

Some trends under the Resource Management Act, Health & Safety in Employment Act and in exemplary damages – fines, prosecutions and awards

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Abstract

This paper will identify and discuss the offence and penalty provisions under the Resource Management Act 1991 (RMA) and Health and Safety in Employment Act 1992 (HSE). Exemplary damages will then be placed in the context of the link between employment related proceedings and the relatively recent introduction of Section 396 of the Accident Insurance Act 1998 (AIA) which provides that nothing in the AIA or criminal proceedings or the possibility of criminal proceedings bars an award of exemplary damages.

The paper will then:

- summarise and discuss the level of prosecutions and fines under the RMA Act, cover director and senior management liability and identify some pertinent examples in relation to the petroleum exploration sector,
- carry out a similar exercise for the HSE Act and
- review the New Zealand common law history of exemplary damages and links to health and safety in the work place, the impact of the no fault Accident Compensation Regime, the impact of Section 396 of the AIA and then identify current trends by reference to case law.

In conclusion it will draw out possible lessons and implications for the petroleum exploration sector and identify some responses.

Introduction

The oil and gas exploration is, relatively speaking, a high profile one both as to its ability to generate significant revenue flows upon a successful discovery and development but also perceived environmental impacts and the day-to-day hazards faced by its field work force. In terms of regulatory overview the latter two matters fall under the provisions of the Resource Management Act 1991 ('RMA') and the Health and Safety in Employment Act 1992 ("HSE Act"). I thought it might be of interest to carry out a brief review of trends in respect of the enforcement end of those two Acts to date. I also decided to touch upon, given its links to work place accidents, a relatively little known and developed (in New Zealand) civil remedy – exemplary damages.

To provide some counterbalance I then offer some suggestions as to how a company and its senior personnel could put in place a systematic programme of response to these liability issues under the RMA and HSE Acts.

The structure of my paper is as follows:

Beginning with the HSE Act, I briefly look at the purpose of the Act, duties of employers, who incurs liability, the enforcers, and then focus on fines and prosecutions by way of a relevant industry example and review some statistics as to fines and prosecutions.

In terms of exemplary damages and its place in regard to workplace accidents I:

- explain what they are;
- explain the relationship between the Accident Compensation Scheme, exemplary damages and the HSE Act; and
- briefly traverse recent legal history as to the development of exemplary damages in New Zealand in the context of workplace accidents.

I then turn to the RMA and:

- by way of introduction identify the fines and penalty regime
- review sentencing principles
- look at trends in terms of the quantum of fines by reference to some cases, and then
- cover a relatively recent high profile case which underlines the real threat posed by the RMA to the directors and senior management of a company following a breach of the RMA.

Finally I conclude by way of some suggestions as to how a company, its directors and senior management, might respond to the potential liability posed by the HSE and RMA. Again I use an industry example as a reference point.

Health and Safety in Employment Act 1992

The long title of the Act states that it is an “*Act to reform the law relating to the health and safety of employees, and other people at work or affected by the work of other people*”. Section 5 of the HSE Act states that the principal object of the Act is to provide for the prevention of harm to employees at work. To achieve this purpose the Act promotes excellence in health and safety management, imposes duties on employers and others and provides for the passing of secondary legislation (regulations) and policies etc relating to hazards.

In addition to employees (per se) the HSE Act catches a wide range of people, those in control of a workplace, self-employed people, head contractors, and employees. The Act requires every person who controls a place of work to:

- take all practicable steps to ensure that no hazard exists or arises in that place that could harm both employees, contractors or other people in the vicinity
- to take all practicable steps to ensure the safety of employees and others in the workplace
- to identify hazards and work to eliminate or minimise them, provide proper training and supervision, maintain an accident register and so on.

In terms of enforcement this is primarily carried out by inspectors of the Department of Labour.

Non-compliance with the HSE Act

An offence is committed against the HSE Act where;

- any person takes (or fails to take) an action, knowing that the action (or failure to act) is reasonably likely to cause serious harm to any person, and;
- the action (or lack of action) is contrary to a provision contained in the HSE;¹ or
- when particular sections of the HSE or associated regulations have not been complied with.²

HSE Act offences other than section 49 offences (knowingly) are **strict liability** offences. It is not necessary to prove that the person being prosecuted intended:

- to take the action alleged to constitute the offence; or
- not to take the action, the failure or refusal to take which is alleged constitute the offence.

