CLOTH FAIR CHAMBERS

IAN WINTER QC

CORPORATE MANSLAUGHTER: THE 2007 ACT

"I WANT TO DIE LIKE MY GRANDFATHER; PEACEFULLY IN HIS SLEEP, NOT SCREAMING LIKE HIS PASSENGERS."
Anonymous

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CLOTH FAIR CHAMBERS SPECIALISES IN FRAUD AND COMMERCIAL CRIME, COMPLEX AND ORGANISED CRIME, REGULATORY AND DISCIPLINARY MATTERS, DEFAMATION AND IN BROADER LITIGATION AREAS WHERE SPECIALIST ADVOCACY AND ADVISORY SKILLS ARE REQUIRED.

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CORPORATE MANSLAUGHTER: THE 2007 ACT

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Since 1373, when the principles of the modern company were enshrined and the veil of corporate immunity first drawn, countless numbers have died at the hands of corporate negligence, their deaths unaccounted for in the jurisprudence of our criminal courts. It is said that globally more people die each year at work or as a consequence of corporate error than are killed in wars. In the UK alone over forty thousand people have been killed in work related circumstances in the last ten years. On 6 April 2008 and for the first time in over six hundred years companies responsible for causing death by gross management failings will themselves be guilty of manslaughter, not as the by-product of the gross negligence of one of their directing minds, but as statutory felons themselves. This will at a stroke introduce over two million potential new UK corporate clients into the criminal justice system.

Few could argue with the need for a new law. The old law in relation to corporate killing required the prosecution to identify a 'directing mind' at a senior level in the company in whom could be established not just the embodiment of the decisions of the company but also its actions. It was not possible to aggregate the various individual pieces of negligence for which many operatives might have been responsible so as to fix the company with that collective guilt. As a result, the larger the company and the more complex its management structures, the harder it was to identify a particular 'directing mind' who had himself or herself acted in a grossly negligent way. As a result since 1992 only seven companies have ever been successfully prosecuted for manslaughter and all of those were small companies. The high profile prosecutions of the large companies have recorded a litany of failure: the Herald of Free Enterprise disaster in 1987, the Southall rail disaster in 1997, the gas explosion at Larkhall in 1999, the Paddington rail crash in 1999 and some twenty-seven others since 1996. The Corporate Manslaughter Act 2007 has been enacted to deal with this problem and to fix corporate homicide in companies whose safety management systems fall grossly below the duties of care they owe. By s.20 of the Act the Common Law offence of gross negligence manslaughter for corporations is abolished.

THE OFFENCE

Section 1 makes 'an organisation' guilty of corporate manslaughter if "*the way in which its activities are managed or organised (a) causes a person's death, and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased*". 'Organisation' is defined as (and only as) a corporation, a police force, a partnership/trade union/employers association that is an employer and the government and non government

departments listed in Schedule 1 to the Act. The Schedule contains a long list of such bodies and includes the Crown Prosecution Service which raises the intriguing prospect of the Director of Public Prosecutions having to give the consent for his own prosecution [s.17].

'Corporation' includes any body corporate, **wherever incorporated** [s.25]. This means that the suggestion made by some commentators in the press, that the levels of fines for corporate manslaughter might drive the head offices of UK corporations abroad, is unfounded. A company would be guilty of manslaughter and justiciable in England and Wales if the death occurred here as a result of the gross breach of a relevant duty of care owed by that company to the deceased. It would make no difference that the company responsible for the death was incorporated in Panama. Limited Liability Partnerships created under the Limited Liability Partnerships Act 2000 (LDP's and MDP's) are covered because they are bodies corporate. The Act does not however apply to corporations sole, so the Archbishop of Canterbury can relax!

Other partnerships are only covered by the Act if they employ people. Partnerships covered by the Partnership Act 1890 and limited partnerships covered by the Limited Partnership Act 1907, if they employ people, are included in s.1(2)(d). Partnerships that do not amount to a separate legal identity are also covered [s.14] in which case the proceedings are to be brought in the name of the partnership and not in the name of any of the members of the partnership. Again, liability will only fix in partnerships that employ people. It would appear therefore that a partnership with no employees could not be prosecuted for corporate manslaughter for causing the death of a person by the gross breach of a duty of care. In practice however in such circumstances it would usually be relatively straightforward to fix liability in the individual responsible for the death.

Importantly, an organisation is only guilty of corporate manslaughter "*if the way in which its activities are managed or organised by its senior management is a substantial element in the breach*" of the duty of care [s.1(3)]. 'Senior management' means those persons who play significant roles in "*(i) the making of decisions about how the whole or a substantial part of [the organisation's] activities are to be managed or organised, or (ii) the actual managing or organising of the whole or a substantial part of those activities*" [s.1(4)(c)]. This means that management failure is at the heart of the new offence. Companies that have safe operating systems ought not to fall foul of the law and certainly would not do so just because of the individual negligence of an operative. The company that employed the grandfather in the quotation at the head of this article would not be liable for the deaths of the screaming passengers unless it had failed to ensure that his working hours and conditions were such that he ought not to have fallen asleep.

