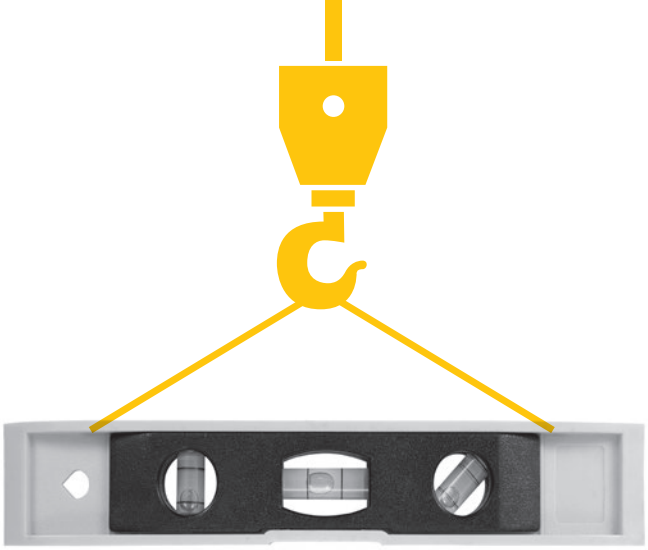
EVERSHEDS SUTHERLAND



Health and Safety update

Step towards sentencing guidelines

Important lessons for employers in light of the Court of Appeal decision in DPP v Kilsaran Concrete Limited.

DPP v Kilsaran Concrete Limited

The recent Court of Appeal decision in *DPP v Kilsaran Concrete Limited [2017] IECA 112* increased by 700% a fine for a breach of the Safety, Health and Welfare at Work Act 2005 (the "**2005 Act**") imposed by the sentencing Court on the grounds that it was unduly lenient.

The Court of Appeal quashed a €125,000 fine and imposed a fine of €1,000,000 on the respondent.

Kilsaran Concrete Limited had pleaded guilty to a count of failing to manage and conduct work activities in such a way as to ensure, so far as was reasonably practicable, the safety, health and welfare at work of its employees, resulting in personal injury to an employee, contrary to the 2005 Act.

The concrete manufacturer had purchased a fully automated piece of machinery for the manufacture of standardised concrete products. Over the course of a year, the use of the machine became more unorthodox and involved operators routinely working inside of the "safety cage". The Court heard how an operator neglected to disengage a mechanical arm inside the machine – as had become practice over the previous year or so. The mechanical arm descended on top of an operator causing a fatal crush injury.

The sentencing Court was satisfied that the case was one which lay in the middle of the range of potential fines outlined in the 2005 Act (€0 to €3,000,000) and imposed a fine of €125,000 having had regard to the following mitigating factors:

- Entering an early guilty plea to the charges, thereby saving the deceased's family additional trauma of listening to evidence.
- The company co-operated fully with the investigation.
- There was a genuine expression of remorse by the company.
- The company had a good health and safety record with only one previous conviction.
- The company had an insurance excess which required them to pay 98% of the fatal injury claim settlement.

The following aggravating factors were also cited:

- The company was the employer of the deceased and, therefore, had a substantial responsibility to ensure his health and safety.
- The deceased should not have been allowed work inside the safety cage, it exposed him to a high risk of injury.
- The effect of the death on the deceased's family, outlined in Victim Impact Statements.

The judge stated that he was also required to have regard to the financial circumstances of the company and that the fine had to be proportionate. The DPP appealed the fine to the Court of Appeal, claiming that it was unduly lenient.

Decision of the Court of Appeal

The Court of Appeal assessed the fine imposed under four headings;

i. **The assessment of the gravity of the case** – The Court of Appeal in considering the available range of penalties, had regard to the culpability of the offender and the harm done. The Court of Appeal stated that the culpability in this case was high in addition to the following aggravating factors:

   a. The harm and distress caused to the deceased's relatives.

   b. The breach of law was deliberate and calculated to maximise profits.

c. There was a conscious and deliberate discounting of safety concerns raised by an experienced employee.

d. A previous near miss was disregarded and ignored.

e. The practices which culminated in the accident were adopted incrementally over a period in excess of one year – this was not a case of passive neglect or omission giving rise to a one-off incident.

f. The practice was not only condoned but actively encouraged and required by senior management.

g. The practice did not appear to have been picked up on in any safety audit.

h. The practice involved a core activity of the company's business.

Taking the above into account, the Court believed that this case merited a headline sentence of between €1,750,000 and €2,250,000.

ii. **The allowance made for mitigation** – The Court of Appeal stated that it was wrong to consider the fact that the respondent paid out 98% of the fatal injury settlement. This could only be done if it gave rise to particular hardship for the offender. However, it was proper to have made due allowance for the guilty plea, the offender's co-operation, remorse, remedial steps taken and the respondent's generally good safety record. Taking all of the above into account, the court believed that nothing above a 50% discount could have been legitimately contemplated.

iii. **Proportionality** – the sentencing court erred in law by disregarding the full range of available fines in favour of a more "realistic" range. The respondent has returned to profitability and has assets valued at many millions of Euro. There was no evidence that the imposition of a very substantial fine would threaten the viability of the company or precipitate its dissolution.

iv. **Sentencing policy issues** – the Court agreed that the fine failed to address the need for deterrence, both general and specific and stated:

"The respondent's reckless disregard for safety in the pursuit of profit drove a coach and four through the policy of the legislature, and requires to be punished and future conduct of that sort requires to be deterred"

Allowing a 50% discount for the mitigating factors, the Court imposed a final sentence of €1,000,000.

Conclusion

In the past, judges have been slower to impose large fines for health and safety breaches by employers but a number of recent cases indicate that this trend is changing. In order to avoid such fines, employers should be aware of a number of take home lessons from this case.

The case highlights the need for employers to pro-actively assess their current health and safety practices. Employers should not wait for an incident to occur before doing so.

Although this will incur costs to the employer, these will be minimal when compared to the potential fine should an accident occur.

If, in the course of such assessment, any unsafe practices in the workplace are identified, these should be discontinued immediately. As can be seen from this case, deliberate and prolonged unsafe practices are likely to attract much larger fines than cases of passive neglect and one off incidents.

Employers should not persist with unsafe practices simply because the alternative will incur greater expense. Deliberate breaches with a view to maximising profit will not be looked on favourably by the court when assessing the gravity of any offence.

This case should demonstrate to employers the dangers of ignoring employee concerns and previous incidents. A failure to learn from previous incidents and neglecting to address concerns raised by employees were both identified by the Court of Appeal as aggravating factors in this case.

Finally, in the event that an accident does occur, it is of critical importance that the employer co-operates fully with any HSA investigation. In calculating the fine to be imposed, an employer who is open and engaging with the HSA is likely to be allowed a significant discount as a result.

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