In general terms, all that must be proven by the prosecution is that the offence occurred³.

Personal and corporate liability

More than one party can be prosecuted for the same offence. Thus, where a body corporate fails to comply, **anyone** who is an **officer, director, or agent** of the company and who directed, authorised, assented to, acquiesced in, or participated in that failure, is a party to the failure, is liable to conviction and punishment, (whether or not the body corporate has been prosecuted or convicted).⁴

Fines and penalties

Where section 49 of the HSE Act (knowingly) has been breached, a fine not exceeding \$100,000 and/or one year's imprisonment could be imposed.

Where the HSE Act has been breached and serious harm is caused, a fine not exceeding \$50,000 may be imposed. Fines of up to \$25,000 may be imposed in other situations.²

Where an employer, controller of a place or work or director of a company has failed to take all practicable steps to warn any authorised visitor to the place of work of any significant hazard that is likely to arise in that place of work, a fine not exceeding \$10,000 may be imposed.

The Petrocorp experience⁵: Petrocorp was operator of the McKee 13 well and in 1995 had the misfortune to suffer a well blowout and control of the well was lost. The judgment paints a vivid picture. Gas, oil and drilling mud was erupting around the base of the rig and spouting up to 30m into the air. There was a partial collapse of the surface area. It took some 35 hours to bring the blowout under control. No injuries were suffered by persons in the workplace in this instance.

In due course, Petrocorp was charged in relation to breaches of under S16 and 15 of the HSE Act. It was alleged that for almost 15 years the defendant company had known that the Mangahewa Formation, encountered directly beneath the McKee Formation, was overpressured and hydrocarbon bearing. The depth at which the overpressured interval within the Mangahewa formation would be encountered was expected, by Petrocorp to be below the depth at which it was

¹ Section 49 HSE Act

² Section 50 HSE Act

³ Section 53, HSE Act

⁴ Section 56 HSE Act

⁵ *Department of Labour and Taranaki RC v Petrocorp Exploration Ltd* DC 22 October 1996. Noted 1997 BRM Gazette 83.

in fact encountered, however in this case Petrocorp, did not allow, so it was found, an adequate margin of safety in the drilling programme.

In particular, Petrocorp failed to take all practicable steps to ensure that people in the place of work were not harmed by any hazard, namely loss of well control, that arose in the place of work in that:

- it failed to design an adequate casing programme in accordance with recognised oil or gas field standards so as to minimise the risk of formation breakdown and surface blowout
- it failed to adequately cement the surface casing so as to minimise the risk of formation fluids blowing out at the surface
- it failed to maintain adequate mud weight in the well to adequately control all known downhole pressures in the well while drilling, in order to minimise the risk of a blowout of fluids at the surface.

The Judge concluded that:

“Bearing in mind the very serious consequences that the company knew or ought to have known would occur, both to the environment and the safety of on-site personnel if the soft sands were encountered at a lesser depth despite expectations to the contrary, the company failed to employ the highest operational and safety standards that it should have employed. Because of that it exposed drill-workers to a degree of risk that was unacceptable and the local environment to the risk of significant detriment.

It is of some significance to note that a “kick” had been experienced very shortly beforehand when another well

encountered the same softer formation, but on that occasion the pressures involved were such that the situation was able to be controlled. I agree with the submission of [prosecuting counsel] that the prior incident should have served as a salutary and timely warning to the company”.

The Company was fined \$20,000 plus costs on the HSE Act charges. In addition, there were the RMA charges which I discuss later.

Number of prosecutions under HSE Act

During 2000/01 Occupational Health and safety carried out over 18,000 proactive work place visits, 9,000 investigations and initiated 135 prosecutions.⁶

The Department of Labour provided the following statistics:

Successful prosecutions under HSE Act

Year	Number
1993	14
1994	136
1995	197
1996	148
1997	115
1998	116
1999	150
2000	110 (approximately)

Levels of fines

Statistics in the following table are taken from Brooker’s “Workplace Safety and Accidents Handbook”.

