

Corporate Manslaughter

Government response to HC 540, March 2006.

Draft Corporate Manslaughter Bill

An offence of corporate manslaughter would be based on the common law standard "gross negligence". In our view this will lead to rapid evolution of what is meant, in civil law, by gross negligence.

One of the key difficulties with proving the offence will be proof of proximity between a management decision and cause of death.

The law will probably have a retrospective effect and liability insurers will be involved if there is any prospect of interim payments being made.

In developing the intent of the Corporate Manslaughter Bill the Government responses to Committee reports can help bring some clarity and could, in future, assist the courts.

The response confirms:

- That the offence would apply to incorporated bodies; unincorporated bodies such as partnerships would not be affected.
- That long tail disease is covered by the Bill but in the Government's view, in practice, such prosecutions are not likely to be brought. DPP would take a view on each case.
- Whether or not a duty of care was owed would be decided along the same lines as established in civil law.
- Assessment of gross breach of duty, the test to be applied in these cases, could usefully be informed by, but is not limited to the standards described in Health and Safety Regulations and Guidance. Breach of regulation would not automatically be interpreted as gross breach of duty. The aim is to prosecute when risk management falls far below the level that could reasonably be expected. Jurors would have to consider whether or not senior managers were aware of the failings and whether they were aware of the risks posed by the failings but not whether they sought to profit from them; the latter will be considered in any assessment of sentencing.
- The Bill will not include any definition of causation. The assertion is that management failure could be found to be the cause of death, notwithstanding the more immediate cause. The concept has already been tested; *Environment Agency v Empress Car Co (Abertillery) Ltd [1999] AC 22*.
- The Criminal Court would have the power to make an order for compensation and funeral costs. Provision for this already exists under section 130-134 of the Powers of Criminal Courts (Sentencing) Act 2000.

Extracts from 130-134 of the Powers of Criminal Courts (Sentencing) Act 2000

130. – (1) A court by or before which a person is convicted of an offence, instead of or in addition to dealing with him in any other way, may, on application or otherwise, make an order (in this Act referred to as a "compensation order") requiring him-

(a) to pay compensation for any personal injury, loss or damage resulting from that offence or any other offence which is taken into consideration by the court in determining sentence; or

(b) to make payments for funeral expenses or bereavement in respect of a death resulting from any such offence, other than a death due to an accident arising out of the presence of a motor vehicle on a road;

132. – (1) A person in whose favour a compensation order is made shall not be entitled to receive the amount due to him until (disregarding any power of a court to grant leave to appeal out of time) there is no further possibility of an appeal on which the order could be varied or set aside.

Effect of compensation order on subsequent award of damages in civil proceedings.

134. – (1) This section shall have effect where a compensation order, or a service compensation order or award, has been made in favour of any person in respect of any injury, loss or damage and a claim by him in civil proceedings for damages in respect of the injury, loss or damage subsequently falls to be determined.

(2) The damages in the civil proceedings shall be assessed without regard to the order or award, but the plaintiff may only recover an amount equal to the aggregate of the following-

(a) any amount by which they exceed the compensation; and

(b) a sum equal to any portion of the compensation which he fails to recover,

and may not enforce the judgment, so far as it relates to a sum such as is mentioned in paragraph (b) above, without the leave of the court.

The response states that it may be more appropriate to leave any assessment of compensation to the civil courts "*who have expertise to assess the extent of damages*".

Comment

In spite of the Government's confidence to the contrary it seems to us that tests of management causation will be difficult and expensive to argue in all except the most obvious cases e.g. the senior management decide, in contradiction to received guidance, to lock all fire escapes and make no defensible assessment of fire risks.

There was no explicit discussion of retrospection. The case mentioned above [*Empress Car*] however was one where a system of work was adopted, was not up to scratch and subsequently led to damage. The system of work had quite probably been in place before the relevant environment protection law had been passed. No new management act was required for the management failure to be found causal. In our view the Bill will have a retrospective effect.

Management causation would be especially complex for long tail disease cases [proof of awareness of failings of prevention systems and the risks implied would need to shown to a high standard]. It would also seem doubtful that a prosecution after 30 years, for example, would accurately target the relevant perpetrator. To what extent can criminal liabilities be inherited?

Compensation is, in our view, much more likely to be pursued through the civil courts than through the criminal court. A criminal conviction would almost certainly ease the passage of a civil claim.

Where a compensation order has been made and there is no civil claim pending, it should be expected that the corporation would fund it unless/until a civil claim is made. In cases where there is a civil claim pending, the liability insurer could satisfy the order by way of interim payment.

In case of disasters involving the public, investigations of civil liability could be extensively delayed. Crown Court judges may therefore be minded to make use of compensation orders on the basis of need and tiding the victim over. This would then be deducted from a civil award.

It is not unknown for insurers to void liability insurance cover in cases of gross negligence. The primary public interest in this Bill is to prosecute companies, the usual remedy being a (uninsurable) fine; however voiding cover when no other source of funds is available for compensation, may attract interest from reformers.

The accepted definition and scope of 'gross negligence' could evolve as a result of this Bill. In our view it seems likely that the current tests of gross negligence will be relaxed.

HSE estimate of the order of 300 deaths are caused by work per year (excluding motoring-related work deaths). Deaths of members of the public e.g. in rail disasters are infrequent but were probably much in the minds of regulators when drafting this bill.

