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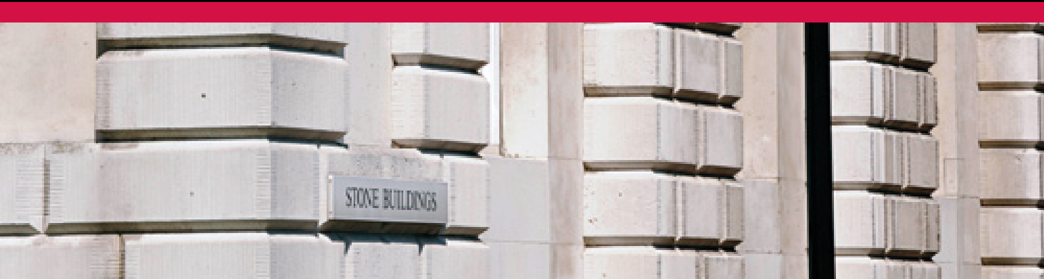

Corporate Manslaughter Act 2007

Solving the Identity Crisis?

David Stern

Foreword

This bulletin is a written representation of the seminar held at 11 Stone Buildings in October 2008 and presented by David Stern.

I had the pleasure of acting as Chair and assisting in the presentation. David, as ever, had an excellent grasp of this new piece of law with its potential complications. It is hoped that this seminar and the bulletin will be the forerunner of others in relation to the plethora of new legislation affecting corporations and therefore solicitors both criminal and civil e.g. cartels, proceeds of crime and in the context of the present economic 'crisis'.

In this regard the gap between the civil and criminal practitioners is narrowing in relation to corporate liability and the context of criminal acts fitting into the philosophy of civil law and procedure.

The consequences in relation to penalties are enormous e.g. unlimited fines based on percentage of turnover etcetera. Corporate clients will be keen to ensure they have the best and most trustworthy (if not familiar) representation

We would be pleased to hear if anyone is interested in further seminars both generally or in house.

Happy and interesting reading!

Michael Beckman QC

January, 2009

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A. General

(i) Background to the Act

1. Frustration at repeated failures to secure convictions against corporations following a string of manmade disasters, including Marchioness, Herald of Free Enterprise and Piper Alpha and more recent serial rail disasters underscore the new Act. The Act, which came into force on 6th April 2008, creates the new offence of corporate manslaughter and is intended to secure the conviction of organisations whose managerial procedures are shown to be so grossly inadequate as to be responsible for fatalities at the workplace or to the public.

2. Pitifully poor conviction rates prior to the Act were largely attributable to the problematic “identification principle”, which required the identification and culpability of an individual corporate officer before an organisation could be convicted of gross negligence manslaughter at common law. Removal of this evidential barrier to corporate conviction by way of the new Act was no doubt intended to secure a more satisfactory conviction rate into the future.

3. Today, an organisation will be guilty of corporate manslaughter if the way it manages its activities not only causes the fatality but also amounts to a “gross breach” of duty of care owed to the victim. There is no requirement to single out any particular corporate individual. However, the role of “senior management” will be crucial to securing any conviction.

4. Those organisations convicted will face an unlimited fine, in practice between 2.5% and 10% of the company's worldwide turnover. In addition, remedial and (perhaps most damaging, but not yet available) publicity orders can be imposed on the offender.

5. Hence, the Act has potentially serious ramifications and poses a significant threat for organisations with deficient managerial procedures and work floor practices. Accordingly, all organisations should conduct a careful review of their systems and procedures to ensure that not only fatalities but ensuing prosecutions and convictions are proactively avoided or at least mitigated.

6. This article investigates the elements comprising corporate manslaughter, procedural considerations and penalties. It also aims to highlight practical and cost-effective recommendations to enable organisations to manage the risk of fatality, prosecution and conviction under the Act.

(ii) The new offence

7. Under section 1(1), an organisation is guilty of corporate manslaughter if "the way in which its activities are managed or organised

- "causes a person's death, and
- amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased"

but

- "*only* if the way the way in which its activities are managed or organised by its senior management is a substantial element in the breach" (s.1(3) emphasis added).