Prosecutions concluded for the period 1 July 1999 to 30 June 2000

Section breached	Number of charges	Number of conviction	Highest penalty	Lowest penalty	Total fines	Average penalty
6	91	55	\$20,000	\$600	\$331,550	\$6,028
7	15	5	\$4,000	\$1,000	\$11,500	\$2,300
10	2	1	\$2,500	\$2,500	\$2,500	\$2,500
12	4	1	\$1,100	\$1,100	\$1,100	\$1,100
13	18	7	\$18,000	\$1,000	\$36,000	\$5,143
15	5	3	\$10,500	\$1,500	\$19,500	\$6,500
16	9	6	\$30,000	\$750	\$47,250	\$7,875
17	2	2	\$2,750	\$1,500	\$4,250	\$2,125
18	15	4	\$12,000	\$3,000	\$24,500	\$6,125
19	11	6	\$4,000	\$250	\$7,800	\$1,300
25	9	7	\$2,000	\$500	\$7,500	\$1,071
26	6	3	\$6,500	\$250	\$8,250	\$2,750
39	1	0	0	0	0	0
43	2	1	\$750	\$750	\$750	\$750
48	1	1	\$750	\$750	\$750	\$750
56	1	0	0	0	0	0
Regulation	12	6	\$2,500	\$250	\$8,000	\$1,333
Totals	204	108			\$511,200	

⁶ Department of Labour Annual Report 2000/01

As far as I can ascertain the highest fine to date for a workplace injury is \$30,000. Also bear in mind the fines under the HSE Act are in addition to bad publicity, legal fees and the possibility that ACC premiums will increase as a result of any workplace injury. In terms of **personal liability** issues, seemingly still an area to be explored, as far as I could ascertain only one prosecution against a company director has been initiated, in addition to the company, for a workplace injury.

In relation to the HSE Act you will no doubt be aware of the HSE Amendment Bill. If enacted this will add new elements to the existing legislation and significantly increase the level of fines and penalties. The clear message from Government is that the level of workplace accidents in New Zealand is too high and extra steps must be taken to lower the same.

Exemplary damages in workplace accidents

For workplace accidents the compensation/rehabilitation provisions of the Accident Compensation legislation and the enforcement provisions of the HSE Act are widely seen as an encompassing regime. However, whilst that is correct in 99.0% of cases, strictly speaking there is another legal avenue an injured employee might (I stress, might) be able to explore – **exemplary damages**.

Background

Exemplary damages are based on common (or judge made) law and go back some way.⁷ They exist to punish and deter outrageous conduct involving civil wrongs (or torts). Examples of civil wrongs (or torts) include the heads of negligence and defamation. To justify an award of exemplary damages the conduct of an employer (or their employee acting in the course of employment) must be deserving of condemnation and punishment. The flavour of the required degree of misconduct can be gained from judicial comments such as “*a contumelious disregard of the plaintiff’s rights.*” Mere carelessness or negligence is not enough. There is no element of compensation in an award of exemplary damages.⁸

The award of damages goes to the manner in which the defendant has conducted him or herself eg was there risk taking almost akin to intentional harming such that civil punishment is appropriate. Because this test is a high one, the number of cases where exemplary damages have actually been awarded against an employer are relatively few. But the risk is there.

How did we get to this point

In getting to this point plaintiffs, over the years, have had to jump a number of legal hurdles eg:

⁷ See for example *Huckle v Money* (1763) 2 Wils 205

⁸ *Taylor v Beeze* [1982] 1 NZLR 81 (CA)

⁹ *Donselaar v Donselaar* [1982] 1 NZLR 97. (CA)

¹⁰ *Auckland City Council v Blundell* [1985] 1 NZLR 732

¹¹ [1996] 3 NZLR 424

- was the Accident Compensation regime with its no fault approach a bar to claim involving personal injury?
- did it matter if the act leading to the injury was unintentional?
- would a criminal conviction under the likes of the HSE Act (punishment) be a bar to a further action arising from the same event (double jeopardy)? and so on.

Accident Compensation Regime: The advent of NZ’s no fault Accident Compensation regime (“ACC”) was, at first, seen to be a barrier to a claim for exemplary damages arising from a personal injury by accident. However the Court of Appeal in 1982⁹ thought otherwise. In a case involving an assault by one brother against the other the Court found that notwithstanding the ACC regime exemplary damages following assault or battery can still be brought. In 1986¹⁰ the Court confirmed this finding in another assault case.

