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Corporate Manslaughter: New Horizon or False Dawn?

Update:

The Prosecution of Lion Steel

Simon Daniels

In *Corporate Manslaughter: New Horizon or False Dawn?* the author concluded with a somewhat melodramatic cliff-hanger as we awaited the trial of Lion Steel Equipment Ltd ('LS'). In July 2012, Judge Gilbert QC, Honorary Recorder of Manchester, published his remarks on sentencing in the trial¹ and, so, this paper becomes an essential sequel to the former, in which we analyse what progress if any can be said to have been achieved in the development of the current law in corporate accountability.

With the thoroughness perhaps not altogether ubiquitous in Crown Court proceedings, it has been extremely helpful that the judge should have addressed his sentencing remarks in the case with meticulous care, although he did not necessarily do so for the reason of divining the emergent law but for the purpose of clarifying his decision on a submission on the admissibility of evidence under that law, as will be seen.

Lion Steel (LS) manufactures and distributes storage equipment from two factories. At its Hyde, Manchester premises, it employed Steven Berry who – in 2008 – fell through a rooflight to his death. Ever since the Crown had failed to secure a conviction against P & O Ferries for the Herald of Free Enterprise disaster², the normative ethics of society had been demanding new legislation that would sweep away the frailties in the common law and punish companies for criminal mismanagement that had led to fatal accidents. There had been a successful prosecution in England and Wales under the Corporate Manslaughter and Corporate Homicide Act 2007 in the

¹ R v Lion Steel Equipment Ltd, Manchester Crown Court, 20 July 2012 (currently unreported). For the full sentencing remarks with ruling annexed see: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/hhj-gilbart-qc-sentence-remarks-v-lion-steel.pdf>

² R v P & O European Ferries (Dover) Ltd [1991] 93 Cr App R 72.

case against Cotswold Geotechnical Holdings³ but, in fairness, this company had been so small that the old common law offence, demanding, as it did, a causal link between the criminal act and the controlling mind, would probably have been just as effective⁴. LS was described by the Trial Judge as being ‘not a large firm’; with a turnover exceeding £10 million per annum and a workforce of 142 employees, the anticipation, however, lay in the fact that here, at last, was a company which was large enough to test the capability of the 2007 Act in corporate accountability, and succeed where the common law had failed. In terms of the evolution of the law, the prosecution against them under the new Act promised to demonstrate the value of this new generation of corporate accountability that would succeed where the old common law had failed.

It will be recalled that Section 1 of the 2007 Act renders the Company guilty if the way in which its activities were managed or organised (a) caused the victim’s death and (b) amounted to a gross breach of a relevant duty of care owed by the company to the deceased. The demands of Section 1(3) require that, once this has been established, the Prosecution must prove that the way in which the company’s activities were managed or organised by its senior management was a substantial element in the breach of the relevant duty of care.

Steven Berry, 45 years old, was employed as a maintenance worker at the company’s Hyde factory, which made steel lockers for storage systems. Parts – but not all - of the roof of the factory building had been replaced in recent years leading up to the incident. At one end, an old part of the roof, consisting of roof panels made of translucent fibreglass, had needed repairs from time to time, and the Court heard evidence of holes being patched with strips of tape to stop rainwater leaking on to the works below. The judge emphatically resisted the Prosecution’s suggestion that the fact that the roof needed repairing was, somehow, contributory to the defendant’s guilt and, indeed, emphasised in his remarks that the case, rather, was about whether the method of carrying out the maintenance was causative of Mr Berry’s death, and the criminal responsibility attaching to the company for that death occurring. All it did was to explain why Mr Berry had been there at the time; for he had made his way on to the roof of the building on the 29th May 2008 in order to attend to the holes through which rainwater leaked onto the floor below.

³ R v Cotswold Geotechnical (Holdings) Ltd [2011] ALL ER (D) 100 (May).

⁴ See R v Kite and OLL Ltd, Winchester Crown Court, 8 December 1994 (unreported).

But Mr Berry was not trained as a roofer; the judge summed up the deceased's duties as that of a general maintenance man. He and another man, Mr Baines (who was not called as a witness) would carry out small repairs about the premises; but evidence was heard that, if they were in any doubt about their ability to carry them out, they were instructed to ask for independent outside contractors to attend.

The Court further heard evidence that, while Mr Berry was aloft with all his weight upon the roof, a fibreglass rooflight became detached from some of its fixings, twisted, and he fell 13 metres to the floor below, suffering fatal injuries.

