



Fisher Scoggins LLP

Effective Emergency Response

Stick, Carrot, Court or Cash

by
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Dublin

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How can regulators best improve safety?

- Advise/assist (free or for payment)
- Encourage
- Reward (insurance premiums, gold stars)
- Threaten (prohibition/improvement)
- Punish (prosecute)
- Stigmatise (name and shame)
- *Which (if any) works?*



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The legal cudgels for safety improvement

- Heavier fines
- Prospect of jail
- Bad publicity
- Judicial criticism
- Improvement orders
- Directors disqualification
- Do any of them actually work?



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Heavier fines ... the curve turns upward

“Disquiet has been expressed in several quarters that the level of fine for health and safety offences is too low. We think there is force in this and that the figures with which we have been supplied support the concern. A fine needs to be large enough to bring that message home where the defendant is a company not only to those who manage it but also to its shareholders.”

**Scott Baker J
R v Howe & Son Engineers
Court of Appeal Criminal Division
6th November 1998**



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The big financial stick ... but wishful thinking?

“Knowledge that breach of this duty can result in a fine of sufficient size to impact on shareholders will provide a powerful incentive for management to comply with this duty. This is not to say that the fine must always be large enough to affect dividends or share price. But the fine must reflect both the degree of fault and the consequences so as to raise appropriate concern on the part of shareholders at what has occurred. Such an approach will satisfy the requirement that the sentence should act as a deterrent.”

Lord Phillips CJ
R v Balfour Beatty Rail Infrastructure Services
Court of Appeal Criminal Division
5th July 2006
§42 [the Hatfield appeal: £10m → £7.5m]



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Really big money AND harsh words

“The company have chosen to attempt to blame the explosion on an internal pipe leak (i.e. something for which they are not responsible) despite overwhelming evidence to the contrary including the views of their own employees on site after the explosion. There was no evidence at all in this case that such an internal leak had occurred. That aspect of the defence by the company serves only to demonstrate that the corporate mind of Transco has little or no remorse for this tragedy which, they ought at least now to accept, was exclusively their own creation”