In essence as the statutory benefits under the ACC regime were not designed to punish, exemplary damages could be claimed for a punitive and non compensatory purpose. The Courts emphasised that the level of exemplary damages awarded should reflect solely the punitive element and should not attempt to compensate the plaintiff for his injuries.

Intentional or Unintentional: In the period from 1982 to the mid 90s the focus of exemplary damages was not workplace accident focussed. However in 1996 in the High Court case of *McLaren Transport Ltd v Somerville*¹¹ we move closer to the workplace.

This case was an appeal from the District Court awarding Somerville, the respondent, exemplary damages for personal injury.

Somerville’s, a customer of McLaren’s, quite serious injuries occurred on McLaren’s premises when an employee of McLaren over-inflated a tyre causing it to explode. The employee was attempting to fit a 15 inch tyre to a 15.3 inch rim. The employee did not read a warning on the tyre stating “tyre may burst with explosive force causing serious personal injury or death. Never exceed 35 psi”. The employee was inexperienced at tyre fitting and did not use a tyre safety cage. The employee made three attempts to fit the tyre, on the third attempt inflating the tyre to over twice the recommended pressure.

Legal Issues: Were exemplary damages available where the cause of action in negligence was not an intentional tort?

Could exemplary damages be claimed given the existence of a statutory accident compensation scheme?

Held: The first issue was answered yes. Exemplary damages are available where the act is unintentional. However, the lack of intention is a factor which may be relevant to whether exemplary damages should be awarded and their level. Secondly, exemplary damages might be obtained in appropriate cases arising out of circumstances falling within the accident compensation scheme, irrespective of whether

the conduct of the defendant was intentional or unintentional.

Tipping J held, at page 434, that exemplary damages for negligence causing personal injury could be awarded if, and only if:

“the level of negligence [was] so high that it amount[ed] to an outrageous and flagrant disregard for the plaintiff’s safety, meriting condemnation and punishment.”

In formulating the above test the judge was careful to keep “recklessness” out of the test because of its difficult and subjective nature. “Gross negligence” was also excluded as insufficiently incorporating the necessary ingredients of the test.

The judgment emphasised that the only purpose of exemplary damages was punishment and condemnation of the defendant’s conduct (cf. compensation of the plaintiff for their injuries), and that it was not appropriate to use exemplary damages to remedy any perceived shortcomings in the statutory scheme.

McLaren’s employee had breached his duty of care to Somerville and displayed a level of negligence so high as to amount to outrageous and flagrant disregard for Somerville’s safety. The conduct merited condemnation and punishment and the award of exemplary damages was upheld.

Exemplary damages in the sum of \$15,000 (plus court costs of \$6,000) were awarded.

Double Jeopardy: By 1995 the HSE Act is in force and the level of successful prosecutions under that Act well in excess of 100 per year. The question then arises could an employer be sued by an injured employee notwithstanding a successful prosecution under the HSE Act. Section 26 of the Bill of Rights is a section barring double jeopardy; being punished for the same accident twice.

*“No one who has been finally acquitted, or convicted of, or pardoned for, an offence shall be tried or punished for it again”.*¹²

However, in 1997 the High Court heard a case for exemplary damages arising from an accident in the workplace.¹³ Caldwell was employed by the defendant as the operator of a square pile saw at the defendant’s sawmill. As a result of an accident Caldwell suffered a serious injury (loss of an arm). The company was prosecuted under the HSE Act (failing to take all practicable steps to ensure the work station was safe) pleaded guilty and was fined \$5,000 plus costs. Caldwell was not satisfied and mounted an action for exemplary damages seeking something in the order of \$500,000.

¹² Section 26(2) New Zealand Bill of Rights Act 1990

¹³ *Caldwell v Croft Timber Co Ltd* [1997] ERNZ 136

¹⁴ *Daniels v Thompson* [1998] 3 NZLR 22 (CA)

¹⁵ [1998] 3 ERNZ 1

In terms of the double jeopardy issue the High Court Judge held that s26 of the Bill of Rights **did not** preclude a civil claim in relation to matters arising from a successful criminal prosecution. The Judge was not sympathetic to the quantum claimed pointing to the history of awards being in the region of \$30,000.

