



JUDICIARY OF  
ENGLAND AND WALES

**R –v- TOTAL (UK) LIMITED, HERTFORDSHIRE OIL STORAGE LIMITED,  
MOTHERWELL CONTROL SYSTEMS (2003) LIMITED, TAV ENGINEERING  
LIMITED AND BRITISH PIPELINE AGENCY LIMITED.**

**Sentence**

On the night of 10<sup>th</sup>-11<sup>th</sup> December 2005

1. At 18.50 a parcel of fuel began to flow into Tank 912 of the HOSL terminal at Buncefield from the UKOP South pipeline..
2. The Automatic Tank Gauge which showed the terminal supervisor the level within that tank got stuck at 3.05 and failed to record the rising level in the tank or to trigger the 3 alarms which should have sounded. Within the next half hour the fuel passed the three levels at which, had the ATG been working, those alarms would have sounded.
3. The Independent High Level Switch on the top of Tank 912 had been left in a position in which it did not operate. The level at which it should have done was passed at 3.55. The tank of course continued to fill.
4. Eventually, at 5.40, fuel began to spill out from the top of the tank. A low-lying mist of vapour similar to the dry ice used on a theatre stage began to form. To make matters worse, just after 5.50 the flow of fuel through the pipeline almost doubled. Something like 250,000 litres of fuel had escaped by 6.01 when the supervisor activated the automatic fire protection system.
5. The cloud of vapour was ignited by a spark from the fire protection system.
6. There was a massive explosion followed by a huge fire which engulfed the site and burned for days. Eventually a decision was taken to put out the fire. 22 tanks were set on fire. Many were so badly damaged that the fuel they contained escaped through the sides
7. A combination of fuel and fire water created by attempts to control and put out the fire escaped from the site through the bund walls which were supposed to prevent such escape and found their way into the drainage systems close to the site. Although the latest reports suggest that are grounds for optimism the damage caused to the aquifers below the soil is unquantifiable even 5 years later but may still be significant.

The failures which led in particular to the explosion were failures which could have combined to produce these consequences at almost any hour of any day. The fact that they did so at one minute past 6 on a Sunday morning was little short of miraculous.

## **Victims**

So too was the fact that not one of the few people on the site or in the surrounding area on that Sunday morning lost their lives.

Those in court when Mr Jearrard testified will remember his chilling evidence. He had got out of his car and walked a little way away to see what the apparent fog might be and to warn others who might be coming along the road when the vapour cloud exploded. When he next saw his car it was destroyed. I asked him, "And if you had been sitting in it" Answer: "I would not be here."

Another witness who was not called to give evidence describes in his statement leaving his car and turning to see it being blown 20-30' in the air. Like some others he was still, by 2009, awaiting compensation.

Had the explosion happened during a working day when large numbers of people would have been at premises close to the site, whether outside or inside, the loss of life may have been measured in tens or even hundreds

The court has been shown statements from a tiny selection of those whose houses were damaged and the consequences, sometimes permanent, for them and their families.

A family which has spent 2 years moving in and out of their house.

Another family living close to the site who described the wall of flame they saw as a Niagara Falls flowing upwards. To another witness it "looked like the end of the world". This family only moved back in in August 2007. Their childrens' education suffered dramatically.

Another family suffered a miraculous escape when the roof caved in on the bedroom of one of the family's young children. The child was saved by the lucky accident that he was sleeping on the side of the bed right against the wall of the room.

In brief – apart from the short or medium term physical injuries and the much longer term emotional and psychological injuries suffered by those close to the explosion - families have had to cope with disruption to education, to employment and, so far as home owners are concerned, to a dramatic drop in the value of their homes even when repaired. The name Buncefield is now inextricably linked to the explosion.

Many businesses were badly affected, some so badly that they were forced out of business.

Dacorum Council had to devote so much of its resources to coping with the consequences that it was downgraded by the Audit Commission as a direct result.

So far as staff working at the site is concerned the court heard from Messrs Nash and Ford the supervisors. Mr Ford described being thrown to the ground by the force of the blast. When he got up he saw that the control room had been severely damaged

and was convinced that his colleague must be dead. Of the tanker drivers unlucky enough to be at the site at the time Mr Reed had 7 months off work and still suffers from tinnitus as the result of the blast. Mr Pearce had more than 2 months off work with whiplash injuries.

Senior staff have had their lives ruined. Mental breakdown, marital breakdown, unemployment and depression are all described by senior employees in the aftermath.

The Court of Appeal has described a category of offence as “....those cases where a major public disaster occurs...that is to say where the breaches of regulations put large numbers of the public at risk of serious injury or more”.<sup>1</sup>

This is undoubtedly such a case.

### **Part 1 – Overfill, explosion and fires**

From 2003 onwards Total (and for years before) or its predecessors was the company with day to control over the site although it was jointly financed with Texaco/Chevron through HOSL. The employees were Total employees and the systems of work were Total systems. From the same period HOSL was the COMAH (Control of Major Accident Hazards) operator and assumed responsibility for compliance with the regulations which applied during the period to COMAH sites. Total's responsibility is as employer; HOSL's as COMAH operator.

