

## Corporate Manslaughter – All Bark: Few Bites?

### The Corporate Homicide and Corporate Manslaughter Act 2007

#### Introduction

1. The Corporate Homicide and Corporate Manslaughter Act 2007 (“the Act”) was given Royal assent on 26<sup>th</sup> July 2007. With great fanfare it brought into legislation the offence of corporate manslaughter with effect from the 6<sup>th</sup> April 2008. The purpose of the offence of corporate manslaughter was to hold a corporation as a whole responsible for the wrongful death of one of their employees. The offence would look at whether the management systems and practices in the organisation were appropriate or if they amounted to a gross breach of a duty of care to the deceased.
2. Prior to this offence a corporation could only be convicted of gross negligence manslaughter if a single employee had ‘in his mind’ all the elements of the offence and was of sufficient seniority to be seen as embodying the “mind” of the corporation. Practically this meant that it was difficult to prosecute a firm, especially a large firm, as the responsibility and the decision-making was diluted by the various chains of management.
3. In a series of high profile cases, such as the capsizing of the Herald of Free Enterprise and the Southall rail crash, the prosecution were unable to successfully prosecute an individual in either of the companies, P & O European Ferries and Great Western Trains, due to difficulty of demonstrating that a single individual in senior management had the required “mind” to be prosecuted. The only notable successful prosecution of this period was *R v OLL Ltd* (1994). This prosecution arose from the Lyme Bay canoeing tragedy. The managing director of OLL Ltd, Peter Kite, was convicted of Manslaughter and sentenced to 2 years imprisonment, after appeal. The success in this prosecution was largely put down to the fact that OLL Ltd was a small corporate body with a clear management structure. Therefore, it was clear after these prosecutions that in the cases of larger corporate bodies it was much more efficient to prosecute simply on the grounds of a safety breach under the Health and Safety at Work Act 1974, rather than gross negligence manslaughter. This was clearly not a satisfactory position.

4. In response to this, the offence of corporate manslaughter was introduced. The principle behind it was to increase the likelihood of successful prosecutions, and to enable the law to hold companies to account for the death of one of their employees. It was thought at the time that opening up the offence in this way would increase the occasions when prosecutions could be pursued, as it was no longer necessary to identify someone who had the necessary 'mind'. It was also thought that if a company knew it could be prosecuted as a body, it would be more likely to comply with its health and safety obligations and would have to consider whether the company's systems and processes for safety management were appropriate.
5. During the 3 ½ years since the offence came into force only two cases have been prosecuted. Cotswold Geotechnical (Holdings) was found guilty of corporate manslaughter on 15<sup>th</sup> February 2011. Lion Steel Equipment Ltd was the second company to be charged with corporate manslaughter and their litigation is continuing.
6. Does the lack of the lack of prosecutions mean that the introduction of the offence was a mistake or failure? My view is no: the effect of the Act has wider implications both in its symbolic value and the effect upon health and safety compliance as a whole as it has forced companies to look at the way they manage risks as a whole and the ways in which they comply with health and safety Regulations.

## Overview of the Offence

7. An organisation is guilty of the offence of corporate manslaughter if the way the company organises or manages an activity causes a person's death and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased. A substantial part of the failure within the organisation must have been at a senior level of management. The two key parts of this offence are that there must be a duty of care owed to the deceased, and there must be a gross breach of that duty. The meaning of 'duty of care' is set out in section 2 of the Act. Section 8 of the Act also sets out clear factors which a jury should take into account: these include how serious the failure was; how much of a risk of death it posed, evidence that shows the attitudes, policies and systems put in place by the organisation; the relevant health and safety guidance.
8. The organisations liable to be prosecuted under this Act are: a corporation; a police force; a partnership, or a trade union or employers' association that is an employer, or a public body listed in Schedule 1 of the Act.

9. If convicted of corporate manslaughter, the sentence is an unlimited fine payable by the company. In addition to that it is open to the court to make a Remedial Order or a Publicity Order.
10. A Remedial Order allows a court to order the company to rectify anything which appears to have caused the death, which was the subject of the conviction, or any deficiencies in health and safety management or in the organisation's policies, systems or practices which appear to the court to have contributed to the company's overall failure.
11. A Publicity Order allows the court to order the convicted company to publicise in a specific manner the following points: the fact that the company has been convicted of the offence; the specified particulars of the offence; the amount of any fine imposed, and the terms of any Remedial Orders made.
12. This change in the sentencing options is in contrast to the old position where imprisonment was the most likely sentence. This is one of the inevitable changes inherent in changing the focus of the prosecution from an individual to a company. The Sentencing Guidelines Council has issued clear guidelines for this offence, which have been followed and demonstrated in *R v Cotswold Geotechnical (Holdings)*.