The indictment originally contained five counts:

Count 1, corporate manslaughter against Lion Steel contrary to Section 1 of the Corporate Manslaughter and Corporate Homicide Act 2007, alleged that, on 29th May 2008, the defendant "...being an organisation, namely a corporation, and because of the way in which the organisations' [sic] activities were managed or organised by its senior management, caused the death of...Steven Berry by failing to ensure that a safe system of work was in place in respect of work undertaken at roof height, which failure amounted to a gross breach of a relevant duty of care owed by it, to the deceased."

Count 2 alleged common law manslaughter against three directors of the defendant company: Kevin Palliser, works manager at the Hyde factory; Richard Williams, works manager at LS's other factory in Chester; and Graham Coupe, the company's financial director⁵. It was the Crown's contention that each was under a personal duty of care towards the company's employee Mr Berry, and that he died as the result of what the Crown say was their gross negligence (the judge rather clarified the Crown's assertion as to the defendants' alleged gross breach of the duty of care, which the Crown argued was owed by them as directors to him as an employee).

Count 3 contained a statutory health and safety charge, alleging that Lion Steel failed to discharge a duty pursuant to Section 2 of the Health and

⁵ The case of R v Adomako [1995] 1 AC 171 established the precedent for the Jury to convict in a case of gross negligence manslaughter against an individual defendant if it is satisfied beyond reasonable doubt that the defendant owed a duty of care to the deceased; that he was in breach of that duty; the breach of duty was 'a substantial' cause of death (as refined by R v O'Connor [1997] Crim LR p16 CA); and the breach was so grossly negligent that the accused can be deemed to have had such disregard for the life of the deceased that it should be seen as criminal and deserving of punishment by the state.

Safety at Work Act 1974 (“HSWA”)⁶. It alleged that, as Mr Berry’s employer, the company failed to ensure so far as was reasonably practicable the safety of employees working at height.

Count 4 alleged that the three directors committed the offence of neglect, contrary to Section 37 of HSWA. It alleged that the failure by Lion Steel in Count 3 was attributable to their neglect⁷.

Count 5 alleged against Lion Steel that there was a contravention of the Work at Height Regulations 2005⁸ (and therefore an offence was alleged under Section 33 of HSWA) because no suitable and sufficient measures were taken to prevent, so far as was reasonably practicable, persons falling a distance likely to cause injury.

At a preliminary hearing, Count 1 was severed from the main indictment, because of the critical need to distance proceedings under the 2007 Act against the company from proceedings against the individual directors under the common law. In the Judge’s words, “it would have been difficult in the extreme to try it alongside the count of manslaughter against the three directors, for reasons connected with the fact that the Act is not retrospective.” The key issue focused on the admissibility of evidence in Count 1, against the Company under the 2007 Act, but tending to address the guilt of the directors in Count 2, referring to conduct occurring before the commencement of the 2007 Act. Moreover, there could be no question of liability of the directors under the 2007 Act⁹. The judge ruled that a joint trial would have required directions to the jury “of baffling complexity, which directions would probably have been ineffective.”

⁶ It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees... including (a)the provision and maintenance of plant and systems of work... (c)the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees... (d)so far as is reasonably practicable as regards any place of work under the employer’s control, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks; (e)the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.

⁷ Where an offence under any of the relevant statutory provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

⁸ SI 2005 No. 735.

⁹ Section 18 expressly excludes secondary liability for the new offence, while para A1(a) of the Sentencing Council Guidelines is even more concise in stating that the offence can be committed only by organisations and not by individuals see Sentencing Council, 2010, Corporate Manslaughter & Health and Safety Offences Causing Death, Definitive Guideline, Sentencing Guidelines Council, London.

The judge also stayed Count 5. There was subsequently no appeal against any of these rulings. The result was that a jury was sworn in to hear the trial of the three directors for manslaughter at common law and the statutory offence of neglect, and of Lion Steel for breach of the Health and Safety at Work Act - a statute demanding entirely different criteria to those for securing a conviction under the 2007 Act, involving, as it does, strict liability rather than depending on proof of negligence. The trial of the company under the 2007 Act in Count 1 would be heard subsequently.

Once the trial was under way against the Directors, the Crown called its evidence on what had occurred, including the evidence it said showed gross negligence by the director defendants and which would also serve against the company. At the end of the Prosecution case submissions were made on behalf of the directors; for the Crown, this is where the case started to unravel.

In a criminal prosecution under English law, the Prosecution must establish that every element of the crime defined under the Statute has been proved beyond reasonable doubt by the weight of the evidence adduced by the Prosecution¹⁰. How persuasive the Jury finds the evidence is entirely up to them, of course¹¹.