The prosecution have identified a number of faults or failures by TOTAL/HOSL. These range from those which were directly causative of it through those which were indirectly causative to those, which although not causative were symptomatic of a serious failure to provide a safe environment for their employees and others who might be affected by their operations. It was accepted by HOSL during the trial and for the purposes of sentence that the faults of Total as employer were the faults of the COMAH operator. I list them together with the mitigation put forward and, if I have taken the view that it is weak or non-existent, the fact that that is my view. They fall into rough categories which overlap.

Staff issues

1. ALLEGATION The supervisors (Total employees) worked 12 hour shifts and, sometimes, an 80 hour week. This was bound to lead to fatigue and mistakes. *NOT ACCEPTED and in any event not causative.*  
MITIGATION No supervisor ever complained of fatigue.  
There were always 2 supervisors on duty. At some terminals there is only one.  
- It is not helpful to compare individual parts of two systems unless the whole system and the nature of the operation is clear. Any reduction in the hours worked would have led to a drop in the overtime payments on which no doubt many relied. It was for the company to examine the working schedules of their employees.

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<sup>1</sup> Friskies – see below

Training has been reviewed and improved.

2. ALLEGATION The handover time when the outgoing supervisors might have reported faults or problems to their successors was too short for a meaningful report of what had happened during a shift to be passed on. *ACCEPTED*  
Systems have been changed to increase the handover time.
3. ALLEGATION It is likely that the supervisors on the Saturday and Sunday were under the impression that the UKOP parcel of fuel which was actually going into 912 was going into another tank. Their work involved them being out of the control room on other work and therefore unable to keep the ATG screens under constant observation. It contributed to the fact that systemic problems such as sticking gauges were treated as one-off occurrences.

*ACCEPTED*

MITIGATION

4. ALLEGATION In addition there was a single ATG screen which meant that at any given time only one of the tank gauges was fully visible on the screen. And an icon on the screen which might have alerted the supervisor to the fact that the gauge had stuck would not have been visible either. *ACCEPTED*
5. ALLEGATION The already onerous task of a supervisor was increased because the control room at HOSL had no control at all over the UKOP pipelines and had therefore to react to unannounced changes in the rate at which fuel was coming down the line. Further difficulties were caused by the fact that since 2002 the amount of fuel coming into HOSL had nearly doubled. This was the result of the closure of Shell's terminal at the site and an agreement between Texaco/Chevron and Shell that its fuel could come into the HOSL site. This meant that frequently ullage was at a premium and that a particular parcel of fuel had to be spread between tanks. On some occasions the pipeline even had to be shut down when there was no more ullage. Much time was spent by supervisors completing stock reconciliations recording which and whose fuel was where. No adjustment had been made to staffing levels or hours of work to cater for this. The attempt to introduce a 9<sup>th</sup> supervisor was not motivated by a desire to ease the strain but by a desire to cut down on the costly overtime payments being made to the 8 supervisors.

*ACCEPTED*

MITIGATION

Other sites lacked complete control over the supplies of fuel coming in. - I have not been impressed with the argument that it is just as bad or worse elsewhere.

New and better written procedures have been introduced.

Increased flow is Chevron's fault. - No mitigation. Total/HOSL were operating this site and had the duty to ensure safety.

6. ALLEGATION. Senior staff, in particular Steve Lewis the terminal operations and pipeline coordinator and Phil Martin the operations manager, were not properly supported and were given far too much to do – including duties at other sites. They had insufficient time to apply themselves to matters outside the day to day running of the site. These pressures led Martin to tender his resignation 10 days before the explosion. The email of 2<sup>nd</sup> December read in part "...It is with much regret that I request to be removed from the position of operations manager for HOSL Fina-Line & Colnbrook. I find I am not

coping with the work load, and it is now affecting my health and home. I realise that you will be disappointed but I feel that it is better to speak now rather than later when the damage is done.” *ACCEPTED*  
MITIGATION although it is conceded that too much time was being spent behind the scenes and on other responsibilities Martin’s plea and resignation had only arrived 10 days before the explosion, too late for significant change to have been made before the explosion.,

### **Systems and procedures**

7. ALLEGATION Access to the ATG software which enabled the levels at which alarms would sound to be set was unlimited when it should have been confined to senior staff. *ACCEPTED though non-causative.*

#### MITIGATION

Buncefield was a “low risk” site.

There were some procedures.

There was, or had until recently been, some supervision of control room operations by senior staff.

8. ALLEGATION Likewise the key to the annunciator panel in the control room which could be used to disable the IHLS was left in for anyone to turn if they wished. *ACCEPTED though non-causative.*

9. ALLEGATION There was no effective system for the reporting of faults and the monitoring of repairs generally which recognised systematic problems. *Accepted.*

#### MITIGATION

There was a defects report book and a computerised system.

Defects were discussed at meetings. There were meetings at local regional national and international levels which discussed safety issues.

There are now both a computerised maintenance system and an annual review of logged defects..

