risk of, a recurrence echoes the existing Rule 43 duty. Such a report can cause a company's hard earned reputation untold damage

The impending changes stress the importance now more than ever of being properly prepared for the inquest and any investigation, to protect a company's interests and brand.

*STOP PRESS – New code for Crown Prosecutors

In the autumn edition of this newsletter, we reported on the proposed new Code for Crown Prosecutors, which was intended to take a more focused, proportionate and effective approach to criminal enforcement (**click here**). The new Code has now been published following the conclusion of a three month public consultation in line with the issues highlighted. The Code can be found at http://www.crimeline.info/uploads/docs/cpscode2013.pdf.

A new era for Local Authority enforcement?

A recent consultation published by the Health and Safety Executive ("HSE") on proposals for a National Local Authority Enforcement Code ("the Code") potentially heralds a new era for Local Authority regulatory enforcement.

The Code has been developed in response to Professor Lofstedt's report, "Reclaiming Health and Safety for all", to ensure a more consistent and proportionate approach to enforcement, with Local Authorities focusing their efforts where it really matters. Given the wide-reaching remit of Local Authority regulation, it is essential that your business understands the proposals.

What is the scope of the Code?

The Code has been drafted to give the HSE a greater role in directing Local Authority health and safety inspection and enforcement activity.

The Code, which will cover England, Scotland and Wales, has four objectives:

1. *To clarify the roles and responsibilities of businesses, regulators and professional bodies to ensure a shared understanding of the management of risk.*

   The HSE will, for example, provide specialist health and safety support and advice to Local Authorities, including a list of those high risk sectors/activities appropriate to be targeted for proactive inspections by the Local Authorities.

2. *To outline the risk-based regulatory approach that Local Authorities should adopt and the need to target relevant and effective interventions that focus on influencing behaviours and improving risk management.*

   For example, Local Authorities should have a risk based intervention plan, focused on tackling specific risks, and use national and local intelligence to inform priorities. They should also regularly publish data on their health and safety inspections to allow transparency and appropriate comparison.

3. *To set out the need for training and competence of Local Authority health and safety regulators, linked to the authorisation and use of Health and Safety at Work Act 1974 powers.*

   Local Authorities should ensure inspectors have suitable and ongoing competence. The inspectors should also assess themselves against the required competencies at least annually to determine any ongoing development needs.

4. *To explain the arrangements for collection and publication of Local Authority data and peer review to give Local Authorities an assurance on meeting the requirements of the Code.*

   Local Authorities should make information regarding their regulatory activities publically available to encourage local accountability and to allow the preparation of national data which will assist Local Authorities to benchmark their work.

   The Code also suggests that "inter-authority peer review" (i.e. undertaken by neighbouring authorities), although not a formal audit, will provide Local Authorities with an assurance that the requirements of the Code are being met.

One of the key areas of focus of the Code is a risk-based approach to ensure that regulatory resources are targeted at workplaces or activities with the most serious risks, or where there is evidence of poor performance. Comparatively lower risk premises should not be the subject of proactive, unannounced inspections.

The Code states that where a business considers that it operates in a lower risk sector and has been unreasonably subjected to a proactive health and safety inspection then it can complain to an independent panel which will consider the complaint and the outcome of its deliberations will be made publically available on the HSE website. Where a complaint is upheld, the HSE will work with the Local Authority to provide advice and assistance to improve and enable their implementation and compliance with the Code.

How to respond

The consultation will run until 1 March 2013. Responses can be submitted at http://www.hse.gov.uk/consult/condocs/cd247.htm. The HSE will then consider all responses, publish a summary and decide how best to take the proposals forward.

A further update will follow once the results of the consultation have been published.

"Focus of the Code is a risk-based approach to ensure that regulatory resources are targeted at workplaces or activities with the most serious risks".

Health and Safety

*STOP PRESS – Fee for intervention update

The Health and Safety Executive ("HSE") has dispatched the first invoices under its new Fee for Intervention Scheme ("FFI"). The recent bills cover all chargeable work done in October and November 2012 and are to be paid within 30 days.

