



CORPORATE KILLING

Introduction

- 1 The New Offence of Corporate Manslaughter is much heralded.
- 2 The absence of any manslaughter convictions for disasters such as Zeebrugge, the Marchioness, the Southall Rail Crash and Piper Alpha, and the subsequent public outcry, has meant that the government has finally taken action over its manifesto commitments; the Corporate Manslaughter and Corporate Homicide Bill is now going through Parliament.
- 3 The political pressure was added to by the Hatfield Rail Crash in October 2004 in which four people died and over one hundred were injured. There was controversy in September 2004, when Gerald Corbett, former boss of Railtrack, was cleared by the Judge, Mackay J, on the basis of lack of evidence. In July 2005 five senior managers from Railtrack and Balfour Beatty were cleared of manslaughter (the charges were dropped).
- 4 The Corporate Manslaughter and Corporate Homicide Bill ("the Bill"), was introduced into Parliament on 21 July 2006. It has already been through the Commons and is currently in its Committee stage in the Lords. The final form of the legislation is unclear.
- 5 It is thought that the Bill will become law in 2007 or 2008.
- 6 In the ten years to 2004, it was reckoned that 3000 workers and 1000 members of the public had died in work related accidents.

- 7 In 2005/06, 212 people were killed at work (223 in 2004/2005). The latest figure represents the lowest on record, at a rate of 0.71 fatalities per 100,000 workers.
- 8 These figures also support a favourable comparison across Europe, which shows Great Britain as having the lowest fatal injury rate in Europe, a rate of 1.1 worker per 100,000.
- 9 Falls from height remain the most common cause of fatal injury, with 46 workers being killed following a fall compared to 53 workers killed in 2004/2005.
- 10 Two industries, construction and agriculture, account for just under half of all fatal injuries; however, both industries saw sizeable reductions in the number and rate of fatalities. In construction there was a 14% drop in the number of fatal injuries resulting in the lowest rate on record and in agriculture there was a reduction of 21% to the lowest rate since 1999/2000.
- 11 Campaigners and Union leaders have long wanted a clear blue line between manslaughter and H&S offences.

The Problem with the Old Law

- 12 The problem with the old corporate manslaughter offence was that it was necessary to prove that someone who could be shown to be the “*controlling mind*” of a company had been grossly negligent and that this negligence led to someone’s death. See for example AG’s Reference No. 2 of 1999 [2000] IRLR 417.
- 13 In large companies, complex management structures made it practically impossible to find a person who had been both negligent and who could be classed as a “*controlling mind*”.

14 By s18 of the Bill:

“The common law offence of manslaughter by gross negligence is abolished in its application to corporations”

The New Offence

15 And so what is the point in a new offence that is easier to prove?

16 It has been said that attributing the stigma of “*manslaughter*” to an offence arising from deaths at work is the main point of the new corporate killing offence.

17 By s16 of the Bill, the consent of the DPP is required for a prosecution for corporate manslaughter.

18 Instead of trying to identify and charge individuals, the new proposed offence makes the company the responsible and punishable entity. By s1 of the Bill, an organisation is guilty of corporate manslaughter if

“the way in which any of [its] activities are managed or organised by its senior managers (a) causes a person’s death, and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased”

19 If found guilty, a company will be subject to an unlimited fine (s1(5)), although no individuals can be punished under the new laws (s17).

20 The breach of this duty must be “*gross*”. By s1(3)(c), this is defined as conduct that “*falls far below what can reasonably be expected of the organisation in the circumstances*”.

- 21 Many critics have focused on the “*senior manager*” test, and have suggested that it is in reality a reintroduction of one of the problems of the old law, i.e. identifying fault at a high level.
- 22 By s2, the definition of “*senior manager*” in the Bill is a person playing a “*significant role*” in:
- (a) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or
 - (b) the actual managing or organising of the whole or a substantial part of those activities.
- 23 However, in the explanatory notes accompanying the Bill, the Government admits that it is still looking at alternatives to the “*senior management failure test*”, stating: “*The Government is continuing to consider whether this part of the Bill can be improved*”.
- 24 So what is a “*relevant duty of care*”? By s3(1):

““*A relevant duty of care*”, in relation to an organisation, means any of the following duties owed by it under the law of negligence –

- (a) *a duty owed to its employees or to other persons working for the organisation or performing services for it;*
 - (b) *a duty owed as occupier of premises;*
 - (c) *a duty owed in connection with –*
 - (i) *the supply by the organisation of goods or services (whether for consideration or not),*
 - (ii) *the carrying on by the organisation of any construction or maintenance operations,*
 - (iii) *the carrying on by the organisation of any other activity on a commercial basis, or*
 - (iv) *the use or keeping by the organisation of any plant, vehicle or other thing.”*
- 25 There are some specific exemptions for duties arising from public policy decisions, exclusively public functions, statutory inspections, policing and law enforcement, emergency services and child protection and probation functions (see s4 - 8).

