

## **CORPORATE MANSLAUGHTER AND HOW TO HANDLE A REGULATORY INVESTIGATION FOLLOWING SERIOUS INJURY OR DEATH**

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The paper will discuss essential components of the proposed offence of Corporate Manslaughter by way of comparison against the existing offence of Involuntary Manslaughter as it applies to Companies. How the new offence will apply in practice and the ramifications for larger corporations, who to date, have had effective immunity from prosecution. The second half of the paper will endeavour to demystify the conduct of a regulatory investigation and give practical tips on how to exercise a degree of control over the process.

### **CORPORATE MANSLAUGHTER**

#### **INTRODUCTION**

Incidents and accidents in the chemical industry tend to have associated with them high degrees of risk, having the potential to result in fatal or serious injuries. Hence even if injury does not result, fines tend to be towards the upper bracket in Magistrates Courts or referred to Crown Courts for sentence, given the obvious degree of risk resulting from deficiencies in management systems.

Public demand for accountability of senior management of companies whose activities have been indicative of disregard for health and safety legislation have been fuelled by disasters such as the Herald of Free Enterprise in 1987 and more recently the Southall, Paddington, Ladbroke Grove and Hatfield rail crashes.

Deaths arising out of work activity remain at an alarming rate despite concerted targeting of high risk sectors by the enforcement agencies. The general perception of the public is that fines are too low and do not act as a deterrent to companies who have not demonstrated a commitment to comply with health and safety legislation.

#### **COMPONENTS OF THE OFFENCE OF INVOLUNTARY MANSLAUGHTER**

The prosecution must make out four elements to secure a conviction:

1. That the defendant owed a duty of care to the deceased;
2. That the defendant was in breach of that duty of care;
3. That the breach might be categorised as gross negligence; and
4. That the breach was a substantial cause of death.

## HOW INVOLUNTARY MANSLAUGHTER APPLIES TO COMPANIES

The law artificially treats companies as a person but recognises the practical way in which companies operate via its directors, employees and/or agents.

### THE IDENTIFICATION ISSUE

In *R v- Great Western Trains (June 1999)* Mr Justice Scott-Baker ruled:

“in any prosecution for manslaughter by gross negligence of a corporation it is necessary for a guilty mind to be proved and that there must, therefore be, a connection with guilt of an individual identified within the company”.

Recognising the difficulty of identifying such an individual in a company with a complex and diverse management structure he went on to say “it is virtually impossible to bring a successful prosecution against a larger corporation particularly where, as here, the allegation is essentially based on a system failure”.

*R v Barrow in Furness Borough Council (March 2005)* Mr Justice Poole ruled:

“There are, as it seems to me, in the present state of the law relating to corporate manslaughter, considerable difficulties facing those who contemplate the prosecution of a local authority. For the reasons advanced by Mr Turner, a local authority is not, in all material particulars, to be equated with a commercial enterprise, of any size; still less perhaps with a very small corporation with few directors or a sole director.

It is far from clear to me I confess that even the Chief Executive Officer would properly be described as ‘the controlling mind’ of a council of elected members, but that is not something I have to decide. I am quite clear, however, that a third tier official in the position of Miss Beckingham could not reasonably be so described, even if delegated an exercise of a particular transaction such as this. The counts of manslaughter, as against Barrow Borough Council, must therefore fail.”

The Barrow case is yet another example of how a diverse management structure can be seen to defeat the current offence but not necessarily in relation to a conventional corporate entity.

### AGGREGATION

Notwithstanding some judicial interest in exploring the concept of aggregating individual’s culpability together to form the culpability of the corporate entity (*Meridian Global Funds Management Asia Limited v Securities Commission 1995*). Under the current law as it stands, it is not possible to aggregate the culpability of a number of individuals within a company’s management structure to demonstrate that the company has been grossly negligent in the way in which it conducted its business activity.