Where a recipient has reason to query the invoice, the HSE recommends the following approach:

- Review HSE 47, "Guidance on the Application of Fee for Intervention", which outlines the principles of FFI. This may answer initial queries.
- If the query or dispute remains, contact the HSE FFI team on 0300 0033 190 or feeforintervention@hse.gsi.gov.uk no later than 21 days after the invoice date. The HSE aims to respond substantively within 15 working days. No fee is payable for this work.
- If the dutyholder remains unsatisfied, a dispute can be raised. This must be done within 10 days of receiving the HSE's response to the query.
- The disputes process has two levels. Initially, the dispute is reviewed by a senior HSE manager who is independent of the management chain responsible for the work (level 1). At level 2, the dispute is considered by a panel of HSE staff and an independent representative.

A fee is payable (at the FFI rate of £124 per hour) for all disputes not upheld.

For a list of issues to consider before paying the invoice, please **click here**.

The fatal consequences of poor food hygiene

The sudden death of a woman who contracted food poisoning after eating a Christmas day lunch has highlighted the serious impact that failures in food safety hygiene practices can have for a business and its employees. With the stakes so high, it is essential that you understand the dangers of poor food safety and what steps your business should be taking to protect itself.

What are the facts?

This tragic case arose after a woman fell ill, along with thirty other diners, due to food poisoning contracted at a pub in Hornchurch, Essex. The lady died in hospital some two days after the Christmas meal.

The Health Protection Agency ("HPA") confirmed that clostridium perfringens bacteria, one of the most common causes of food poisoning, were present in samples sent to the organisation by those affected, including the woman who died. The HPA is working with Havering Council's Environmental Health Officers to investigate the matter further.

What are the lessons?

Unsatisfactory food hygiene arrangements can result in criminal investigation, prosecution in the criminal courts, unlimited fines in the Crown Court, imprisonment, a contribution towards prosecution costs if convicted, director disqualification and adverse publicity.

In order to guard against such adverse consequences, your business should:

- Ensure it has documented food safety management systems to identify where in your operations food safety issues may arise.
- Ensure that all staff handling food have appropriate training and that the training is recorded.
- Monitor all staff and exclude any staff displaying symptoms of food poisoning from working with or around food.
- Regularly monitor your procedures and ensure that they are being complied with.
- Ensure that you can identify suppliers and businesses which you have supplied with your products.
- Immediately inform your Local Authority and the Food Standards Agency if you withdraw food that is unsafe from the market or have reason to believe that your food may be injurious to health.
- In the event of an incident and subsequent investigation, seek legal advice from specialist solicitors to ensure that the position of your business and its employees is not prejudiced.

Remember that it is your business which is responsible for the safety of the food it produces. It is therefore vital that it treats food hygiene seriously. In the worst case, the consequences could be fatal.

*STOP PRESS – Food labelling changes

In the Spring 2012 edition of this newsletter, we reported on the overhaul of food labelling rules (**click here**), with much of the changes expected to come into force this year.

The key changes to note are:

- The Government has revealed plans for a new hybrid method of front of pack labelling which will create a unified system, including traffic-lights and colour-coded Guideline Daily Amounts, to be in place by summer 2013.
- The Food Information Regulations 2013 cover changes including mandatory nutrition labelling, clarity of labels, labelling and information on allergenic ingredients, and country of origin labelling. It is expected they will come into force between 2014 and 2016.

We will continue to monitor the developments and keep you updated.

Is death by driving unlawful killing?

There are many deaths on the road in England and Wales each year, all of which require an inquest to be held.

Until recently, Coroners adopted different approaches as to whether a verdict of "unlawful killing" could be recorded in circumstances where the death was caused by the careless or dangerous driving on the part of another. However, a recent decision by the High Court has greatly restricted the circumstances in which such a verdict will be appropriate. This will be welcome news for both businesses and their drivers who are regularly on the road.

