

National and International Developments in health and safety

By Gerard Forlin QC, Cornerstone Barristers (previously 2-3 Gray's Inn Square)

This article focuses on three areas: significant recent statutory changes; case law of potentially wider relevance; and international developments.

Recently in the UK we have seen the first successful prosecution of a company under the Corporate Manslaughter and Culpable Homicide Act 2007. This case concerned the death of a young unsupervised employee aged 27 who was taking soil samples from the bottom of a 3.7 metre pit at a building site when the trench walls collapsed suffocating him.

In essence, the prosecution stated that the pit was insufficiently supported for its depth and was in breach of industry accepted standards. The Managing Director, Peter Eaton, had also originally been charged with manslaughter and health and safety offences but the prosecution was stayed against him due to his serious ill health.

The company, Geotechnical Holdings Co Ltd, after a 13 day trial was fined £385,000 the equivalent of 250% of turnover, although it was granted ten years to pay the fine. In *R v Cotswold Geotechnical (Holdings) Ltd* [2011] All ER (D) 100, the Court of Appeal dismissed their appeal against the fine.

The Lord Chief Justice (sitting with Beatson and Bean JJ) in a judgment delivered extempore said it was unfortunate but “unavoidable and inevitable” that the company would probably have to go into liquidation to pay the fine:

In the circumstances, it was plainly foreseeable that the way the company conducted operations could cause serious injury or death. The reality was that the judge had taken the view, and had been right to take that view, that, in the circumstances the fact that the company could be put into liquidation was unfortunate but unavoidable and inevitable. There could be no justifiable criticism of the sentence imposed. The company was faced with manslaughter causing death as a result of a gross breach of duty following a system of work that was unsafe with the potential for causing death.



This fine (and the Sentencing Council Guideline that came into force in February 2010) may well set off certain alarm bells in larger organisations, companies and sectors, who may in time, find themselves before the criminal courts. It will almost inevitably put the wind in the sails of the CPS to prosecute again when they are of the view that there has been serious management failure. However, it leaves many issues still to be interpreted, for instance the scope of senior management failure and other thorny issues.

Very recently, the CPS has further announced that a company called Lion Steel Ltd and three

directors have been charged with respectively corporate manslaughter and manslaughter. The CPS news brief dated July 1st 2011 stated “... [the CPS] has advised Greater Manchester Police to charge Lion Steel Ltd in Manchester with corporate manslaughter following the tragic death of Steven Berry at the Hyde Site on Johnson Bank Road when he fell through a fragile panel and died as a result of injuries sustained in the fall. [The CPS] also decided that three of the company directors should be charged with gross negligence manslaughter. The three men are also charged under section 37 of the Health and Safety at Work Act 1974 for failing to ensure the safety at work of their employees. Lion Steel is also charged under section 2 and 33 of the Health and Safety at Work Act 1974 for failing to ensure the safety at work of its employees...”

The CPS went on to say they had “... taken this decision after very carefully reviewing the material gathered in the police investigation and have concluded there is sufficient evidence for a realistic prospect of conviction and that it is in the public interest to bring these charges...”

We have also recently seen the first conviction under the Health and Safety (Offences) Act 2008, which allows for the imprisonment of individuals convicted of certain health and safety offences. A Mr Dutton, the Health and Safety Manager of a metal distribution firm called South Essex Stockholders Ltd was given a four months term of imprisonment, suspended for two years.

He pleaded guilty to one count of s.7 of the HSWA 1974. Mr Dutton had asked a junior employee to bring him a can of chemical to use as an accelerant to burn debris in a skip.

On pouring it in, it (somewhat predictably!) exploded and seriously burned him. He spent over three months in hospital and required major skin grafts. His Honour Hayward Smith QC commented he had been “extremely foolish ... you were severely burned. You were in flames. Those who saw what happened suffered trauma”.

Given the risk to himself and others who may also have been injured, a suspended sentence was imposed. In mitigation it was pointed out that he had perhaps fortuitously been the only injured person. He also had to pay £5,000 towards the prosecution costs. His employer was also convicted after a trial under Section 2 of the HSWA 1974 and fined.

Currently, the courts have been busy attempting to grapple between various definitions of risk and foreseeability.

The Supreme Court in *Baker v Quantum Clothing Group* [2011] UK JC17 and the Court of Appeal in *Viola and Tangerine Confectionery Ltd*, have both looked at this issue but these cases together with another leading case of *Porter* still leave many issues unanswered.

R v Bodycote Hip [2010] EWCA Crim 802 involved a double fatality. The Court of Appeal, when considering an appeal against sentence, took into account what the defendant's sister company had failed to do in the United States:

... the serious aggravating feature in this case was that a similar incident has led to the death of two employees at a HIP plant operated by another company in the same group that occurred in May 2001 in Tarzana California. These two employees had also died from asphyxiation as a result of inhaling argon and nitrogen. That may have prompted the appellant to either adopt or to expedite the introduction of its present system, but, as the prosecution was able to show, not with the rigour that the dangers demanded and the appellant allowed the other defaults in its safety procedures to continue or to get worse (at para.13).

... the other aggravating features of particular note were that there had been two deaths, and the appellant had not adequately heeded the warnings from the failures in the Californian plant (at para.15).

This approach marks a radical departure from what has previously occurred and will be viewed by many UK based organisations as ominous, given it clearly demonstrates the English Court's intention to factor in foreign conduct even if there are different laws, customs and operational approaches involved.

There has also been a significant increase in Rule 43 reporting by Coroners after inquests. These reports are made to government bodies or departments (with copies to the interested parties and the Lord Chancellor) in the hope they will prevent future deaths: see 'Come in number 43' by Gerard Forlin QC and Louise Smail (2011) 161 New LJ 306). Ignoring such recommendations may well trigger 'bad character' applications by the prosecution in the event of subsequent accidents or incidents.

