



CORPORATE MANSLAUGHTER

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CAPITAL PROJECTS IN THE EDUCATION SECTOR

Introduction

1. Over the last thirty years 10,000 people have been killed in work related incidents 7,000 of which were, according to the Health and Safety Executive, a result of management failure.⁽¹⁾ This has resulted in 11 company directors being convicted of corporate manslaughter, with 5 directors being imprisoned.
2. According to the Health and Safety Executive in 2005/2006:
 - 2.1 28% of all work related fatalities occurred in the construction industry;
 - 2.2 "Falls from a height" accounted for over half of work-related deaths in the construction industry;⁽²⁾
 - 2.3 The rate of construction-related deaths has dropped by 50% in the last five years, the biggest ever drop.⁽³⁾

The impetus for a new offence

3. The impetus for a new law on corporate manslaughter has been the rail/transport disasters of the late 80s/90s. In 1987 192 people died on the *Herald of Free Enterprise*; the Ladbroke Grove disaster in October 1989 resulted in 31 fatalities with

⁽¹⁾ *The Guardian* Monday 24 July 2006. Please note that the Engineering Employers Federation dispute the Health & Safety Executives figures

⁽²⁾ *HSC Statistics of Fatal Injuries 2005/2006* page 7

⁽³⁾ Against *HSC Statistics of Fatal Injuries 2005/2006*

- 141 people injured; in the Southall rail disaster 7 people died and at Hatfield 4 people died and 102 were injured.
4. In the Hatfield disaster five middle-ranking managers were charged with manslaughter, but all five were acquitted at the direction of the judge. This was despite the judge describing the situation as “one of the worst cases of industrial negligence” he had ever seen. The Sheen Inquiry into the *Herald of Free Enterprise* disaster stated “from top to bottom the body corporate was affected by the disease of sloppiness”. No company or individual was convicted for corporate manslaughter in respect of the *Herald of Free Enterprise*, Hatfield, Ladbroke Grove, Paddington and Southall disasters.
 5. Instead Health and Safety Law has been used to impose fines. Fines have been imposed on companies involved in Hatfield (Balfour Beatty £7.5m,⁽⁴⁾ Railtrack £3.5m), Paddington (Thames Trains £2m) and the Southall disaster (Great Western Trains £1.5m) for breaches of the Health and Safety at Work Act 1974. The fines, however, did not prevent universal condemnation when companies and the individuals avoided manslaughter convictions. The public perception is that the courts have been too lenient.
 6. The recent crane collapse at a Barratt site in Battersea, where a crane driver and a member of the public were killed, has also brought the focus of health and safety/corporate killing issue back on the construction industry. The Battersea crane collapse was the third collapse in six years.⁽⁵⁾

Manslaughter by gross negligence

7. Manslaughter can result from a death where the perpetrator did not have the intention to either kill or cause serious injury to the victim. As the law currently stands an organisation such as a company, etc., can be convicted of the common law offence of manslaughter by gross negligence.
8. In order to convict a company of manslaughter by gross negligence the prosecution must establish that:

⁽⁴⁾ Reduced from £10m by the Court of Appeal

⁽⁵⁾ In February 2005 two men were killed and a crane collapsed at a Willmott Dixon site in Worthing, East Sussex, whilst in May 2000 a crane collapsed at Canary Wharf killing three people.

- 8.1 There was a duty of care owed by the organisation to the deceased. This will often exist if business has been carried out in a way that may affect the public, employees etc.;
- 8.2 There must be breaches of duty of care which resulted in death;
- 8.3 The breach of duty of care was so great it could be characterised as gross negligence and therefore criminal. Gross negligence means the organisation's conduct departed so radically from the standard expected of a reasonable person that the organisation's actions can be considered as criminal.