What were the circumstances of the case before the High Court?

The case involved a vehicle recovery technician who attended the scene of an accident on the M60 motorway, near Manchester. Whilst standing at the rear of a vehicle on the hard shoulder, he was struck by a VW Golf motor vehicle and died from his injuries.

The driver of the Golf was investigated by the Police for an offence of causing death by careless driving. Having considered all the evidence, the Crown Prosecution Service ("CPS") decided not to prosecute the driver.

During the inquest, the Coroner referred the case back to the CPS for further consideration, believing there was evidence to suggest that the driver of the Golf drove carelessly. The CPS stood by their original decision.

The inquest resumed and the Coroner left three possible verdicts to the jury: unlawful killing, accidental or open verdict. The Coroner directed the jury that they could return a verdict of unlawful killing if there was sufficient evidence for a conviction of gross negligence manslaughter, causing death by dangerous driving or causing death by careless driving.

The jury returned a verdict of unlawful killing.

What question was the High Court asked to consider?

The verdict was appealed by the driver to the High Court.

The question before the High Court was whether evidence of the commission of a criminal offence of causing death by careless driving was capable of justifying a verdict of "unlawful killing" at an inquest. It was inevitable that their decision would also give consideration to the more serious offence of causing death by dangerous driving.

This issue arose because there is no statutory definition of "unlawful killing" and, therefore, such a verdict is open to interpretation.

This led to some Coroners recording a verdict of unlawful killing for deaths involving road traffic collisions.

What decision did the High Court come to?

The High Court concluded that the verdict of unlawful killing is restricted to murder, manslaughter (including corporate manslaughter) and infanticide only.

In their judgment, the High Court also stated "the main purpose of having a verdict of unlawful killing is to distinguish between those cases where there has been an accident of some kind (where, of course, someone may be to blame for it, even with some degree of responsibility) and those cases where it would be an abuse of language to describe the events leading to the death as simply an accident".

Someone killed by murder or manslaughter is done so either deliberately or by negligence of the worst kind (i.e. gross). Someone killed by careless or dangerous driving has died as a result of an accident. Whilst there may be some criminal liability on the part of the driver, the Court held the scope of an inquest does not permit further investigation of the driver's conduct by the inquest process.

Does this mean that no road traffic related death can amount to unlawful killing?

No, although bad driving cases causing death can only amount to "unlawful killing" for the purposes of an inquest if they satisfy the ingredients of the offence of gross negligence manslaughter. This is only going to apply in very few cases.

Is the High Court's decision welcome news?

This entirely depends on whether you are the family of someone killed in a road traffic collision or a driver who is said to bear some responsibility for a fatal collision.

Certainly, inquests will be shorter and involve far less scrutiny of the driver, as the verdicts open to the Coroner or the jury will be limited to a small few.

Businesses and their drivers will no doubt be relieved that the verdict of unlawful killing is essentially no longer available and that inquests involving road traffic collisions will now be concluded more quickly.

For the full details of the judgment, please see the link below:
http://tinyurl.com/abz5d9h

Packaging Waste: an environmental success story?

As the New Year heralds the introduction of new and tougher targets for those obligated under the packaging waste regime, has the scheme been a success and how achievable are the new goals? This article briefly summarises the application of the system and considers its utility thus far, both from an environmental and an enforcement perspective.

Background

Introduced into domestic legislation by the Producer Responsibility (Packaging Waste) Regulations 2007 (the "Regulations"), the founding principle of the regime is that businesses that manufacture, use and handle packaging should be responsible for its recycling and recovery. The aim of the scheme was to introduce a method of ensuring that recycling and recovery of ever increasing volumes of packaging waste took place and to identify certain minimum standards and requirements to be met in terms of the design and composition of packaging.

What is packaging?

For the purposes of this regime, packaging is a product made from any material which is used for the containment, protection, handling, delivery and presentation of goods from raw materials to processed goods.

Who does it apply to?

