# PRESENTATION TO ATAC MEMBERS

20TH JANUARY 2010

## Getting it Wrong - Litigation and Prosecution

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# Failure to Manage: Potential Legal Liabilities

| | |
|---|---|
| Criminal: | Health and Safety at Work Act 1974 (HSWA)<br>Control of Asbestos at Work Regulations 2006 (CAR) |
| | Prosecution by HSE/local authorities<br>Companies and individuals<br>Penalties - criminal conviction, unlimited fines, prison, remedial order<br>Licensing restrictions |
| Civil: | Claims for damages for personal injuries, property damage |

# Criminal Liabilities

HSWA 1974 - Offences by companies

s2 (1) duties of employers to their employees

s3 (1) duties of employers to others

"*Risks*" R v Board of Trustees of the Science Museum [1993]

the possibility of danger was sufficient, no need for the prosecution to show actual danger

R v EGS Limited [2009]

"Material risk"

Reasonably practicable

R v HTM [2007]

Employer not required to guard against the unforeseeable.

# Individual Offences

HSWA s37 (1) - Offence committed by the company

*"with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager or other similar officer……he as well as the company shall be guilty of that offence".*

HSWA s7 (1) - Duty of every employee to take reasonable care for the health and safety of himself and others.

# Penalties

Health and Safety Offences Act (2008)

In force 16 January 2009

Raises the maximum fine in the Magistrates Court to £20,000

Imprisonment an option for more offences

More “either way” offences

# Recent Fines

R Maskell Ltd £150,000, £30,000 costs 06/08/08

s2 (1) HSWA, Reg 18, Construction (Health, Safety and Welfare) Regulations 1996

LCH Contracts £70,000, £13,821 costs

CAR breaches

- workers exposed to ACM's

PW Mills (Cradley) CAR, HWSA breaches

Company in receivership

Manager received a conditional discharge

Inconsistency in sentencing

# Powers of HSE Inspectors

HSWA s20 (1) (a) to enter any premises

(g) to take samples

(k) to require the production of any books or documents (not search and seize)

(j) to require any person to answer such questions as the inspector thinks fit to ask and to sign a declaration as to the truth of his answers

Offences s33 (h) intentionally to obstruct an inspector in the exercise or performance of his powers or duties

# Interviews

Query basis of the interview request

- voluntary

- s20 HWSA: “nominated person” present

- Interview under caution: legal representative

The employers solicitor and conflicts of interest

# Improvement and Prohibition Notices

ss, 21, 22 HSWA

“If an inspector is of the opinion that”

Right of appeal to the Employment Tribunal rarely used

Chilcott v  Thermal Transport Limited [2009]

Tribunal not limited to considering the reasonableness of inspector's decision

Focus should be on the risk at the time that the notice was served

# Preparing for Enforcement Action

Preparing for enforcement action

- Is there a disaster management plan?
- What about document management policies?
- Evaluate competence of health and safety personnel and others with safety responsibilities.
- Keep up to date with new legislation and HSE guidance
- Are directors and senior managers aware of the investigative powers of the Police and HSE?
- Is there adequate cover for legal defence costs: the company and individuals

# Approach of the Civil Courts

Willmore v Knowsley MBC [2009] (on appeal)

Local authority was liable after Willmore developed mesothelioma following her exposure to asbestos at school. Once exposure above a minimal level was found, a risk of harm was established.

Sienkiewicz v Greif (UK) Ltd [2009]

Claimant was an office worker, exposed to a low level of asbestos dust in the general atmosphere. Required standard of proof is whether the exposure materially increased the risk of contracting mesothelioma.