

# 24 The Legal Beagle

## Corporate Manslaughter and Corporate Killing



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Rob, author of the SCALA and LGTF 'Guide to Standard Forms of Construction Contracts', has offered to share his experience and expertise with you and looks forward to hearing from readers.

The following paper from Worcestershire County Council concerns 'Corporate Manslaughter', which is not to be confused with 'Corporate Killing'.

Following two unsuccessful prosecutions of large companies, referred to in the paper, Corporate Manslaughter has once more become topical with the current prosecution of the Technical and Design Services Manager at Barrow-in-Furness Borough Council for manslaughter and breaches under the Health and Safety at Work etc Act (1974). That case concerns an outbreak of Legionnaire's disease, related to the maintenance of the air-conditioning system of a Council building. The prosecution alleges the maintenance was conducted with "negligence so gross that it was criminal". Because the officer concerned was regarded as "so far up the chain of command at the Council", the Council was also prosecuted. That is a major development. When I was a deputy the Borough Architect was always meticulous in checking that such maintenance was being conducted correctly - some will recall the problems with Legionnaire's disease some twenty years ago - and I'm glad he was, but so also should our Council.

You will see from the paper that the issue of prosecuting an employing organisation has been around since the early 1990's. Successful prosecution of large companies has proved difficult due to the need to identify a guilty officer who can be shown to be the 'mind and will' of the organisation. However, a small company, where the senior employee (the sole Director) was clearly the controlling mind, was successfully prosecuted following the Lyme Bay incident in 1993. So, the current case shows that the issue has not gone away in respect of large organisations.

'Corporate Killing' refers to proposed new legislation arising from, but not to be confused with, the above issues. The idea is to remove the obligation to identify a 'controlling mind' of a company. A company would be guilty when a management failure of the company is the cause, or one of the causes, of a person's death, if that failure falls far below what can reasonably be

expected of the company in the circumstances. So, it's about management and the foreseeable consequences of management decisions. With the continuing, quite correct, concern to improve health and safety in construction, it can be seen that the industry will be fertile ground for Corporate Killing prosecutions. Consider the selection of design-and-build main and sub-contractors for main contracts and contractor designed portions. While it is not clear when, or even if, the legislation will be enacted, it illustrates the increasing pressure for everyone to sharpen up their act in pursuit of improved health and safety - not to mention self-preservation and preservation of careers! Read on...

### 'Corporate' Manslaughter

Until very recently it was rare for a Corporation and/or its directors or senior managers to be charged with (corporate) manslaughter. However, the situation has now been brought into the spotlight as a result of the case involving Barrow-in-Furness Borough Council. The media reports that both a council manager and the Council itself have been charged with seven counts of manslaughter and also offences under the Health and Safety at Work Act 1974 following an outbreak of Legionnaires Disease.

Given the potential ramification, Malcolm Williams, Head of Property Services at Worcestershire County Council felt the issue was one of major topicality and asked if the Council's Legal Services could arrange a briefing note on the law. The rest of the article reflects the briefing by Legal Services colleague Brenda Loughrey which Malcolm thought would be helpful to share.

### Manslaughter

There is no separate crime of 'corporate manslaughter'. (An offence of 'corporate killing' has been proposed but is not yet law.) Manslaughter is a crime which can be committed by an individual or a company



(including a Council) in relation eg to a work-related death. The test of whether a company or council is guilty of manslaughter or not is intrinsically linked to whether or not a director or senior manager of the company - a 'controlling mind and will' of the company - is guilty of manslaughter. If the director/manager is found guilty, the company is guilty; if the director/manager is found innocent, the company is innocent. This is known as the 'identification principle'.

The type of manslaughter which may generally affect employees is that of involuntary manslaughter. There are two main categories of killing which come under this criterion:

1. killing by an unlawful act likely to cause bodily harm (not likely to affect an employee in the course of their employment) and;
2. killing grossly negligently.