In fact, even if those working hours and conditions were not wholly safe the company would still not be liable for corporate manslaughter unless the conduct that amounted to the breach of the duty of care fell "*far below what can reasonably be expected of the organisation in the circumstances*" [s.1(4)(b)]. This preserves the essential test of liability identified by the House of Lords in **R v Adomako [1995 1 AC 17**]. It is not mere negligence therefore that will attract criminal sanction under the Act; such negligence is actionable in the civil courts, only negligence so gross as to amount to criminal negligence will result in conviction.

Because the offence concentrates upon management failure – systemic failure leading to a gross breach of duty – a question arises as to whether liability under the Act could be avoided by delegation. If the board of a company delegated its safety systems to an outside company that specialised in installing and running safe systems of work, could that delegation result in the company escaping liability? The government believes that the answer to this question is no but the Act does not say so. There is no clause preventing the delegation of legal responsibility for safety management issues. A company that delegated such safety management issues could only be prosecuted for a subsequent death if the decision or process that lead to such delegation was itself grossly in breach of a duty of care. It might be very difficult to criticise a company for outsourcing its safety management to a specialist company. On the other hand a company that failed to monitor the performance of that specialist company might be said to have acted negligently by wilfully thereafter shutting its eyes to the safety issues. Alternatively, does it really matter which of the two companies is prosecuted for the death (assuming that the specialist safety company is 'an organisation' covered by the Act)?

THE RELEVANT DUTY OF CARE

So far so good, now for the hard part. The Act only applies to 'relevant duties of care'. Not all duties of

care are covered by the Act and the relevant duties of care do not apply equally to all organisations. This is to cover organisations such as the National Health Service trusts, the army and those performing public functions so as to limit the extent of their liability. It was concern in relation to organisations such as those, that lead to the delay in the passing of the Act and the limitation of liability in that regard was the trade-off required for the passing of the Act. The 'relevant duty of care' is defined in terms of the law of negligence. The relevant duties of care are as follows:

s.2(1)(a): A duty owed to the organisation's employees or those working for it or performing services for it.

s.2(1)(b): A duty owed as occupier of premises.

s.2(1)(c): A duty owed in respect of the supply of goods or services, or in connection with any construction or maintenance operations, or in connection with 'any other activity on a commercial basis', or in connection with the use or keeping of any plant, vehicle or other thing.

s.2(1)(d): A duty owed to someone in custody or secure accommodation or who is being transported in pursuance of prison escort arrangements or who is a detained patient, and that person is someone for whose safety the organisation is responsible.

It is clear therefore that as a result of s.2(1)(c) all activities of a commercial nature are caught by the Act. The following sections (ss.3-7) exempt various organisations from the full scope of s.2 in various ways. Further, the Act in so far as it relates to the prison service and to duties of care in respect of prisoners, will not be brought into force with the rest of the Act on 6 April 2008. No date has been published for when those provisions will be in force. All the duties of care that exist under the law of negligence will apply to those activities conducted on a commercial basis covered by s.2(1)(c). It would appear therefore that the full range of negligence is covered by the Act. This includes those areas of negligence where the Common Law has been replaced by a Statute such as the Occupiers' Liability Acts 1957 and 1984 and the Defective Premises Act 1972. The Act does not however cover the full range of negligence where the activity being carried out is not on a commercial basis. Employers' and occupiers' liability will be covered in such cases but not the wide range of negligence covered by s.2(1)(c). This is deliberate so as to exclude from liability those public bodies performing activities for the benefit of the community or the policy making decisions of central government such as the setting of regulatory standards.

The Act makes clear that whether a particular organisation owed a duty of care to the deceased is a question of law and "*the judge must make any findings of fact necessary to decide that question*" [s.2(5)]. The Crown Court bench will therefore have to brush up on its law of torts! This is a critical section of the Act. The prospect of successfully defending a prosecution on the basis that the duty of care was not breached will be slim: the person died. The cases in which it might be possible to argue that the breach of the duty did not cause the

"I've decided to step down as your CEO in order to spend more time in jail..."