Judicial Response: However later in 1997 the Court of Appeal¹⁴ was considering a claim for exemplary damages in relation to alleged sex offending by the defendant who had already been convicted and punished in respect of the same conduct in criminal proceedings.

Held: Where a person had already been convicted and sentenced for the acts it followed that punishment had already been exacted. It would be inappropriate for one Court to add to the punishment exacted by another. Consequently, it was appropriate that there should be an **absolute bar** on such claims.

New Legislation: Parliament was not so convinced and an amendment to the Accident Compensation legislation quickly followed.

Section 396 (of what is now the Accident Insurance Act 1998) provides that nothing in the Act, or in any rule of law, prevents any person from bringing proceedings for exemplary damages for conduct that has resulted in personal injury covered by the Act or its predecessors (subsection (1)). Subsection 2 provides that an award of exemplary damages may be made notwithstanding that the conduct in question has been the subject of criminal proceedings or such proceedings are possible. However, in determining whether to award exemplary damages and if so their quantum, the Court must have regard to any penalty imposed on the defendant for the relevant conduct (subsection (3)).

Accordingly, it was now clearly possible for employees to bring both tortious and contractual claims against employers for exemplary damages following an accident in the workplace. Claims in tort could be based in either negligence or breach of statutory duty, for example breaching duties imposed under the Health and Safety and Employment Act 1992. The case of *Morrit v Jespersen*¹⁵ is informative.

Facts (*Morrit v Jespersen*): The plaintiff had an uncomfortable and unergonomic workstation. Despite repeated complaints over an extended period of time the situation was not remedied by her employers. The plaintiff developed serious occupational overuse syndrome (“OOS”). The plaintiff eventually contacted occupational health and safety (“OSH”), who carried out a workstation inspection and identified a number of problems with the workstation. It took nine months from the OSH visit until the problems were remedied.

The plaintiff’s claim for exemplary damages was based on among other things the defendants’ failure to provide a healthy and safe workplace and to discharge the statutory duties under the Health and Safety in Employment Act 1992 (“HSE Act”).

Legal Issues: Was there a breach of the defendant's contractual duty? If there was a breach, was the breach outrageous?

Held: Based on the factual and medical evidence Goddard CJ held that the plaintiff's workstation was unsafe, that it contributed to or caused the plaintiff's OOS and that the defendants' had breached their duties to the plaintiff, especially in light of her repeated complaints about the workstation.

For an award of exemplary damages there needed to be some outrageous and flagrant disregard for the plaintiff's safety. Here the test was satisfied as the defendants' had ignored the plaintiff's repeated complaints and this had altered the complexion of the defendants' inaction. The defendants' had deliberately breached the terms of trust and confidence and of fair and reasonable treatment in the employment contract and this merited condemnation.

The plaintiff claimed \$800,000 and was awarded \$20,000 in exemplary damages.

The point has been made in several cases that exemplary damages are not to be used to compensate the plaintiff or to remedy any perceived short-comings in the statutory compensation scheme. In one case, the Court of Appeal made the observation that the punishment of outrageous behaviour could be adequately achieved by a relatively modest penalty.

Borrill v A¹⁶: In this recent high profile case the plaintiffs claim for exemplary damages arose out of the negligence of the defendant pathologist reading of cervical smear slides. On the facts, the Court of Appeal (majority) found that exemplary damages for negligence could only be awarded if the defendant was subjectively aware of the risk of conduct and acted deliberately in reckless disregard of the result. Gross negligence was not sufficient. The decision is very useful in terms of it traversing the principles and policy considerations relevant to exemplary damages.

- purpose – to punish and deter
- quality of defendants
- conduct – doesn't have to be intentional but requires conscious risk taking
- no element of compensation
- not available to patch up perceived failings of ACC regime
- type of misconduct – contumelious disregard of plaintiff's rights
- subjective recklessness test.

On the facts the claim was dismissed.

