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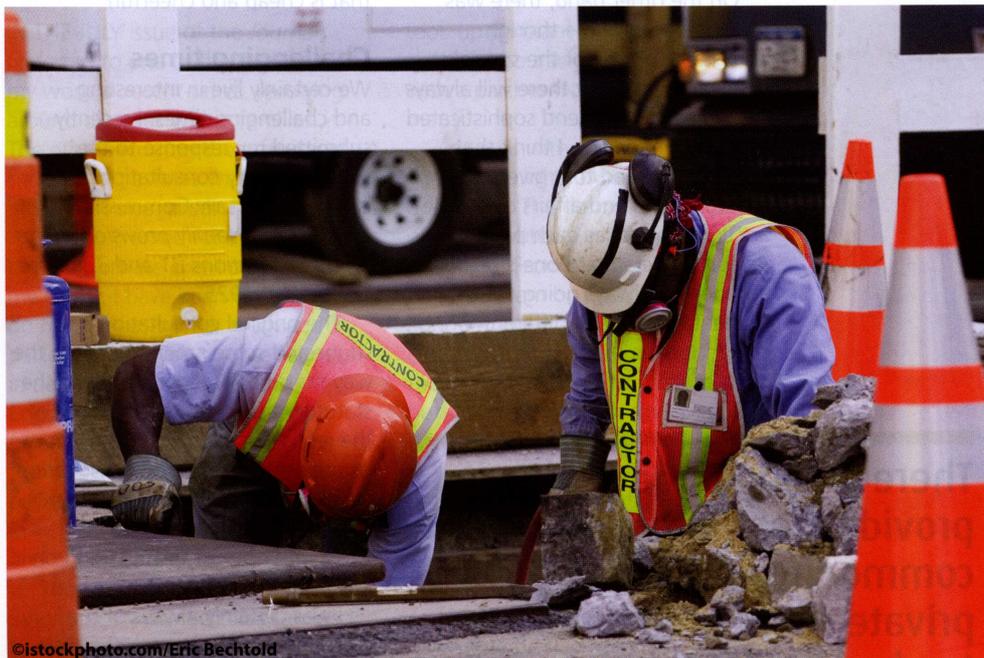
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The criminal companies

The first company sentenced under the new corporate manslaughter law was fined so heavily it became insolvent. Such penalties could become the norm, writes **James Mendelsohn**



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Companies and crime

In February, Cotswold Geotechnical Holdings Ltd became the first company to be sentenced under the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA).

The case, *R v Cotswold Geotechnical Holdings Ltd* [2011] EWCA Crim 1337, provides a timely opportunity to review when and how companies can be held liable for criminal offences. Whilst many hope the Act will increase levels of corporate accountability, important questions remain.

Since companies have legal personality, they can in general be criminally liable in the same way as humans. However, companies have artificial legal personality, which makes it problematic to prosecute them under statutes which were drafted with human defendants in mind.

Companies cannot commit the *actus reus* of offences such as bigamy or rape, though they can arguably be accomplices. In *Richmond upon Thames LBC v Pinn & Wheeler Ltd* [1989] RTR 354, a

company was acquitted of illegal driving, since only a natural person could perform this physical act. Nor can companies be convicted of murder, since the only punishment is imprisonment.

Mere servants

As companies have no mind of their own, attributing them with *mens rea* has also challenged those who have sought to make companies criminally responsible. This is not always necessary. As in the civil sphere, companies can be imputed with vicarious liability for their employees' criminal acts (*R v Great North of England Railway Company* (1846) 2 Cox CC 70).

Strict liability offences require no *mens rea* (*Alphacell Ltd v Woodward* [1972] AC 824). Companies can also be liable for breach of statutory duties owed in their capacity as employers or occupiers (*Evans & Co Ltd v LCC* [1914] 3 KB 315).

Usually, though, it remains necessary to attribute companies with *mens rea*. The courts developed the 'identification

Safety at work: man died because deep pit was not properly supported

principle', under which both the acts and the state of mind of a person identifiable with a company are attributed to that company.

In *DPP v Kent & Sussex Contractors Ltd* [1944] KB 146, a company officer intentionally signed false documentation. The court attributed his *mens rea* to the company, which was therefore convicted of providing false documentation in order to circumvent wartime rationing regulations.

As Denning LJ (as he then was) said in *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159: "Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will.

"Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by law as such."

In *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 (HL), Lord Reid said: "A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one and the same person. Then the person who acts is not speaking or acting for the company.

"He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company, or, one could say, he hears and speaks through the persona of the company... his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company."

