

Health and Safety Legal Update

(including lessons from the first
Corporate Manslaughter conviction)

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Overview

- Corporate Manslaughter – lessons learnt
- Liability
- Fire

Corporate Manslaughter



Corporate Manslaughter and Corporate Homicide Act 2007

- Introduced new manslaughter offence for organisations
- In force since 6 April 2008
- 1 prosecution
- Second company charged in July 2011

Corporate Manslaughter and Corporate Homicide Act 2007

- Prosecution must prove the way in which activities managed or organised:
 - Caused a person's death;
 - Amounts to a **gross breach** of a relevant duty of care owed to the deceased; and
 - **Senior management's** role in the breach was a substantial element in the breach

Corporate Manslaughter and Corporate Homicide Act 2007

- Areas for dispute:
 - Grossness of the Breach
 - Compliance with law / standards / guidance and organisations safety culture
 - Role of senior management
 - Collective failings
 - Key is effective delegation and accountability

Penalties for Corporate Manslaughter

- Penalties
 - unlimited fine;
 - remedial order; and / or
 - publicity order

Cotswold Geotechnical (Holdings) Ltd

- Charged with CM on 23 April 2009
- Personal charges – permanently stayed in October 2010
- Section 2 HSWA dropped in January 2011
- Trial: Winchester Crown Court – February 2011
- Permission to appeal against conviction / sentence refused on **11 May 2011**

Cotswold Geotech - background

- A small site investigation company
 - 6 other direct employees
 - 2010 accounts – turnover of approx £155k
 - Just breaking even in 2010/11
- Size of company is no comfort. Act intended for organisations with multiple layers of management

Cotswold Geotech – case for prosecution

- A gross breach because the company:
 - Ignored its own H&S policy
 - Ignored relevant HSE and industry specific guidance and British Standards
 - Ignored previous HSE advice

Cotswold Geotech – conviction

- Unanimous **Guilty** verdict
- Has **not** tested the limits of the legislation
 - The breach of duty is specific to the deceased - ✓
 - Role of senior management - ✗
 - Grossness – ✗
 - Causation – must be more than trivial cause, but not necessarily the sole cause - ✓

Cotswold Geotech - fine

- **Fined £385k payable over 10 years**
- **No prosecution costs**
- **No Publicity Order**
- **No Remedial Order**

Cotswold Geotech – lessons learnt

- Unprecedented fine representing 250% of the company's turnover
 - *CM is a very serious offence met with very high fines*
 - *SMEs likely to go out of business*
 - *Larger companies should expect multi-million pound fines*
- Important for senior managers to ensure:
 - safety management systems are robust
 - they understand their own health & safety obligations and set clear **priorities** for H&S

Key themes

- Setting and maintaining the right “tone at the top”
- Strong leadership and delegation of responsibilities
- Investing in health and safety – controlling risks / equipment / training etc
- Ensuring a positive safety culture - through policies and practices
- Managing contractors and supply chain where risks can be imported
- Management of Incidents – Incident Response Protocols

Incident Response Protocol

- Should cover:
 - Escalating incidents internally
 - RIDDOR reporting
 - Accident investigations / emails etc
 - Managing requests for documents
 - HSE interviews (**voluntary, compulsory and PACE**)
 - Communications with third parties
 - Notifying insurers
 - Appointing specialist regulatory criminal lawyers

Can Accident Reports be privileged?

- **Waugh -v- British Railways Board 1980**
 - *“a document which was produced or brought into existence...with the **dominant purpose** ...of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation... **should be privileged and excluded from inspection**”*

Liability



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Defending prosecutions

- **Prosecution** must prove (so that the jury is sure):
 - The risk arose out of (was caused by) the conduct of that employer's undertaking; **AND**
 - The risk was reasonably foreseeable
- **Defendant** must establish (on the balance of probabilities) that any risk (unsafe state of affairs) had been controlled “so far as was reasonably practicable”
 - They had done enough – any more would have been disproportionate; **or**
 - Reasonable conduct on behalf of the employer

Fire Safety – still a “hot” topic!



Responsible Persons

- **R v New Look Retailers Limited**
- **Court of Appeal** – June 2010
- Upheld fine of **£400k** – severe but not disproportionate
- No death/injuries
- No causation but failed to manage risks
- Relevant factors were:
 - Seriousness of the breach;
 - Ability to pay;
 - Need to send clear message to management and shareholders

Article 5 (3) duty holders

- Art 5.—(1) Where the premises are a workplace, the responsible person must ensure that any duty imposed by articles 8 to 22 ...is complied with ...
- (2)
- (3) Any duty imposed by articles 8 to 22...on the responsible person in respect of premises shall also be imposed on every person... who has, to any extent, control of those premises so far as the requirements relate to matters within his control.

Article 5 (3) duty holders

- **Christopher Morris: January 2011**
- Prosecution of fire alarm engineer
- Former fire fighter failed to maintain fire alarm system in care home and failed to inform home owners of systems deficiencies
- **£5,000 fine** plus costs of £6,000

Article 5 (3) duty holders

- **John O'Rourke: July 2011**
- Inadequate fire risk assessments of hotel's sleeping accommodation which put occupants at serious risk
- **8 months in prison** plus costs of £5,800

- **ANY QUESTIONS?**



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