The Regulations apply to anyone who is a "producer" of packaging. The test determining the definition requires businesses to have an annual turnover of more than £2m in the last financial year and to have handled in excess of 50 tonnes of packaging in a preceding calendar year. Where the business is part of a group, an aggregation is required of the packaging volumes handled by all subsidiaries.

The business must also have undertaken some or all of the following activities in the preceding and current year:

- manufacturing raw materials for packaging
- converting raw materials into packaging
- packing or filling packaging
- importing packaging
- selling packaging to the final user or consumer
- leasing or hiring out packaging
- operating a pub or acting as a licensor

What do obligated businesses have to do?

Those caught by the scheme are required to register with the Environment Agency, following which they must:

- supply a certificate of compliance, and
- demonstrate that they have recovered or recycled in line with specified targets

How has the UK performed so far?

In 1998, just 27% of packaging waste was recovered. Defra's statistics for 2010 show that the UK is now recovering around 67% of its packaging waste, exceeding its EU set targets in respect of all materials.

> "Method of ensuring that recycling and recovery of ever increasing volumes of packaging waste."

Environmental

What are the new targets?

Material	2012	2013	2014	2015	2016	2017
Paper/card	69.5%	69.5%	69.5%	69.5%	69.5%	69.5%
GlassGlass	81%	81%	81%	81%	81%	81%
Aluminium	40%	43%	46%	49%	52%	55%
Steel	71%	72%	73%	74%	75%	76%
Plastic	32%	37%	42%	47%	52%	57%
Wood	22%	22%	22%	22%	22%	22%
Total recovery	74%	75%	76%	77%	78%	79%
Of which recycling	68.1%	69%	69.9%	70.8%	71.8%	72.7%

How achievable are the new goals?

In June 2011, Defra published the Review of Waste Policy in England. The document highlighted the Coalition's commitment to being, "the greenest Government ever", acknowledging that significant progress had already been made in terms of reducing the volume of waste directed to landfill whilst increasing recycling rates. Drawing on the widely held consumer belief that packaging is a big environmental problem, the Government sought to do more to encourage businesses to continue to change and improve their behaviour and approach to packaging.

The consultation process that followed demonstrated some appetite for the Government's preferred approach, which would impose higher statutorily prescribed targets.

New targets have therefore been introduced and these can be found at http://www.defra.gov.uk/environment/waste/business/packaging-producer/

However, despite the motivations for the new targets concerns have been expressed, particularly within the plastics industry, as to the viability of the new targets with some believing they are near impossible to hit. 2010 recovery and recycling data showed the UK had achieved a rate of 24.1% in respect of plastics, yet the new targets look to reach a rate of 57% by 2017. Defra's representative in the House of Lords, Lord De Mauley noted that *"at present, the UK's [plastic packaging] recycling rate puts us towards the bottom of the EU league table"*. However, he has assured the industry that the Department would monitor progress, *"and take appropriate action if needed"*.

More success for packaging waste?

Aside from encouraging improved recycling and recovery of packaging waste, the regime has provided the opportunity for the EA to flex its enforcement muscle in the form of civil sanctioning.

Whilst the sanctions do not yet apply to the majority of environmental offences, breaches of the packaging waste regime have demonstrated the true value of this method of enforcement. Speaking at a recent conference, Dan Wiley the EA's Senior Legal Advisor for Enforcement, Sanctions and Prosecution confirmed that in 2012 there had been no prosecutions; all contraventions having been dealt with by way of civil sanctions, with enforcement undertakings being particularly successful.

We have previously successfully represented businesses faced with investigation in this area by persuading the Environment Agency to issue a civil sanction instead of proceedings with a time-consuming and costly prosecution.

*STOP PRESS – Deferred Prosecution Agreements

In the last edition of this newsletter, we reported on Deferred Prosecution Agreements ("DPAs") and their suitability for tackling environmental crime (**click here**). The Crime and Courts Bill 2012/2013 is currently making its way through Parliament and has just had its second reading in the House of Commons. The Bill introduces DPAs for dealing with financial and economic crime, although there is presently no suggestion of extending this to other offences. The Bill is unlikely to come into force until 2014; however we shall continue to monitor its passage through Parliament.