26 And what is a “*gross breach of...duty*”? The definition is expanded later in s9 of the Bill:

“(1) ...

(2) *The jury must consider whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the alleged breach, and if so –*

(a) *how serious that failure was;*

(b) *how much of a risk of death it posed.*

(3) *The jury may also –*

(a) *consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure as is mentioned in subsection (2), or to have produced tolerance of it;*

(b) *have regard to any health and safety guidance that relates to the alleged breach.”*

27 When an organisation is convicted, s10 provides a power for Courts to order it to take specified steps to remedy:

(a) the breach mentioned in s1(1);

(b) any matter that appears to the Court to have resulted from that breach and to have been a cause of the death.

28 There has been much criticism of the new law, particularly from Trade Union Leaders, over the fact that individuals will not be prosecuted and potentially imprisoned.

29 By s17 an individual cannot be guilty of aiding, abetting, counselling or procuring the commission of an offence or corporate manslaughter.

30 Amicus’ General Secretary Derek Simpson has recently said:

“Although we welcome the bill which will make it easier to bring prosecutions against companies that kill their employees, we want to see a much wider range of penalties. All the evidence shows that the threat of prosecution and imprisonment is the main incentive for companies to improve their health and safety standards”

Level of Fines

- 31 Prior to the Hatfield Crash, the record fines handed down by the Courts in England and Wales for H&S offences were the £2m fine given to Thames Trains over the Ladbroke Grove train crash and the £1.5m fine given to Great Western over the Southfields crash.
- 32 On 5 July 2006, the Court of Appeal reduced the £10m fine imposed on Balfour Beatty over the Hatfield Crash to £7.5m for breaches of the Health and Safety at Work Act 1974 (“the 1974 Act”) - R v Balfour Beatty Infrastructure Ltd [2006] EWCA 1586; The Times, 19 July 2006.
- 33 The Court accepted the argument that there had been a discrepancy between the fine imposed on Balfour Beatty and that imposed on Railtrack which had been fined £3.5m.
- 34 The Court cited R v Fawcett 5 Cr App R CS 158, which said on page 161
- “would right thinking members of the public, with the knowledge of the relevant facts and circumstances hearing of the sentence consider that something had gone wrong with the administration of justice”*
- 35 The Court went on to say *“the disparity in the two fines is so great in this case that we consider that the test is satisfied”*.
- 36 The Court approved the guidelines of mitigating and aggravating factors set out in R v Howe & Co (Engineers) Ltd [1999] 2 Cr App R (S), which further reiterated the objects of a sentence, namely *“to achieve a safe environment for the public and to bring the message home, not only to those who manage a corporate defendant, but to those who own it as shareholders”*.

- 37 The Court was able to reduce the fine within the Howe principles, which in turn reduced the disproportion between the two fines.
- 38 In March 2006, the Court of Appeal had reduced the fine on Transco after they had pleaded guilty at the earliest opportunity for a breach of the 1974 Act from £1m to £250,000 (R v Transco [2006] EWCA Crim 838).
- 39 In August 2005, the Scottish High Court imposed a fine of £15m for a H&S offence on Transco, following a seven-month trial involving a gas explosion that killed a family of four in a house near Larkhall in Scotland.
- 40 Not many fatal accidents involving purely employees result in fines of over £1m; the average fine for a fatality at work is £50,000. Most commentators predict that this will change under the new law, and that fines of up to £15m will become common place. See Blast Furnace Deaths below.
- 41 Some very recent examples of sentencing under existing H&S legislation are set out below.

Warrington Death

In January 2007, the HSE successfully brought criminal charges against five different parties after the death of Mr David Moran. Between them they were fined a total of £87,000 and ordered to pay £57,228 costs at Manchester's Minshull Street Crown Court.

David fell eight metres to his death when he stepped on a fragile roof light in Warrington on 20 September 2002. David and another untrained demolition worker, Anthony Harris, were using the roof to access another roof on the site.