**Manslaughter by gross negligence**

There is no precise definition of gross negligence. However, there has been much debate over the years and most recently Lord Mackay in the case of *Adomako* [1995] 1 AC 171 at 187 set out what he regarded as the essentials of gross negligence:

"...in my opinion the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such a breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty by the defendant in all the circumstances in which the defendant was placed when it occurred..."

...The essence of the matter which is supremely a jury question is whether, having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or omission."

In general a person is guilty of manslaughter if death is caused by his or her criminally negligent act or omission. The sentence, if convicted, can be up to life imprisonment for an individual. A company or Council could face an unlimited fine if convicted.

**Can a council be prosecuted?**

In Attorney General's Reference No. 2/1999 it was held that the identification principle remains the only basis in common law for corporate liability for gross negligence manslaughter. Thus, if there is insufficient evidence to convict the 'controlling mind and will' of the company or council then the company or council itself cannot be liable for manslaughter.

**Who is the 'controlling mind and will'?**

Again this area is not clearly defined. It has been said to mean those people who carry out the functions of management and speak and act as the company. Alternatively, another definition has been given as a person "who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders."

To be convicted of manslaughter it would need to be proved that the employee's acts were grossly negligent. In order to fulfil the 'identification principle' to commit a Council, it would then need to be shown that the same employee was the 'controlling mind' of the company.

Prior to the *Barrow* case, there have only ever been two large companies which have been prosecuted for manslaughter - and both have failed. The P&O (*Zeebrugge*) case failed because there was insufficient evidence to show that any director or senior manager was grossly negligent in carrying out their duties. The *Great Western Railways* case failed because the CPS tried to prosecute the company without prosecuting any individual. There have been a limited number of small companies which have been convicted.

On the basis of the above one needs to show clearly that the director, or a senior manager, was grossly negligent in the carrying out of their duties in order for the Council to be equally criminally liable. ▶

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One needs to look again to the test set out in *Adomako* - did the director or senior manager breach the duty of care towards the victim? If the answer is yes then, was that breach so serious as to be considered grossly negligent?

If less senior managers, who are not seen as the ‘controlling mind’, breach a duty of care towards a victim through their grossly negligent actions then they may be personally prosecuted for manslaughter, but in those circumstances the company or council will not be pursued.

#### **Health and Safety at Work Act 1974**

Under this Act an employer has a duty to ensure as far as reasonably practicable the health and safety of employees and non-employees. It is an offence under this Act to fail to discharge this duty.

Where an offence is committed by a body corporate which is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or similar officer of the body corporate, that person as well as the body corporate shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly. If convicted in the Magistrates Court the maximum penalty is £20,000. However, if convicted in the Crown Court the fine has no maximum limit.

#### **Conclusion**

Before any charge of manslaughter could be brought against a Council, one would need to identify either a director or a senior manager who had acted in a way which was clearly grossly negligent. The case would need to be proven beyond all reasonable doubt. More junior managers, if they have acted in a grossly negligent manner, could be prosecuted for manslaughter even though they are not the controlling mind of the company or council.

It has been difficult to prove the gross negligence test in previous cases and therefore the outcome of the *Barrow* case may be of great significance to local authorities throughout England and Wales and, if successful, may lead to a greater risk of prosecution of public bodies.

The proposed new offence of ‘Corporate Killing’ will also prove to be an interesting new area which is likely to have an impact on local authorities. Partly prompted by previous difficulties in securing ‘corporate’ convictions for manslaughter, it is intended that this new offence will make companies accountable in criminal law where they fall far below what can be expected in the circumstances. The suggested penalty is an unlimited fine and an order to correct the original cause of the accident. The proposals are intended to link the negligence of an organisation not to a single individual, but to a management failure by the corporation as a whole. In relation to local authorities it would mean that no longer will it be necessary to identify an individual who is the controlling mind of the company and has acted grossly negligently. If the Council’s conduct falls far below what is reasonably expected of the corporation in the circumstances then they can be prosecuted. Watch this space! 