10. ALLEGATION The “near miss” of 2003 when the ATG had stuck, and the IHLS and been placed so high that when it operated the fuel level had already damaged equipment within the tank was not properly appreciated. *NOT ACCEPTED*

#### MITIGATION.

1. The IHLS worked on that occasion.
2. It was identified as a near miss although not one really.
3. The maintenance contract with MCS was introduced as a result.
4. There was no requirement for 1 IHLS so it was not wrong to turn down one supervisor’s request for a second one.
5. The company’s reaction was appropriate. – No. Although there was some activity following the report the system of reporting and collating defects remained poor.

- Although this was not a near miss in the sense of being a replica of what happened on the night of 11/12 December it was a near miss and was recorded as such by the terminal manager and the response to it was far from thorough. Procedures at different sites with different products and systems is not helpful.

11. ALLEGATION The fact that the ATG had stuck at least 14 and possibly as many as 19 times in the 3 months prior to the explosion was never picked up

by either Motherwell or Total as a systemic fault which needed more than individual call-outs to Motherwell the contracted maintenance engineers or temporary fixing by “stowing” the gauge. In addition no thought was given to the installation on the ATG system of an alarm which would alert supervisors to flat lining caused by a sticking gauge. *ACCEPTED*

**MITIGATION**

Supervisors should have picked it up. - Total made it clear that in their plea they had no wish to blame individuals . Such mitigation is without strength bearing in mind the prosecution’s case, which I accept, that supervisors were over-worked and had insufficient handover time.

There were monthly checks of the gauges. - These were primarily to discover any significant discrepancy between the levels shown on the gauge and the actual level.

There is no evidence of anyone else having such an alarm. - And no evidence that other sites had such a problem with sticking gauges either.....

There are now better procedures including a better handover procedure.

12. ALLEGATION. There was no written system devised for the filling of tanks. Each supervisor was free to and did devise his own. One sensibly brought in an alarm clock to help him. And when for 9 months and 3 months respectively Tanks 911 & 912 operated without an IHLS no procedure was adopted by the company to ensure that the increased risk of overspill was catered for. *ACCEPTED.*

MITIGATION Supervisors were experienced and could be relied upon in normal circumstances to operate the ATG system within safe limits.

Supervisors were not reckless when using the hi and hi hi levels on the gauge.

13. ALLEGATION The system for identifying critical equipment and devising fool-proof methods for testing and maintaining it was defective. There was an inadequate document retention system. *ACCEPTED with reservation that Lewis had produced a draft critical parts list some 2 years after being asked to provide it.* – Mr Lewis was given too much to do. The Company should have realised that his apparent tardiness in producing the list was not due to laziness but to overwork.

14. ALLEGATION There was no proper management of change system. In particular it was not understood that management of change procedures should be applied to operational expenditure and not just capital expenditure. The system should have been triggered by the purchase of the 2 new IHLS, one of which was the one which did not operate on the night of the explosion. *ACCEPTED*

MITIGATION The problem with the switch should have been identified by TAV and by MCS before the switches were installed. – This mitigation would be stronger if there was any evidence from Total that it had checked that this had been done.

IHLS were not and still are not obligatory. - Not helpful without a complete examination of the systems etc of other terminals. And even then the fact that another person may be putting safety at risk is no real mitigation.

Other sites had the same problem. – see above.

New equipment has now been installed..

There was a change management procedure in the Loss Control Manual.

There were signs in September 2005 that the company realised that it could and should be doing more in this area.

15. ALLEGATION Total's system for selecting and then monitoring the performance of contractors to perform safety critical tasks such as the installation and maintenance of Automatic Tank Gauges and Independent High Level Switches was seriously defective. The need for such arrangements to go beyond a simple customer/supplier to a proper partnership with roles clearly defined on both sides was not properly understood. There was no monitoring or audit of performance. *ACCEPTED*

#### MITIGATION

Motherwell was a market leader in its field. Although wrong, it is understandable that Total relied on its expertise.

There was a detailed contract.

There were regular tests of the IHLS and an annual inspection of it.

#### **General Mitigation (Total)**

All these complaints and the individual pieces of mitigation in respect of them are to be seen against the general background:

1. That as at 12<sup>th</sup> December 2005 an unconfined or open vapour cloud explosion was not believed to be a credible event". The two serious consequences considered were fire and the escape of polluting material in the form of fuel or a combination of fuel and firewater.
2. That enormous improvements have been brought about since then to ensure that there will never be another Buncefield.
3. That it had taken the CA more 2 years to consider the Safety Report and it had still not signed it off by December 2005. Up to that time few if any of the faults identified in the wake of the explosion had been identified. And in respect of HOSL, there was a failure within the CA to treat the question of COMAH notification with the necessary care. This criticism was also made in the course of its judgment on a preliminary hearing by the Court of Appeal. It is clear too that if such care had been taken the potential for the unattractive dispute which broke out after the explosion between the joint venture partners would not have resulted in a long trial of HOSL before a jury.
4. That Total's remorse, expressed to the court through counsel, is genuine and its behaviour in remedying the damage and positively, as a local employer, trying to encourage the rebirth of the businesses in the area is supporting evidence of this. The managing director was at court to mark the company's appreciation seriousness of the offences and their consequences and to show that the expressions of regret genuinely reflect the company's attitude.
5. That it had attempted to persuade Chevron that HOSL should plead guilty and had offered to pay all its fines and costs. Following conviction, although there is no legal obligation upon either of the joint venture partners to do so Total will in fact indemnify HOSL as to its share as joint venture partner of both fine and costs.
6. That the civil litigation which has already run into hundreds of millions has already had a salutary effect.. £16.9m has been spent on reparation work at the site. £450,000 has been paid to the Dacorum Community trust fund set up to restore the area to its former self as quickly as possible.