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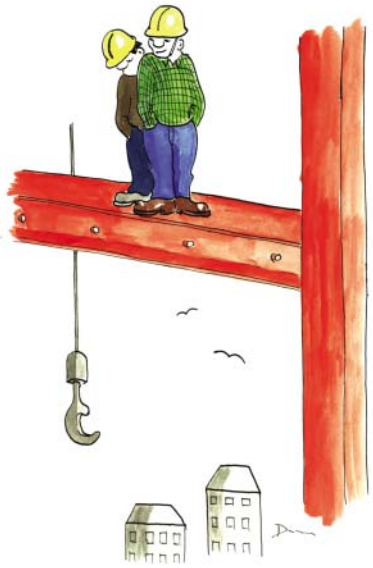
death will be rare since the chain of causation is seldom broken by an intervening act. Once a judge has ruled that the organisation owed a relevant duty of care to the victim the only questions for the jury will be whether the victim died as a result of the breach, whether the breach was gross and whether the breach was as a result of the organisational failures of senior management. In order to make the decision about the existence of the relevant duty of care the judge must resolve the relevant issues of fact. Such issues of fact will be right at the heart of the case since what the victim and the organisation were doing at the time of the incident, resulting in death, will be the central facts in the case. By resolving the factual question – as to whether what was happening at the time of the incident gave rise to a relevant duty of care to the victim on the part of the organisation – the judge will have resolved the central facts upon which the jury will decide whether the breach of the duty was gross.

The government has recognised that decisions about such questions of fact are 'usually for the jury' [Explanatory Notes to Corporate Manslaughter Act 2007 ISBN 9780105619079] but considers that "*The questions of fact that the judge will need to consider will generally be uncontroversial and in any event will only be decided by the judge for the purposes of the duty of care question. If they otherwise affect the case, they will be for the jury to decide*". Given the diverse and complex nature of the relationships between the millions of different organisations covered by the Act and their employees, sub-contractors, sub-contractor's employees, customers, facility users and general passers-by, to suggest that the questions in relation to the existence of a duty of care will 'generally be uncontroversial' is little short of extraordinary. To consider that such questions of fact would not ordinarily 'otherwise affect the case' is, it would appear, to misunderstand the nature of a criminal trial. For both the judge and the jury to be separately responsible for making findings as to the same facts is likely to give rise to problems where different conclusions as to those facts are reached.



"It's comforting to know that we have safety boots and hats."

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In the example at the head of this article the judge would have to resolve whether the train company owed a duty to the screaming passengers. In order to do so he might have to decide, as a fact, whether the grandfather was an employee of the train company at the time of the incident. Let us further assume that there are complex issues of fact and law as to whether he was. The judge hears the evidence on a voir dire and finds that the grandfather was an employee of the company at the time of the incident and accordingly that the company owed a duty of care to the screaming passengers.

There is no issue as to causation, the grandfather fell asleep, the train hit the buffers and all were killed. The live question for the jury is whether the breach of the company's duty of care was gross. Obviously the breach of the grandfather's duty of care was gross but that is not the relevant duty of care for the company. The question in relation to the company was whether the manner in which the company was organised by its senior management was a substantial element in the grandfather falling asleep. This may well involve consideration of the same complex issues of fact relating to whether the grandfather was an employee of the company at the time of the incident e.g. had he been suspended pending medical treatment for his narcolepsy. Those questions of fact will 'otherwise affect the case' and therefore will be for the jury to decide as indeed is recognised in the Explanatory Notes.

What therefore happens to the findings of fact made by the judge? He cannot direct the jury to accept his findings of fact he can only direct them that as a matter of law he has found there to be a relevant duty of care. The possibility therefore plainly exists for the jury to find core facts to be different to those upon which the judge has ruled there to be a relevant duty of care, not by revisiting the question as to whether there was a duty of care but in deciding whether the breach of that duty of care

was gross. The jury might in law therefore have to return a verdict of guilty notwithstanding that they disagreed with the finding of fact upon which the ruling as to the existence of the duty was based. The jury would be bound to follow the judge's ruling in law that the company owed a duty to the passengers even though on the basis of the facts as they had found them to be the company did not.

The overlap between these two central issues is highlighted by s.8 of the Act. The section applies where "*(a) it is established that an organisation owed a relevant duty of care to a person, and (b) it falls to the jury to decide whether there was a gross breach of that duty*" [s.8(1)]. The section requires that the jury 'must' consider whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the alleged breach and if so how serious the failure was and how much of a risk of death it posed [s.8(2)]. The jury 'may also' consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices that were likely to have encouraged any failure to comply with any health and safety legislation or to have produced tolerance of such failure and may have regard to any health and safety guidance relating to the alleged breach [s.8(3)]. The question as to whether the breach of the duty was gross when compared to the health and safety legislation and the practices or attitudes in relation to it will of necessity cover the same factual ground that the judge has covered in relation to the existence of the duty.