Non-compliance with fire safety results in prison

A judge has described the offences of a former takeaway owner in Rochdale as "a wake up" for those running a business, handing down a suspended prison sentence in the process.

This is just one of a string of cases where we have seen prosecutions brought in connection with blocked escape routes and locked fire exit doors. With a clear trend developing, businesses would be well advised to consider such issues as a matter of priority when undertaking their fire risk assessment.

What are the facts of the case?

Fire safety officers from Greater Manchester Fire & Rescue Service inspected the Mr Cod takeaway in Rochdale in February 2011. Officers were shocked by the level of risk with no fire alarm in the building, no fire doors to separate the commercial premises from the living space, and a large number of combustible materials stored in the hallways and escape routes. The case was further aggravated by the discovery of a four-year-old girl sleeping in the basement alongside mains gas and electricity intakes and overloaded extension leads.

Sentencing Usman Farzand, His Honour Judge Timothy Mort said: "*As a matter of common sense the first thing you should have done was pick up the phone to the Fire Service and ask for help as we all know the Fire Service is active in the community and helps people to avoid fires. You failed to sit down and think what to do if there was a fire and consider basic fire precautions in general. This should be a wake up for employees running a business.*"

Mr Farzand pleaded guilty to eleven separate offences under the Regulatory Reform (Fire Safety) Order 2005. The most serious of these was considered to be the lack of a fire risk assessment. He was handed a four month suspended sentence for each offence that will run concurrently and ordered to carry out 80 hours of community service.

> "Businesses would be well advised to consider such issues as a matter of priority when undertaking their fire risk assessment".

The Green Deal – beware of mis-selling!

The "Green Deal" is a Government scheme which is designed to help householders and businesses increase the energy efficiency of properties across the UK. Whilst the incentives and attractions offered by the Green Deal are no doubt high, such improvements could give rise to problems associated with mis-selling.

The Office of Fair Trading is currently focused on this issue, with a recent report stating that there are "potentially aggressive and misleading sales techniques and concerns over the quality of products and services" in this area. Businesses and their salespersons involved with selling products associated with the Green Deal must therefore be careful that they do not fall foul of fair trading rules.

What is the Green Deal?

Many businesses already market green improvements which mainly consist of solar panels, loft insulation, cavity wall insulation and new heating boilers. However, in order to increase the amount of green improvement in the country Parliament passed the Energy Act 2011, described as the "flagship piece of legislation, which will deliver energy efficiency to homes and buildings across the land". The Act includes provisions for the Green Deal framework.

The main feature of the scheme is that the improvement will be provided without any immediate payment by property owners but the cost will be recouped over a significant period of time by additions to energy bills. Tradespeople, manufacturers and others involved in the supply and installation of energy saving products are all able to participate in the delivery of the scheme.

What are the risks?

Whilst nothing should detract from the great desirability of selling energy saving products, the scope for unfair commercial practices is significant.

The OFT has already identified widespread mis-selling of energy products in general. The major form of mis-selling will no doubt be the amount of money which can be saved by making the improvement.

With salespersons likely to be rewarded with commission, the incentives for mis-selling or aggressive selling are high. However, the consequences of engaging in unfair trading practices are serious including criminal prosecution possibly resulting in hefty fines, custodial sentences for the worst offenders, significant prosecution costs, adverse publicity and director disqualification. Businesses and sole traders must therefore tread carefully.

What should you do?

Those involved in providing Green Deal improvements must be authorised by the Green Deal Oversight and Registration Body. This shows they meet Green Deal standards and allows them to use the Green Deal Approved quality mark. This assurance of quality is essential if a business wants to demonstrate compliance with trading requirements.