7. It doubled the supply of fuel to Colnbrook in order to ensure that Heathrow and Gatwick Airports continued to operate.
8. Planning permission has recently been obtained to restore the site to operation.

### **General Mitigation (HOSL)**

1. HOSL expressed an apology to the court.
2. Although it has been convicted by the jury of being the COMAH operator at the material time it did not know that it was. .- I reject this submission. The case was left to the jury, following the ruling of the Court of Appeal on this matter, on the basis that conviction was only possible if HOSL had identified itself to the CA as the COMAH operator and the CA had treated it as such.
3. Total had been the COMAH operator in the period before the indictment period – The breaches of duty for which it is being sentenced are confined to the indictment period.
4. The CA should have clarified the COMAH position for its own benefit and that of the operator following what was an ambiguous notification. Had it done so the position would have been clear from the outset and there would have been no need for the lengthy jury trial. - I agree and have taken this into account when considering the question of costs.
5. There had been no complaint about HOSL's performance of COMAH duties before the explosion. The Corrective Action Request to it of March 2005 did not raise the matters now the subject of the indictment.
6. The delegation by HOSL of many of its COMAH responsibilities to Total relieves it of much of the responsibility for the breaches of duty. HOSL had no actual control over the operation of the site and it was for Total to ensure that its systems were safe. – None of this affects the ultimate responsibility of a COMAH operator to ensure that Regulation 4 is not breached.
7. Many of the aggravating features described in the case law are not present.
8. HOSL assumed responsibility after the explosion for handling claims and performing remedial work. Claims have been settled generously. There were some 4000 claims amounting in total to many millions of pounds. Loss adjusters were appointed immediately. By March 2006 letters had been sent to potential claimants.
9. Uninsured claims were prioritised and most were paid by July 2006. The Community Trust Fund received £250,000 from HOSL towards the restoration of services and the rebirth of the area. Insured claims of up to £100,000 were settled by March 2007.
10. Chevron will indemnify HOSL as to 40% of any fine and costs ordered by the court.

### **MCS** faced allegations and has therefore been convicted of

1. Failing to carry out its maintenance contract with Total in such a way as to identify systematic faults with the gauges, draw them to the attention of Total and deal with them as such.

2. Failing to carry out the testing of both gauges and switches in such a way as to minimise risk.
3. Failing to appreciate that the replacement IHLS which it installed on Tanks 911 & 912 were not like for like replacements, and therefore
4. Failing to carry out its own duty of ensuring that it understood how the checkable switches worked when purchasing them and installing at Buncefield. Such a check would have identified the inoperable position of the switch.

The mitigation which it would have addressed to the court is contained in the interview of Mr Price its managing director at the time. He blamed TAV for selling switches which contained what he described as a trap and Total for not picking up the systematic failure of the gauges. While the jury's verdict against TAV and Total's pleas of guilty provide some support for this contention the same jury came to the same conclusion against MCS in respect of the switches.

The single complaint made by the Crown against **TAV** and found to have been proved by the jury was that in designing manufacturing and then supplying the new checkable lever switch F16 to all its customers, not simply Motherwell in connexion with Buncefield, it created a danger that the padlock supplied to fix the lever in its operating position might not be so fixed by end users or maintenance engineers. It was essential that users were aware that failure to do so would render the switch inoperable. Much evidence was called to the effect that persons at Buncefield and elsewhere assumed that the padlock was only security device to avoid the alarm being set off needlessly for instance in tanks which are mainly underground with the IHLS at or near ground level.

1. The documents which contained instructions on testing the switch which contained instructions as to locking and relocking the padlock before and after the test were not routinely supplied with the switch.
2. The previous checkable switch had a position for the lever which was rebated for the lever in the operational position. The new switch had no rebate so the lever was much more liable to fall under its own weight or by light pressure.
3. Even when instructions were supplied they did not point out the critical importance of the padlock. Users were not informed either
  - i. That the switch would not work at all if the lever was left even slightly below the horizontal or
  - ii. That the padlock supplied had to be used or, if not, at least one with the same or almost the same diameter of shackle.

### **Mitigation**

The switch's designer Mr Cockwell has a long record of safe design and was a transparently honest witness. He genuinely believed that the company had done enough to ensure safe operation of the F16 switch by its users.