8. Accordingly, senior management seem to be provided with a potential defence under s.1(3); that of lack of "hands on" the work floor management. However, given the central aim of the Act is to secure convictions against the worst corporate offenders, it is unlikely that any attempt to shift senior roles to junior management will succeed in bypassing this requirement.

(iii) Identification principle, identity crisis

9. As touched on above, a malingering problem with the common law offence of gross negligence manslaughter prior to statutory codification was the "identification principle", by which the prosecution had to establish not only the duty of care and its gross breach, but also the guilt of the "directing mind" of the organisation, being a senior corporate official whose actions and intentions could be imputed to the organisation at large.

10. This considerable evidential hurdle for the prosecution was accentuated by the fact that there could be no aggregation of the states of mind of several senior officials to satisfy the directing mind test (AG's Ref No.2 of 1999).

11. Section 20 of the Act abolishes the common law offence of gross negligence manslaughter with regard to organisations to which the new statutory offence applies and the problematic identification principle with it. Consequently, a historic evidential hurdle to conviction has been removed. What remains to be seen is whether the statutory regime put in its stead creates a more straightforward approach.

(iii) The six essential elements in summary

12. Despite the easing of its burden, the prosecution must still prove six essential elements:

    (a) The defendant was an "Organisation" for the purposes of the Act

    (b) owing a relevant duty of care to the deceased

    (c) it breached that duty in the way organisation's activities were managed or organised, and

    (d) the breach was "gross"

    (e) the death was caused by the breach of duty and

    (f) a substantial element of this gross breach was attributable to senior management.

B. Duty of Care

(i) "Organisation" – who may be liable?

13. The broad definition of "Organisation" is found in s.1(2) and Schedule 1 of the Act and includes:

    - Corporations (including LLPs)
    - Any government or public body listed in Schedule 1
    - The Police force, and
    - Other partnerships, trade unions or associations, provided they are an employer

The application of this definition is further widened by the removal of Crown immunity for bodies listed in Schedule 1 and, by way of s.11, for corporations that are Crown servants or agents; save that many are saved by relevant duty of care exemptions, for example those exercising public policy decisions or public functions (s.3), military activities (s.4), policing (s.5) and emergencies (s.6).

(ii) Relevant duty of care

14. As an essential element to the new offence, the organisation must owe a "relevant duty of care" to the deceased. This means any of the following duties owed by it under the law of negligence:

    (a) A duty to its employees or other persons working or performing services

    (b) A duty owed as an occupier of premises

    (c) A duty owed in connection with the supply of goods or services, construction or maintenance, any commercial activity, use or keeping of any thing (s.2.(1)).

    In addition, a duty is owed to any person for whose "*safety the organisation is responsible*" (s.2(2)), including circumstances of custody and related transportation.

15. The Act does not create new duties of care rather it seeks to rely upon those already owed in negligence, otherwise under civil statutes and in strict liability (s.2(4)).

16. Whether a duty of care is owed to the individual is a question of law and unusually "*the judge must make the findings of fact necessary to decide that question*" (s.2(5)). It remains to be seen whether judges will determine this question in the presence or absence of the jury; as part of the full trial or as a preliminary issue. Indeed, lengthy argument may then arise as to the proper party (judge or jury) to determine the scope of a duty once its existence is established.

(iii) Breach of duty in the way activities are "managed or organised"

17. An organisation is guilty of the new offence if "*the way in which its activities are managed or organised*" (s.1(1)) causes a fatality. There is as yet no judicial clarification or statutory definition of the "way". Accordingly, the Crown may will be put to strict proof and required to provide particulars of each and every "way" it alleges any failure in such management or organisation: *R v Landy* (1981) 72 Cr App R 237. Furthermore, the defence should be able to request similarly to civil proceedings for further and better particulars of any claim upon which the prosecution intend to rely.