As a minimum, your business should also:

- Review its existing marketing practices and sales procedures to ascertain whether they are compliant with Green Deal Standards. Further guidance can be found at http://www.decc.gov.uk/en/content/cms/tackling/green_deal/gd_quickguides/gd_quickguides.aspx and consumer protection legislation
- Review its websites carefully, particularly any statements made in relation to goods, services and offers. Follow the link to our previous update "A Festive Message to Online Retailers from the OFT" (**click here**) for further information
- Review existing business relationships; consumers will need to be made aware of any commercial links with other Green Deal participants and third parties
- Train employees to ensure they fully understand the company's policies and procedures and what constitutes an unfair or aggressive commercial practice
- Consider whether any additional training is required on areas specific to the Green Deal
- Implement any appropriate amendments to procedures and ensure employees are trained in these
- Continue to monitor the above in order to ensure compliance

The Green Deal offers many opportunities for those already working in or looking to expand into the energy market. However, it is essential your business operates in this market on a fully compliant basis.

Meet one of the team

1. Who are you?

Mark Brookes, Senior Associate in the Safety, Health & Environment Regulatory Department.

2. Why did you choose the law?

My initial interest in the Law stemmed from enjoying Modern British History at secondary school. During these lessons we spent the majority of our time learning about new laws that were being implemented and the reasons why they were brought into force.

Unfortunately we never went on to study how these laws worked in practice or what the consequences were when they were breached. Studying law seemed like the logical next step to answer some of these questions.

I should also confess that I have read all the John Grisham books.

3. What appealed to you about this career?

Since university I have always wanted to be involved in advising and representing clients in criminal related matters.

There is nothing quite as exciting and nerve racking as being involved in a Crown Court Trial where a jury of twelve members of the public are deciding the fate of a client.

The drama of the Crown Court is one of the reasons why there are so many TV shows and films on our screens depicting the various different scenarios which commonly occur at courts around the country on a daily basis.

I have been fortunate over the last few years to have been involved in a number of cases before Juries and I work in a Department that has a good track record in obtaining positive results for clients.

4. How would your colleagues describe you/ how would you describe yourself?

I would hope that the answers to these two questions are the same – which are approachable, knowledgeable, professional and most importantly reliable.

5. Have you had any particularly interesting cases recently?

Just before Christmas I was involved in a four day Crown Court Trial, where our client was being prosecuted for Causing Death by Careless Driving.

It was both a sensitive and complicated case. The deceased was an elderly man who had been knocked over by our client's Heavy Goods Vehicle ('HGV'), while he was crossing the road.

The issues at Trial revolved around the visibility or lack of visibility afforded to a driver of a HGV, despite the fact there are a number of mirrors present around the cab of the vehicle to assist the driver.

One of our main issues at Trial was to try to dispel the myth that simply because a HGV driver is seated in a high up driving position, he has a good view of various different areas around the cab. Indeed, it is actually very surprising and slightly worrying how little can be seen by a HGV driver.

6. What was the outcome?

On the afternoon of the fourth day of the Trial the jury returned a unanimous 'Not Guilty' verdict. Clearly this was a great relief to our client who had never been either arrested or before a court previously. A conviction would have resulted in a minimum 12 month disqualification from driving and a potential custodial sentence.

Professionally the result was also a huge relief; the combination of several months of hard work and a defence case which we genuinely believed should result in an acquittal. Unfortunately with a jury you can never guarantee they will see the evidence in the same way as the defence team, but on this occasion, thankfully, they did.

7. What do you do in your spare time?

I enjoy a large number of sports particularly football and cricket, although unfortunately this is now mainly watching rather than playing.

8. What is your favourite holiday destination?

Last year I was fortunate enough to go to the Monaco Grand Prix, which was a fantastic experience. I have promised myself that I will go to a different Grand Prix every two years, with Valencia being the next one on the agenda.

In terms of a dream holiday then this would have to be following the England Cricket team on a tour of either the West Indies or Australia.

9. What would you be if you weren't a lawyer?

I would probably be involved in sport in some way and journalism would be my favoured option.

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Further advice should be taken before relying on the contents of this summary.

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