Health & Safety Lawyers Association

HSLABULLETIN

July 2012

In this issue...

Leadership in a Crisis: the Costa Concordia

As the Costa Concordia ship began to tilt over and came to rest in a precarious position upon the rocks off Italy's west coast, the passenger ship industry, and indeed other industries, were unlikely to have appreciated the far reaching ripples this incident would cause.

Leaving aside the prosecutors' prompt questioning of the Captain and preservation of evidence for the future manslaughter prosecution which was to be commenced against the Captain, the aftermath of such a tragedy requires strong leadership on the part of many, including the authorities, those leading the rescue/recovery operations and the ship owners and operators.

Managing the safety of the recovery teams, drawn in this case from the coastguard, navy and fire brigade, was an extremely challenging task with the vessel tilted 90 degrees, with visibility beneath the water limited in places to little more than a couple of inches and a series of confined spaces on board to check. The dive crews were forced to swim through all manner of debris, marking their inward route with thread so as to ensure the way out was clear in the event of a further emergency such as the ship slipping off the rocky shelf on which it was then balanced.

Pre-dive briefings were delivered with the benefit of large plans to illustrate which parts of the vessel could be searched, with laminated copies issued to divers to take with them. Clarity of communication and confirmation of instructions in this manner is, of course, vital.

Also, fitness tests were undertaken to ensure the divers were fit for the arduous conditions ahead of them, and dive times were strictly limited.

Costa itself was prompt to issue a press statement, to express their great sorrow. The words, "We're very sorry," flowed without hesitation – such important words for a company to use towards those bereaved and suffering, without overly defensive lawyers and insurers preventing such humanity. Whilst "human error" was promptly said by them to be the cause, undoubtedly a thorough investigation has also been undertaken so as to ensure all appropriate lessons are learned.

And so too is there a requirement for leadership on the part of the industry as a whole following an incident of this scale. In a determination to avoid more loss of life, various safety reviews have been announced, including the launch of a Cruise Industry Operational Safety Review by the Cruise Lines International Association, Inc. and a regulator's Passenger Ship Safety Review by the International Maritime Organisation (IMO).

In the interim, the IMO has called upon Member States to ensure that their current national safety regulations and procedures are being implemented fully and effectively. For those of us who advise operators in this industry our clients should expect a period of intense scrutiny.

Those in the marine industry would be well advised to take this opportunity to review their own approach towards compliance with the International Safety Management Code, the robustness of their efforts to prevent human error and their crisis management plans. Safety lawyers with clients in this sector have an important role to play in highlighting the importance of doing this, and maybe assisting their clients in the exercise.

In many other industries, especially those where passenger safety is also an important priority, the background to the tragic demise of the Costa Concordia, and the response by regulators and industry, not to mention the pending prosecutions, are bound in due course to provide general lessons in good safety leadership for all, and a timely reminder of how the courts will punish those found wanting.

Madeleine Abas, HSLA Chair
Osborn Abas Hunt Tel. (0161) 200 8450

Click here for a profile...

Fire, Fire, Burning Bright!

The Regulatory Reform (Fire Safety) Order 2005 came into force on 1 October 2006, replacing regulations made under the Fire Precautions Act 1971. This order was made pursuant to the Regulatory Reform Act 2001 to be in compliance with the EU directive on fire safety in the workplace and business premises. There have been a series of recent cases where the fines have been gradually ramping up. Arguably, the first relevant case fell under the previous legislation. In ESB Hotels Ltd, owners of a hotel pleaded guilty to two counts of contravening the requirements of a Fire Certificate, contrary to section 4 of the Fire Precautions Act 1971. Bed mattresses had been stored in various corridors. Investigators found that the hotel staff did not appear to have a complete understanding of the potential fire hazard. The seat of the fire was the ignition of mattresses which had been caused by a deliberate act of an employee. The fine was reduced from £400,000 to one of £250,000.

In R v Shell International Ltd, Shell was fined £300,000 in 2009 for the breaches of the 2005 Legislation. The Shell building employed about 2,000 people. There had been two small fires in three weeks in the Waterloo Shell Centre. There was no appeal against sentence.

