

# NII Lunchtime Lecture: Understanding and Controlling HSE Investigations in Fatal Accident Claims

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Chris Gough  
Consultant



# Some Context:

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# Some Context:

- Fatal Accident **9 Jan 2003**
- 350 ft fall inside B6 chimney
- Long running decommissioning project
- Blurring of lines and responsibilities for RAs and SSWs
- “Client” and “Demolition Sub-Contractor” fined **20 Nov 2008**
  - Fine £250,000
  - Costs award £75,000
  - Own costs £250,000+
- Dependency Claim £250,000 (50:50 between defendants)

# Why are we here (today's objectives)?

- Taking time & opportunity to reflect on fatal accident investigations
- Understanding background to current legislative framework
- Refreshing awareness of post-2007 approach and direct implications for the Insured and their day to day business objectives
- Incorporating practical tools into proactive strategy for “managing” serious incident investigation by regulator
- Update as to recent caselaw & prosecutions

# The Common Law Offence:

- Common law offence of Corporate Manslaughter [R v P&O Ferries (Dover) Ltd (1991)]
  - A person's *gross negligence*
  - Leads to the death of another
  - Person's **actions can be imputed** to the Company
  - Person **is in control of** the Company
  - Company can be fairly said to ***think/act through him/her***
  - Satisfies the Identification Principle (“mens rea”)
- Issues:
  - Often no single person acts as “controlling mind”
  - H&S often delegated to junior managers therefore not “controlling mind”

# Mens Rea (“guilty mind”) for Gross Negligence:

- **Indifference** to obvious risk of injury
- **Actual foresight** of the risk and a **determination to run it**
- Appreciation of the risk and the intention to avoid it, but such a high degree of negligence in attempting to avoid it that a conviction is justified
- Inattention or failure to advert to a serious risk which goes beyond inadvertence in respect of an obvious and important matter which the Defendant’s duty demanded that he should address.

# A run of disasters



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# A run of disasters...



# Perceived failings in the legal system:

- Zeebrugge 1987 – 193 passengers and crew killed
  - “disease of sloppiness” but no evidence that one sufficiently senior manager had been reckless. **No Conviction**
- Clapham 1988 – 35 deaths
  - £m in compensation but **No Prosecution**
- Southall 1997 – 7 dead, 139 injured
  - Corporate Manslaughter **prosecution collapsed**
  - Crown not in a position to satisfy doctrine of identification
  - No controlling mind/single person whose actions imputed to Co.
  - £1.5m fine for breaches of H&S regulations

# Perceived Failings...

- Larkhall 1999 – 4 deaths (one family)
  - **No conviction** of “culpable homicide”
  - £15m fine (against Transco) s3 HSWA
- Hatfield 2000 – 4 deaths, multiple injuries
  - £m in compensation
  - **No individual convictions** or “corporate manslaughter”
  - Heavy fines (Balfour £7.5m; Railtrack £3.5m)

# The one exception:

- R v OLL Ltd 1994 (Lyme Bay Tragedy)
  - Proceedings against activity centre and its owner (M.D. also)
  - Owner Managed business
  - Decisions and actions of the MD = those of the business
  - Company thinks/acts through the MD
  - Identification principle satisfied
  - Company **convicted of “corporate manslaughter”** and £60,000 fine
  - Director with “controlling mind” received 3 year sentence

# Why so hard to convict?

- The “identification principle” and some important fundamentals
  - Some offences require identification of the state of mind or “mens rea” of the Defendant
  - For a body corporate that hinges on establishing the acts and state of mind of those who represent the “directing mind and will” of the Company
  - Difficulty in complex corporate structure with layers of management, decision making and responsibility to identify “directing mind”.

# Attempts to make it easier – CMCHA 2007

- A new era – criminal liability for organisations, directors and employees
- Corporate Manslaughter and Corporate Homicide Act 2007 (new offence – CM)
- Health and Safety (Offences) Act 2008 (Increased fines AND imprisonment for individuals)

# The “new” offence under Corporate Manslaughter and Corporate Homicide Act 2007

- o An **organisation** is guilty of the offence if
  - the way in which its activities are managed or organised
  - causes a death and
  - amounts to a gross breach of a *relevant duty of care*\*
  - owed to the deceased
  - and a substantial part of the breach must have been in the way its activities were managed by **senior management**.

s1 CMCHA 2007

\*As employer/occupier/seller of goods/construction/commercial activity/keeper of plant and vehicles.