### THE OUTCOME OF THE COMBINED HURDLES OF IDENTIFICATION AND AGGREGATION

To date there has not been a successful conviction of a “captain of industry” arising out of the notable disasters involving large national companies. There is a common theme to be

gleaned from the successful convictions to date, namely that they have all involved directors of small companies comprised of one or two directors because in that type of unsophisticated business it is relatively easy for the prosecution to identify the so called “controlling mind”.

#### THE DRAFT CORPORATE MANSLAUGHTER BILL

The much heralded draft bill acknowledges the significant hurdles presented by the identification and aggregation issues. It addresses those issues, in terms of the proposed new offence, by incorporating the requirement for a management failure on the part of senior managers focusing on the way in which a particular activity was being managed or organised collectively, as well as individually.

An organisation’s senior management is defined by, “only those who play a role in making management decisions about, or actually managing, the activities of an organisation as a whole or a substantial part of it”. This is said to specifically include management at regional level within a national organisation.

The intention is to criminalise under the offence management failings that can be associated with the organisation as a whole, which will capture different levels of responsibility depending on the size of the organisation.

Therefore, the proposed new offence would not require identification of an individual “controlling mind” and would allow the offence to be made out of where there was a systemic management failure which could be attributed to the acts or omissions of one or more senior managers within the management structure. Those two components of the new offence effectively reverse the observation by Mr Justice Scott-Baker in the Great Western Trains case in relation to both identification and aggregation.

The proposed new offence would still require the prosecution to demonstrate conduct that falls far below what can reasonably be expected in the circumstances and that conduct had caused the death of the victim to secure a conviction.

#### PROPOSED PENALTIES

Organisations found guilty of corporate manslaughter would face an unlimited fine. In addition, the courts would be able to impose remedial orders, enabling the courts to require that specific remedial action be taken to address, within a specified time, the failures that lead to death.

#### STATUS OF THE PROPOSED NEW OFFENCE IN THE REGULATORY FRAMEWORK

The objective of the new offence is to complement, not replace, other forms of redress such as prosecutions under health and safety legislation.

#### THE RESULTANT EFFECT OF THE PROPOSED NEW OFFENCE

Individual senior managers will not face individual prosecution in the event that the company is charged with the new offence, even if it was shown that they contributed to

the relevant management failure. They will remain liable to prosecution for individual offences including gross negligence manslaughter and under health and safety law, where it can be shown that their personal conduct amounts to an offence. Disqualification proceedings under existing legislation will also be possible in certain circumstances. Historically disqualification proceedings have very rarely been utilised.

Directors and senior managers could, however, still be the subject of a prosecution pursuant to Section 37 of the Health & Safety at Work etc Act 1974 in the event that it could be demonstrated that the offence, committed by the company, had been committed with the consent, connivance or neglect of a director or senior manager.

Meanwhile directors of small companies managed by sole or joint directors remain vulnerable to individual prosecution for involuntary manslaughter.

The result is a two-tier system of justice which differentiates between how directors and senior managers of large and small companies are punished in the event of culpability arising from a death caused by the company's business activity.

Undoubtedly the proposed new offence will not satisfy those who want to route out bad management by making individual directors accountable. The proposed new offence perhaps reflects the Government's political dilemma in trying to appease the trade unions and the CBI who are at different ends of the spectrum in terms of individual directors accountability. In reality the only teeth that the proposed new offence would have over and above offences that are currently brought under existing health and safety legislation, which attract unlimited fines in the Crown Court for serious breaches of health and safety legislation, is the stigma and resultant negative impact on a company's reputation as a result of being associated with significant management failings resulting in a conviction for corporate manslaughter.

Many feel that the sanctions of an unlimited fine and the possibility of a remedial order, both of which existed under existing legislation, are unimaginative.

Other innovative sanctions have previously been considered but have not been embraced by the proposed new offence. Examples include: -

- Equity fines – instead of imposing a fine on a conventional basis the corporate defendant would be ordered to issue new shares thereby diluting existing shareholders interests which it is thought will result in shareholder dissatisfaction and thus pressure will be applied to the board.
- Community sentence orders – For example ordering a construction company to build a community based asset such as a leisure facility.
- Director disqualification – greater use of disqualification proceedings than has historically been the case is not advocated.