At the end of the Prosecution case, if it is apparent that the evidence is insufficient to establish the elements of the crime, consisting of the mens rea and actus reus, required by the Statute, then it would be unsafe to direct the Jury to reach a verdict on the evidence, and a submission can be made to the judge by the Defence that there is no case to answer. Submissions are made to the judge in the Jury's absence, for a consideration of the law is not within their remit¹². All they need to know is the substantive law which makes a persuasive case on the evidence which they hear. If, having heard the Defence's submission and the Prosecution's reply, the judge concludes that the Prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty to stop the case. In that situation the jury must be directed to return a verdict of not guilty¹³.

That said, generally it is not open to the judge to rule that there is no case to answer due to insufficient evidence before the close of the

¹⁰ It would be fair to qualify this only in so far as strict liability offences, such as those in the HSWA, demand merely that the Prosecution establish breach of health or safety provisions, which then places a reverse burden of proof on the defendant to show, on the balance of probabilities, that it had exercised due diligence.

¹¹ The author emphatically will not be tempted to discuss the jury process in the light of the case against Vicky Pryce in Southwark Crown Court in February 2013.

¹² R v Falconer-Atlee [1974] 58 Cr App R 348 CA.

¹³ R v Galbraith (George Charles) [1981] 2 All ER 1060; [1981] 73 Cr App R 124; [1981] Crim L R 648.

Prosecution case, so that the judge can draw an informed opinion for himself in addition to the arguments established by the Defence and the Prosecution reply.

In *R v Brown*¹⁴ it was confirmed that if, at any time after the conclusion of the Prosecution case, the judge is satisfied that no jury, if properly directed, could convict, he has the power to withdraw the case from the Jury, but that this is a power to be sparingly exercised. That said, this is precisely what happened in the Trial against P & O Ferries for corporate manslaughter in the case of the Herald of Free Enterprise¹⁵. For those commentators baying for a conviction under the 2007 Act, this would be a disaster surpassed only by a not guilty verdict.

On 2nd July 2012, the judge duly ruled that in the cases of two directors of LS (Messrs Williams and Coupe) there was no case to answer on the common law manslaughter count; and in the case of Mr Williams, also no case to answer on the count of neglect. In the Judge's opinion, the case against them should never have been brought and he was minded to direct the jury to acquit them; interestingly, however, the combined effect of Section 1 and Section 18 of 2007 Act expressly exclude a director's personal liability for the new offence, whether on an individual basis or on the basis that they aided, abetted, counselled or procured it.

As a result, any personal conviction or acquittal would have been on an indictment for manslaughter, and as such would have been immaterial to the company itself, save for the probative value of evidence that would have been admissible both under common law and the statute. The judge did feel that the Prosecution had an arguable, albeit weak, case against the director Mr Coupe, but the merit of that case disappeared as the evidence in the case unfolded and there just remained a case on neglect.

It is apparent that, in the light of this, the Prosecution and Defence negotiated a solution with acceptable pleas that would bring the Trial to a close before the case against LS was due to commence. As a result of the negotiation, LS then pleaded guilty to the count alleging corporate manslaughter, and the Prosecution offered no evidence against the directors on the remaining counts.

The personal priorities of the directors to eliminate the risk of conviction and imprisonment of manslaughter had been met, but the downstream consequence is that we are none the wiser, nor are we better

¹⁴ *R v Brown* (Davina) [2002] 1 Cr App R 5 CA.

¹⁵ *R v P & O European Ferries (Dover) Ltd* [1991] 93 Cr App R 72.

informed as to whether the 2007 Act will succeed in its task of securing corporate accountability for manslaughter where its common law predecessor had failed. The exercise was not entirely a waste of time, though. The judge made some notable observations which can be employed to clarify some key points in the prosecution of a company under the 2007 Act.

It will be recalled that Section 1 of the 2007 Act renders the Company guilty if the way in which its activities were managed or organised (a) caused the victim's death and (b) amounted to a gross breach of a relevant duty of care owed by the company to the deceased. The demands of Section 1(3) require that, once this had been established, the Prosecution must prove that the way in which the company's activities were managed or organised by its senior management was a substantial element in the breach of the relevant duty of care.

The judge assessed the risk of a fall through the roof as an obvious one, and he felt that the company's management team - that is, those senior persons responsible for making decisions about how the whole or a substantial part of its activities are to be managed or organised, or the actual managing or organising of the whole or a substantial part of those activities, as provided in the Act¹⁶ - should have appreciated that. The judge accepted evidence that a Health and Safety Executive ('HSE') inspector had conducted an inspection in 2006 and cautioned LS that warning notices should be erected to keep persons away from fragile roofs; the inspector referred to HSE guidance and codes of practice warning of the danger of fragile roofs, and emphasised the need for proper supervision and training.