The controlling mind

9. However, the law finds it difficult in trying to work out what a company's intentions or thoughts actually were. The law requires a guilty mind when committing an offence. The difficulty is when trying to taint a whole (say) company with an intention/guilt on the basis of the actions of a few of its employees.
10. In order to discover what the true intentions of a company are, the law looks for a "controlling mind" of a company. There must be one person who is the "mind of the company" and directs the company's operations. Further still, it must be this person who actually carried out or conspired with the act or omission which caused the fatality.
11. Whilst such an approach may have worked for small organisations in the nineteenth century, the concept of a "controlling mind" does not lend itself easily to modern large and often complex businesses. In modern companies with complex management structures it is often difficult, if not impossible, to identify a single person who directs the company. A death can be caused by a series of negligent decisions stretching through every or just some levels within a company so that it is impossible to blame a single guilty individual. When looking for a company's intention the law does not allow the negligence of several individuals to show that the company is grossly negligent. Even if a number of people, including the board/directors/senior managers, have acted negligently, this will not render an organisation guilty of manslaughter. It is necessary to identify a specific individual who is guilty of gross negligence. There must be this individual who was the "controlling mind" of the organisation. ⁽⁶⁾

⁽⁶⁾ Against *HSC Statistics of Fatal Injuries 2005/2006*

12. The difficulty with trying to find a “controlling mind” of a large modern business has led to virtually all prosecutions for manslaughter by gross negligence against large businesses, such as P&O Ferries and Railtrack, failing. The lack of a “controlling mind” has often led to judges ordering an acquittal, before the facts are even put to a jury.
13. For a company to be convicted of manslaughter by gross negligence, an individual with the “controlling mind” must be convicted of manslaughter too.
14. Accordingly, the only successful corporate manslaughter prosecutions have been against small companies where it is easy to find the controlling mind. In *Kite and OLL Limited* the company was successfully prosecuted following the death of four teenagers on an adventure trip in Lyme Bay. However, OLL Limited was fined £60,000 which represented its entire assets and Mr Kite was sentenced to three years in prison (later reduced on appeal to two). The controlling mind of the company was clearly Mr Kite - OLL Limited was a one-man organisation.

Attempts to Create a new offence of corporate manslaughter

15. Public outcry has led to numerous attempts to try to amend the law as it relates to corporate manslaughter. A Law Commission Report was issued in 1994 followed by a further Law Commission Report two years later in 1996. This 1996 Report added a new approach by suggesting that a company’s inherent management failings should be looked at when deciding whether or not to convict a company, rather than trying to find an individual with the controlling mind.
16. When the Labour Party came to power in 1997, the then Home Secretary, Jack Straw pledged the Labour Party to a new law on corporate killing.
17. A third Law Commission Report in 2000 led to the publication of a Corporate Killing Bill. This proposed that not only companies but individuals could be convicted of the offence of corporate manslaughter. It was followed by lobbying from employer trade unions and other bodies alike.

This version of the corporate manslaughter Bill was eventually dropped.

18. In May 2003 the then Home Secretary, David Blunkett confirmed that the Government was still committed to a corporate manslaughter Bill but only companies rather than individuals could be convicted. In 2005 the Home Office, then headed by Charles

Clarke, issued a further consultation document and a draft Bill was published in July of 2006.

Corporate Manslaughter and Corporate Homicide Bill

19. The most recent Corporate Manslaughter and Corporate Homicide Bill passed its second reading in the House of Commons in October 2006 and is currently in the Committee Stage.

Organisations

20. The Bill will apply to “organisations” and the point has already been made that this will require amendment. An organisation includes a company, government departments and even the police force.⁽⁷⁾ Arguably “organisations” will not apply to partnerships, sole traders and some unincorporated associations.⁽⁸⁾ Schools, clubs, parish councils, etc. are unincorporated associations and, as the Bill is currently drafted, they will not be caught by its provisions. The reason for this is, according to the Home Office, unincorporated associations have a constantly changing membership and it is therefore difficult to taint the school, club, etc. with the thoughts and deeds of its earlier members who were around when the fatality took place.
21. As to be expected, there is a considerable amount of lobbying going on as the Bill goes through the Committee Stage. It is likely that the definition of “organisations” will be extended to include partnerships, schools, clubs, etc. The pressure group Liberty has made the point very strongly that many partnerships, clubs, schools, etc. nowadays have the same degree of permanency as a modern company/corporation.⁽⁹⁾

Crown immunity

22. The Bill, for the first time, will also abolish crown immunity as its scope will cover government departments, school, the police force, etc. The Bill makes it clear government departments etc. are not to be treated as a servant or agent of the crown.⁽¹⁰⁾

⁽⁷⁾ Clause 1 (ii)

⁽⁸⁾ Against *HSC Statistics of Fatal Injuries 2005/2006*

⁽⁹⁾ See Liberty briefing paper on the Corporate Manslaughter and Corporate Homicide Bill, October 2006, pages 5 and 6.

