

HOWARD
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CORPORATE KILLING

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AIM

- To look at corporate liability in the workplace from an employment perspective
- Set out the current position
- Set out the Government's proposals
- Risk assessments
- Provide guidance for the corporate employer

CURRENT LIABILITY OF DIRECTORS AND MANAGERS AND PROPOSALS FOR CHANGE

Reforming the law on involuntary manslaughter: The Governments' Proposals 23 May 2003.

Three ways of committing "involuntary manslaughter".

- "unlawful act manslaughter" - where the person who causes the death was engaged in a criminal act which carried with it the risk of some injury to another person.
- "gross negligence manslaughter" - where a person causes death through extreme carelessness or incompetence.
- The third is where a person is aware that their conduct involves a risk of causing death (or probably serious injury) and unreasonably takes that risk.

Reasons why current law is problematic

- The most significant problem is that having one offence of involuntary manslaughter to cover such a wide range of possible offences presents judges with significant problems, particularly when determining what the appropriate sentence should be in any given case.
- The Law Commission therefore proposed the creation of two separate offences of unintentional killing i.e. "reckless killing" and "killing by gross carelessness" with the main difference being the fault elements.

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- inappropriate that types of conduct which vary widely in terms of fault should all carry the same descriptive label

Law Commissions proposals:

Reckless killing

A person commits reckless killing if:

- his or her conduct causes the death of another;
- he or she is aware of a risk that his or her conduct will cause death or serious injury; and
- it is unreasonable for him or her to take that risk having regard to the circumstances as he or she knows or believes them to be.

Killing by gross carelessness

A person commits killing by gross carelessness if:

- his or her conduct causes the death of another;
- a risk that his or her conduct will cause death or serious injury would be obvious to a reasonable person in his or her position;
- he or she is capable of appreciating that risk at this material time (but did not in fact do so)

and either

- his or her conduct falls far below what can reasonably be expected in the circumstances; or
- he or she intends by his or her conduct to cause some injury, or is aware of, and unreasonably takes, the risk that it may do so, *and* the conduct causing (or intended to cause) the injury constitutes an offence.

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A Proposed Third Offence

Present law

- At present under the law on “dangerous and unlawful act manslaughter” a person who intends or is reckless as to whether he commits what would otherwise be a relatively minor assault will be guilty of manslaughter if the victim dies as a result, even though death was quite unforeseeable. So, if for instance, in the course of a fight A gives B a small cut - but A had no way of knowing B had haemophilia - and B then dies, under the law at present A would be liable under “dangerous and unlawful act manslaughter”.

Law Commission’s concern

- that the present law allows a person to be convicted of an offence carrying a maximum penalty of life imprisonment not because of his mental intention but because of an “unlucky” event.
- wrong in principle for the law to hold a person responsible for causing a result that he did not intend or foresee, and which could not even have been foreseeable by a reasonable person observing his conduct.
- an accused who is culpable for causing some harm is not sufficiently blameworthy should not be held liable for the unforeseeable consequence of death.

Governments Proposals re A Third Offence

The Government considers that there may be a need for an additional homicide offence to cover a situation where:

- a person by his or her conduct causes the death of another;
- he or she intended to or was reckless as to whether some injury was caused; and

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- the conduct causing, or intended to cause, the injury constitutes an offence.
- However, the Government sees no case for extending the offence to instances where death is caused by someone who, through gross carelessness, causes someone to be injured and, totally unforeseeably, death results.
- The Law Commission have made it clear that they are against any such offence in principle because it would not be linked to what a person could possibly have foreseen. They argue that people should not be punished for “the lottery effect”.

Maximum Sentences

Reckless killing

- Government states this should attract the same maximum penalty as at present i.e. life imprisonment.

Killing by gross carelessness

- The Government states that the offence of killing by gross carelessness warrants a maximum sentence short of life imprisonment.
- The Government therefore proposes a maximum penalty for the offence of killing by gross carelessness of 10 years imprisonment.

Death resulting from intentional/reckless causing of minor injury

- where death results but was unforeseeable and all the offender intended to cause or recklessly caused was some minor injury.
- Under existing legislation, courts have imposed long determinate sentences (sometimes in excess of 5 years) in cases where a relatively minor assault has resulted unexpectedly in death.

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- The Government therefore considers that the maximum penalty for the offence of causing death when the only intention was to cause minor injury should be between 5 and not more than 10 years imprisonment - possibly 7 years.

