

homes. Those who work in the field know this only too well. It changes regularly; so regularly that ladies such as Mrs Hopkins and Mrs Priest, who went into the business because they wanted to care for people, have been regulated out of existence. Care Homes are inspected twice a year, with both announced and unannounced inspections. If there is anything amiss, problems can be required to be rectified and, failing that, the homes can be closed. Regulatory prosecutions abound.

If someone can be proved to have acted in a manner that calls for a criminal prosecution over and above a regulatory

prosecution, let them be prosecuted, for the range of assaults from common assault to manslaughter or murder, or for s.4 or 5 of the Public Order Act 1986 in the case of bullying behaviour, all these offences aggravated by the vulnerability of the victim.² Such charges have the advantage of requiring the prosecution to identify the incident of which complaint is made, avoiding the broad-brush approach adopted in the case of *Hopkins*, which ultimately resulted, as the Court of Appeal found, in an unfair trial.

² See the CPS' helpful document "Guidance on Prosecuting Crimes against Older People", with a table at Annex A setting out the potential offences for different alleged behaviours: http://www.cps.gov.uk/publications/docs/caop_guidance.pdf

Developments in health and safety

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This article focuses on three areas: significant recent statutory changes; case law of potentially wider relevance; and international developments.

We have recently seen the first successful prosecution of a company under the Corporate Manslaughter and Culpable Homicide Act 2007. This case concerned the death of a young unsupervised employee aged 27 who was taking soil samples from the bottom of a 3.7 metre pit at a building site when the trench walls collapsed suffocating him. In essence, the prosecution stated that the pit was insufficiently supported for its depth and was in breach of industry accepted standards. The Managing Director, Peter Eaton, had also originally been charged with manslaughter and health and safety offences but the prosecution was stayed against him due to his serious ill health.

The company, Geotechnical Holdings Co Ltd, after a 13 day trial, was fined £385,000, the equivalent of 250% of turnover, although it was granted 10 years to pay the fine. In *Cotswold Geotechnical (Holdings) Ltd* [2011] All E.R. (D.) 100 (also reported in the TLR July 20, 2011), the Court of Appeal dismissed the appeal against the fine. The Lord Chief Justice (sitting with Beatson and Bean JJ.) in a judgment delivered extempore said it was unfortunate but "unavoidable and inevitable" that the company would probably have to go into liquidation to pay the fine:

In the circumstances, it was plainly foreseeable that the way the company conducted operations could cause serious injury or death. The reality was that the judge had taken the view, and had been right to take that view, that, in the circumstances the fact that the company could be put into liquidation was unfortunate but unavoidable and inevitable. There could be no justifiable criticism of the sentence imposed. The company was faced with manslaughter causing death as a result of a gross breach of duty following a system of work that was unsafe with the potential for causing death.

This fine (and the Sentencing Council Guidelines, which came into force in February 2010) may well set off certain alarm bells in larger organisations, companies and sectors which may in time find themselves before the criminal courts. It will almost inevitably put the wind in the sails of the CPS to prosecute again when it is of the view that there has been serious management failure. However, it leaves many interpretational issues to be decided, including the scope of senior management failure and other thorny is-

sues.

Very recently, the CPS has announced that a company called Lion Steel Ltd and three directors have been charged with, respectively, corporate manslaughter and manslaughter. The CPS news brief dated July 1, 2011 stated "... [the CPS] has advised Greater Manchester Police to charge Lion Steel Ltd in Manchester with corporate manslaughter following the tragic death of Steven Berry at the Hyde Site on Johnson Bank Road when he fell through a fragile panel and died as a result of injuries sustained in the fall. [The CPS] also decided that three of the company directors should be charged with gross negligence manslaughter. The three men are also charged under section 37 of the Health and Safety at Work Act 1974 for failing to ensure the safety at work of their employees. Lion Steel is also charged under section 2 and 33 of the Health and Safety at Work Act 1974 for failing to ensure the safety at work of its employees...". The CPS went on to say they had "... taken this decision after very carefully reviewing the material gathered in the police investigation and have concluded there is sufficient evidence for a realistic prospect of conviction and that it is in the public interest to bring these charges...".

We have also recently seen the first conviction under the Health and Safety (Offences) Act 2008, which allows for the imprisonment of individuals convicted of certain health and safety offences. A Mr Dutton, the Health and Safety Manager of a metal distribution firm called South Essex Stockholders Ltd was given a four months term of imprisonment, suspended for two years. He pleaded guilty to one count under s.7 of the Health and Safety at Work Act 1974. Mr Dutton had asked a junior employee to bring him a can of chemical to use as an accelerant to burn debris in a skip. On pouring it in, it (somewhat predictably!) exploded and seriously burned him. He spent over three months in hospital and required major skin grafts. His Honour Hayward Smith QC commented he had been "extremely foolish ... you were severely burned. You were in flames. Those who saw what happened suffered trauma". Given the risk to himself and others who may also have been injured, a suspended sentence was imposed. In mitigation it was pointed out that he had perhaps fortuitously

been the only injured person. He also had to pay £5,000 towards the prosecution costs. His employer was also convicted after a trial under s.2 of the Health and Safety at Work Act 1974 and fined.