Other criticisms of the proposed offence:-

- Focusing on senior management failure may result in responsibilities being taken away from senior managers and passed to junior managers who may or may not have the competency to carry out particular roles. This is a device to try and defeat the objective

of the new provisions by transferring management decisions to junior level in an attempt to defeat the definition of “senior Management”.

- Greater focus on senior managers and their roles and responsibilities may result in a defensive management strategy as commented upon by the CBI.

## **HOW TO HANDLE A REGULATORY INVESTIGATION FOLLOWING SERIOUS INJURY OR DEATH**

### **WHO CAN PROSECUTE**

Proceedings for health and safety offences can only be instigated by the HSE, Local Authorities or with the consent of the Director of Public Prosecutions.

### **WORK RELATED DEATHS**

The principles for effective liaison between the parties, the police, the HSE, the Crown Prosecution Service, Local Authorities and British Transport Police in relation to work related deaths are set out in the second version of Work Related Deaths: a protocol for liaison (“the Protocol”) which was published in March 2003.

The underlying principles of the Protocol are as follows:-

- An appropriate decision concerning prosecution will be made based on a sound investigation of the circumstances surrounding the work related death.
- The Police will conduct the investigation where there is an indication of the commission of a serious criminal offence (other than a health and safety offence), and the HSE, Local Authority or other enforcing authority will investigate health and safety offences. There will usually be a joint investigation, but on the rare occasions where this would not be appropriate, there will still be liaison and co-operation between the investigating agencies.
- One of the situations that the Protocol particularly deals with is where there has been a fatality and the evidence suggests that a serious criminal offence e.g. manslaughter may have been committed.

At present, only the Police can investigate such offences and, it is the Crown Prosecution Service (“CPS”) which decides whether there is a reasonable prospect of securing a conviction.

It is proposed that the Police and the CPS will continue to have powers to investigate and prosecute new corporate manslaughter offences, but the health and safety enforcing authorities should also have the ability to investigate and prosecute health and safety offences.

### **RESPONSE TO A REGULATORY INVESTIGATION**

It is very important that companies and/or individuals put themselves in the best possible position following an incident to:-

- a. Prevent a prosecution;
- b. Mount a defence against any prosecution, if a prosecution ensues; and
- c. Mitigate any sentence following a conviction.

The best possible way of achieving these objectives is to ensure that:-

- a. The company is in a position to undertake an effective internal investigation, and
- b. Procedures are in place to handle the investigation being carried out by the Regulatory body.

It is therefore vitally important that the Company gains and retains control of both investigations from the earliest possible opportunity.

Although both investigations run in parallel for the purposes of this paper, they are dealt with in turn, although, they are both as important as each other.

## THE REGULATORY INVESTIGATION

The purpose of the Regulatory Investigation is to:

- a. Establish the cause of the incident, and
- b. Decide whether an offence (or offences) has been committed and whether the Company and/or individuals should be prosecuted.

This section is written against the background of the Health & Safety at Work etc. Act 1974 ("the Act"). There are at least three possible targets for prosecutions under the Act. These are as follows:-

- a. The corporate employer.
- b. Directors, Managers, Company Secretary or other similar officer.
- c. Other person i.e. employees or others by whose acts or default the offence has been committed.

Each of the above are potential targets or Defendants and may be the subject of an interview by the Regulator. In addition to potential Defendants, the Regulator may also want to interview persons who may be potential witnesses.

There are three ways in which an Inspector can interview an individual:-

1. An interview under caution which is commonly referred to as a PACE interview.
2. An interview carried out by an Inspector using his statutory powers under Section 20 (j) of the Act.
3. Interviewing an individual as a potential witness, on a voluntary basis.

It is therefore important to establish on what basis the Inspector wishes to interview the person.