In R v New Look Retailers Ltd [2010] EWCA Crim 1268 the Court of Appeal (Criminal Division) looked again at the relevant law and previous decisions. It concerned an appeal against a £400,000 sentence imposed by HHJ Rivlin QC for two offences under the Regulatory Reform (Fire Safety) Order 2005. The national clothing retailer had a serious fire in its Oxford Street premises. The fire probably started in a store room on the second floor. Thirty fire appliances attended and Oxford Street was closed for two days. Four hundred people had required emergency evacuation. Article 8(1)(a) of the Order requires that the responsible person under the Act must take such fire safety precautions as will ensure so far as is reasonably predictable, the safety of his employees. Article 8(1)(b) also requires the responsible person to take such general fire precautions as may be reasonably be required to ensure that the premises are safe.

The original indictment had 35 alleged breaches of duty but the actual indictment set out two counts, namely (a) a failure to carry out an adequate risk assessment and (b) a failure to ensure that the employees were provided with adequate training. The Court of Appeal in determining the appropriate sentence looked at a number of factors and made some interesting observations.

One such observation was, "Contrary to the submissions made to us ESB [the case last cited], in our view, provides support for the judge's observation that assessing fines in these cases is, first and foremost, a fact sensitive exercise." They also quoted and agreed with what HHJ Rivlin QC had said, "... when it comes to fire, one does not have to think very deeply in order to appreciate the potential for disaster." They went on, "What the sentencing judge was entitled to recognise was the fact that the nature of the risk against which employees and others were to be protected was the risk from death or serious injury in a fire. Fire can be indiscriminate in its effect and, in the case of an organisation which is in the centre of a large city undertakes responsibility for a large number of visitors to its premises, breach will usually be a very serious matter." They continued, "What the fire served to illustrate was the magnitude of the risk which the appellant ran with public safety. Exactly the same considerations would have been relevant if, in the case of a near miss, investigation had revealed wholesale disregard by Balfour Beatty and Railtrack [see R v Balfour Beatty Rail Infrastructure Services Ltd [2006] EWCA Crim 186] for their responsibilities towards rail passengers. Fines would in that eventuality have been imposed for the magnitude of the risk knowingly taken and not for the causation of any tragic consequences." It is perhaps of some interest that the court used a Health and Safety case as an analogy.

In conclusion, the court said, "However, we share the judge's scepticism, expressed during argument, that the appointment of a single fire safety advisor for a group of 600 and more shops was a sufficient response to the magnitude of the obligation." They felt that, "The breaches of duty acknowledged by the appellant fell into two distinct categories, first, deficiencies in the appellant's provision and maintenance of fire safety precautions and, secondly failure to provide any adequate training and retraining schemes not just for essential health and safety staff but employees generally. We share the judge's view that the appellants' performance of its fire safety duty in a large departmental store in the centre of London was lamentable. The fines were, we recognise severe, but they were not in our judgment manifestly excessive and the appeal is dismissed."

This judgment has heralded a more stringent approach by the courts and penalties are increasing in severity.

In April 2010, Tesco was fined £95,000 at Wood Green Crown Court and ordered to pay £24,000 in costs after pleading guilty to five breaches of the 2005 Fire Safety Order arising from various breaches at their store in Barnet after a small fire in the staff kitchen. London Fire Commissioner, Ron Dobson, said, "Fire safety is a key part of good business management and the general public should feel safe from fire when they are out shopping. London Fire Brigade will continue to take action when businesses, large or small, do not take their fire responsibilities seriously. Failure to comply with the law can, as this case has shown, result in a prosecution."

Also in April 2010, the Co-operative Group was fined £210,000 and ordered to pay £28,000 costs. The company pleaded guilty to six breaches of the Fire Safety Order relating to their store in Southampton. These related, inter alia, to failure to keep the rear emergency exit doors unlocked for easy egress in an emergency and the fact that they had fitted a lock between the retail and storage area which required a security code to unlock it.

The judge said that the case demonstrated a lamentable approach to fire safety and that the Group had been responsible for a potential death trap, given the severity of the fire safety failings.

In 2010, a hotel in Cheshire was fined £75,000 and £52,000 costs imposed after pleading guilty to three breaches of the Regulatory Reform (Fire Safety) Order 2005. During renovation, a prohibition notice was served on the hotel. There was no operable automatic detection system and there were faulty smoke detectors. The hotel was allowed to reopen four days after the remedial action was taken.