18. The joint Institute of Directors and Health & Safety Commission publication "Leading Health and Safety at Work" (Oct. 2007) identifies three key principles for robust systems of internal control, which may be relevant considerations for a jury. Although these principles are non-exhaustive, they represent a solid conceptual base against which organisations can assess or have assessed their managerial health:

    a. Strong and active leadership from the top:

    - visible active commitment from the board
    - establishing effective downward communication systems and management structures, and
    - integration of good health and safety management with business decisions.

    b. Worker involvement:

    - engaging the workforce in the promotion and achievement of safe and healthy conditions
    - effective upward communication
    - providing high quality training.

    c. Assessment and review:

    - identifying and managing health and safety risks
    - accessing and following competent advice
    - monitoring reporting or reviewing performance.

19. Naturally, in the event of any prosecution, demonstration of full compliance with existing Health and Safety (H&S) obligations would be helpful to an effective defence. Currently, organisations with five or more employees must:

    a. Submit a written H&S policy
    b. Assess risks to employees, customers, partners and any other persons affected by their activities
    c. Arrange for effective planning, organisation, control, monitoring and review of preventive and protective measures

d. Ensure access to competent health and safety advice

e. Consult employees about their risks at work and current safety measures.

(iv) Role of senior management and others

20. As seen above, the offence is complete only where a substantial element of the gross breach of duty is at "senior management" level. This is defined at s.1(4) as:

*"… persons who play **significant** roles in:*

i. the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or

*ii. the actual managing or organising of the whole or a **substantial part** of those activities*" (s.1(4)(c) Emphasis added).

Plainly, involvement of others (non-senior managers) may be admissible but the Crown should be careful to avoid a jury concluding that such input does not render senior management involvement as something less than substantial. This could well be an area for the defence to employ a certain amount of "smoke and mirrors" tactics.

21. As with the "*way*" definitional issue in s.1(1), the defence should put the Crown to strict proof and require particulars as to its allegations of a "*significant role*", which is currently undefined and will no doubt cause extensive argument. Moreover, the current lack of clarity over "*substantial part*" should prove equally controversial.

C. Breach

(i) "Gross breach" the new statutory test

22. The Act sets out an objective test akin to the test for dangerous driving at s.2(A)(1) of the Road Traffic Act 1988, whereby a person is guilty of dangerous driving if "*the way he drives falls far below what would be expected of a competent and careful driver*" and "*it would be obvious to a competent and careful driver that driving in that way would be dangerous*". By way of s.1(4)(b) of the Act, a breach of a relevant duty is considered "gross" if:

"*the conduct alleged to amount to a breach ...falls far below what can reasonably be expected of the organisation in the circumstances*"

23. This test should be read in light of *Milton v DPP* [2007] EWHC 532, where "*circumstances*" were considered to be both those which are favourable to the accused and well as unfavourable and could include matters both relevant to the conduct as well as the organisation. While the test remains objective, subjective elements can become relevant. The test can be broken into four constituents:

a. What are the applicable standards, which an organisation should follow in relation to the applicable conduct?

b. Has the organisation fallen below these standards?

c. If yes, is it "far below" those standards? and

d. How do the circumstances affect the answers to the above questions?

24. One can confidently predict from the above that industry-specific expert evidence will be commonplace to assist juries in understanding the *minutiae* of this test, which differs from the common law test in *R v Prentice* (1993) 3 WLR 937, where a breach of duty amounts to "gross negligence" when there is:

"*... indifference to an obvious risk of injury to health; actual foresight of the risk coupled with the determination nevertheless to run it; appreciation of the risk coupled with an intention to avoid it but also coupled with such a high degree of negligence in the attempted avoidance as the jury consider justifies conviction, and inattention or failure to advert to a serious risk which goes 'beyond inadvertence' in respect of an obvious and important matter which the defendant's duty demanded he should address.*"

It should be noted that while a Defendant's state of mind is not a pre-requisite, it may still be potentially relevant: Attorney General's Reference No 2/1999 (Feb 2000).

(ii) Factors for the jury to decide

25. When considering whether there was a "gross breach", the jury must consider whether:

    i. The evidence shows that the organisation failed to comply with any relevant health and safety legislation, and if so

    ii. How serious that failure was and how much of a risk of death it posed (s.8(2)).

"*Health and safety*" may include any code, guidance, manual concerned with

health and safety matters made or issued by an authority responsible for enforcement of any health and safety legislation (s.8(5)).