The breach of duty so far as the Buncefield explosion was concerned was remote in time and proximity, the switches had been purchased more than a year earlier and

Neither Motherwell nor Total identified the fact, as they should have done for themselves by careful study of this safety critical piece of equipment, that it did not work if the lever was left below the horizontal.

The complete cooperation with the investigation extending to the creation of a replica switch for the purposes of it.

Full compliance with the improvement notice served on it after the explosion. Every single previous purchaser of the switches was traced and informed of the new instructions high-lighting the necessity of using the padlock for safe operation of the F16 switch

## **Part 2 – The Environmental Consequences**

### **So far as Total/HOSL are concerned the prosecution allegations were**

1. Total/HOSL caused polluting matter to enter controlled waters. *Accepted. The offence is absolute and can be committed without the knowledge of the offender.*
2. The failings identified in connexion with the explosion are relevant to that causation. *Accepted*  
MITIGATION The extent of the pollution caused by the combination of fuel and firewater was not predictable. Most relevant scenarios were based upon 1 tank failing rather than many.  
The clean up began immediately and has been and continues to be effective. The consequences are now said by a credible expert to be manageable and limited.
3. Bund wall defects should have been repaired. *Accepted*  
MITIGATION Expert advice was sought and followed.  
The defects had not been identified by the CA.  
The standard of bund wall was on a par with other sites.  
There was a programme of bund improvements in hand at the time which was only being delayed until the results of research at John Moores Uni to decide on its nature and extent.
4. There was no continuing process of reviewing the design or adequacy of the bunds. *Accepted*  
MITIGATION The possibility of a vapour cloud explosion and its consequences was not appreciated by anyone in the scientific community at the time.
5. Although there was no requirement imposed on it by the CA it should have taken steps to provide tertiary containment.  
MITIGATION there was no requirement for tertiary containment at the time.  
- The practical “requirement” was that there is absolute liability for causing polluted water to escape as the company knew only too well from its experiences with petrol station forecourts at the beginning of this century.

Both HOSL and Total relied upon the same general mitigation in respect of Part 2 as they did in part 1. There has been a determined and apparently successful attempt by all parties to remove polluting fluid from the site and its surroundings and to clean the soil.

## **BPA**

As I have already said BPA falls to be sentenced for the 2 offences to which it pleaded guilty on the Basis of Plea which the prosecution for reasons I have mentioned have chosen not to challenge.

The background to it is that it bears no responsibility whatever for the failures which led to the explosion and subsequent fires. The bund wall about which complaint was made surrounded Tank 12 which was across the road from the HOSL site.

The plea is based on the acceptance of 4 failures

1. Failure to take all necessary measures to limit the consequences of a major release of polluting matter into 4 particular soakaways, 2 in Cherry Tree Lane near the site, and one in the Wickes site and one at the Hoggs Lane roundabout a little further away.

MITIGATION. BPA did not know of the two in Cherry Tree Lane. They were not visible to the naked eye being covered with undergrowth They did not appear on maps supplied by the County Council and were not discovered by consultants in 2004. Although there is a dip in the road which might indicate that there would be a drain it would have been reasonable to assume that rainwater would simply soak into the grass verges at the side of the road. Although the company realised there must be drains at the Wickes site and the roundabout it did not know of their precise locations.

2. Failure to design the Tank Bund wall to relevant standards.
3. Failure to construct the Tank Bund wall to the original design in particular by
  - a. Installing hydrophilic strips instead of water stops and joints in the wall. In the event neither were used.
  - b. Not avoiding tie bolt holes.
  - c. Using shallow angled obtuse corner joints were used.

MITIGATION. Although a better constructed wall would no doubt have performed better in retaining the fuel and firewater there is no guarantee that it would have contained all of it. The unforeseen extreme consequences of the explosion involving fires on both sides of the wall which caused the wall to deform and crack, the continuing flow of fuel into the Tank after the explosion because of the damage to the BPA control room, the decision of the Fire Service and police to attack the fire on 13<sup>th</sup> December which led to huge quantities of firewater adding to the fuel, would likely have caused damage to a properly constructed bund wall.

The risk of bund overtopping had been assessed as less than 1 in a million by a report of February 2004.

4. Failure to create tertiary containment in the knowledge that there was a risk that fuel might overtop the bund wall.
  - a. MITIGATION. BPA did have a plan but the plan did not cater for the 4 missed soakaways. It could have either have reprofiled the topography by building mounds or walls or
  - b. Blocked the relevant drains.
  - c. Its Safety Report conceded that the bund wall was not impregnable and therefore a major release was possible but
  - d. 3 large lagoons were created for foreseeable accidents.
    - i. Treated fluid could be dispersed through Pratts Dell to a river.
    - ii. Fluid could be transferred by pump either way between bunds.

- iii. There was an agreement with HOSL to take the excess.