¹⁶ [2001] 3 NZLR 622 (CA)

¹⁷ Section 339 RMA

¹⁸ Section 339B RMA

In concluding this section I must stress the relatively small number of awards under this cause of action since the 1980's and the even smaller number involving workplace injuries compared to prosecutions under the HSE Act albeit achieving greater prominence since the introduction of amending legislation referred to earlier. However, in my view the later is the immediate and greater threat to those in control of a place of work.

Resource Management Act 1991

The Resource Management Act is an Act whose purpose is to promote the sustainable management of natural and physical resources and to avoid remedy or mitigate adverse effects on the environment.

The RMA imposes a general duty on all persons to avoid, remedy or mitigate any adverse effects on the environment arising from activities carried out by or on behalf of the person concerned.

Most offences under the RMA are ones of strict liability, which means that it is not necessary to prove an intention to commit the offence. However, there are some limited statutory defences available.

What are the consequences of non-compliance?

There are three types of enforcement under the RMA – abatement notices, enforcement orders, and prosecution. An abatement notice may be served requiring the recipient to cease doing something that is having an adverse effect on the environment, or to requiring that person to do something positive. Non-compliance with an abatement notice constitutes an offence.

A local authority may apply for an enforcement order to require a person to stop doing something, or to require a positive act. Non-compliance with an enforcement order is an offence.

Prosecutions can be laid under the RMA and are generally commenced by local authorities. An offence is usually committed where an activity is undertaken in breach of the RMA, in breach of the rules of the relevant District or Regional Plan, or without a resource consent. Depending on the nature of the contravention and the type of action taken the potential consequences of prosecution include:

- fines of up to \$200,000 plus \$10,000 per day for continuing offences
- imprisonment for up to two years or community service
- an order to pay clean up costs and/or an order to stop or undertake an action¹⁷
- payment of up to three times any commercial gain resulting from the commission of the offence (in addition to any fine under section 339).¹⁸

Personal liability: Where a body corporate is convicted of an offence under the RMA every director and every person concerned in the management of the corporate may also be

convicted if it can be shown that the offence took place with his or her authority or consent and they knew or should have known of the offence but failed to take all reasonable steps to stop it.¹⁹

Sentencing principles

The leading New Zealand case as to sentencing principles is that known as *Machinery Movers*.²⁰ In sentencing the Company the Court identified various factors to be taken into account:

- Purpose of the Act. The emphasis in the RMA is on the avoidance of adverse effects on the environment.
- The need to deter such acts. Underlined by the relative severity of the penalty regime (significant fines and the power to imprison), separate criminal liability for directors/managers.
- The nature of the environment affected.
- Extent of the damage inflicted.
- Deliberateness of the accused.
- Extent of attempts to comply.
- Size, operations and power of the Company.
- Level of remorse.
- Existence of profit motive.
- Previous record.
- The financial circumstances of defendant (designed to punish but not push out of business).

It is perhaps no surprise to find given this range of considerations that there is a wide range in the actual level of fines.

Some examples:

- ***Machinery Movers***: Employees of the Company had been told to empty the liquid contents of storage tanks into a sewer and then remove the tanks from the site. They had been told the contents of the tanks were harmless. Unfortunately one of them contained a toxic substance. On the day the employees did not empty the contents into the sewer and instead discharged the liquid onto the ground where it escaped into a nearby stream, killing large numbers of wild ducks and adversely affecting members of the public attempting to rescue the same. \$25,000 fine (but bearing in mind the size of the Company and its capacity to pay – payment spread over two years) and a requirement to distribute to all employees an environmental awareness notice.