In July 2011, a hotel manager of two hotels and an external fire risk assessor, Mr O'Rourke, were both jailed for eight months for fire safety offences. Nottingham Fire and Rescue Services found in a routine inspection that fire precautions in the sleeping areas were inadequate, including at one hotel where officers found both staircases terminated in the same ground floor area with no alternative escapes or separation. There were also blocked exit routes and a locked fire door. Mr O'Rourke also pleaded guilty to two counts for failing to provide a suitable fire risk assessment.

Further, at Blackfriars Crown Court, a hotel owner has recently been fined £210,000 following a fire. It is believed to be the first time a jury, rather than a judge or a magistrate, has convicted an organisation for breaches under the Regulatory Reform (Fire Safety) Order 2005.

In 2011, the HSE prosecuted two waste recycling companies after a major fire on an industrial estate near Preston. More than 100 fire fighters and 25 engines were needed to put the fire out. It spread to more than 10,000 sq metres and surrounding roads were closed for a day. They were prosecuted under section 2(1) and section 6(1)(a) of the HSWA. The companies were fined £87,000 and costs of £137,000 were imposed. The Chief Fire Officer of Cheshire stated, "This was a major incident which could have been a lot worse if crews had not prevented flames from reaching cylinders containing 25 tonnes of liquid petroleum gas close to the original site of the fire. It is extremely fortunate that there were no injuries to members of the public or fire fighters."

In 2011, a London building owner was sentenced to six months suspended prison sentence after being convicted of seven offences under the Regulatory Reform (Fire Safety) Order 2005. He was also sentenced to 150 hours of community service and £13,000 in costs. The property was used as a takeaway restaurant whilst the upstairs was used as sleeping accommodation. The officers found a range of fire safety breaches, including no fire doors or emergency lighting. There was also no alternative means of escape from the sleeping accommodation.

In 2011 the owners of a Cornish hotel were fined £80,000 and £62,000 costs. The fire in Newquay, described as the worst British hotel fire in 40 years, killed three people. There were failings relating to checking that the alarms and detectors were working and a failure to make an adequate Risk Assessment. Further, recently, a north Devon landlord in Ilfracombe was fined £11,500 and asked to pay £3,000 costs after a major fire occurred in flats. No one was injured.

Finally, in June 2012, ASDA Stores Ltd were fined £40,000 and £15,647 costs after pleading guilty to two charges under the Regulatory Reform (Fire Safety) Order 2005. An inspection by Royal Berkshire Fire Authority identified serious breaches, including two fire exit doors that were chained and locked shut and fire exit doors wedged open. The Fire Authority said "Staff and customers are entitled to feel safe when working at, or visiting, a supermarket or any other premises. We will continue with our efforts to ensure that any business owner, or manager who refuses to take obligations seriously will be brought before the courts."

In conclusion, these cases herald a severe approach to issues relating to fire risk. Organisations and individuals (including professional advisors) who do not have adequate systems and assessments in place run the risk of large fines and terms of imprisonment. Prevention is now more than ever, the touchstone of prudence.

This article is partly based on a previous article by Gerard Forlin QC in the New Law Journal in March 2012.

Gerard Forlin QC

Cornerstone Barristers (previously 2-3 Gray's Inn Square)

Tel. (020) 7242 4986

Click here for a profile...

Acquiescence: an abuse all of its own

The particular relationship between commercial undertakings and the HSE / local authorities as regulators has frequently been the source of applications to stay proceedings as an abuse of process in criminal proceedings. Defendants have successfully argued that it would be unfair for them to be prosecuted for conducting their undertaking in a way previously approved by the prosecutor (or another government agency) in the role of regulator (e.g. Brent LBC v Postermobile [1997] EWHC Admin 1002; R v Petrus Oils (2008); Trafford BC v Leavey (2004); Stroud DC v Equiland & Anr (2008)). Such applications sit comfortably alongside the Court of Appeal's decision in R v Tangerine Confectionery Ltd & Anr [2011] EWCA Crim 2015 as to the elements of the offences under the HSWA.

"Acquiescence" has been adopted as the moniker for cases which properly fall into this category. It should not be confused with an assurance or promise not to prosecute (on the limited circumstances in which such promises give rise to abuse, see R v Abu Hamza [2007] 1 Cr App R 27). This is particularly important since the Courts are much more familiar with the latter category. The central element of acquiescence – an approval of the Defendant's conduct by a regulator – does not occur in cases of promises not to prosecute. Indeed, no such relationship exists in the "mainstream" criminal context.