Scope of the Proposals - a New Offence of Corporate Killing

Present position on corporate liability for involuntary manslaughter

- Companies have limited liability provided by incorporation but this does not at present protect individuals from criminal liability, nor will the proposed new offence of corporate killing of itself either increase or decrease individual liability. It will merely provide a different basis of criminal liability for corporations.
- The governing principle in English law on the criminal liability of companies is that those who **control or manage** the affairs of the company are regarded as embodying the company itself. Before a company can be convicted of manslaughter, an individual who can be **“identified as the embodiment of the company itself”** must first be shown himself to have been guilty of manslaughter. Only if the individual who is the embodiment of the company is found guilty can the company be convicted. Where there is insufficient evidence to convict the individual, any prosecution of the company must fail. This principle is often referred to as the **“identification” doctrine**.

Problems in practice with current position

- difficulty in identifying an individual who is the embodiment of the company and *who is culpable*.
- The problem becomes greater with larger companies which may have a more diffuse structure, where overall responsibility for safety matters in a company can be unclear and no one individual may have that responsibility. In such circumstances it may be impossible to identify specific individuals who may be properly regarded as

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representing the **directing mind** of the company and who also possess the requisite *mens rea* (mental state) to be guilty of manslaughter: in such circumstances, no criminal liability can be attributed to the company itself.

The need for reform

- Recent disasters which have evoked demands for the use of the law of manslaughter and failures to successfully prosecute have led to an apparent perception among the public that the law dealing with corporate manslaughter is inadequate.
- This perception has been heightened because the disasters have been followed by inquiries which have found corporate bodies at fault and meriting very serious criticism and in some instances there have been successful prosecutions for offences under the Health and Safety at Work Etc Act 1974, as amended (“the 1974 Act”). These disasters have included:
 - The Herald of Free Enterprise disaster on 6 March 1987 where the jury at the inquest returned verdicts of unlawful killing in 187 cases and the DPP launched prosecutions against 7 individuals and the company. The case failed because the various acts of negligence could not be aggregated and attributed to any individual who was a directing mind.
 - The King's Cross fire on 18 November 1987 which claimed 31 lives. London Underground were criticised for not guarding against the unpredictability of the fire and because no one person was charged with overall responsibility.
 - The Clapham rail crash on 12 December 1988 which caused 35 deaths and nearly 500 injuries. British Rail were criticised for allowing working practices which were “positively dangerous” and it was said that the errors went much wider and higher in the

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organisation than merely to be the responsibility of those who were working that day.

- The Southall rail crash on 19 September 1997 which resulted in 7 deaths and 151 injuries. In July 1999 Great Western Trains (GWT) pleaded guilty to contravening Section 3(1) of the 1974 Act in that they failed to ensure that the public were not exposed to risks to their health and safety. They received a record fine for a health and safety offence of £1.5 million for what Mr Justice Scott-Baker described as “a serious fault of senior management”. The judge had earlier ruled that a charge of manslaughter could not succeed because of the need to identify some person whose gross negligence was that of GWT itself.
- The low numbers of manslaughter cases in relation to deaths at work brought before the courts do not reflect any unwillingness on the part of the health and safety enforcing authorities to refer such cases to the CPS and the police, but result principally from shortcomings in the existing law on corporate manslaughter. From April 1992 to March 1998, 59 cases investigated by HSE were referred to the CPS for possible manslaughter charges. The CPS felt able to prosecute in only 18 cases and only 4 during that time were successful (most of these did not concern corporations).
- The result of the operation of the identification doctrine has meant that there have been only a few prosecutions of a corporation for manslaughter in the history of English law and only three successful prosecutions - OLL Ltd, Jackson Transport (Ossett) Ltd and Roy Bowles Transport Ltd - and all of these were small companies.

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- Many cases of deaths in factories and building sites where death could and should have been avoided. Furthermore, in response to the Law Commission's Consultation Paper No. 135 on involuntary manslaughter, the Health and Safety Executive (HSE) commented that death or personal injury resulting from a major disaster is rarely due to the negligence of a single individual. In the majority of such cases the disaster is caused as a result of the failure of systems controlling the risk with the carelessness of individuals being a contributing factor.

The Law Commission's proposals

- it would benefit both companies and the enforcement authorities, if companies were to take health and safety issues more seriously. The Commission considered a number of approaches for extending corporate liability but concluded by recommending that:
 1. There should be a special offence of corporate killing, broadly corresponding to the proposed offence of killing by gross carelessness.
 2. The corporate offence should (like the individual offence) be committed only where the corporation's conduct in causing death fell far below what could reasonably be expected.
 3. The corporate offence should not (unlike the individual offence) require that the risk be obvious or that the defendant be capable of appreciating the risk.
 4. A death should be regarded as having been caused by the conduct of the corporation if it is caused by a "management failure", so that the way in which its activities are managed or organised fails to ensure the health and safety of persons employed in or affected by its activities.
 5. Such a failure will be regarded as a cause of a person's death even if the immediate cause is the act or omission of an individual.