But enough of the digression. The 'relevant duty of care' in s.2 is affected by two important clauses in s.2(6). Any rule of the Common Law that has the effect of preventing a duty of care from being owed by one person to another by reason of the fact that they are jointly engaged in unlawful conduct is 'to be disregarded'. So too is any rule of the Common Law that has the effect of preventing a duty of care from being owed by one person to another by reason of his acceptance of a risk of harm. The first of these clauses presents few problems; it would be absurd for criminal liability for manslaughter to be avoided because of the joint illegality of the activity that resulted in death. The second however relates to where a person accepts the risk of harm. This might have ramifications for those involved in organising dangerous activities such as motor sport.

Sections 3 to 7 exempt various organisations and certain activities conducted by such organisations from the full scope of s.2. Duties of care owed by public authorities in respect of any 'decision as to matters of public policy' are **not** covered by the Act. This specifically includes decisions relating to the allocation of public resources [s.3(1)]. It would appear therefore that a death in hospital caused by a decision to apply funding elsewhere would not result in liability. Duties of care owed by public authorities in respect of things "*done in the exercise of an exclusively public function*" are **not** covered by the Act unless the duty of care is in relation to employers' or occupiers' liability or in relation to someone for whose safety the organisation is responsible [s.3(2)]. It would appear therefore that a death in hospital caused by a decision to apply funding that was not implemented would not result in liability unless the failure to implement the decision grossly breached duties owed as an employer or occupier or to a person for whose safety the hospital was responsible. Would, for example, a gross failure to put in place proper cleaning processes in the hospital so as to remove the MRSA superbug be regarded as a breach of the occupier's duty to provide a safe place for those lawfully present? Would that still be the case if the presence of the superbug was due to the 'decision' to apply resources to holistic masseurs rather than cleaners? Is a Primary Care Trust responsible for a patient's 'safety' in the sense that the patient should be kept safe from the activities of a superbug? Duties of care owed by public authorities in respect of "*inspections carried out in the exercise of a statutory function*" are not covered by the Act unless the duty of care is owed as employer or occupier [s.3(3)].

The Ministry of Defence is exempted from liability under s.3(1) in so far as its decision-making relates to matters of public policy and under s.3(2) in so far as its actions do not breach its duties as employer and occupier. Similarly in respect of peacekeeping operations, terrorism operations and operations in relation to civil unrest or serious public disorder in the course of which members of the armed forces come under attack or face the threat of attack or violent resistance all liability in relation to whatever duty of care is excluded [s.4(1-2)]. Liability is also excluded in relation to activities carried on in preparation for or directly in support of such operations [s.4(1)(b)]. Likewise liability is excluded in relation to training of a hazardous nature which is considered necessary in order to improve the effectiveness of the armed forces in relation to such operations. Duties of care owed in relation to hazardous training otherwise than in preparation for peacekeeping, terrorism, civil unrest or public disorder, such as the routine training to be a soldier are **not** exempted by the Act. All duties of care

owed in relation to the activities of the special forces are excluded from liability. James Bond can relax! The Act makes no mention of liability during war but the law of negligence recognises that military authorities rarely owe a duty of care in such circumstances in any event.

Similar provisions exempt the activities of police forces and other law enforcement bodies when engaged in operations for dealing with terrorism, civil unrest or serious disorder as part of carrying on the activities of policing or law-enforcement and officers come under attack or face the threat of attack or of violent resistance in the course of those operations [s.5]. The exemption applies to any duty of care owed by a police force in relation to 'other policing or law enforcement activities'. Such duties of care are not 'relevant duties of care' unless owed as employer or occupier or to someone for whose safety the police force is responsible. This provision [s.4(3)] is very similar to that in s.3(3) which applies only to the exercise of an exclusively public function. It appears therefore that where the police are concerned, duties owed in relation to exclusively public functions are excluded from liability under s.3(3) and in relation to all other policing or law-enforcement activities under s.4(3). In neither case are the duties owed as employer, occupier or to someone for whose safety the police are responsible exempted from liability. Deaths in custody would accordingly be covered by the Act either under occupier's liability or because the police were responsible for the detainee's safety. Deaths caused by police chase incidents would not be covered by the Act unless one of the deceased was working for the police force. This could lead to the extraordinary result of the police force potentially being liable for the death of the driver of the police vehicle, himself responsible for the crash, but not for the primary school children crossing the road. The duty is owed as employer and not therefore to people who are employed.

Duties of care owed by certain organisations in respect of the way they respond to emergencies are not relevant duties of care and are not covered by the Act unless the duty of care is owed as employer or occupier [s.6]. Those organisations are fire and rescue authorities and "*any other organisation providing a service of responding to emergency circumstances*", ambulance services, blood/organs/equipment or personnel transport in pursuance of ambulance services, the armed forces and relevant NHS bodies [s.6(e-i)]. The section does not apply however to the way in which medical treatment is carried out or to decisions taken in relation to the carrying out of such treatment [s.6(3&4)].