## Recent Litigation History of Corporate Manslaughter

13. Cotswold Geotechnical (Holding) Ltd, were prosecuted for the death of Alex Wright. Mr Wright was a geologist for the company. On the 5<sup>th</sup> September 2008 he was investigating soil conditions in a deep trench on a development plot in Stroud, when the trench collapsed and he was killed. The prosecution's case was that Mr Wright was working in a dangerous trench because Cotswold Geotechnical Holdings' systems had failed to take all reasonably practicable steps to protect him from working in that way. The prosecution highlighted that Cotswold Geotechnical's system of work in digging trial pits was wholly and unnecessarily dangerous. The company ignored well-recognised industry guidance that prohibited entry into excavations more than 1.2 metres deep, requiring junior employees to enter into and work in unsupported trial pits, typically from 2 to 3.5 metres deep. Mr Wright was working in just such a pit when he died. The company was sentenced to a fine of £385,000 payable over ten years at a rate of £38,500 per annum. Cotswold Geotechnical Holdings Ltd applied for leave to appeal against both conviction and sentence.

14. The judgment on the appeals was delivered on 11 May 2011 by the Lord Chief Justice, Lord Judge, who refused both applications for leave to appeal. In relation to the sentence, it was contended on behalf of the company that the fine imposed, which represented 250% of the company's turnover, was manifestly excessive. The fine was wholly beyond the means of the company and meant that there was no prospect whatever of the company surviving.
15. In coming to its decision, the Court of Appeal considered the sentencing guidelines for corporate manslaughter and noted that account must be taken of the financial circumstances of the defendant organisation. The guidelines underline that a fine is intended to inflict painful punishment, but that it should be one which the defendant should be capable of paying, if appropriate over a period which may be a number of years. On the other hand the guidelines also indicate that in assessing the financial consequences of a fine, one of the factors that should be taken into consideration is whether the fine will have the effect of putting the defendant out of business; in some bad cases this may be an acceptable consequence. It was held that the judge took the view that in the circumstances the fact that the company could be put into liquidation was unfortunate, but unavoidable and inevitable. The court stated that there could be no justifiable criticism of the sentence imposed.
16. Lion Steel Equipment Limited is the second company to be prosecuted for this offence. The company is charged with failing to ensure the safety of employees following the death of an individual who fell through a fragile roof panel on an industrial site in Manchester in May 2008. The matter is not due to be in court until June 2012.
17. These are the only two companies to be prosecuted for corporate manslaughter, since it was enacted in April 2008. In the current economic climate it is unlikely that the number of prosecutions will be increased any time soon, as the resources needed to prosecute are considerable.

## Overall effect of the Legislation

18. The key effect of this legislation is not in the headline prosecutions but the effects it has had on companies as a whole. By providing a headline offence with very serious punishments, companies of all sizes have had to take a serious look at the working procedures they have in place and their compliance with health and safety requirements as a whole. These need to be regularly checked and updated by senior management. Responsibility can no longer be delegated to junior employees in the knowledge that if it is delegated in the correct manner then a prosecution can be

avoided. The very essence of the legislation is to make the whole company responsible and to put that responsibility in the hands of senior management

19. It is arguable that lack of prosecutions is a demonstration of how effective the legislation has been: even when taking into consideration the lack of resources of the prosecuting authorities, it is of note that the only two cases which have been charged are from within 6 months of the offence being brought into force. There are three clear factors which have contributed to the Act's overall success:-

- Firstly, the increase in enforcement of health and safety legislation and regulation of the relevant industries. While the offence of corporate manslaughter acts as a real deterrent, it is the increased day to day regulation and prosecution of smaller matters which keep companies in the right position overall. Without these lower level matters there would be many more significant incidents which would be open to prosecution, as companies would have fewer guides by which measure themselves;
- Secondly, it is clear from Cotswold Geotechnical (Holdings) that the courts will pass and uphold heavy sentences upon a company that is convicted of corporate manslaughter. This may prove to be a severe, if not fatal financial blow to a company;
- Thirdly, the possibility of a Publicity Order being made has potentially far reaching damage to a company's reputation.

20. In my opinion the presence of the offence is a significant corporate deterrent, coupled with the knowledge that it will be prosecuted in appropriate cases. It has helped to increase compliance with health and safety regulations, and has encouraged companies to consider carefully how they operate, especially in comparison to the best practice in their industry. The key lesson for companies is the importance of considering all these factors and putting operational measures in place, such as retaining a specialist lawyer or seeking regular legal advice on current operational procedure and compliance.

1<sup>st</sup> November 2011

**Barnaby Hone**

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**ONE PAPER BUILDINGS**