Lord Carloway

R v Transco

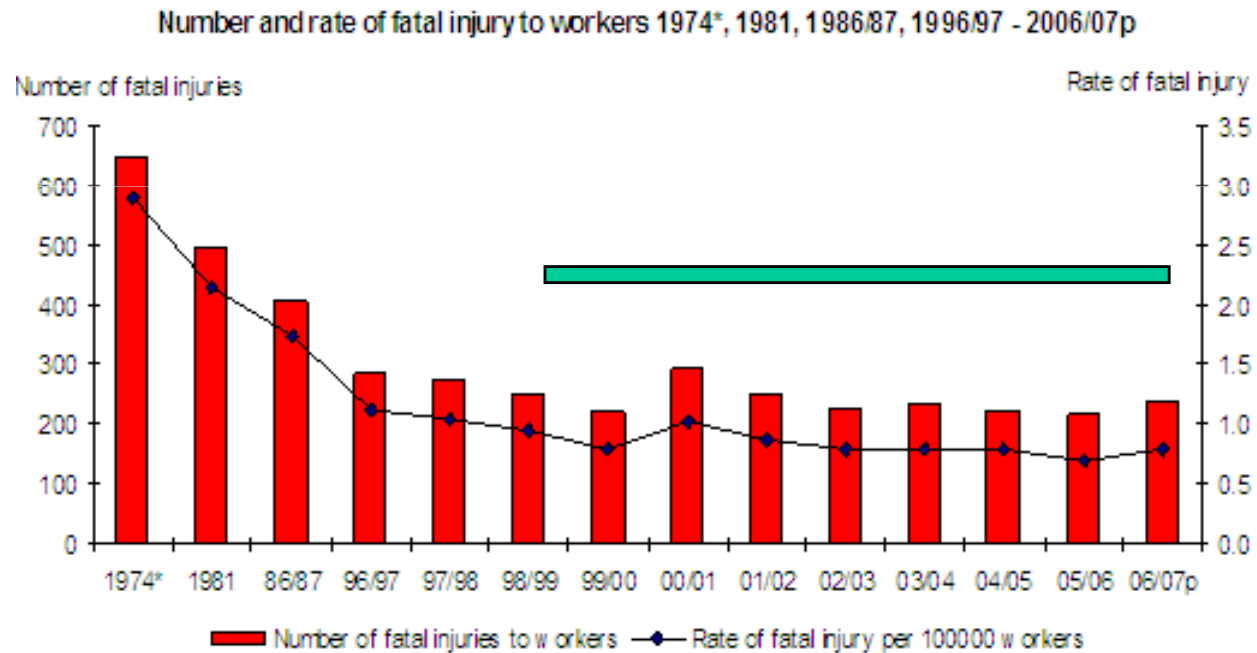
Court of Session

25th August 2005

[the Larkhall explosion: £15m]



Has it worked? Fatal accidents – workers

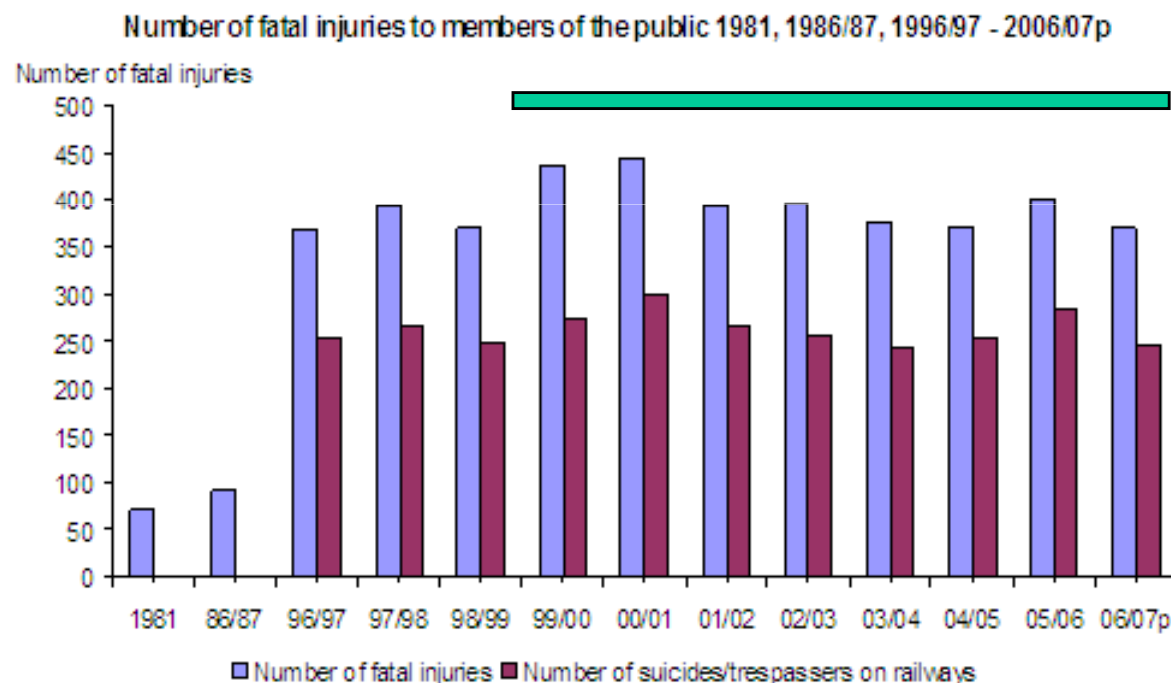


Source: HSE



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Has it worked? Fatal accidents – members of the public