It is likely that such treatment and decisions would already be exempt under s.3 where it amounts to an exclusively public function. Emergency circumstances are defined by s.6(7) of the Act as "*circumstances that are present or imminent and (a) are causing, or are likely to cause, serious harm or a worsening of such harm, or (b) are likely to cause the death of a person*". 'Serious harm' includes "*serious harm to the environment (including the life and health of plants and animals)*" [s.6(7)(b)]. This appears to exclude liability for a company which knocked down and killed a pensioner whilst racing to protect some trees from the imminent threat of being chopped down! Subsection 8 extends the definition of emergency circumstances to *"circumstances that are believed to be emergency circumstances"*. This would appear to exclude liability for the company racing because it **thought** that some trees were in imminent threat of being chopped down!

Duties of care owed by local authorities, probation boards and other public authorities to children and those covered by the Children Act 1989 and Part 1 of the Criminal Justice and Court Services Act 2000 are not relevant duties of care unless owed as employer, occupier or to someone for whose safety the organisation was responsible.

It is plain therefore that the questions as to whether an organisation owed a duty of care to the victim and if so whether the duty of care was a relevant duty of care for the purposes of the Act are complex questions of fact and law. A thorough understanding of the law of negligence will be required to resolve them plus a detailed construction of the Act so as to decide whether the organisation in question or the activity it was performing falls within ss.3-7. These decisions must be made by circuit judges and recorders and are decisions that in many cases might effectively determine guilt or innocence of corporate homicide. All the more important therefore that companies and organisations involved in someone's death take early and high quality advice so that such issues may be focused upon from the outset. Perhaps more important still, those companies and organisations whose activities expose persons to the risk of death should address their health and safety systems in the light of the Act both so as to reduce the risk of death but also to ensure that should a death occur the company

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can demonstrate that it did not occur as a result of the gross failures of senior management.

FACTORS FOR THE JURY

As has been considered above the decisions as to whether the organisation owed the deceased a duty of care and whether that duty of care was a relevant duty of care are matters for the judge to resolve both as to fact and law. It is for the jury to resolve questions of causation and whether the breach of duty that caused the death was a gross breach. In doing so the jury 'must' consider whether 'the evidence' shows that the organisation failed to comply with any health and safety legislation and if so how serious was that failure and how much of a risk of death the failure posed [s.8(2)]. This means that the jury will have to be taken to all the health and safety legislation, directed as to how it should be read and instructed to apply the evidence as they find it to the relevant parts of that legislation.

Section 19 makes it clear that an indictment may contain a count of corporate manslaughter and a count alleging a health and safety offence and that the jury may "*if the interests of justice so require, be invited to return a verdict on each charge*". An organisation may also be charged with the health and safety offence after it has been convicted of corporate manslaughter in respect of 'some or all' of a 'particular set of circumstances' if the interests of justice so require [s.19(2)]. It is very difficult to imagine a set of circumstances where the interests of justice would so require a second prosecution. This provision removes the privilege against re-incrimination (autrefois convict). It will be interesting to see whether the appeal courts treat it in the same way as they did the removal of the privilege against re-trial (autrefois acquit).

The jury 'may' also consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged a failure to comply with any health and safety legislation or to have produced tolerance of such failure [s.8(3)]. The judge will therefore have to direct the jury that they 'must' consider whether a failure to comply has been proved but need not go on to consider circumstances that might have caused that failure. It is unclear why Parliament thought it appropriate to make the first mandatory and the second discretionary. Both s.8(2) (the mandatory part) and s.8(3) (the discretionary part) specifically relate to 'the evidence' in that the jury must/may consider whether the evidence shows such a failure and the reasons for it. Subsection (b) of s.3 allows the jury to "*have regard to any health and safety guidance that relates to the alleged breach*". This does not mention 'the evidence' and as worded could mean that the jury could call to be given health and safety guidance. It is likely that the courts will rule that s.8(3)(b) means that the jury may have regard to any health and safety guidance that **has been adduced in evidence**. If however the jury called for such guidance during the

"Go ahead and **dig**, you said! What are the odds there's a pipe **right there**, you said!"

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evidence it would appear that the judge would not be able to refuse the request unless he could rule that such guidance was irrelevant. In certain industries the health and safety guidance may well be extensive and complex. It certainly would include any "*code, guidance, manual or similar publication that is concerned with health and safety matters*" [s.8(5)].

Section 8(4) makes it clear that the jury may have regard "*to any other matters they consider relevant*". Again it is likely that the courts will rule that this means 'any other matters' that **have been adduced in evidence**. Otherwise it would mean that the jury would determine the relevance of evidence to be adduced and could call for whatever they wanted. It is likely that the courts will rule that s.8(4) is simply there to prevent any argument to the effect that s.8 had restricted the areas that the jury could consider. In other words that s.8(4) simply preserves the right of the jury to consider all the evidence called before it and to give such weight to it as they consider proper.