## PACE INTERVIEW

PACE interviews are effectively not compellable and are entirely voluntary unless the person interviewed is under arrest. At the present time, health and safety offences are not arrestable offences.

The rules relating to the interview of potential Defendants under caution are contained in Code of Practice C of PACE and in Section 34 of the Criminal Justice and Public Order Act 1994.

The PACE interview should be proceeded by the interviewee being given a caution.

It is important to remember that although attendance at a PACE interview is voluntary, unless the person is under arrest, once the individual has decided to attend the interview and has been cautioned, a failure to mention any fact which is later relied on in the company's defence, or his own defence (if he is being interviewed personally) (which he might reasonably have been expected to mention) may result in the Court or jury drawing such inferences from his failure to mention such facts as appeared proper when deciding whether or not the company or the individual is guilty of an offence.

Accordingly it is important to establish in what capacity a person is being interviewed by the Regulator as part of the investigation.

If an individual is being interviewed under PACE in his own right, as opposed to being a nominated representative authorised to speak on behalf of a company, representation and in particular potential conflicts of interest should be considered. In the event that there is a conflict of interest or potential for one to occur as between the individual and the company, both parties should be separately represented. That would also be the case if several individuals were subject to PACE interview and there was potential for conflict of interest between the individuals. In that situation, each individual would have to be separately represented.

## AN INTERVIEW CARRIED OUT BY AN INSPECTOR USING HIS STATUTORY POWERS UNDER SECTION 20 (J) OF THE ACT

As a consequence of this power, an Inspector can require any person who he has reasonable cause to believe is able to give any information relevant to the investigation or examination to answer such questions as the Inspector thinks fit to ask and to sign a declaration of the truth of his answers.

It is an offence to refuse to answer the Inspector's relevant questions. However answers given cannot be used against the person giving them, or the husband or wife of that person in any proceedings. In essence, this type of interview represents a trade off, in that whilst the interviewee is compelled to answer questions, his answers cannot be used as evidence to incriminate him.

The interviewee is entitled to have a person nominated by him to be present. At the present time the Law Society is in the process of drafting guidance as to who may attend such interviews as the nominated representative. It may be that as a result of that guidance, a nominated representative who also represents the interviewee's employer will not be allowed to attend such interviews. In such cases, alternative representation may be

required or the interviewee may be prepared to be accompanied to the interview by a trade union representative or a colleague.

### INTERVIEWING AN INDIVIDUAL AS A POTENTIAL WITNESS

Often, as part of the investigation, Inspectors ask witnesses to make a voluntary statement under Section 9 of the Criminal Justice Act 1967 (“Section 9 Statement”).

It is important to remember that there is no obligation to make a Section 9 Statement and that providing one is purely voluntary.

There is no statutory protection against self-incrimination, although if an Inspector believes that the interviewee is incriminating himself, he should immediately terminate the interview and proceed to conduct the interview under PACE.

The content of the Section 9 Statement should be decided by the interviewee rather than the inspector and the interviewee should not sign the statement unless he is completely happy with the content.

A Section 9 Statement is admissible in evidence.

### ISSUES TO BE ADDRESSED IN TERMS OF REQUESTS BY THE REGULATOR FOR INTERVIEW

- a) Is the interviewee being questioned as a witness or as a potential defendant?
- b) Is the interviewee being interviewed as a representative on behalf of the company or as an individual?
- c) If the interviewee is being questioned as a defendant in his own right, then the interview should proceed under PACE.
- d) If he is being interviewed as an individual then a decision needs to be made as to representation and in particular, whether separate representation is required in the event of a conflict of interest.
- e) If employees are being interviewed whether they are to be represented and if so, by who.
- f) If the intention is to interview the interviewee as a representative of the company, it needs to be established whether the interviewee has authority to speak on behalf of the company.
- g) If the interviewee is to be interviewed under caution, either in his own right or as a representative on behalf of the company, it needs to be decided whether it would be in the individual’s or company’s best interests to attend a PACE interview.
- h) If the decision is to attend the PACE interview, then the strategy to be adopted at the interview needs to be considered.
- i) If a decision is made not to attend the PACE interview, consideration needs to be given as to whether it would be in the individual’s or company’s best interests to provide a written submission addressing areas of questioning identified by the Regulator.