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6. That individuals within a company could still be liable for the offences of reckless killing and killing by gross carelessness as well as the company being liable for the offence of corporate killing.
- The Government believes the creation of a new offence of corporate killing would give useful emphasis to the seriousness of health and safety offences and would give force to the need to consider health and safety as a management issue.
 - The Government therefore accepts the Law Commission's proposal for a new offence of corporate killing, subject to what is said below.

Governments restrictions on corporate killing offence

- Corporations
- “Undertakings”
 - The concept of “undertakings” as used in the 1974 Act. Although an “undertaking” is not specifically defined in the 1974 Act, HSE have relied on the definition provided in the 1960 Local Employment Act where it is described as “any trade or business or other activity providing employment”.
 - Clearly, the use of the word “undertaking” would greatly broaden the scope of the offence. It would encompass a range of bodies which have not been classified as corporations aggregate including schools, hospital trusts, partnerships and unincorporated charities, as well as one or two person businesses e.g. self-employed gas fitters. In effect the offence of corporate killing could apply to all employing organisations. We estimate that this would mean that a total of 3½ million enterprises might become potentially liable to the offence of corporate killing. However, such organisations are already liable to the provisions of the 1974 Act.

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Widening those who can Investigate and Prosecute the New Offences

- Under the general criminal law in England and Wales, it is the responsibility of the police to investigate allegations of criminal activity, charge the accused and pass the case to the independent Crown Prosecution Service to determine whether the charge is appropriate and whether to proceed with a prosecution. These organisations will continue to have the same powers in respect of the new offences.
- However, there will be many instances in England and Wales where a fatality occurs at work and the expertise on the operation of the undertaking will lie with another statutory body. There are a number of areas of work and public health that are subject to enforcement by agencies under specific legislation e.g. marine safety, civil aviation and food safety. Under the 1974 Act the enforcement of health and safety at work is divided between local authorities and HSE. In cases of work related death HSE and local authority inspectors liaise closely with the police who recognise that the health and safety enforcing authorities' knowledge and expertise is essential in determining both the immediate and underlying causes of death in such cases.
- The Government considers that there are strong practical reasons for considering whether it should be open to health and safety enforcing authorities to investigate and prosecute the new offences.
- The tests for the new offence of corporate killing - whether a management failure by the corporation is the cause of death and whether that failure constitutes conduct falling far below what could be reasonably expected - correspond to those applied by the health and safety enforcing authorities in considering prosecutions for health and safety offences where they have the expertise. The investigation requirements placed on the health and safety enforcing authorities mean that they will discover in

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the course of their investigation whether there is sufficient evidence to warrant a charge of corporate killing. To require the police to conduct what would in effect be a parallel investigation would lead to duplication of effort.

- Prosecution led by the relevant enforcing authorities, such as the HSE, the Civil Aviation Authority, or the Maritime and Coastguard Agency, would avoid the complexity of current arrangements for liaison with the police and referral to the CPS and would facilitate consideration of corporate killing together with any other offences which might also be appropriate.
- In cases where the responsibility for a death at work lies squarely with individuals, the health and safety enforcing authorities in England and Wales should continue to consider, as they do now, whether a reference to the police or CPS for a possible “reckless killing” or “killing by gross carelessness” prosecution was appropriate.
- The Government therefore considers that there is a good case in England and Wales for the health and safety enforcing authorities and possibly other enforcement agencies, as appropriate, to investigate and prosecute the new offences, in addition to the police and CPS.

Enforcement Against Companies and their Officers

- The Government expects that, while any undertaking could be liable (in the event of the creation of a new offence of “corporate killing”) for the offence, most prosecutions would be against companies not individuals.
- In accordance with the Law Commission's recommendations, the Government proposes that undertakings, including corporations, should be liable to a fine and subject, as necessary, to orders to take remedial action.

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- The Government wants to prevent unscrupulous companies or directors from escaping liability, and that enforcement action should act as a real deterrent, even in large companies and within groups of companies. The Government's concern lies principally in the four following areas.

Liability within groups of companies

- The directors of each individual company in a group are required to operate it in the best interests of that company and not in the interests of the group. It has long been recognised under company law, however, that in relation to financial disclosure, a "true and fair" view of the financial position of a group of companies cannot be presented unless the parent company presents group financial statements as well as its own individual statements. Moreover, since 1986, a parent company may be liable in relation to fraudulent or wrongful trading as a shadow director.
- The Government is concerned that it should not be possible for holding companies to attempt to evade possible liability on a charge of corporate killing by setting up subsidiary companies carrying on the group's riskier business which could most readily give rise to charges of corporate killing.
- Particularly since the Government is concerned by the possibility that a subsidiary company within a large group of companies may have insufficient assets to pay a large fine, and that, in such cases, liability could not be transferred to its parent company.
- The Government recognises that a company must be convicted on a charge of corporate killing in proper proceedings, and that such liability cannot simply be moved around within a group of companies. Equally, that it is important that group structures should not be used as a mechanism for evasion.