PENALTIES

There have been scare stories in the press that consideration is being given by the Sentencing Guidance Council to recommending a tariff for the fines for corporate manslaughter of between five and ten percent of a company's turnover. This does not seem very likely since attaching a financial penalty to turnover rather than profit could and ordinarily would cause serious injustice. A company may turnover billions of pounds but make only a small profit. How could such a company pay a fine way in excess of the profit it makes? The proposal would also fall foul of the sentencing principle that the punishment should fit the crime rather than the criminal. A death caused by a rich company is not more serious than one caused by a poor company only because the company is rich. A crime is more serious than another because of the manner of its commission, in these circumstances because of the grossness of the breach. Additionally, setting tariffs such as those would place a value on the life of the deceased that might have ramifications in the civil suit that could mirror the criminal action. It would be inappropriate for the criminal courts to become involved in valuing the life of the particular deceased. Furthermore it would not appear to be right that the company should be made to pay a fine and possibly thereby divert finances away from any civil suit in which the victim's family may be seeking access to the same pot to compensate for the negligence involved.

In addition to a fine, the sentencing court has power to make a 'remedial order' [s.9]. The prosecution must apply for a specific remedial order that may order the convicted company to take certain steps to remedy the breach or any matter that appears to have resulted from the breach and to remedy any deficiency in respect of health and safety matters.

The order may be in such terms as the court considers fit and the court may hear evidence in respect of any matter before making the order. Before making an application for such an order the prosecution 'must' consult with the relevant enforcement authority. Whether the failure to do so would result in an ultra vires remedial order remains to be seen. It is probable that the courts would find that this mandatory condition would not render a subsequent order invalid if not complied with. The order must specify the period of time within which compliance with the order must occur and such period may be extended on application made prior to the expiration of the period. A company in breach of a remedial order is guilty of an offence and may be fined but interestingly cannot in such circumstances be made to comply with the original remedial order.

The court may also order that the convicted organisation be made to publicise the fact of the conviction, the specified particulars of the offence, the amount of any fine imposed and the terms of the remedial order made [s.10]. Before doing so the court 'must' ascertain the views of the relevant enforcement authority and 'must' have regard to any representations made by the convicted organisation. It is more likely that the courts would find that a failure to comply with this requirement rendered the order invalid. The order must specify the period of time within which the publicity must be made but there is no provision for that period to be extended. An organisation that fails to comply with the order is guilty of an offence and may be fined but cannot be ordered to comply with the original publicity order. A company would not want its customers to know of its conviction or of its failure to comply with the remedial order (meaning that the risk of death continued). It might be more ready to be convicted of the failure to comply with the publicity order and to pay the additional fine than it would be to publicise its negligence. In fact of course in such cases the prospects of the matter not being reported in any event are slim and this would probably be sufficient to ensure compliance with both the remedial order and the publicity order.

CROWN IMMUNITY AND TRANSFER OF FUNCTIONS

Currently, under the principle of Crown immunity, the Crown and its servants and agents cannot be prosecuted for gross negligence manslaughter. This privilege is removed by s.11 of the Act. Departments and corporations that are servants or agents of the Crown are to be treated as owing whatever duties of care they would owe if they were a corporation that was not a servant or agent of the Crown. This places such organisations on a broadly level playing field with the private sector save that public bodies have the exceptions to liability provided in ss.3-7.

In relation to public organisations only, where a death is alleged to have occurred in connection with the carrying out of functions by a department or body listed in Schedule 1 to the Act, or by a corporation that is a servant or agent of the Crown or by a police force and the functions in question have been transferred to another organisation then that new organisation may be prosecuted for the breach of duty occasioned by the previous organisation [s.16]. This does not apply to the private sector for obvious reasons.

No individual may be convicted of corporate manslaughter or of aiding, abetting, counselling or procuring the commission of an offence of corporate manslaughter [s.18]. Individuals may however be prosecuted under the Common Law for gross negligence or unlawful act manslaughter.

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This raises the possibility of a trial in which an individual director or employee or director faces personal manslaughter charges and the company faces corporate manslaughter charges. The issues are of course very different and the likelihood of cut-throat defences is high. In particular the causation issues in such a trial are very different. The personal defendant will have to be shown to have caused the death by his gross negligence or unlawful act whereas the company will have to be shown to have caused the death by the gross breach of its duty of care to the victim brought about by the organisational failures of senior management.

There may well be cases where neither is established. In some cases it may not be possible to attribute sufficient negligence in the hands of the individual for him to be guilty of manslaughter because his negligence was not gross. His negligence might however be sufficient to mean that the death was not caused by the failures of senior management. He might, for example, have failed to comply with safety systems but not in a manner that was gross. In such cases neither the individual or the company could be convicted over the death.