In addition, a jury may (subject to relevance and/or s.78 of PACE):

    i. consider evidence relating to attitudes, policies, systems or accepted practices likely to encourage such a failure or to have produced a tolerance for it, and

    ii. have regards to any health and safety guidance that relates to the alleged breach (s.8(3)).

Furthermore, a jury *may* have regard to any other matters "*they consider relevant*" (s.8(4)).

26. There is potential for considerable controversy over the parameters of evidence admissible by way of the above provisions.

27. Given the sweeping nature of these provisions, it would be apposite for the defence to consider all corporate and any other involvement relating to the event, however remote, determine its level of relevance and whether it concerned "senior management". Further, it may be wise to collate all relevant primary legislation, industry codes of practice, governmental regulatory and EU directives. Similarly, collation of all relevant industry-wide evidence of practice would go to determine whether an organisation's senior management conduct was reflective of standard market custom and practice. Thorough embarkation on this process would place the defence in the best position to argue over the admissibility of evidence for the jury's consideration.

D. Causation

(i) Considerations

28. There is no singular definition of causation contained in the Act, but as the apparent intention of the Act was to comply with certain aspects of the common law on gross negligence, then the test in *R v HM Coroner for Inner London, ex parte Douglas-Williams* (1999) 1 All ER 344 is likely to apply. Under *Douglas-Williams*, it is not necessary for the management failure to have been the *sole* cause of death; merely "but for" the management failure (including the substantial element attributable to senior management aspect), the death would not have occurred. As the law does not recognise very remote causes, then the existence of an intervening event may break the nexus between management failure and cause of death.

(ii) The test – *per* Lord Woolf in *ex p Douglas-Williams*

29. For "gross negligence manslaughter", there must be evidence of:

    a. Negligence consisting of an act or failure to act

    and

    b. That negligence must have caused the death in the sense that it more than minimally, negligibly or trivially contributed to the death

    and

    c. The degree of negligence has to be such that it can be characterised as gross in that it was of an order that merits criminal sanctions rather than a duty merely to compensate the victim.

"It is an essential ingredient that the unlawful or negligent act must have caused the death at least in the manner described. If ... it cannot be said that the death ... was caused by an act which was unlawful or negligent … then a critical link in the chain of causation is not established. That being so, a verdict of unlawful killing would not be appropriate and should not be left to the jury."

E. Procedure

(i) Considerations

30. The following procedural considerations are of particular relevance within the Act:

    - The Director of Public Prosecution's consent to prosecute is required (s.17)
    - The Indictment may contain both corporate manslaughter and a health & safety offence and the jury may be invited to return verdicts on each charge (s.19)
    - There is nothing in the Act to limit the prosecution of an individual under the old common law manslaughter regime, but such a prosecution would be in effect a contradiction in terms
    - s.1 only attaches "*if the harm resulting in death*" occurs within the United Kingdom (s.28(3)) as defined.

(ii) Commencement & savings

31. Although the Act came into force largely on 6th April 2008, s.1 "*does not apply in relation to anything done or omitted before the commencement of that section*" (s.27(3)).

32. While the common law offence of gross negligence manslaughter by organisations under is abolished under s.20, that "*does not affect any liability ... for ... an offence committed wholly or partly before the commencement of that section*" (s.27(4)). A common law offence is thus deemed to have been so committed where "*any of the conduct or events alleged to constitute the offence occurred before [6th April 2008]*" (s.27(5)). A fortiori taking these subsections together, no prosecution under the Act should succeed unless all of the relevant conduct and events took place after 6th April 2008.

33. Accordingly, it would be prudent for the defence to establish the time line of all potentially relevant events with precision to assess the procedural viability of any charge.

F. Penalties

(i) Fines

34. Although an organisation found guilty of a s.1 offence is liable to an unlimited fine (s1(6)), the Sentencing Guidelines Council issued a consultative document recommending fines of between 2.5% and 10% of annual company turnover averaged over the preceding three years.

(ii) Publicity and Remedial Orders

35. In addition to a damaging fine, s.10 provides for the imposition of a publicity order, requiring the organisation to publicise details of its conviction and fine. Although this provision is not yet in force (expected summer 2009), it could spell real danger for an organisation, depending on the nature of its business. If it operates in a media sensitive market or where demand is highly elastic, such an order could prove commercially fatal.