# The “targets” – Who will the investigation “flush out” for prosecution?

- The Organisation
  - Corporate Manslaughter
  - Breaches of HSWA (s2 and s3)
- The Individual (Director/Senior Manager)
  - Gross Negligence Manslaughter (unlimited fine &/or “LIFE”)
  - Director/Manager Secondary liability to that of organisation (s37 HSWA – “consent, connivance or neglect”)
- The Individual (more lowly employee)
  - Personal liability (s7 HSWA) – fine &/or imprisonment

# The sanctions

- Corporate Manslaughter
  - Unlimited fine (£500,000 starting point? SGC para 24 & 25)
- HSWA Offence
  - Fines from £100,000 in event of a death (but see “Sellafield” environmental pollution issues)
- Fees for Intervention
  - £124/hr can be billed to client every month of investigation

# Prosecutions after the 2007 Act

Company	OMB?	CM Fine £	CM Contest/Plea	Gross Neg/HSWA?
Cotswold Geotechnical	Yes	385,000	Contested	No (deceased)
Lion Steel	Yes	480,000	Plea	Dropped
JMW Farms	Yes	187,500	Plea	Dropped
J Murray & Sons	Yes	100,000	Plea	Dropped
Princes Sporting Club	Yes	35k & 100k	Contested	No
Mobile Sweepers (Reading)	Yes	8,000	Plea	£183k HSWA fine
PS & JE Ward	Yes	Nil	Contested	Acquitted
MNS Mining	Yes	Nil	Contested	Acquitted
Sterecycle Rotherham	Yes	500,000	Contested	Withdrawn

# The investigation risks

- Criminal conviction
- Imprisonment (from directors to employees)
- Significant fines against the organisation and individuals
- Severe reputational damage (impacting on existing and new business?)
- Business interruption (direct and indirect costs – examples?)
- Costs of compliance and remedial action in face of enforcement notice
- Defence costs
- Prosecution costs and investigation costs

# Pause - Reflect

- We all have “clients” who might face the risk but do we have their engagement?
- HSE control in fatal and other accidents has high sensitivity for the insured
- Do our corporate stakeholders appreciate the risk ?
- Are there steps we can take to promote a more effective approach?

# Practical Examples (1) Immediate steps by the police

- Securing the scene
- Taking names of everyone on site
- Speaking to and taking statements from eyewitnesses and those immediately involved in accident
  - NB : “Bottom up” investigation – finish with management as possible suspects
- Obtaining documentary or other evidence regarded as relevant including:
  - original documents,
  - equipment
  - machinery
  - safety materials

# Practical Examples (2) Investigator's powers

## o Police

- Search and seizure (goods, documents, computers etc)
- Interview under caution for nominee of organisation

## o HSE

- Power to enter premises HSWA s20(2)(a)
- Compulsory questioning & signed statement HSWA s20(2)(j)
- Compulsory production HSWA s20(2)(k) pre-existing documents or copies
- Interview under caution (adverse inference if fail to mention...)

# Early enforcement action & business interruption

- Improvement notice (minimum 21 day deadline by which to improve) HSWA s21
- Prohibition notice (prevents the insured from continuing with activity until compliance) HSWA s22
- Appeal (s24 HSWA) to Employment Tribunal?
- Comply?

# Pause - Reflect

“It takes twenty years to build a reputation and five minutes to ruin it. If you think about that you’ll ***do things differently.***”

Warren Buffet

Chairman & CEO Berkshire Hathaway

# “Doing things differently” - preparing the business in advance and protecting it in the aftermath

- Dedicated link to existing provider?
- Crisis management systems (**see appendix**)?
- Central point of contact?
- Employee awareness?
- Counselling & independent advice to employee witnesses?

# Practical Examples (3) The ongoing response to the investigation

- Central point of contact to deal with all enquiries from investigators, family members of deceased, employees, media or other external parties?
- Employee awareness raising?
  - Role of central point of contact – response to investigations and instructions to employees
  - Referral of enquiries
  - Documentation and who has property in it/control of its release
  - Interviews as “witness” entirely voluntary
  - Availability of independent and free legal advice?

## Practical Examples (3) The ongoing response to the investigation (Cont)

- Postpone internal investigation?
- Limit scope of any enforcement notice?
- Protect investigations with “defence privilege” focussing on fact finding but with causation and liability discussions?
- Legal costs – notification of insurers/ right to choose / panel v specialist?

# Stock Take

- Why are we here?
- Preaching to converted?
- Rare events but with catastrophic outcomes?
- Broker/Relationship Management focus?
- Contingency planning beyond all “fail-safes”
- Know your client’s business and build a framework?

Any Questions?

# thank you



T +44 (0)844 561 0011 [www.mills-reeve.com](http://www.mills-reeve.com)

Offices:  Birmingham  Cambridge  Leeds  London  Manchester  Norwich

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