The Act does not legislate for this eventuality and deliberately so. The government considered that it would be wrong and contrary to the public interest to render organisations criminally liable for every death that occurs in connection with their activities. The central purpose of this Act is to ensure that organisations address their safety systems and management processes so as to become risk averse. A company that can demonstrate that its senior management has focused on producing safe systems of work will be highly unlikely to be prosecuted or convicted. As such, this Act is as much about prevention as it is about securing conviction. The government is not expecting there to be more than some ten to thirteen additional prosecutions a year as a result of the new offence.

CONCLUSION

This Act is an important piece of legislation that will make it easier to prosecute companies for gross breaches of the duties of care they owe persons with whom they come into contact. It is imperative that company directors and those in charge of the various organisations covered by the Act focus on this legislation, understand how it affects them and put in place systems to prevent accidents and to promote safety. The mere fact of being able to demonstrate such focus will, of itself, go a considerable distance in defeating any prosecution. It follows that those involved in advising companies about their legal responsibilities will have to add advice about this Act to the increasingly large portfolio of guidance in respect of corporate crime that concerns the day to day running of a company. In the light of this Act, to the noise of the screaming passengers must now be added the thud as the directors put their collective heads in their hands.

"You said you wanted more responsibility, so I'm making you responsible for everything that goes wrong."

www.CartoonStock.com

TOWARDS AN AMERICAN APPROACH TO SENTENCING AND THE MANAGEMENT OF THE PRISON POPULATION

NICHOLAS PURNELL QC

The Lord Chancellor has invited Guy Beringer QC, Senior Partner of Allen & Overy, Christopher Murray, Senior Partner of Kingsley Napley and me to serve as the private practitioner members on the Sentencing Commission Working Group under the chairmanship of Lord Justice Gage. This Working Group comes into being as a consequence of the Report "Securing the Future" which, in December 2007, published the findings and recommendations of Lord Carter's Review of Prisons.

The Report made a number of detailed recommendations towards the efficient and sustainable use of custody in England and Wales directed at the management, capacity and operational efficiency of the prison estate. In addition, Lord Carter recommended an examination of different ways of addressing the sentencing of defendants in criminal cases.

Lord Carter made this recommendation: *"The Government should establish a working group to consider the advantages, disadvantages and feasibility of a structured sentencing framework and a permanent Sentencing Commission and report to the Lord Chancellor and Lord Chief Justice by summer 2008. A framework and Commission could allow for the drivers behind the prison population to be addressed and managed in a transparent, consistent and predictable manner through the provision of an inclusive set of sentencing ranges."*

Lord Carter added this rider: *"A structured sentencing framework proposal does not mean that individual sentencers have to have regard to resources at the time they sentence in individual cases."*

The Working Group was appointed in the last week of January and is meeting on a fortnightly basis at the Home Office, supported by a secretariat drawn from the Ministry of Justice and the Home Office. The Chairman and some of the members of the secretariat have paid a flying visit to two American States where Sentencing Commissions are well established.

The time-table set by Lord Carter and accepted by the Lord Chancellor defeats the description of 'tight'. Accordingly the Working Group is looking to increase the frequency and duration of meetings in order to consider the advantages and disadvantages of such a radical proposal.

Importantly the time available for the essential element of consultation with the wider public and in order to obtain the valuable input of experienced practitioners will be severely curtailed. The Working Group intends to issue a consultation paper at the end of March 2008 with a response deadline of the 2 June 2008.

The American experience suggests that, within the context of State criminal justice systems, the existence of a permanent sentencing commission provides a greater degree of sentencing consistency across the court-rooms and a higher level of predictability of future prison populations. Moreover in the systems which were visited, the sentencing commission is asked to provide a 'fiscal assessment' of the likely cost implications for all legislative proposals for new offences before the decision to enact such legislation is made.

The work of the Group will require a detailed examination of the differences between the American system in practice and current procedure and practice in England and Wales. There are

obvious differences, such as the division in America between State and Federal prosecutions and the formalised plea bargaining which takes place in more than 90% of disposals. However the significance of these differences has to be analysed.

Moreover a proper assessment of the way sentencing occurs in England and Wales (and an examination and assessment of the existing methods of data collection and analysis of the sentences passed) are essential parts of the Working Group's studies.

Indeed for my part I need to identify and understand what are 'the drivers behind the prison population' which need to be addressed and managed.

A structured system of sentencing is predicated upon a hierarchy of criminal offences which under current practice we do not have.

The aim of a structured sentencing system in America is to render sentences in all cases within a range of severity which is proportionate to the gravity of the offences.