### **General Mitigation**

1. The consequences have not been as bad as was feared. The pumping station at Bow Bridge nearby has recently started working again and the indications are that the consequences are manageable and limited.
2. The company has an excellent safety record which has been recognised by many awards.
3. The remedial work of skimming contaminants and removing contaminated soil was immediate and has been comprehensive.
4. Messrs Lewis and Oathen of BPA have been entirely open and cooperative with the investigation.
5. The company cooperated with the efforts to restore supplies to London and Gatwick Airports.
6. The company has had to meet COMAH costs of £1.4m since the explosion.

### **Sentence**

In identifying the relevant principles for sentence in this class of case I have been referred to a number of cases by counsel.

R v F Howe & Son (Engineers) Ltd [1999] 2 Cr App R (S) 44

R v Friskies Petcare Ltd [2000] 2 Cr App R (S) 401

R v Balfour Beatty Rail Infrastructure Ltd [2007] 1 Cr App R (S) 65

R v Thames Water [2010] 3 All ER 51

New Look Retailers Ltd v London Fire & Emergency Authority [2010] EWCA 1268, as well as to the Guidelines issued by the Sentencing Guidelines Council in Feb 2010 on the level of sentences to be passed in cases involving breaches of the Health and Safety at Work Act and Environmental legislation such as the Water Resources Act. From these I have derived the following principles.

1. The severest penalties should be reserved for major public disasters.
2. While there can be no precise correlation between the size of the penalty and the size of the company the penalty in such cases should be “....substantial enough to .....bring the necessary deterrent message home to those who manage the company and also its shareholders”.<sup>2</sup>
3. The more foreseeable the danger the more serious the offence.
4. The more serious the consequences the more serious the offence.
5. Although offences in which death actually results are more serious than those in which it does not, “...the court does not have to wait until death or serious injury has occurred to express its displeasure at whole sale breaches of the defendant’s responsibilities under the law.”<sup>3</sup> (Pitchford LJ’s recent judgment in R v the London Fire and Emergency Planning Authority [2010] EWCA Crim 1268 para 42).

### **Possible aggravating features**

6. Was the breach or were the breaches isolated or systematic?

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<sup>2</sup> Thames Water para 39

<sup>3</sup> New Look Retailers Ltd para 42

- a. Systematic in the cases of Total, HOSL and MCS.
  - b. Isolated although prolonged in the cases of TAV and BPA.
7. How far short of an acceptable standard did the defendant fall? In this respect I accept with one exception the analysis in the Crown's document "Relevant Sentencing Features" submitted for this purpose.
- a. Very far in the case of Total and HOSL.
  - b. Far in the case of MCS.
  - c. Significantly in the cases of TAV and BPA.
8. How widespread within the organization was this breach? This is not an easy or particularly helpful question in the context of this case. The case focused on the HOSL site at Buncefield for the most part. The only Count on the indictment which extended beyond the site was that faced by TAV. The only company whose activities were confined to the site was HOSL. There was therefore limited evidence as to practices and systems employed by Total, BPA or MCS elsewhere.
- a. No evidence re Total or BPA.
  - b. HOSL's status as COMAH operator was a principal area of its work.
  - c. There was evidence that the same failings applied to MCS at at least one other site.
  - d. The breach within TAV was confined to the manufacture and supply of a particular type of switch. TAV is a small company.
9. How far up the organization did the breaches go? There are similar difficulties with this question.
- a. As to Total the court has little evidence.
  - b. As to HOSL it went right to the top. This was a joint venture company which had taken to itself the responsibility for compliance at Buncefield with the COMAH regulations.
  - c. As to BPA no evidence.
  - d. As to MCS and TAV these were small companies. The responsibility was at or near the top of the companies.
10. Was there an element of cost-cutting at the expense of safety? Although that featured somewhat in the case when the question of the 9<sup>th</sup> supervisor and the savings in overtime payments was discussed and when the expenditure on improvements to the bund wall was considered it was not put forward as a major feature of the prosecution case in respect of any defendant. This case has more to do with slackness, inefficiency and a more or less complacent approach to matters of safety.
11. A failure to respond appropriately to near misses. Yes in the case of Total/HOSL. though not accepted in full. No evidence in respect of the other defendants.
12. Was there a prompt acceptance of responsibility? No. 3 defendants contested the case and two pleaded guilty some time after the proceedings had been instituted some 4 years after the incident. However, Total pleaded guilty at the first available opportunity. BPA pleaded guilty much later but I accept that as the earliest opportunity since I was assured that that a plea or pleas of guilty would be in due course be entered but that its or their basis was still the subject of discussions between the parties and their respective experts. In the end they came close to agreement but to the extent that they did not the

prosecution did not ask for the disputed matters to be put before me for decision at a *Newton* hearing in view of the facts,

- a. that the overspill and explosion were nothing to do with them and
- b. that there had been full cooperation with the CA from BPA since the explosion.

The two defendants which pleaded guilty are entitled to a reduction in the fine to reflect this as well as the obvious reduction in the costs, their own and those of the CA, which they will have to pay. In addition, following the jury's verdict on Count 1 of the indictment tried by the jury HOSL pleaded guilty to Count 2 of the second indictment and is entitled to some, though a much smaller reduction, in respect of that plea.