¹⁹ Section 340(3) RMA

²⁰ *Machinery Movers Ltd v Auckland Regional Council* [1994] 1 NZLR 493

²¹ *Bay of Plenty R C v Tasman Pulp & Paper Co Ltd* noted [1995] BRM Gazette 42

²² *Doug Hood Ltd v CRC* [2000] NZLR 490

- ***Kiwi Drilling Co Ltd***: A company engaged in the business of water bore drilling activities. Unfortunately they did so in a manner (to use the words of the Judge): “... demonstrating a cavalier, irresponsible approach to the sinking and construction of facilities for access to the precious resource which is water.” This approach to business generated some 20 alleged breaches of the RMA mainly relating to failure to observe the conditions of consents. In deciding the severity of the sentence the Judge worked his way through the factors discussed in *Machinery Movers*. On appeal the fines were, in the case of the Company, reduced from \$154,000 to \$30,000.
- ***Petrocorp Exploration Ltd***: Involves the *McKee 13* blowout. Following a “blowout”, control of the well was lost. The defendant discharged drilling mud, crude oil, hydrocarbons and other contaminants into the Mangahewa Stream, over the period it took to regain control – some 35 hours. In considering the sentence the various mitigating effects undertaken by the Company (both before and after the incident) were noted. These included more rigorous assessment of well design, additional training and so on. It was noted the Company pleaded guilty relatively quickly, which avoided a long trial. In terms of the RMA offence – the Company was fined \$30,000 plus costs.
- ***Tasman Pulp And Paper***²¹ Repeat offences and the breach, discharges above permitted limits, were well in excess of the limits allowed. Fined a total of \$60,000 (3 offences). The Judge commented that if it happened again then the directors and senior management could well fact prosecution personally.

Personal liability

The reality of directors or senior management facing prosecution in addition to their corporate organisation is now well developed in the RMA context.

In *Kiwi Drilling* the director of the Company was in the first instance fined \$53,000 reduced on appeal to \$15,000.

The case known as the *Opuia Dam*²² is also salutary for those Project Managers in the audience. The defendants were the contractor company and project manager for construction of a medium sized earth dam. Rather than diverting the river a conduit pipe was constructed at the base of the dam and an overflow channel maintained across the top of the dam in case the conduit pipe was unable to cope in high water flows. Unfortunately by the time a heavy rainfall event occurred in early February 1997 the channel across the top of the dam to guard against overtopping was no longer in existence. In due course despite strenuous efforts to the contrary a major breach of the dam occurred. Some 190,000 cubic metres of dam material were swept downstream.

The defendants were charged with discharging contaminants in breach of the RMA (s15 and 338). As can be appreciated there was any amount of legal debate about issues such as whether a discharge had occurred, did the dam material

constitute a contaminant, could the defendants claim their actions on the day which led to the collapse of the dam were in response to an emergency and so on. At the end of the day the absence of a diversion channel was fatal.

The Company was fined \$50,000 plus \$54,000 costs. The Project Manager \$20,000.

Individual liberty

What about the really sharp end of personal liability – imprisonment or community service? The Courts have moved in this area. Examples include imposing a suspended six month jail sentence and in another a sentence of six months’ periodic detention. To be fair this has been in cases where the defendant has been fairly flagrant in the commitment of the offence, indicated little remorse and whose financial affairs (and thus their ability to pay a fine) have been limited.²³

Some possible responses to these liability issues

In this section we look at some strategies by which corporate and senior management could manage issues surrounding personal liability.

Due Diligence and Compliance Programs

Due Diligence – what is it? It is a fact of life that accidents happen or employees do things of which directors have no knowledge. However, much recent legislation contains strict liability offences. It is not necessary to show that you the director, knew or authorised the act or omission but rather only that the breach has occurred.

Nevertheless, in some situations directors may be able to raise, as a defence, that they took all reasonable steps to prevent the commission of the offence.²⁴ An essential prerequisite for the establishment of such a defence will be for you to show that you exercised due diligence to prevent the breach and that proper procedures were in place for preventing or minimising the breach. Even in the absence of a statutory defence the ability of a company to point to a serious “due diligence compliance program” may well assist in avoiding prosecution or act to mitigate the level of penalty.

Clearly, designing and implementing systems and procedures to achieve compliance with the wide variety of legal requirements will:

- provide a means of being able to utilise any statutory defences available
- have the pro-active effect of preventing and minimising the likelihood of a breach; and

²³ Eg see *Smith (South Wairarapa DC) v D.T.S. Riddiford* noted [1996] BRM Gazette 117

²⁴ Section 340(2) RMA

²⁵ *Taranaki Regional Council v Fletcher Challenge Energy Taranaki Ltd.* DC October 2000 CRN 0043010045

