

Fisher Scoggins ^{LLP}

Worldwide Firefighters' Conference

Criminal Liability and Corporate Killing

by
Mark Scoggins

**Manchester
15th March 2005**

Fisher Scoggins LLP
Hamilton House
1 Temple Avenue
London EC4Y 0HA
Tel: 020 7489 2035
Fax: 020 7489 2113
Email: scoggins@fisherscoggins.co.uk

© 2005 Mark Scoggins

Fisher Scoggins ^{LLP}

Aims and objectives I

- Understand likely framework of “Corporate Killing”
- Appreciate timescale, political and practical problems of CK
- Assess what changes if any required to avoid CK prosecution
- Keep in mind current health & safety liability of individuals

Aims and objectives II

- Dissuade regulators from prosecution
- Deter civil compensation claims
- Defend your actions in court and elsewhere
- Put forward the strongest mitigation
- Keep your jobs, liberty and reputations

Corporate manslaughter – the current test in law

- Proof that an identified individual is guilty of gross negligence manslaughter
 - Duty of care owed to deceased
 - Breach of duty (negligence)
 - Causation/contribution to death
 - Negligence “gross”, “shows disregard of life”, “criminal”

AND

- Proof that such individual is a “directing mind” of the corporation, its embodiment or relevant part of it

Corporate manslaughter – the current test

Someone bad enough and big enough

Corporate Killing – elements of the suggested offence

A corporation is guilty of corporate killing if

- (a) a *management failure* by the corporation is the *cause or one of the causes* of a person's death; and
- (b) that failure constitutes *conduct falling far below what can reasonably be expected* of the corporation *in the circumstances*.

Law Commission draft Bill
March 1996
(emphasis added)

“Management Failure” = strict liability

For the purposes of subsection (1) above

- (a) there is a management failure by a corporation if the way in which its activities are managed or organised ***fails to ensure*** the health and safety of persons employed in or affected by those activities; and
- (b) such a failure may be regarded as a cause of a person’s death notwithstanding that the ***immediate*** cause is the act or omission of an individual.

Law Commission draft Bill
March 1996
(emphasis added)

Why might we need a new homicide offence?

- The Law Commission’s 1996 Report
- The Court of Appeal’s ruling in *R v GWT*
- Pre-1996 defects of the HSWA 1974 regime
- The decision in *R v Gateway Food Markets*
- The decision in *R v Howe*
- The post-*Howe* history and strategy
- The *Hatfield* and similar prosecutions: last gasp of old law?
- Current status and forecast future
- The Work-Related Death Protocol and other issues

Corporate Killing – the likely (?) timescale

- 9 years of fudge
- Inclusion in Queen's Speech 23.11.04
- Publication of draft Bill deferred [yet again]
- Parliamentary process and time allocation
- Trouble in the Lords and the Parliament Acts?
- Enactment before the next general election?
- Delayed commencement order?
- Retroactivity? No – ECHR Article 7

Individual/ministerial liability – political stalling point?

No individual shall be convicted of aiding, abetting, counselling or procuring an offence [*of corporate killing*] but without prejudice to an individual being guilty of any other offence in respect of the death in question.

In this section “a corporation” does *not* include a *corporation sole* but includes any body corporate wherever incorporated.

Law Commission draft Bill
March 1996
(emphasis added)

Corporate Killing – how best to avoid prosecution

- Home Office forecast of 3-4 cases per year
- Reservation of prosecution for the “worst” instances
- Alignment of CK and H&S liabilities
 - “management failure”
 - “way in which its activities are managed or organised”
 - “conduct” of “undertaking”
 - “fails to ensure health and safety”
- CK is very bad H&S failure
- No need for different system or process

The helpful endorsement

“I would like especially to praise the work of the Thames Valley emergency services, and also the agencies who worked closely together to respond to the accident with well-prepared contingency plans.”