⁽¹⁰⁾ Clause 11 (2)

23. There are some narrow exceptions where a public body has to make strategic decisions when it comes to spending public money - strategic decisions taken by the prison services in respect of detainees, emergency services response times, the police in relation to allocating resources to riots, general policing, etc., are not covered by the Bill.
24. Although crown immunity has been lifted, this too is coming in for regular examination. The exception given to some public bodies/decision-making is said to avoid trading a level playing field between the public and private sector where they perform the same roles.⁽¹¹⁾ The Bill had been criticised because the immunity given to (say) the army would mean that the Bill would not apply to the deaths of the four young soldiers the Deepcut Barracks which has gained considerable notoriety at recently.

Individuals

25. The Bill makes it clear an individual cannot be guilty of aiding, abetting or in any way being involved with the commission of the new offence of corporate manslaughter.⁽¹²⁾ The common law offence of manslaughter by gross negligence will be abolished insofar as it applies to organisations. Instead organisations will be caught by the new corporate manslaughter Bill.
26. This does not by any means mean that individuals cannot be responsible for manslaughter if they commit manslaughter during the course of their employment - individuals will still be caught by the criminal offence of manslaughter.
27. The pressure group, Family against Corporate Killers, has condemned the Bill as “not fit for purpose and will not have any major effect in deterring negligent employers from injuring and killing people as it does not carry the threat of imprisonment for gross negligence”. The new Bill makes the position clear; company directors cannot be imprisoned due to the gross negligence of their company.

Senior managers

28. The key feature of the Bill is that there will be no need to find a single director or manager with a “controlling mind”. Instead the focus will shift whereby the jury will look at the combined failings of senior management.

⁽¹¹⁾ This is one of the aims of the Bill according to the notes accompanying it, paragraph 18.

⁽¹²⁾ Clause 17

29. An organisation will be guilty of the offence of corporate manslaughter "if the way in which it manages any of its activities are managed or organised by senior managers [and]:-
- (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."
30. A "senior manager" is someone who plays a significant role:
- 30.1 Making decisions about how the whole or substantial part of an organisation manages to organise or
 - 30.2 Actually manages the whole or substantial part of the organisation's activities.⁽¹³⁾
31. Many directors and senior managers will be directing a "whole or substantial part" of an organisation's activities. However, it is doubtful as to whether site-based personnel will be deemed to be directing a "substantial part" of (say) a contractor's business.
32. Confining the offence to senior management has also attracted considerable criticism.⁽¹⁴⁾ This is because it is only the failures of senior management that will render the company open to prosecution. Failures at other levels of management, no matter how serious, will not be caught by the Bill. If an investigation found that death was caused by a number of failings at different levels, some at a senior management level and some at junior management level, then when prosecuting only those failures at a senior management level would be looked at.
33. Critics have argued that companies can make themselves "manslaughter proof".⁽¹⁵⁾ Allegedly companies could make themselves immune from prosecution by delegating the safety responsibilities to below senior management level.

"Gross breach of relevant duty of care"

34. The organisation must owe the victim a "relevant duty of care". This is defined by the civil law of negligence and in particular:-

⁽¹³⁾ Against *HSC Statistics of Fatal Injuries 2005/2006*

⁽¹⁴⁾ See for example the Centre for Corporate Accountability commentary on the Corporate Manslaughter and Homicide Bill 2006

⁽¹⁵⁾ See again the Centre for Corporate Accountability briefing note.