David's employer Elmsgold Haulage Ltd and John McSweeney, the Managing Director of Elmsgold Haulage Ltd, pleaded guilty to two charges under Section 2(1) of 1974 Act in that they failed to provide a safe system of work and failed to ensure that people working on site were properly trained and supervised, and a third charge under Regulation 9(3) of the Lifting Operations and Lifting Equipment Regulations 1998 in that they failed to ensure that lifting equipment was properly examined and inspected.

Elmsgold Haulage was fined £10,000 for each charge and ordered to pay total costs of £9,756. Mr McSweeney was fined £5,000 for each charge and ordered to pay total costs of £5,000.

Demolition contractor Excavation & Contracting (UK) Ltd, the principal contractor for the Chesford Grange project, and the company's former Managing Director Bernard O'Sullivan pleaded guilty to a charge under Section 3 (1) of the 1974 Act in that they each failed to ensure that risks to non employees were adequately controlled.

Excavation & Contracting (UK) Ltd was fined £35,000 and ordered to pay £9,972 costs. Bernard O'Sullivan was fined £20,000 and ordered to pay £30,000 costs.

Dennis O'Connor, Elmsgold Haulage's site foreman pleaded guilty to a charge under Section 7 of the 1974 Act in that he failed to ensure the safety of other employees. He was fined £2,500 and ordered to pay £2,500 costs.

At an earlier hearing at Warrington Magistrates' Court on 31 January 2006, John Edge of Knight Frank, a property management company acting for the owner of Chesford Grange and planning supervisor for the project, pleaded guilty to two charges under Regulation 15 of the Construction (Design and Management) Regulations 1994 for which Knight Frank was fined a total of £7,000 plus costs of £4,500.

Knight Frank operate as a partnership, which does not constitute a legal entity for the purposes of prosecution, and therefore the case was taken against one of the partners, Mr John Edge.

Relevant Legislation

- Section 2(1) of the 1974 Act states: "It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees."
- Section 3(1) of the 1974 Act states: "It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety."
- Section 7 of the 1974 Act states: "It shall be the duty of every employee while at work to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work; and as regards any duty or requirement imposed on his employer or any other person by or under any of the relevant statutory provisions, to co-operate with him so far as is necessary to enable that duty or requirement to be performed or complied with."
- Regulation 9(3) of the Lifting Operations and Lifting Equipment Regulations 1998 states: "Subject to paragraph (6), every employer shall

ensure that lifting equipment which is exposed to conditions causing deterioration which is liable to result in dangerous situations is

- thoroughly examined
 - in the case of lifting equipment for lifting persons or an accessory for lifting, at least every 6 months.
 - in the case of other lifting equipment, at least every 12 months; or
 - in either case, in accordance with an examination scheme; and
 - each time that exceptional circumstances which are liable to jeopardise the safety of the lifting equipment have occurred; and
- if appropriate for the purpose, is inspected by a competent person at suitable intervals between thorough examinations
 - to ensure that health and safety conditions are maintained and that any deterioration can be detected and remedied in good time."
- Maximum penalty in a Crown Court for breaches of health and safety legislation is an unlimited fine for each offence.

Blast Furnace Deaths

In December 2006 Steelmaker Corus UK Ltd was fined £1,333,000 and ordered to pay costs of £1,744,474.74 following charges brought by the HSE. Three workers died in 2001 from a blast furnace explosion at the company's Port Talbot site.

Stephen Galsworthy, Andrew Hutin and Leonard Radford were fatally injured in a massive explosion within Blast Furnace no. 5 at the Corus works on 8 November 2001. The company pleaded guilty before Swansea Crown Court to two charges of failing to ensure the safety of their employees and others brought by the HSE under the 1974 Act.

The explosion was caused by water in the furnace coming into sudden contact with hot material. As water turned into steam it expanded rapidly, creating pressure, which blew a confined vessel apart.

Corus UK Ltd was charged with a breach of Section 2(1) of the 1974 Act, in that the company did not ensure, so far as was reasonably practicable, the safety of its employees, including Stephen Galsworthy, Andrew Hutin and Leonard Radford, in connection with the operation of Blast Furnace Number 5.

Corus UK Ltd was also charged with breaching Section 3(1) of the 1974 Act, in that the company did not conduct its undertaking, namely the operation of Blast Furnace Number 5, in such a way as to ensure, so far as was reasonably practicable, that persons not in its employment, namely contractors, were not exposed to risks to their safety.