## THE INTERNAL INVESTIGATION

Regardless of whether an investigation is being undertaken by a third party, an internal investigation should always be carried out as soon as possible after the accident or incident.

An appropriate person should be appointed to carry out the internal investigation.

The internal investigation should identify the immediate cause of the accident and it should try to determine whether or not there were shortcomings in the Health and Safety Management System, or management failure (for an offence of corporate manslaughter) which arose because of:

- a) Incorrect risk management;
- b) System or procedure implementation problems;
- c) Monitoring failure;
- d) Inadequate review;
- e) A failure to manage change effectively; and
- f) A failure of control measures.

Experience demonstrates that many company's who are successfully prosecuted for breaches of health and safety legislation, lost their case, not in court months after the event, but on site within 24 hours of the accident because, for example, witness statements were not taken proximate to the accident or important documents were lost or because speculate and/or incriminating statements were made to the Regulator.

## EVIDENCE THAT SHOULD BE GATHERED DURING THE INTERNAL INVESTIGATION

- Photographs
- Sketch plans
- Witness statements
- Preserve all relevant documentation in one central location
- Preserve any real evidence
- Consider whether an expert needs to be instructed to produce a report.

## PROTECTING THE INTERNAL INVESTIGATION

It is common for internal investigation reports to be overly critical and at times, speculative. The Regulator will, as a matter of course, ask for the internal investigation report to be produced. The Regulator will use the often damning conclusions of the report as the basis of a prosecution.

Usually, if the company carried out the internal investigation with a view to establishing the cause of the accident and preventing a re-occurrence, the report will be deemed to have been prepared otherwise than for the purposes of litigation and will not attract legal professional privilege.

Alternatively if the internal investigation report is prepared on instructions from the company's lawyers for their purposes in terms of giving legal advice, and handling the regulatory investigation and any subsequent prosecution, the report should attract legal professional privilege. The same principle applies to experts' reports.

Accident investigation reports attracting legal professional privilege do not have to be disclosed to regulatory authorities unless the company chooses to waive privilege.

#### IN ORDER TO EXERCISE A DEGREE OF CONTROL OVER THE REGULATORY INVESTIGATION, IT IS NECESSARY TO HAVE KNOWLEDGE OF THE REGULATOR'S POWERS

Inspectors powers are set out under Section 20 of the Act. These include:

- a) Power to enter premises at any reasonable time (or, in a situation which in his opinion, is or may be dangerous, at any time) to carry out his investigation.
- b) To make such examination and investigation as may in any circumstances be necessary.
- c) To direct that premises or any part of them, or anything therein, shall be left undisturbed for as long as is reasonably necessary for the purposes of any examination or investigation.
- d) To take measurements and photographs and make recordings as he considers necessary for the purpose of any examination or investigation.
- e) To take samples of any articles or substances found in the premises.
- f) To dismantle or subject to any process or test (but not so as to damage or destroy it unless this is in the circumstances necessary for the purpose of carrying out the investigation) any article or substance which appears to him to have caused or be likely to cause danger to health or safety.
- g) To require the production of, inspect and to take copies of any entry in books or documents.
- h) Any other power which is necessary for the purpose of carrying out his investigation.

Without a working knowledge of the extent of the Inspector's powers, the people on the ground dealing with the regulatory investigation will not be in a position to assess whether the Regulator is exceeding or misusing his powers.

Care should be taken when dealing with Inspectors that actions are not construed as obstruction or a failure on the part of the company to co-operate with the regulatory investigation.

It is noteworthy that the Inspectors have, in some cases, wider powers than the Police, particularly in terms of the power to compel a witness to answer questions. Other than that, the Police have similar powers to those of Inspectors, save that the Police have the power of arrest.