Reasonable precautions

Sometimes, the "directing mind" means those to whom the directors have delegated responsibility (*Worthy v Gordon Plant (Services) Ltd* [1989] RTR 7n). In *Tesco Stores Ltd v Brent LBC* [1993] 2 All ER 718, a sales assistant had reasonable grounds to believe that a customer was underage, but sold him a classified video anyway.

Tesco was charged under the Video Recordings Act 1984. It was a defence to show that the defendant did not know, or had no reasonable grounds to believe, that the customer was underage. Clearly, the directors did not know, and did not have reasonable grounds to believe this.

The court refused to apply the "directing mind" test in relation to the defence, because the Act did not distinguish between the company itself and those who supplied the video on its behalf, and larger companies would otherwise escape its provisions. Tesco was therefore convicted.

Usually, however, the "directing mind" means the company's directors. In *Tesco v Natrass*, Tesco was prosecuted under the Trade Descriptions Act 1968, for pricing goods incorrectly, following the errors of a local store manager. At the time, Tesco had 800 stores. Tesco escaped conviction. The store manager was not its "directing mind", which was in fact represented by its directors, whose systems of training amounted to "reasonable precautions" preventing such offences.

Manslaughter cases

As *Tesco v Natrass* shows, the "identification" principle hinders prosecutions of larger companies, since it is harder to trace blame back to one individual "directing mind". This was clear in cases involving death: prior to the CMCHA 2007 coming into force, only eight companies were successfully prosecuted for gross negligence manslaughter.

All were small companies, where a single individual could be easily identified with the company, which was therefore effectively carrying out the instructions of one person. For example, in *R v OLL Ltd and Kite* [1996] Cr App R 295, four teenagers died after their canoes capsized

during bad weather. The managing director of the company which ran the venture had failed to take adequate safety measures. Both he and the company were convicted of manslaughter.

Conversely, larger companies were acquitted of manslaughter following major rail and sea disasters, because it proved impossible to pin fault on a single individual identifiable with the company. In *P&O Ferries (Dover) Ltd* (1991) 93 Cr App R 72, P&O was charged with manslaughter following the Zeebrugge ferry disaster.

The ferry had set sail with its bow doors open and capsized, causing 193 deaths. Although numerous employees, including the directors, were found to be at fault, the prosecution failed, because it was not possible to identify a single, grossly negligent individual as the "directing mind". The court did not allow the "aggregation" of the mental state and actions of more than one individual, so as to make the company guilty. This was confirmed in *Attorney-General's Reference (No.2) of 1999* [2000] QB 796, CA.

Below expectations

Following public outcry at such acquittals, and a 1996 Law Commission Report on *Involuntary Manslaughter* ([1996] EWLC 237), CMCHA 2007 was enacted, coming into force on 6 April 2008. A company now commits "corporate manslaughter" (section 1(5)) if the manner in which its activities are organised or managed causes a death (section 1(1)(a)) and amounts to a gross breach of a duty of care owed to the deceased (section 1(1)(b)).

The way in which activities are managed or organised by "senior management" must be a "substantial element" of the breach (section 1(3)). The conduct causing the breach must fall "far below" reasonable expectations (section 1(4)(b)).

A company will be acquitted where a death occurs but it has established reasonable safeguards for the management of the activity. The reference to "senior management" removes the need

to identify a single, negligent "directing mind". It is arguably still too narrow, allowing larger companies to escape liability if particular failings cannot be traced back to "senior management".

This brings us back to *Cotswold*. An employee had died following the collapse of an unsupported 3.5 metre pit in which he had been working. This was in breach of regulations which stipulated that any pit over 1.2 metres should be supported. The company had failed to take reasonable steps to protect the employee from working in such conditions. The prosecution succeeded.

However, *Cotswold Geotechnical* was a small company, with just eight employees and one director. Therefore, it could probably have been successfully prosecuted for manslaughter under the old "directing mind" test. The case therefore sheds little light on the "senior management" test or the potential impact of CMCHA.

The prosecution of a large company, with multiple directors and apparently compliant health and safety systems, will reveal more. Such companies will be better placed to argue that any death was accidental, rather than the result of any breach of duty on their part, or any failings of "senior management".

More significant, perhaps, is the sentence. *Cotswold* was fined £385,000. Although below the £500,000 level recommended by the Sentencing Guidelines Council, this represented 250% of the company's turnover, effectively rendering it insolvent. The Court of Appeal confirmed this as an "unfortunate" but "unavoidable" outcome.

If the same approach is taken in the case of larger companies involved in major disasters, we could see extremely large fines imposed upon those companies, leading to business failure and significant job losses. Whether the judiciary will have the courage to follow this approach remains to be seen.

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