Acquiescence is to be distinguished from a defence. It stands alone as a category of abuse of process. The distinction is important, especially since there is a temptation for the court to equate the two and thereby fail to give proper regard to the application: either, in a defended trial, in the belief

that the trial can proceed without denying the defendant the opportunity to present its case; or, if the defendant has no substantive defence and seeks to defeat the prosecution by an abuse application alone, in the belief that granting the application would amount to an unjust windfall for the defendant.

The approval at the heart of an acquiescence does not necessarily signify that there was / is no breach of duty, but rather that the regulator communicated to the defendant that, in its opinion at the time, the defendant's undertaking was being conducted in compliance with its duties. The approval may have been incorrectly given, certainly in the later opinion of the prosecutor, or in the opinion of other employees of the same regulator / prosecutor. However, if the defendant relies upon that approval, a subsequent prosecution based on that approved conduct is rendered abusive.

Applicants should nonetheless beware prosecutions which are not co-extensive with the approval given. For example, policies or procedures may have been approved, but if the prosecution rests on a failure to implement those policies, the later criticism does not contradict the approval and no abuse is likely to be found.

In last year's Marks & Spencer asbestos litigation, precisely this problem arose. Three months before the trial, Marks & Spencer argued that its "Green Guide" asbestos removal policy had been approved by HSE, and that therefore a prosecution based on its inadequacy was abusive. Rather than deny that there had been acquiescence to the contents of the Guide, HSE defeated the application by characterising its case against M&S as a failure to ensure that less than full rigour precautions for asbestos removal set out in the guide were not used by contractors in circumstances in which it was inappropriate for them to do so. At trial, the evidence from the Asbestos Licensing Unit was rather clearer than that from the documents alone that there had been acquiescence to the contents of the guide, so the prosecution's approach to the previous application was shown to be even more important. But the over-arching point is that where the prosecution extends beyond any acquiescence, it is likely to survive, albeit possibly in a narrower form.

In Tangerine, the Court of Appeal determined that it will be for the prosecution at a trial to prove that the risk of injury was foreseeable as an element of an offence under section 2 or 3 of the HSWA as at the time of commission. Whilst, as set out above, acquiescence is distinct from a defence, it is noteworthy that it sits very comfortably as a category of abuse of process alongside the analysis of Tangerine: if a regulator has previously stated that the conduct of an undertaking is in compliance with its duties, a prosecution based on a contrary view being taken subsequently is rendered still less attractive post-Tangerine, since it will require the prosecution to prove the foreseeability of a risk which they themselves failed to identify at an earlier stage.

The exceptional nature of the exercise of the Court's power to stay proceedings as an abuse of process is well established. The Courts are naturally cautious in their approach to such applications. However, in circumstances in which an employer has been in receipt of previous attentions from the regulator and received a "clean bill of health" (Equiland), it will always be worthwhile to consider carefully whether such an application can be made if they are later prosecuted. In light of the decision in Tangerine, it may properly be hoped that the initial sympathy of the Court for an application per se, which is so often a practical essential to its success, will be more easily secured.

Harry Vann

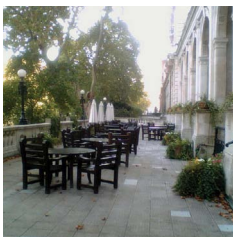
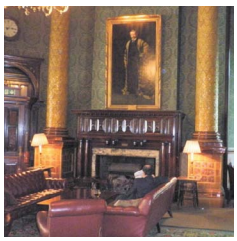
Crown Office Chambers

Tel. (020) 7797 8100

Click here for a profile...

Upcoming Events

Don't forget the HSLA Summer Party!

On Thursday, 12 July, 5.30pm – 8.30pm

At The National Liberal Club, The Terrace & The David Lloyd George Room, 1 Whitehall Place, London SW1A 2HE

The event is free of charge for all HSLA members and their individual guests.

Please confirm your attendance (and the name of any individual guest) to the HSLA Administrator, Hilary Riddle by email hilary@hradmin.co.uk or telephone (020) 8444 5609.

Please keep an eye on our website for further events information: www.hsla.org.uk

The HSLA e-bulletin is a good way of sharing your views about current issues affecting health and safety law and those who work with it. If you have articles or ideas for inclusion within future editions of the bulletin, please contact our bulletin editors:

Michael Veal: e-mail Michael.Veal@LA-law.com

Austin Stoton, e-mail AStoton@2bedfordrow.co.uk