The judge accepted evidence that LS had, in fact, responded to this risk by devising a safe system of work, intending to keep Mr Berry off the fragile areas; what he (the judge) felt it had not done was to train him properly, or to equip him or others with equipment, in the form of a harness and line, which would protect him should an accident occur. Without catwalks or barriers defining safe access routes, the judge concluded that there was nothing to discourage a workman from taking a short cut if he carelessly chose to do so, echoing the words of Mr Justice Bridge in a Judgment against the Blue Star Line when he observed

¹⁶ S1(4).

...it is not only the reasonable behaviour of employees which it is an employer's duty to anticipate; it may include unreasonable behaviour.¹⁷

Two questions need to be addressed in order to reach the core of the problem of establishing guilt in this case:

- 1 Whether the system adequately managed the risk which was reasonably foreseeable that Mr Berry was working on and around the fragile roof with no precautions or training.
- 2 If the management had failed for this reason, was the resultant breach so sufficiently gross as to amount to a crime?

Much of the argument in the case crucially revolved around the admissibility of evidence which came into existence before the 2007 Act entered into force¹⁸; this was an issue which, however important to the case in question, would not probably be shared by cases in the future, so a review of this point is not undertaken in this discussion.

The judge drew attention to the Act's reliance on the application of the common law of negligence¹⁹, without dwelling on the old baggage that accompanies the application of civil liability to a criminal offence²⁰. Whatever the argument on admissibility, the judge brought into sharp focus the key point that the Prosecution still had to meet the demands of Section 1(3), which states that the company would only be guilty "if the way in which its activities are managed or organised by its senior management is a substantial element in the breach²¹." This hurdle being cleared, the Prosecution would then have to show that the breach of the relevant duty of care would have to be 'gross', defined by Section 1(4) as conduct which

¹⁷ Chalmers v Blue Star Line Ltd [1968] 1 Ll R 643.

¹⁸ Paradoxically, had the defendant been arraigned under the common law charge, the problem for the Prosecution would not have arisen, but such an option was not open to them, because Section 20 states that The common law offence of manslaughter by gross negligence is abolished in its application to corporations, and in any application it has to other organisations to which Section 1 applies.

¹⁹ Para 21 of the explanatory notes to the Act clarifies that Section 2(1) requires the duty of care to be one that is owed under the law of negligence. This will commonly be a duty owed at common law.

²⁰ See Corporate Manslaughter: New Horizon of False Dawn? for a detailed argument.

²¹ Section 1(3).

“falls far below what can reasonably be expected of the organisation in the circumstances.”

The decision on what constitutes a gross breach of duty is a matter reserved for the Jury in every case, but Section 8 gives guidance on factors which the Jury should consider. This section states inter alia that

[t]he 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, (a) how serious that failure was and (b) how much of a risk of death it posed.

Even given any perceived weakness in the Prosecution case arising out of the evidence pre-dating the Act, the judge expressed a leaning towards the interpretation in this case that

a breach may be considered as gross in late April 2008 because (for example) it consisted of a failure at that time to act on knowledge gained long before.

In fact, the much-heralded case of Lion Steel was preceded by a matter of weeks by a prosecution in Belfast Crown Court, when the Recorder of Belfast, His Honour Judge Burgess, sentenced J M W Farm Limited for the corporate manslaughter of Robert Wilson, one of the company's employees, who, on the 15th November 2010, was washing the inside of a large metal bin which was positioned on the forks of a forklift truck. In a seemingly Heath-Robinson arrangement, such a method of cleaning was by no means unique for the positions of the forks on the usual truck corresponded with the position of the sleeves on the bin, giving an apparently safe foundation for the process; but this truck was not the normal one, having replaced it when the normal truck had gone for servicing a number of weeks earlier. As a result, the arrangement was now decidedly unstable and, with the inevitability of Greek tragedy, when he jumped on to the side of the bin it overbalanced and, when he fell to the ground, the bin fell on top of him, killing him.