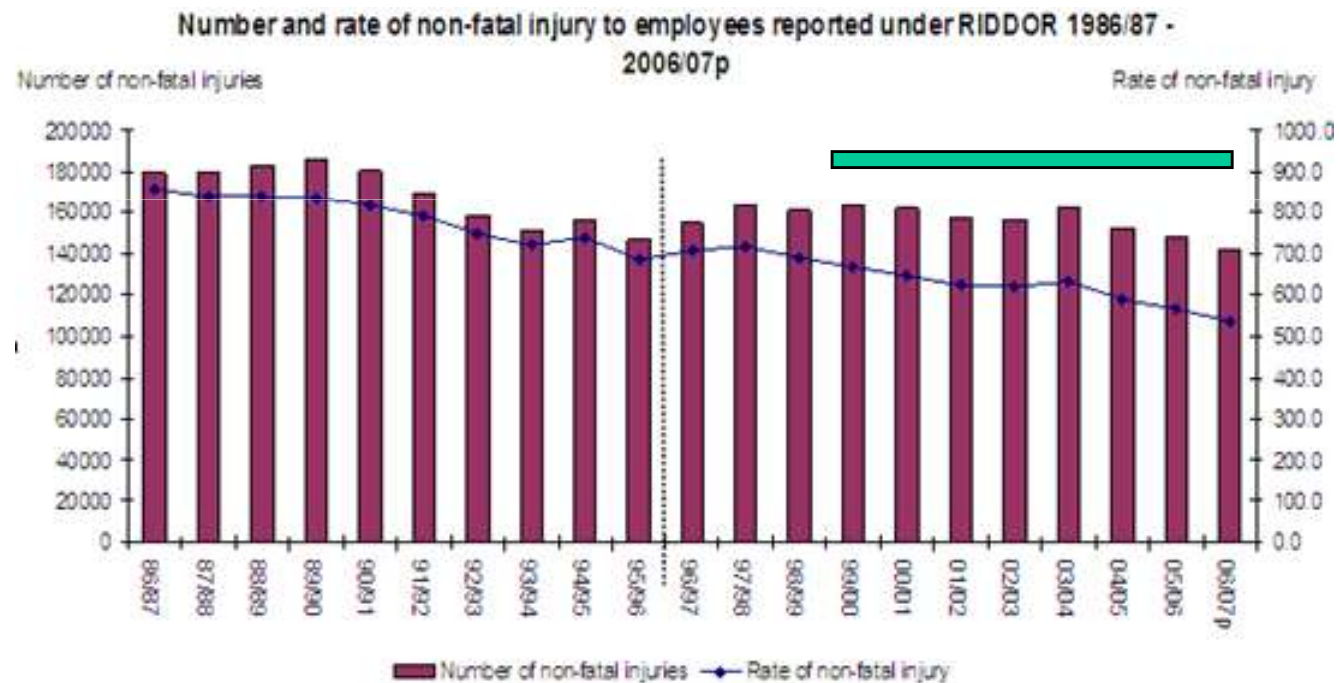


Source: HSE



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RIDDOR reports



Source: HSE



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Has it worked? The level of fines

	Average fine per offence (£)	Change from previous year
02-03	5,555	-
03-04	6,524	+ 12%
04-05	7,010	+ 11%
05-06	6,412	- 9%
06-07	8,723	+ 13%

Why so low? Culpability & means

Source: HSE (prosecutions by HSE alone - adjusted for anomalies)



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Prosecutions in context

	Prosecutions	Convictions	Rate
02-03	1,989	1,558	78%
03-04	2,130	1,671	78%
04-05	1,652	1,306	79%
05-06	1,313	1,087	82%
06-07	1,445	1,106	76%

Average annual number of RIDDOR reports c.175,000

Source: HSE (prosecutions by HSE or by local authority)



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So what now?



A flurry of activity ... but to what end?

- HSC/IoD INDG417 (October '07)
- Corporate Manslaughter Act 2007 (April '08)
- Sentencing Advisory Panel consultation (February '08)
- Health & Safety (Offences) Bill 2008 (current)
- Regulatory Reform & Sanctions Bill 2008 (current)



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Encouragement with a thinly-veiled threat?