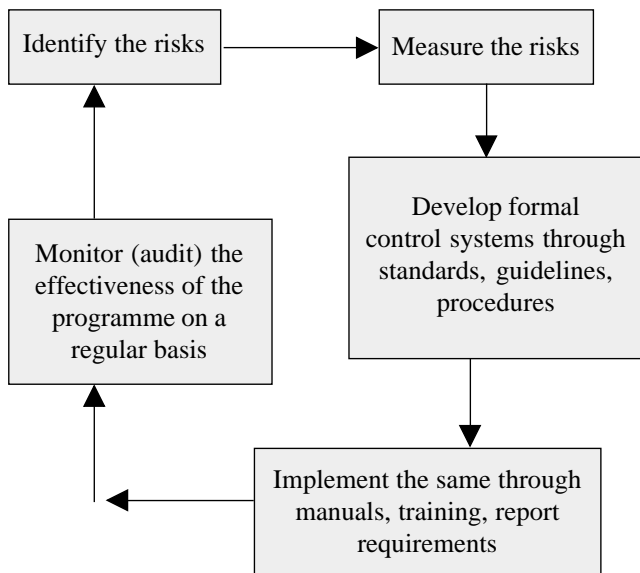
- if a breach is committed it may enable you to avoid prosecution or mitigate sentence.

What to do: The exercise of due diligence involves at least two steps:

- a review and assessment of current activities
- implementing a management regime (ie documentation of the processes and procedures).

An important part of the process is to assess the risks of the business. In some cases, eg an oil and gas exploration company both HSE and RMA issues will be critical. In other businesses, eg a compute software company, the potential risk may lie elsewhere eg under the Health and Safety in Employment Act (OOS or RSI).

While any compliance programme will focus on areas of perceived high risk, it should also be used as an opportunity to bring together in a holistic way a documented paper trail that is a working tool for the company to ensure compliance with all relevant legislation and/or reporting requirements.



Thus an effective compliance program could look something like this:

It is outside the brief of this paper to provide a detailed approach to the format and content of compliance programs. However as an initial tool we attach a sample checklist. Whilst this is focused on an environmental compliance programme it could, with adaptation, be of general use.

Does Due Diligence work?

The Fletcher Challenge Experience²⁵: FCE faced three charges of discharging contaminants into the sea from its off shore Pohokura-1 well. The non combustible material had been directed to the flare and spilled into the sea. The unintentional discharge was not immediately noticed because of a water curtain spray. The Court noted:

- FCE had a **contingency** plan which put into effect immediately and cleaned up the affected beach.
- The defendant had a policy of environmental compliance and enforced it on its contractors and employees. It had been embarrassed by its failure to meet the standards it owed to the local community. It had apologised to the community and also to the local hapu. It had re-engineered its equipment to avoid risk of occurrence of the spills.
- There was no element of wilfulness and the defendant had co-operated fully with the Regional Council and appropriately entered guilty pleas.
- However, the defendant had previously, under another name, been convicted of an offence against the Resource Management Act. That was to do with contamination of a stream on land. The Judge accepted that those events were not related to the events the subject of the current charges and did not reflect an unsatisfactory attitude of the company to its environmental responsibilities.

A fine of \$9,000 on the more serious discharge and in respect of the other two more minor charges \$3,000 each (total \$15,000).

In my view but for the likes of FCE's 'paper trail' (the environmental policy, the contingency plan and its relatively effective implementation), and the degree of co-operation, FCE's previous record may well have counted against it and the level of fines far higher with, perhaps, questions being asked of senior management by the authorities.

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Schedule One

Draft due diligence checklist – identification of systems

- Is there a company environmental policy?
- What compliance programmes are already in place to ensure compliance with resource management legislation for company owned facilities? eg is there a compliance manual?
- Have staff been allocated responsibilities?
- Is there a system for checking whether resource consents are needed for any of your activities?
- Is there a resource consent register, showing expiry dates and other important information?
- Is there a supervision/monitoring system to ensure compliance with resource consents held?
- Are there clear reporting procedures in the event of accidents or other events?
- Is there an environmental education and training policy for staff?
- Are there procedures for ensuring contractors are bound to comply with environmental obligations?
- Is there any system for obtaining clearances or compliance certificates that may be required?
- Are there clear directives and procedures to keep senior management and directors informed of compliance status?
- Are emergency response plans in place? Have these been circulated to both senior and middle management? Are people aware of their roles under these plans?
- Has an audit been conducted in the last 12 months to monitor performance and verify compliance with respect to the above?

Author

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