Interestingly, new legislation is planned which could allow the prosecution of "any boss [CEO] of a 'systematically important financial institution' whose actions had a significantly damaging effect on the wider economy."

A Tory MP is expected to make a speech stating that, "Those who put our big banks at risk should be held to account, just as with those who destroy property or endanger the health of their fellow citizens." It therefore appears that legislation based on the legal test for gross negligence manslaughter will be introduced shortly.



Globally, there have been many significant developments. The Government of Ireland has recently announced they were intending to introduce two new offences – corporate manslaughter and grossly negligent management causing death - where directors and senior managers will be able to be imprisoned for up to 12 years.

The Cabinet approved the preparation of similar laws, but before any bill could be introduced there was a change of government. Recently, Senator Mark Daly has introduced a Private Member's Bill "to create the Indictable Offence of grossly negligent management causing death by a high managerial agent of the undertaking, and to provide for related matters."

Any undertaking could face an unlimited fine. A person convicted could be fined up to Euro 5 million and be sentenced up to two years imprisonment. Further, upon conviction, the undertaking or person would have to publicise their convictions, together with details of any fines or remedial orders. Interestingly, in a recent manslaughter trial in Tipperary under the law as it currently stands, two barmen were acquitted after the Trial Judge ruled that there no such thing in Ireland as an Alcohol Liability Act and manslaughter counts couldn't be left to the jury. The prosecution case centred on a pint glass containing eight shots that were consumed as part of a young man's 26th birthday celebrations. He later passed out and died.

Gibraltar intends to introduce corporate manslaughter legislation. The draft legislation states that there will be an offence of corporate manslaughter if the way in which an organisation's 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. The Gibraltar Justice Minutes stated that "... there are no plans at present to exempt any Government Department...".

In January 2012 the Australians are about to introduce the Safe Work Act 2009 to harmonise their health and safety legislation and to tighten up sentencing for most Australian States and Territories. This will have a large impact on heavy industry, particularly in the mining sector.

There has been a major ramping up in the number and intensity of investigations and prosecutions in the aftermath of recent aircraft crashes (the DHL collision over Germany, the Concorde crash, the GOL incident in Brazil, the Helios Investigations in Greece and Cyprus and many others). UK (and global) organisations need to be aware that conduct in one country is increasingly being examined by plaintiff lawyers (particularly in the US), regulators and prosecutors in other jurisdictions. Thus the trend towards greater use of European arrest warrants is set to continue.

Prosecutors are making more use of the Regulatory Reference (Fire Safety) Order 2005 which is triggered by the possible risk of fire. The Order imposes duties on a defined "responsible persons" to protect anyone who may be on or in the vicinity of the premises. Substantial fines include £300,000 against Shell plc and £400,000 imposed on New Look Ltd. Recently two managers in the leisure industry have been imprisoned for breaches of the Fire Safety Order.



The Coalition government has announced an independent review of health and safety legislation, under the auspices of the Department for Work and Pensions, to “... *consider the opportunities for reducing the burden of health and safety legislation on UK businesses while maintaining the progress made in improving health and safety outcomes*”.

Following on from Lord Young’s report in October 2010, Professor Löfstedt recently published his report into potentially simplifying health and safety regulations. He has proposed a series of recommendations. Many of these seem eminently sensible but some (including absolving self-employed people from Health & Safety laws) may be in need of further consultation. The author has recently been asked to comment on this report which he did for Barbour in December 2011. Further, David Cameron has recently stated that the excessive health and safety culture was costing businesses billions and he intended to “*kill off the health and safety culture for good*”. He added it had “*become an albatross around the neck of British businesses*”.

Richard Jones of The Institute of Occupational Safety and Health responded, “*Labelling workplace health and safety as a monster is appalling and unhelpful. The reason our legislative system exists is to prevent death, injury or illness at work, protecting livelihoods in the process.*” He also said that, “*The problem identified by the government’s own reviews is not the law, but rather, exaggerated fear of being sued, fed by aggressive marketing*”.

In conclusion, recent developments provide both new opportunities for increased safety and wellbeing in the work place and potential pitfalls for those organisations and individuals who do not have a genuine intention of making health and safety (and environmental) the cornerstone of their operations.

We will continue to witness more investigations (and possibly prosecutions) in the aftermath of accidents and incidents whether they be natural (New Zealand and Japan), deliberate terrorism (such as New York and London) or more usual workplace type incidents.

This shift in prosecutorial approach towards the global means that the days of splendid isolation have long gone –prosecutors wait in the wings for those unable or unwilling to make the required step change regarding safety and environmental issues.

As an interesting postscript, National Grid Gas and Northern Gas networks were fined recently by Ofgen £4.3 million and £900K respectively for neither responding nor attending to gas leaks in time.

Gas distributor network operators have to respond to 97% of uncontrolled gas escapes within one hour and 97% of controlled within two hours. This perhaps indicates where future fines are leading in health and safety matters.

Gerard Forlin QC of Cornerstone Barristers (previously 2-3 Gray’s Inn Square) was educated at Trinity Hall, Cambridge and the London School of Economics.



His specialisation is regulatory work, including health and safety, aviation, environmental and product liability. He has been in many of the pivotal cases, including Watford, Southall, Teebay, Paddington, Hatfield and Purley train crashes and is currently acting in the lift fatality incident in the City of London.

He undertakes a lot of inquest work and has lectured, practised or consulted in over 30 countries.

He has published many articles and is General Editor of “Corporate Liability – work related deaths and criminal prosecutions”, 3rd Edition 2012 (Bloomsbury).