The police will take the lead in any investigation where it is suspected that an offence of gross negligence manslaughter may have been committed, by virtue of the Work Related Deaths Protocol. The decision to prosecute in such cases is made by the

Crown Prosecution Service based upon whether, in their view, there is sufficient evidence to secure a conviction and whether it is in the public interest to prosecute. The HSE follow similar principles which are set out in the Enforcement Management Model.

## PENALTIES

Offences involving contravention of Sections 2 or 3 of the Act, are subject to a maximum penalty of £20,000 per breach in the Magistrates Court.

Offences involving breach of health and safety regulations are the subject of a maximum penalty of £5,000 per breach in the Magistrates Court.

In both instances, if the case is referred to the Crown Court, the fine is unlimited.

If there is more than one offence, the penalty is cumulative, although the Court does have the power to impose no separate penalty in cases where multiple offences are alleged and the sentencing court feels that there is duplication of offences.

## THE SENTENCING EXERCISE

The decision as to whether sentencing takes place in the Magistrates or Crown Court is predominately based upon whether the Magistrates feel that their powers of sentence are adequate, taking into account the circumstances of the case and in particular, the level of culpability, aggravating and mitigating factors and the means of the defendant.

*R -v- F Howe & Son (Engineers) Limited – 1998 Court of Appeal*

This is the leading case on sentencing and gave some guidance as to factors to be taken into account when approaching sentencing for health and safety offences:

- In assessing the gravity of the breach, it is often helpful to look at how far short of the appropriate standard defendant fell in failing to meet the reasonably practicable test.
- Generally whether death is the consequence of a criminal act, it is regarded as an aggravating feature of the offence. The penalty should reflect public disquiet at the unnecessary loss of life.
- A deliberate breach of the health and safety legislation with a view to profit seriously aggravates the offence.

The Court of Appeal identified the following aggravating and mitigating features:

### a) Aggravating features

- Failure to heed warnings (this has been construed to mean the failure to act on the advice of a Regulator prior to an accident or incident and/or failure to act upon a near miss prior to the accident or incident).
- Whether the defendant has deliberately profited financially from a failure to take necessary health and safety steps or specifically run a risk to save money.

### b) Mitigating features

- Prompt admission of responsibility and a timely guilty plea (a guilty plea entered at the first possible opportunity attracts a discount of 1/3<sup>rd</sup>).
- Steps to remedy deficiencies after they are drawn to the defendant's attention.
- A good safety record.

The particular aggravating and mitigating features should be, as far as possible, agreed between the prosecution and defence and recorded in a written document that is put before the Court at the sentencing hearing.

As can be seen, cases involving a fatality attract a more rigorous regulatory investigation and are more likely to be referred to the Crown Court for sentence.

Statistics show that fines are increasing for health and safety offences and in cases where there is a fatality or a risk of fatality and the defendant is a large multi-national company, fines exceeding £1 million are becoming more common.

## **CONCLUSION**

Chemical companies would be a prime target for prosecution under the proposed new offence given the potential for accidents resulting in a fatality or multiple fatalities to occur as a consequence of serious management failings.

Given that the proposed new offence requires the regulator to look at the way in which a particular activity was being managed collectively as well as individually a much more diverse investigation of management systems is likely to result. Whereas previously the regulator was forced to pursue the controlling mind to have any chance of securing a conviction and as a result the investigation was narrowly focused.

Therefore management systems will come under greater scrutiny once the new offence is on the statute book. In readiness to deal with increased regulatory scrutiny, companies should themselves conduct or commission risk and competency gap analysis of their existing management systems to identify and address deficiencies before such deficiencies manifest in the form of a fatal accident.

It is equally important to have protocols and procedures in place to identify roles and responsibilities and actions to be taken in the event of a serious accident or incident that is likely to lead to a regulatory investigation. This will put a company in the best possible position to exercise a degree of control over the investigation process and to achieve its strategic objectives of minimising the impact of the outcome.