In England and Wales, the sentencer approaches the task of sentencing in a broader context, striving to impose a penalty which reflects the justice of the case by balancing the gravity of the offence and its consequences with the culpability and circumstances of the offender.

THE CURRENT ADVISORY BODIES IN ENGLAND AND WALES

THE SENTENCING ADVISORY PANEL

The work of the Sentencing Advisory Panel dates from its creation in the Crime and Disorder Act 1998. An independent non-departmental body, drawing its membership from the judiciary and representatives from the wider criminal justice system, the Panel has the task of consulting and proffering advice to the Court of Appeal.

THE SENTENCING GUIDELINES COUNCIL

Since the enactment of the Criminal Justice Act 2003, the Sentencing Guidelines Council, chaired by the Lord Chief Justice and with a majority judicial membership, is the body to which the Panel now reports. The Council frames or revises sentencing guidelines. The Council is only four years old and the process of consulting, considering and formulating guidelines is both time consuming and necessary. As a consequence, to date there have been just three sets of guidelines issued.

One element which is missing from the Council's work is any requirement for the Council to have regard to resources in framing guidelines although it must have regard, by reason of section 170(5) of the 2003 Act, to the cost of different sentences and their relative effectiveness.

Ministerial attempts to legislate to introduce a requirement for the Council to have regard to current and likely future resources when framing the guidelines was frustrated by the 2005 General Election and was not subsequently revived.

There can be little doubt that whatever the impact of a structured framework might be upon the individual sentencer at the time of an individual sentence, one principal element of such a structured framework would be the introduction and evaluation of resource considerations into the work of the Commission. This 'fiscal evaluation' is seen as an important and valuable part of the American sentencing commission process.

There can be no question that government has a legitimate and necessary interest in the formulation of criminal justice policy and the resource consequences of the way in which that policy is implemented by the sentence of the court.

The more interesting question, perhaps, is whether the framework or practice within which the judge is required to sentence should itself be shaped or influenced by resource implications.

Consistency and predictability are important values. The Carter Report laments that the *"complexity and uncertain effect of external factors makes the sentencing framework opaque. Predicting the factors that determine and influence sentencing is therefore difficult and inhibits government decision-making and planning on the use of finite resources."*

The tension, perhaps, is the degree to which the judiciary should become engaged in the law-making and resource scrutiny role of a sentencing commission and whether the judge, in passing sentence, is engaged in a function which is primarily to do justice to the case or to fit an offender within a framework built upon a hierarchy of offence seriousness.

Both are legitimate ends. The contrast reflects a difference in culture and experience. The adversarial system within which we practise does not extend to engaging the prosecution in a pre-trial, pre-sentence process which will fix the offence within a comparatively narrow range. In some States in America this is accompanied by an automatic appellate procedure where judges 'depart' from the guidelines.

The judges visited in America were clear that they did not consider that a sentencing commission and framework acted as a constraint upon their discretion or individual responsibility. Whether that would be the reaction of the judiciary in this jurisdiction remains to be seen.

THE NEXT STAGES

The Working Group is intending to hold a number of meetings with interested parties before the curtailed consultation process begins. A meeting with the circuit judiciary has been arranged and an open conference will be held on 30 April to which bodies and organisations with an interest in the criminal justice system and members of the public will be invited to attend.

If you have views which you would like express in writing you can submit them direct to the secretariat by sending them to Ruth Allen, The Sentencing Commission Working Group, Home Office, 2 Marsham Street, London SW1P 4DF.

Lord Carter's Review of Prisons: *"Securing the Future"* may be downloaded from www.justice.gov.uk.

If you would prefer to contribute more informally please do not hesitate to contact me or Christopher Murray to make your views known.

The purpose of this advanced notice is principally to compensate for the abbreviated time-scale of the proposed consultation process and to enable Christopher, Guy and myself to access the widest possible experience and knowledge from fellow practitioners.

The ramifications and consequences of a development of these proposals would clearly be far-reaching and constitutionally significant.

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or for a hard copy contact Charlotte Bircher, email charlottebircher@clothfairchambers.com

CLOTH FAIR CHAMBERS

Nicholas Purnell QC
Julian Bevan QC
Richard Horwell QC
John Kelsey-Fry QC
Timothy Langdale QC
Edmund Lawson QC
Ian Winter QC

Senior Clerk: Nick Newman
nicknewman@clothfairchambers.com

Commercial Director: Charlotte Bircher
charlottebircher@clothfairchambers.com

Consultant Clerk: Michael Greenaway
michaelgreenaway@clothfairchambers.com

39-40 Cloth Fair
London EC1A 7NT
tel: 020 7710 6444
fax: 020 7710 6446
tel: (out of office hours) 07875 012444
dx: 321 Chancery Lane/London
email@clothfairchambers.com
www.clothfairchambers.com