36. Finally, a remedial order may be imposed, ordering the organisation to take steps to remediate managerial failures pertaining to any death. Such an order may only be imposed upon an application by the Crown, that specifies its terms (s.9).

G. Solving the identity crisis?

(i) Identification

37. As seen above, the Act has removed the common law identification principle that stymied prosecutions in the past, introducing liability through senior management conduct. A thorough review and remediation of all corporate managerial systems is vital to the avoidance of culpability under the Act. Senior management should also be aware that task delegation to junior management would likely still be deemed a substantial failure of senior management.

(ii) Hurdles

38. While the identification principle has been removed, easing the burden of the prosecution, hurdles have been imposed, which may counteract this advantage:

    a. requiring both the fatality and all relevant conduct to have taken place after to 6th April 2008

    b. confusing the interrelationship between senior management failings and other organisational failures through definitional deficiencies, and

    c. increasing evidential burdens by looking at general organisation failures, as opposed to only those by senior management, together with standard market practices.

H. A Cautionary Illustration

39. X Co., an oil and gas company, owns a pipeline. The pipeline explodes after two children were smoking next to it, killing them instantly. X Co. is facing a number of serious claims as well as a HSE and a potential corporate manslaughter investigation. Property damage and business interruption claims worth £100s millions are paid by insurers, the families' claims were settled and a prosecution was averted.

39. What could have been the outcome in the event of a successful prosecution under the new Act?

    a. The insurance assets would have been voided and worthless

    b. The likely fine would have run in to £100s millions if based on 2.5% to 10% of X Co.'s worldwide turnover

    c. The remedial order could potentially have delayed the reopening of the pipeline costing further losses, and

    d. A publicity order (if applicable) could irreparably damage X Co.'s reputation.

I. Recommendations

40. As indicated below, prevention is clearly the best method to manage the risk of fatality and prosecution under the Act. Thorough implementation of all applicable statutory and subordinate legislation relating to H&S, together with good corporate governance and the adoption of all applicable industry standards is highly advisable. The cost of any such process would be easily offset by corporate peace of mind, reduced insurance premiums, a safer workplace and an enhanced reputation.

41. A prudent organisation should also consider the following:

    a. Nomination of a "Senior Manager" within the organisation and assessment of their competency and remit

    b. Regular review of the organisation's H&S policies to ensure that the standards set are achievable are fulfil all legal and regulatory obligations

    c. Review of job titles to ensure they accurately reflect the seniority of the employee

d. Enhanced H&S training for senior management

e. Increased board-level scrutiny of H&S compliance

f. Imposition of an accident management protocol for dealing with the authorities

g. An audit of insurance assets and wordings, and

h. Regular liaison with regulatory bodies to keep pace with regulatory developments and market trends.

42. In the event of a loss of life, a prudent organisation should:

a. Take all reasonable steps to liase and negotiate with HSE and prosecuting authorities to try to reduce the likelihood of the A-G's consent to prosecute being given

b. Consider settling any civil actions on appropriate terms with victims' families

c. If no consent is granted, insurance assets are protected, the risk of fines remedial orders or punitive publicity orders is removed.

43. In the event of a prosecution, the adoption of a joint civil and criminal approach to active defence may be effective, by proactively testing each of the elements of the Crown's case, both before and during trial; together with preparation of a detailed defence of the defendant organisation's commitment to "the way in which its activities are managed or organised".

David Stern

David Stern has a wide range of experience involving both serious fraud and corporate crime and has been involved, often as lead advocate, in several highly profile trials. He also has a broad commercial understanding of corporations having acted for many Fortune 500 companies involved with bodily injury, property damage and environmental liability claims, including those arising out of 9/11. Unusually for counsel, he has had the opportunity of reviewing and understanding the entire paper trail at board level and in corporate risk management departments and the interaction between the board, its senior management and employees.

His interest in this particular field stemmed from his involvement in the potential prosecution of the parent company arising out of the Marchioness disaster. David's analytical and creative approach has led to a number of successful stays of prosecutions on grounds of abuse of process and several notable reported cases.

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