In this case, the defendant company also pleaded guilty and, so, the 2007 Act was not tested before a Jury. Once again, though, we may hazard some analysis of the evidence as applied to the statutory provisions. The Court was told that the company was aware of such a danger, having carried out a risk assessment which included instructions for anyone operating the

forklift truck, but it is clear from the Judge's remarks that this assessment had been made of the former truck; when it was replaced by the temporary truck, no assessment was made of the position of the forks on this truck relative to the sleeves on the bin. The judge commented that it would have been apparent to any operator that it would not be possible to take the necessary steps mitigate the foreseeable dangers; he added that it was of particular concern that the operation had been going on from when the replacement forklift truck was deployed, and that the incident was not an isolated event. The judge concluded with rather wearied words that, yet again, the Court was confronted with an incident where common sense would have shown that a simple, reasonable and effective solution would have been available to prevent this tragedy.²²

In both cases, the judges relied heavily on the guidelines published by the Sentencing Guidelines Council in February 2010²³. This gives us further assistance because of the commentary which necessarily defines the obligation on the Prosecution to prove each of the elements beyond reasonable doubt, within the statutory limitations establishing that the offence

- (a) can be committed only by organisations and not by individuals;
- (b) has as its root element a breach of a duty of care under the law of negligence;
- (c) requires that the breach be a gross breach; that is to say one where the conduct falls far below what can reasonably be expected of the organisation;
- (d) further requires that a substantial element in the breach is the way in which the organisation's activities are managed or organised by its senior management;
- (e) is committed only where death is shown to have been caused by the gross breach of duty.

In the JMW Farm case, the judge recited the Court's function in a slightly different way to that summarised by Judge Gilbart in LS, stating that the Court should firstly consider the seriousness of the offence by asking how foreseeable was serious injury; how far short of the applicable standard did the defendants fall; how common was a breach of this kind in the

²² R v J M W Farm Limited, Belfast Crown Court, 8th May 2012 (currently unreported). For the Summary of Judgment See: http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/SummaryJudgments/Documents/Summary%20of%20judgment%20-%20R%20v%20J%20M%20W%20Farm%20Limited/j_sj_R-v-JMW-Farm-Limited_080512.pdf

²³ Indeed, in sentencing the defendant in such a case, the Court is obliged to follow any sentencing guidelines, unless the Court is satisfied that it would be contrary to the interests of justice to do so, pursuant to s125 of the Coroners and Justice Act 2009.

organisation; and how far up the organisation the breach went. The Court was then required to consider both aggravating and mitigating factors. In this case the judge held that it was clearly foreseeable that the failure to address the hazard would lead to serious injury and indeed that the consequences could well be fatal; that the company had fallen far short of the standard expected in relation to such an operation; and that the operation was permitted to continue for some time. The judge added, however, that there was no evidence that this represented a systemic departure from good practice across the company's operations. This, itself, would lead us into some difficulty in reconciling the Judgment with the Act. The Sentencing Guidelines Council particularly distinguishes guilt in corporate manslaughter cases from guilt in cases under the Health and Safety at Work Act 1974,

because corporate manslaughter involves both a gross breach of duty of care and senior management failings as a substantial element in that breach, those cases will generally involve systemic failures; by contrast health and safety offences are committed whenever the defendant cannot show that it was not reasonably practicable to avoid a risk of injury or lack of safety; that may mean that the failing is at an operational rather than systemic level and can mean in some cases that there has been only a very limited falling below the standard of reasonable practicability²⁴.

As a result, we are left in rather a quandary: in the case against LS, the judge apparently had satisfied himself that there had been a systemic failure, which (had the trial proceeded) it would have been safe for the Jury to conclude that the breach was a significant (if not necessarily the only) cause of death and, hence, the essential elements of an offence under Section 1 of the 2007 Act would be established. If, however, we analyse the Judge's conclusion in JMW Farm, the rationale of his decision is equivocal; if there were no evidence of a systemic management failure, then it would not have been safe to leave the matter for the Jury to decide and a guilty verdict would be misconceived.

According to research by Solicitors Pinsent Masons, the number of new corporate manslaughter cases opened by the Crown Prosecution Service rose from 45 in 2011 to 63 in 2012 – an increase of 40 per cent, with 141 corporate manslaughter cases opened since records began in 2009 and 56

²⁴ Para A(4).

cases currently being investigated for prosecution²⁵. In fairness, the CPS has not readily disclosed such statistical information on its website²⁶, and one is left wondering when the next case will be revealed, and lead, one way or the other, to a more definitive conclusion on the ability of the 2007 Act to deliver what the common law offence of corporate manslaughter did not.

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²⁵ <http://www.pinsentmasons.com/en/media/press-releases/2013/new-corporate-manslaughter-cases-opened-by-cps-up-40-in-20121/>

²⁶ See: http://www.cps.gov.uk/legal/a_to_c/corporate_manslaughter/