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- The Government therefore proposes that the prosecuting authority should also be able to take action against parent or other group companies if it can be shown that their own management failures were a cause of the death concerned.

Enforcement action against a director or other company officer

- It is a fundamental principle of company law that, from the date of incorporation, a company is an artificial legal person with rights and duties distinct from its members or directors. The limited liability provided by incorporation does not at present protect individuals from criminal liability nor will the proposed new offence of corporate killing of itself either increase or decrease individual liability. It will merely provide a different basis of criminal liability for corporations.

Concerns of creating a claims culture

- The Government considers that action against individual directors or officers might be justified even in cases where a company found guilty of corporate killing could pay the fine imposed by the court and/or comply with a remedial order.
- The Government proposes that any individual who could be shown to have had some influence on, or responsibility for, the circumstances in which a management failure falling far below what could reasonably be expected was a cause of a person's death, should be subject to **disqualification** from acting in a management role in any undertaking carrying on a business or activity in Great Britain.
- The ground for disqualification would not be that of causing the death but of contributing to the **management failure resulting in the death**.

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- It is envisaged that separate proceedings would usually be brought against individual officer(s) following the conviction of the company on indictment; in some cases (e.g. where the company was insolvent), it might, however, be appropriate to move straight to a disqualification proceeding.
- Disqualification would normally be for a limited period of time, but might, in the most serious cases, be unlimited. If a person acted in contravention of a disqualification order, he would be liable to imprisonment or an unlimited fine, or both.
- The Government's aim is to make undertakings more accountable in law where a person dies because of a failure on their part. If there was sufficient evidence, an individual officer could be charged with one of the new manslaughter offences ie killing by gross carelessness or reckless killing, whether or not proceedings were brought against the undertaking for the new corporate killing offence.
- It would not be possible for an individual officer automatically to be made criminally liable on the sole basis of the conviction of an undertaking for the corporate offence. It would be necessary for him to be charged with an offence which he has committed and be given the chance to defend himself against it.
- In order to go down this route, it would be necessary to create an additional criminal offence in respect of substantially contributing to the undertaking in question's corporate offence, leading to the death of a person. The Government has reached no firm view on this suggestion but is putting the matter out to consultation as an opportunity to obtain views on the possibility of creating such an offence, and if such a course were adopted, the range of penalties which should be available on that conviction - and in particular, whether a court should be able to sentence individual officers to imprisonment.

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Enforcement Against Other Corporations or Undertakings and their Officers?

- Several of the issues discussed above are also relevant to other forms of undertaking, such as partnerships. The Government is concerned that liability for “corporate killing” should not be determined by the form of undertaking. It believes that this would be both inherently unfair, and cause great scope for evasion. In particular, the Government is of the view that:
- Any individual who could be shown to have had some influence on, or responsibility for, circumstances in which management failure far below what could reasonably be expected was a cause of a person's death should be subject to disqualification from acting in a management role in any undertaking. This would apply as much in the case of a manager in a partnership or a school governor as in the case of a company director.
- Prosecuting authorities should have authority to institute proceedings to freeze assets in any undertaking, not just in companies.

Remedial Action and Enforcement of Remedial Orders

- If an undertaking is found guilty of corporate killing, the Government accepts the Law Commission's recommendation that the court should have the power to make remedial orders.

Independent contractors

- The Government accepts the Law Commission's suggestion that there is no need to make specific provision in the present context in relation to the employment of a contractor by an undertaking. In every case it will be left to the jury to determine:

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1. whether a death of which the immediate cause was the conduct of a contractor employed by the undertaking was attributable, at least in part, to a management failure on the part of the undertaking; and
2. if so, whether the failure amounted to conduct falling far below what could reasonably be expected of the undertaking in the circumstances.

Other recommendations made by the Law Commission

The Government also agrees:

- that there should be no requirement of consent to the beginning of private prosecutions for the offence of corporate killing;
- that the offence of corporate killing should be triable only by jury to mark the seriousness of the offence;
- the Law Commission's recommendations on alternative verdicts, in particular, that it should be possible for the jury, if they find a defendant not guilty of any of the proposed offences, to convict a defendant of an offence under section 2 or 3 of the 1974 Act;
- that there should be no individual liability for the corporate offence itself.

Management of Health and Safety at Work Regulations 1992 and 1999

1992 Regulations

- Came into force

1999 Regulations

- Came into force 29/12/99
- Special provisions re: risk assessment of young persons

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Applies to:-

- Every employer
- Every self-employed person

Requirement:-

- “Where the employer employs five or more employees, he shall record:-
 - (a) the significant findings of the assessment; and
 - (b) any group of his employees identified by it as being especially at risk

NB: Keep written records.

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