- 34.1 A duty owed to an organisation's employees or any person performing services for the organisation;
- 34.2 The duty owed as an occupier of premises;
- 34.3 The duty owed in relation to the supply of goods or services, or in relation to care of any construction or maintenance operations or any other activity on a commercial basis or even the keeping of any plant vehicle or any other thing.⁽¹⁶⁾
35. The scope of the duty may be defined by reference to the law of negligence; the law of civil negligence is constantly developing. Particularly in the construction industry the courts have decided that a local authority building inspector firstly did and then did not owe a duty of care when inspecting foundations to the property owners, the position in respect of builders to subsequent purchasers of property has also changed, whilst it is unlikely that the courts will still uphold that a subcontractor owes a duty of care in negligence to an employer.
36. The problem is that the civil law of negligence has had to take into account factors which have nothing to do with the principles that underpin the criminal law. The criminal law tries to protect citizens who are deprived of their rights to life, limb or property, etc., whereas a civil law would decide whether one organisation or person should pay compensation or make redress to another.
37. As to deciding whether there was a gross breach of the duty owed, the jury has to look at a wide range of factors such as:
- 37.1 Health and safety legislation and, in particular, how serious the breach of the health and safety legislation was, and how much of a risk of death that breach posed;
- 37.2 The extent to which they were allowed to choose policy systems accepted practice etc. within the organisation that would have encouraged the failure to comply with health and safety legislation;
- 37.3 "Any other matters" which the jury may consider relevant.⁽¹⁷⁾
38. It is difficult to define the standard of care to be expected of all organisations/companies bearing in mind the different functions a business will carry out when compared with a school, local authority, the police, etc. The law has fallen

⁽¹⁶⁾ Clause 3

⁽¹⁷⁾ Clause 9

back on the law of negligence and health and safety legislation but as a result the standard required for conviction is vague. There are proposals to abandon the use of the law of civil negligence when defining corporate manslaughter but instead allow a judge to decide whether a relevant duty of care was owed and the jury to decide whether the “gross breach” could have been prevented had all reasonable precautions etc. been taken.

Whichever definition of a duty of care which organisations owe eventually makes its way into the Bill, because the definition will have to be applied universally, the definition by its very nature will be open-ended and it will be left to the judges to interpret how the relevant duty is to be applied in practice.

Unlimited fines

39. Although companies cannot be imprisoned they can be fined. It is expected that if the Bill becomes law juries will look at the whole range of management conduct and working practices, rather than concentrating their deliberations on individuals’ actions. The fine, however, will be set by the judge, not the jury. Some commentators believe that fines as much as £20m or even higher will result even though judges sometimes have a tendency to be conservative when imposing money penalties. It is thought that with more companies in the dock, it will be easier for victims’ families to obtain compensation.

Under the Bill, the fines which can be imposed on companies will be unlimited.

40. A prosecution for corporate manslaughter could only be instituted with the consent of the Director of Public Prosecutions.⁽¹⁸⁾ This too has been criticised as it apparently reverses the position taken by the Law Commission and the Home Office. By concerning the need to obtain the consent of the Director of Public Prosecutions, individuals will not be able to commence a private prosecution.

Health and Safety at Work Act 1974

41. The fines imposed in the Hatfield, Paddington and Southall incidents were all imposed for a breach of health and safety legislation. According to section 3(1) of the Health and Safety at Work Act 1974:

¹⁸ Paragraph 1 clause 16.

“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, the persons not in his employment who may be affected thereby are not thereby exposed to risk to their health and safety.”

Failure to comply with this duty is a criminal offence. The offence is punishable by an unlimited fine.

42. When deciding what is “reasonably practicable” the employer is expected to weigh up the risk on one side against the sacrifice to him on the terms “*time, trouble and money*” to avert the risk.⁽¹⁹⁾
43. It might be argued that the new Bill does not add anything to penalties imposed by the criminal law. The Bill allows for unlimited fines, so does the Health and Safety at Work Act (all of the fines imposed irrespective of the Hatfield, *Herald of Free Enterprise*, Paddington and Southall disasters were all fines made pursuant to the Health and Safety at Work Act). However, the conviction of fine for breach of health and safety legislation attracts public criticism - a conviction for corporate manslaughter will have more impact.

Conclusion

44. The current Corporate Manslaughter and Corporate Homicide Bill has been over twelve years in the making. It will make it easier to convict companies of corporate manslaughter as the emphasis will shift from trying to find an individual with a directing and guilty mind to looking at all of the company's procedures, operations, etc. However, the effect of the Bill, if it becomes law, would be the same as breaches of the Health and Safety at Work Act. Companies will face significant fines.

The Bill is the subject of considerable lobbying and will change significantly if it is to stand a change of getting on the statute book.

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Fenwick Elliott LLP

⁽¹⁹⁾ Against *HSC Statistics of Fatal Injuries 2005/2006*