13. Was there a high level of co-operation with the investigation, beyond that which will always be expected? Yes in the case of BPA and TAV. Yes, though not to the same extent in the case of HOSL. Some but not sufficient for this to count as mitigation in the case of Total. Limited in the case of Motherwell whose responses to requests for documents were far from satisfactory.
14. Did the companies have a good safety record? Yes, with the exception of Total who have convictions under the WRA concerning escapes of fuel from petrol station forecourts from 2000-2002. These have been brought to an end following an agreement between the EA and the company. There is nothing of this nature or scale on their record.
15. Did they have a responsible attitude to health and safety such as the commissioning of expert advice or the consultation of employees or others affected by the organisation's activities? The court had little direct evidence concerning TAV and MCS though it is clear that neither company ignored safety. Total certainly did not ignore safety but the Buncefield operation would have benefited, as is now conceded, from a far more thorough look than was provided by the DNV reports which it commissioned on a regular basis of its systems and operation and, as is also conceded, for more account to have been taken of the concerns expressed by those on the ground. HOSL relied entirely or almost entirely on the one hand upon reports of the terminal manager and on the other on more or less distant head offices in Paris and San Ramone California for the funding necessary for expenditure on safety improvements.
16. The position is further complicated in this particular case by four unusual features.
  - a. First – the existence of a defendant – Motherwell Control Systems 2003 Ltd – which has escaped its just desserts by putting itself into voluntary liquidation and reforming itself under a new name with the same personnel and a clause in its Articles of Association specifically excluding any liability of the new company for the faults of the old. Counsel for TAV used some forceful language when describing this development in his speech to the jury. It was hard then not to agree with him. However, the Crown has not joined itself to these criticisms and the Court – in the absence of evidence to the contrary - with the possibility of a genuine voluntary liquidation which has left it owing £133,000 to trade creditors, lenders and the like and just short of

£80k in VAT and other debts to the state. The court saw a letter from the liquidator questioning the public interest in pursuing a prosecution of the company in view of its circumstances. While of course it was for the Crown to decide whether it wished to continue a case against a dormant company it was clearly in the public interest to know where the faults lay which contributed directly or indirectly to the explosion and its consequences. Since conviction the Crown has written to the liquidator asking him for any representations he may have. Unfortunately no reply has been received.

- b. Second, TAV itself is now nothing more than a shadow of its former self. Although it cannot be said that the way in which this has come about was the result of an intention to avoid these proceedings since the change occurred on 1<sup>st</sup> Jan 2005, the effect of it has been to put TAV beyond the reach of any proper or effective penalty for its breach of the Health and Safety at Work Act and to enable it to contest these proceedings safe in the knowledge that it would only receive a nominal penalty if convicted.
- c. Third, the defendant Hertfordshire Oil Storage Ltd is a joint venture between Total UK the first defendant and Texaco/Chevron. Any fine imposed on this defendant will be paid as to 60% by Total and 40% by Texaco. The case for Total, its majority shareholder is, and has been throughout, that HOSL was the COMAH operator and, as already mentioned, I was shown an open letter from Total to Texaco/Chevron sent a few days before the pleas were to be entered urging that company to agree that HOSL plead guilty. The case therefore for HOSL has, curiously, been presented as the case of its minority shareholder Chevron/Texaco and involved an unsuccessful attempt to shift all responsibility onto the majority shareholder Total. This came about as the result of the company's earlier agreement to abide by the decision of a litigation committee set up to advise it. This extraordinary state of affairs also has the consequence that the fine imposed on HOSL to reflect its breaches of its duty under Regulation 4 of the COMAH regulations will be paid as to 60 % by Total whose own admitted breaches as an employer, of duties owed to its employees and to the public at large under the HSWA 1974, are to be punished separately.
- d. Fourth, in respect of Part 2, one company, BPA, has pleaded guilty to charges both under the WRA and the HSWA in connexion with its status as COMAH operator whereas HOSL whose conviction on Part 1 was under the HSWA in connexion with its COMAH operator status has pleaded guilty only to the WRA charge and indicated that the plea to the WRA count was only tendered on the basis of the jury concluding that it was indeed the COAMH operator. I have taken the view that the respective culpabilities of HOSL and BPA are to be determined by the facts rather than by reference to the number of counts.

The Court is required to consider compensation in all cases and to give reasons, if it does not order it, why it has not done so. In this case the court has been informed that payments of many millions of pounds have already been made and that the process of settling those claims is far advanced. The Court of Appeal has repeatedly urged the criminal courts not to embark upon complex investigations which are best handled in the civil courts. No application has been made in these proceedings for compensation in respect of any person.

I now turn to considerations of the size of the penalty. The features of individual cases are so variable that only the principles are clear. How those principles transfer into the appropriate financial penalty in a particular case is a matter for the sentencer putting together the seriousness of the offences and the ability of the defendant to pay. The courts have accepted that this will often lead – as it will in this case – to widely differing sentences. Where possible in these serious cases the amounts of fine and costs should be such as not to cripple the defendant and put employees out of work but sufficient to demonstrate to the companies concerned and their shareholders' public displeasure at their conduct.