Alistair Darling
Sec of State for Transport
10 November 2004
[commenting on the Ufton Nervet level crossing
crash of 6 November]

A plan that worked

“The fire-fighting tactics employed by the combined forces of the French and UK teams were competent and effective. The two Commanders worked together and they amended their strategies to cope with developments. The fire-fighting operation was characterized by resoluteness and high personal commitment of the fire-fighters. The Commanding Officers of both nations deserve commendation for their performance of duty at this difficult fire.”

Channel Tunnel Safety Authority
Report of the Inquiry into the fire of 18 November 1996
Chapter IX para 23

Not part of the team ... but doing their best

“NYPD’s 911 operators and FDNY dispatch were not adequately integrated into the emergency response. FDNY ordered both towers fully evacuated by 0857 but this guidance was not conveyed to 911 operators and FDNY dispatchers, who for the next hour often continued to advise civilians not to self-evacuate. ... In planning for future disasters, it is important to integrate those taking 911 calls into the emergency response team.”

9/11 Commission Report
Authorized Edition
August 2004
Page 318

Working together ... too late to do anything

“As of September 11, the Port Authority lacked any standard operating procedures to govern how officers from multiple commands would respond to and then be staged and utilized at a major incident at the WTC.”

9/11 Commission Report
Authorized Edition
August 2004
Page 282

Damned at the highest level

“There were significant flaws ... senior management were too easily satisfied that [procedures] were being operated properly ... they failed to provide the training required ... in face of a known problem they did not become personally involved in resolving it ... they adopted a superficial response when issues of safety were raised by others ... they were not prepared for a major incident as they should have been.”

The Hon. Lord Cullen
Piper Alpha Disaster
Public Inquiry Report §14.52

Executive exposure

“Where an offence under [this Act] committed by a body corporate 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 *other similar officer* of the body corporate ... he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.”

Health & Safety at Work etc Act 1974
Section 37

Targeting individuals for H&S prosecution

	99/00	00/01	01/02	02/03	03/04
Charges against individuals	48	55	55	41	42
- of which directors/managers	31	36	31	22	17
Convictions	34	45	40	25	30
- of which directors/managers	21	31	23	11	11

NOTE 1: includes only prosecutions brought by HSE itself.

NOTE 2: charges principally under s.7 or s.37 HSWA 1974

Source: HSE

Individuals in the dock 2004 - UK

Date	Defendant	Sector	Fatality	Penalty
<u>Directors/managers (manslaughter)</u>				
03.12.04	Spree	Haulage	Yes (3)	7 years
03.12.04	March	"	"	16 months
03.12.04	Miller	"	"	160 hours CS
<u>Directors/Managers (HSWA s.37)</u>				
19.07.04	Braidford	Construction		£200
19.03.04	Elsome	Food	Yes	£10,000
02.02.04	Smalley	Wood		£1,000
<u>Other employees (HSWA s.7)</u>				
18.05.04	Grindley	Rail		£2,000
14.05.04	Grundy	Construction	Yes	£1,000
10.05.04	Hamer	Construction		£2,000
26.04.04	Winmill	Food		£750
18.02.04	Carroll	Food		£250
02.02.04	Newman	Car maker		£300
28.01.04	Prosser	Swimming pool	Yes	£500

Claim ... and be able to prove (I)

- ☐ "We did a good and professional job"
- ☐ "We can cope: service as (almost) usual"
- ☐ "We were as ready as we could reasonably be"
- ☐ "Safety of people came first by a very long way"
- ☐ "The top took and takes a vigorous interest"
- ☐ "We constantly improved our knowledge and systems"
- ☐ "Saving money was not a consideration in safety"

The key questions for those in charge

- ❖ What was your job?
- ❖ Did you do it properly?
- ❖ Can you prove it?

The Case for the Defence

Rational
Reasonable
Professional
Informed
Flexible
Proactive
Calm
Concerned
Co-operative
Accountable
Prepared

The End

**... and may the blame be found
to lie with someone else ...**