Lightwater Valley Ride Death

In November 2006, Lightwater Valley Attractions Ltd was fined £35,000 plus costs of £40,000 for breaching H&S at Leeds Crown Court.

Maintenance electrician Mr Eric Butters was fined £2,500 plus costs of £500. The French manufacturer, Societe Reverchon Industries, France, was found guilty after a four-day trial. The company, which is in liquidation, was fined a total of £120,000 plus £55,000 costs.

The cases were brought after a HSE investigation into an incident on 20 June 2001 at Lightwater Valley theme park, North Yorkshire. Twenty year old student Gemma Savage died and three other riders were injured after two cars collided on the 'Treetop Twister' roller coaster.

The 'Treetop Twister' ride at Lightwater Valley is a roller coaster where cars are pulled up to a height and then run back down on an undulating and twisting track under gravity. When a car failed to clear a 'hill', it was held near the top and the ride automatically stopped the following cars. Eric Butters used the maintenance hand controls to return cars to the station but his actions, combined with the effect of a ride wiring fault, resulted in the two cars colliding.

Lightwater Valley Attractions Ltd was charged with breaching Section 3(1) of the 1974 Act. Mr Butters was charged under Section 7(a) of the 1974 Act, and charges against the ride's French manufacturer, Societe Reverchon Industries, France, were under Sections 6 (1A)(a) & 6(1A)(c) of the 1974 Act.

Lightwater Valley Attractions Ltd and Mr Eric Butters pleaded guilty at an earlier hearing.

Relevant Legislation

- Section 6(1A)(a) of the HSW Act states: "It shall be the duty of any person who designs, manufactures, imports or supplies any item of fairground equipment to ensure, so far as is reasonably practicable, that the article is so designed and constructed that it will be safe and without risks to health at all times when it is being used for or in connection with the entertainment of members of the public."

Lancashire Farm Death

In November 2006, two companies and a company director were fined a total of £250,000 and ordered to pay total costs of £216,000 at Preston Crown Court after being found guilty of criminal charges following the death of a 31-year-old man at Heskin Hall Farm in Lancashire.

The charges were brought by the HSE following the death of 31-year-old Chargot Ltd employee Shaun Riley at Heskin Hall Farm on 10 January 2003. Mr Riley was driving an articulated dumper truck moving soil around the site when it overturned.

Ruttle Contracting Ltd, the principal contractor for the work, was found guilty of a charge under Section 3(1) of the 1974 Act in that it failed to ensure the safety of someone not in their employment. The company was fined £100,000 and ordered to pay £75,000 costs.

Chargot Ltd trading as Contract Services, which employed Mr Riley, was found guilty of a charge under Section 2(1) of the 1974 Act in that it failed to ensure the safety of an employee. The company was fined £75,000 and ordered to pay £37,500 costs.

Mr George Henry Ruttle of Heskin Hall is a director of Ruttle Contracting Ltd and in that role was found guilty under Section 37(1) of the 1974 Act in that he caused the company to commit an offence under Section 3(1) of the same act. He was fined £75,000 and ordered to pay £103,5000 costs.

Tow Tractor Accident

In November 2006, a Chorley company was fined £100,000 and ordered to pay £18,895 costs after pleading guilty to three criminal charges brought by the HSE following the death of an employee, 21-year-old Daryl Wayne Lloyd, in a tow tractor incident.

Pin Croft Dyeing and Printing Co Limited was fined a total of £100,000 after pleading guilty to three charges:

- Under Section 2(1) of the 1974 Act in that they failed to ensure the safety of employee Daryl Wayne Lloyd;
- Under Regulation 3(1) (a) of the Management of Health and Safety at Work Regulations 1999 in that they failed to make a suitable assessment of the risks to Daryl's health and safety; and
- That they breached regulation 5(1) of the Provision and Use of Work Equipment Regulations (PUWER) in that they failed to ensure that the tow tractor being driven by Daryl was maintained in efficient working order.

Relevant Legislation

- Regulation 3 (1) (a) of the Management of Health and Safety Regulations 1999 states:

Every employer shall make a suitable and sufficient assessment of the risks to the health and safety of his employees to which they are exposed whilst they are at work.

- Regulation 5(1) of the Provision and Use of Work Equipment Regulations 1998 requires an employer to ensure its equipment is maintained in an efficient state, in efficient working order and in good repair.

RODERICK MOORE

SOUTHERNHAY CHAMBERS
EXETER

25 January 2007