In this case, as I have already said, the court's ability to punish 2 of the defendants has been removed by their effective disappearance. A penalty of any kind, let alone one which otherwise be appropriate upon MCS will simply mean that the little money left to pay creditors, who are in no way to blame, will be further diminished and the available resources of TAV – some £1500, a small fraction of the fine which would have been imposed otherwise. To impose a fine which the Magistrates' Court has no chance of recovering would be wrong in principle and involve the court in more wasted expense. As I have already said HOSL's liability for fine and costs is to be indemnified by the two shareholders. Total have put in accounts which indicate that they are in a position to meet any penalty the court sees fit to impose. Chevron has not put in accounts, they are not of course defendants, but Mr Henderson QC has indicated that it is in the same position as Total. I have also considered the accounts supplied me by Mr Lissack QC on behalf of BPA. BPA is a substantial company with substantial corporate shareholders.

I have discounted the fines by the following percentages for reasons I have set out above. I have reduced the starting point for HOSL in order to take some account of the fact that Total is to pay the majority of the HOSL fine as well as its own.  
Total by 40% to reflect the early plea and the other mitigation.  
HOSL by 10% on part 2 only to reflect the late plea.  
BPA by 50% to reflect the plea and the exceptional mitigation.

Sentence

Total

On count 1 of the original indictment T20090222/3

Fine £1,500,000

On count 2 of the original indictment

£1,500,000

On Count 7 of the original indictment

£600,000

Total fines of £3,600,000

HOSL

On Count 1 of the Part 1 trial indictment T20090222A

Fine £1,000,000

On Count 2 of the part 2 trial indictment T20090222B

Fine £450,000

Total fines of £1,450,000

BPA

On Count 6 of the original indictment

£150,000

On count 9 of the original indictment

£150,000

Total Fines of £300,000

MCS

On Count 2 of the Part 1 indictment

Fine £1000

TAV

On Count 3 of the Part 1 indictment

Fine £1000

I have also had to consider the application of the Crown for costs.

The cost to the taxpayer of the investigation and the trials has been more than £6.3m.

### **Principles.**

1. Guilty defendants should normally pay both trial and investigative costs in fair proportion to the amount which each can be said to have incurred and otherwise to share them if they cannot be separated out.
2. However, although Total and HOSL are most to blame by reason of their involvement in both Parts of the indictment whereas TAV, BPA being limited to part 2 and TAV and MCS to part one and in the latter cases their failings are fewer than those of Total/HOSL, it would be wrong to saddle Total or HOSL with the costs of TAV or MCS' trial or investigation. Although there are dicta in the case of Fresha Bakeries 2000 CAR (S) 401 to the effect that where there are both corporate and human defendants it may be appropriate to order that the corporate defendants shoulder more of the burden of costs, that principle should not in my judgment extend to cases like the present where the impecunious co-defendants' offending is different and the wealthy defendants had no responsibility for them or their stance at trial. The prosecution embarked on the two prosecutions in the knowledge that what it was doing was putting important matters before a jury for decision and that if convicted any penalty imposed on MCS or TAV would be nominal.

3. I have accepted that there is some force in the complaint made by HOSL that the CA should have done more to establish to everyone's satisfaction who was the COMAH operator and have reduced the costs to reflect this.

I have apportioned costs as follows and rounded the resulting figures down.

Total. 55% of the pre-trial legal costs, 5 % of Part 1 trial costs, 33.3% of Part 2 trial costs  
60% investigation costs (Part 1), 55% investigation costs (Part 2).

£2.6 million

HOSL 25% of pre-trial legal and investigation costs discounted to 15% for the reasons given, 50% of trial costs (Part 1), 33.3% of trial costs (Part 2)

£1million

BPA 10% pre-trial legal costs, 33.3% of trial costs (Part 2) 25% investigation costs (Part 2)

£480,000

The sums I would have awarded against MCS and TAV respectively would have been £300,000 and £450,000 to reflect MCS' lack of effective participation in the trial. In the result I order that £500 be paid by both defendants.

The combination of fines and costs results in orders that

Total (UK) pay £6,200,000

HOSL is to pay £2,450,000

BPA is to pay £780,000

MCS is to pay £1500

TAV is to pay £1500

In the absence of submissions to the contrary the amounts must be paid in 7 days.

Finally I should pay tribute to the people of this county who in various ways have been involved in events from the 11<sup>th</sup> December onwards. I have referred to the victims of the blast who have by all accounts kept the spirits up during a time of great stress. The emergency services were faced with a unique situation and reacted to it with coolness and no doubt great courage in many cases. The court and its staff here at St Albans has shown that it was possible for this Hertfordshire case to be fairly tried in this county. I thanked the jury for their service at the end of the trial. Many have returned to see the end of the case and I state in open court what I believe they have been informed by letter, that they are excused further jury service – if they wish – for 10 years.

The case involved a massive effort of preparation on all sides. It is a tribute to all parties that the documentation was kept to the minimum necessary and the a trial which had been estimated to last 5 -6 months has been concluded in less than 3.