Importantly, in *Baker v Quantum Clothing Group* [2011] UKSC 17 the Supreme Court recently (by a majority of 3-2) allowed the defendant's appeal in a civil case concerned with noise-induced hearing loss in the knitting industry of Derbyshire and Nottingham in the 1980s. Lord Dyson said "... if reasonable foreseeability is not imported into the meaning of 'safe', I would agree with the Court of Appeal that it is imported into reasonable practicability." We await what impact this judgment will have on future criminal cases (see also *Viola Ltd and Tangerine Confectionery Ltd*, where the Court of Appeal's judgment is reserved).

Bodycote Hip [2010] EWCA Crim 802 involved a double fatality. The Court of Appeal, when considering an appeal against sentence, took into account what the defendant's sister company had failed to do in the United States:

... the serious aggravating feature in this case was that a similar incident has led to the death of two employees at a HIP plant operated by another company in the same group that occurred in May 2001 in Tarzana California. These two employees had also died from asphyxiation as a result of inhaling argon and nitrogen. That may have prompted the appellant to either adopt or to expedite the introduction of its present system, but, as the prosecution was able to show, not with the rigour that the dangers demanded and the appellant allowed the other defaults in its safety procedures to continue or to get worse (at para.13).

... the other aggravating features of particular note were that there had been two deaths, and the appellant had not adequately heeded the warnings from the failures in the Californian plant (at para.15).

This approach marks a radical departure from what has previously occurred and will be viewed by many UK based organisations as ominous, given it clearly demonstrates the English Court's intention to factor in foreign conduct even if there are different laws, customs and operational approaches involved.

There has also been a significant increase in r.43 reporting by Coroners after inquests. These reports are made to government bodies or departments (with copies to the interested parties and the Lord Chancellor) in the hope they will prevent future deaths: see "Come in number 43" by Gerard Forlin QC and Louise Smail (2011) 161 New L.J. 306. Ignoring such recommendations may well trigger 'bad character' applications by the prosecution in the event of subsequent accidents or incidents.

Globally, there have been many significant developments. For instance, the Government of Ireland has recently announced they are intending to introduce two new offences—corporate manslaughter and grossly negligent management causing death—where directors and senior managers will be able to be imprisoned for up to 12 years. Interestingly, in a recent manslaughter trial in Tipperary under the law as it currently stands, two barmen were acquitted after the trial judge ruled that there no such thing in Ireland as an Alcohol Liability Act and manslaughter counts couldn't be left to the jury. The prosecution case centred on a pint glass containing eight shots that were consumed as part of a young man's 26th birthday celebrations. He later passed out and died.

Gibraltar intends to introduce corporate manslaughter legislation. The draft legislation states that there will be

an offence of corporate manslaughter if the way in which an organisation's activities are managed or organised causes a person's death and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased. The Gibraltar Justice Minister stated that "... there are no plans at present to exempt any Government Department...".

The Australians are about to implement the Safe Work Act 2009 to harmonise their health and safety legislation and to tighten up sentencing for most Australian States and Territories. This will have a large impact on heavy industry, particularly in the mining sector.

There has been a major ramping up in the number and intensity of investigations and prosecutions in the aftermath of recent aircraft crashes (the DHL collision over Germany, the Concorde crash, the GOL incident in Brazil, the Helios Investigations in Greece and Cyprus and many others). UK (and global) organisations need to be aware that conduct in one country is increasingly being examined by plaintiff lawyers (particularly in the US), regulators and prosecutors in other jurisdictions. Thus the trend towards greater use of European arrest warrants is set to continue.

Prosecutors are also making more use of the Regulatory Reform (Fire Safety) Order 2005 which is triggered by the possible risk of fire. The Order imposes duties on defined "responsible persons" to protect anyone who may be on or in the vicinity of the premises. Substantial fines include £300,000 against Shell plc and £400,000 imposed on New Look Ltd. In July 2011 a hotel manager and an external fire risk assessor were fined and jailed for eight months under this Act. The Learned Judge said "...[the time has come] ... to send out a message to those who conduct fire risk assessments and to hoteliers who are prepared to put profit before safety".

The Coalition government has announced an independent review of health and safety legislation, under the auspices of the Department for Work and Pensions, to "... consider the opportunities for reducing the burden of health and safety legislation on UK businesses while maintaining the progress made in improving health and safety outcomes". One hopes that whatever this report recommends, it does not push the UK off the top place for currently having the world's best health and safety record. The HSE recently published its workplace statistics showing a general trend downwards. However, the number of workplace fatalities rose from 147 in 2009/10 to 171 in 2010/11.

In conclusion, recent developments provide both new opportunities for increased safety and wellbeing in the work place and potential pitfalls for those organisations and individuals who do not have a genuine intention of making health and safety (and environmental issues) the cornerstone of their operations. We will continue to witness more investigations (and possibly prosecutions) in the aftermath of accidents and incidents whether they be natural (New Zealand and Japan), deliberate terrorism (such as New York and London) or more usual workplace type incidents. This shift in prosecutorial approach towards the global means that the days of splendid isolation have long gone—prosecutors wait in the wings for those unable or unwilling to make the required step change regarding safety issues.