“leading health and safety at work”

INDG 417

Joint HSC/IoD publication

October 2007

Generalities and vagueness

HSE’s expressed view on status



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Sentencing for corporate manslaughter (and H&S fatalities)

- SAP draft Guidelines recently out for consultation
- Key recommendation is fine as percentage of turnover
- Starting point 5% of annual turnover (even on early guilty plea)
- Going up to 10% or down to 2.5%
- The implications for large corporate groupings
 - OpCo + BBML/BBGL + PLC
- A huge leap in baseline penalty levels if adopted
- A (much) more worrying suggestion in the consultation
 - fatalities from non-manslaughter breach of H&S duties
 - also as a percentage of annual turnover
 - starting point 2.5%
 - Stockwell: £175,000 fine would be £57 million



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Make you pay to publicise your wickedness?

“A court before which an organisation is convicted of corporate manslaughter or corporate homicide may make an order (a “publicity order”) requiring the organisation to publicise in a specified manner—

- (a) the fact that it has been convicted of the offence;
- (b) specified particulars of the offence;
- (c) the amount of any fine imposed;
- (d) the terms of any remedial order made.”

**Corporate Manslaughter and Corporate Homicide Act 2007
Section 10**



Judicial compulsion? But past history ...

“A court before which an organisation is convicted of corporate manslaughter or corporate homicide may make an order (a “remedial order”) requiring the organisation to take specified steps to remedy—

- (a) the the relevant breach;
- (b) any matter that appears to the court to have resulted from the relevant breach and to have been a cause of the death;
- (c) any deficiency, as regards health and safety matters, in the organisation’s policies, systems or practices of which the relevant breach appears to the court to be an indication.”



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Nothing new ... and extremely rarely used

“Where a person is convicted of an offence ... in respect of any matters which appear to the court to be matters which it is in his power to remedy, the court may, in addition to or instead of imposing any punishment, order him, within such time as may be fixed by the order, to take such steps as may be specified in the order for remedying the said matters.”

**Health & Safety at Work etc Act 1974
Section 42**



Put people in jail?

“The effect of the Bill is to:

- (a) raise the maximum fine which may be imposed in the lower courts to £20,000 for most health and safety offences;
- (b) make ***imprisonment*** an option for more health and safety offences in both the lower and higher courts;
- (c) make certain offences, which are currently triable only in the lower courts, triable in either the lower or higher courts.

At present, imprisonment is an option only in certain cases. The Bill will make imprisonment available for ***most*** health and safety offences.”

Health & Safety (Offences) Bill 2008
Explanatory Note



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A reality check: rehabilitation or deterrence?

“I hope also that the cost to the business of rectifying the deficiency that caused the health and safety breach will be taken into account. Paying a fine is one thing—we all accept the reason for fines and their importance as a deterrent—but we must remember that the first and most important thing that the business needs to do is to buy and install the necessary safety apparatus, such as railings or harnesses, to ensure that its workers are safe.”

**Andrew Selous MP
Debate on the H&S (Offences) Bill
26 March 2008**



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Only for exceptional cases. Can we be sure?

“I do not claim that there have been many occasions on which the courts have expressed frustration about the absence of custodial sentences for health and safety offences, but there have been enough to justify extending the provision. The regulatory impact assessment accompanying the Bill ... draws attention to the infrequency with which individuals are prosecuted for health and safety offences. It records that between 2005 and early 2008, only six people have been sent to prison for health and safety offences. Our expectation is that that might double to three or four a year if the Bill is enacted.”

**Keith Hill MP (government lead)
Debate on the H&S (Offences) Bill
26 March 2008**



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Unlimited penalty without trial: regulator as judge and jury The Regulatory Enforcement & Sanctions Bill 2008

- Across the board application: HSE, EA, FSA, etc.
- Financial penalties (supposedly “civil” not “criminal”)
- Potentially unlimited in amount
- Imposed by regulator without proceedings
- If regulator satisfied offence committed
- Appealable to specialist tribunal but “discount” for going quietly
- Article 6 erosion: requirement to object
- Coming into force early 2009
- The (unofficial but encouraging) stance of HSE



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Too much legislation, not enough logic?

“I take some objection ... to the generalized criticism of magistrates’ courts and Crown Court as being unable to set proper penalties. How difficult it is to judge from the corridors of power what a fair and proportionate penalty is. That should be done by the independent courts.

**Lord Lyell
Lords Debate on the RE&S Bill
31 March 2008**