

CPI Biennial H&S Conference 2011

Directors & Senior Managers – Leading from the Top

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Overview

- Corporate Manslaughter – update
- Liability and culture
- Lessons

Corporate Manslaughter – update



Corporate Manslaughter and Corporate Homicide Act 2007

- Introduced new manslaughter offence for organisations
- In force - 6 April 2008
- 1 prosecution – *R v Cotswold Geotechnical (Holdings) Ltd*
- 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

R v Cotswold Geotechnical (Holdings) Ltd (2011)

- 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**

R v Cotswold Geotechnical (Holdings) Ltd (2011)

- £385,000 in equal instalments over 10 years
- 250% of turnover (NB: Sentencing Guidelines Council consultation recommended 5-10%)
- No remedial order – surprising
- No publicity order – offence pre-dated Feb 2010
- Judge’s sentencing remarks were relevant to “culture”

Cotswold Geotech – lessons learnt

- Unprecedented fine
 - *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

Liability and Culture



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HSE Fee Intervention proposals

Intervention

- Inspection – no action
- Inspection – letter
- Inspection – enforcement notice
- Investigations

Average Costs - estimate

- Nil
- £750
- £1500
- £750 to £thousands

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

Directors – Tone at the Top

- “Directors” and senior managers
 - There are currently no specific legislative health and safety duties imposed on an individual director
 - IoD/HSC Guidance INDG 417 – **“Leading health and safety at work – leadership actions for directors and board members”**

Section 37 HSWA

Where an offence... has been committed with the **consent, connivance**, or...is attributable to any **neglect** on the part of any director, manager ... or a person who purports to act in that capacity, he/she as well as the company shall be guilty of that offence (s.37)

Individual H&S duties

- **Consent** - have knowledge and endorse/direct it
- **Connivance** – have knowledge and ignore it
- **Neglect** – should have been aware (even if they are not) and taken action
 - *“it will be a relatively short step for the **inference** to be drawn if the circumstances under which the risk arose were under the direction or control of the officer. The more remote his area of responsibility is from those circumstances, the harder it will be to draw that inference” (R v Chagot)*

Individual H&S duties

- Fines / penalties
 - Section 37
 - Magistrates – £20,000
 - Crown – unlimited (*typically £50k to 100k*)
 - Imprisonment – up to 2 years (or community service!)
 - Disqualification for up to 15 years (*typically 5 years*)

Lessons / Key themes

Lessons Learnt

Corporate Manslaughter has reinforced the need for:

Effective leadership (**Tone at the Top**);

A robust system for managing risk with H&S an integral part of business decisions;

Incident Response Protocols incorporating legal privilege over accident investigation reports

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** ”*

Questions



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