

Manslaughter in the workplace

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"If corporate manslaughter is introduced, it will plug the culpability gap between manslaughter and breaches of health and safety legislation."

On 29 December 2013 Paul Burr felled a tree that resulted in the death of 20 year old forestry worker, Lincoln Kidd. Mr Burr and his company, Paul Burr Contracting Limited, both pleaded guilty to breaching s 50 of the Health and Safety in Employment Act 1992 (HSEA) by not taking all practicable steps to protect the safety of Mr Kidd. Mr Burr and his company failed to use effective means of communication on site and failed to ensure Mr Kidd was more than two tree lengths from the tree being felled. The Court imposed fines and reparation on Mr Burr totaling \$100,000.

But a jury was not satisfied beyond reasonable doubt that the circumstances amounted to manslaughter, and acquitted Mr Burr.

This recent unsuccessful manslaughter prosecution for a workplace death raises the question of when a fatal workplace accident will be sufficiently serious to result in a manslaughter conviction.

Ingredients for a manslaughter charge

The necessary ingredients for a successful negligence based manslaughter charge are:

- Someone is killed by another person
- The death occurred because of:
 - an unlawful act; and/or
 - an omission without lawful excuse to perform any legal duty (a failure to perform a duty arising from health and safety legislation will be sufficient to satisfy this ingredient);
- The unlawful act or omission was a substantial and operative cause of the death
- The unlawful act or omission was a major departure from the standard of care expected of a reasonable person.

The Crimes Act 1961 creates a legal duty for people who are in charge of dangerous things that could endanger human life to take reasonable care to avoid such danger. A breach of this duty of care will satisfy ingredient 2a above.

The "major departure" test has variously been described as "gross negligence" or, having regard to the risk of death involved, the conduct of the accused was so bad as to amount to a crime. Anything less than a major departure from the standard of care expected will not be sufficient.

The importance of the major departure test was highlighted by the Court of Appeal in the case of *R v Spencer* in 2001. In that case, the deceased was a labourer for David Spencer Limited. He was working in a trench alongside David Spencer when the trench collapsed killing him. Initially charges were brought against the company, which pleaded guilty to breaches of the HSEA. The guilty pleas were entered by Mr Spencer as the sole director of the company.

One week after the company was sentenced the police laid a manslaughter charge against Mr Spencer in relation to the same incident (charges against Mr for Spencer personally breaching the HSEA could not be laid because they were time barred). A jury found Mr Spencer guilty of manslaughter, but his conviction was later quashed by the Court of Appeal because of inadequacies in the Judge's summing up of the case to the jury. Essentially, the Judge did not place enough emphasis on the "major departure" standard. The Court said the Judge should have reminded the jury that others had visited the site prior to the accident and had not identified the risk which was realised in the accident. This was relevant because it indicated Mr Spencer's failure to identify that risk may not have been so far removed from ordinary standards as to constitute a major departure.

Is manslaughter appropriate for workplace accidents?

In some circumstances, labelling the offence as manslaughter may be more appropriate than simply labelling it as a breach of a health and safety duty. A conviction under the HSEA does not directly state that the offender wrongfully caused the death of the victim. It is merely a finding that the offender should have done more to provide a safe working environment. Manslaughter on the other hand, squarely places blame for the death of the victim on the offender. This conveys the seriousness and culpability of the offender and may go some way to providing vindication to the victim's family. It properly apportions fault and gives a readily understood label to the degree of blame.

However, the current system is skewed in favour of larger companies, who can more readily avoid manslaughter charges. Blame must be attributable to an individual rather than a company for a manslaughter charge to succeed as New Zealand has no corporate manslaughter offence. This means systematic failures of a company's health and safety policies that result in the death of an employee are unlikely to result in a manslaughter prosecution, even when those failures are serious. What is needed is individual fault. Arguably, this puts smaller owner/operator businesses at more risk of manslaughter charges where fatal workplace accidents occur, than larger companies where blame can be spread across a number of employees.

The future - corporate manslaughter?

Currently there is no corporate manslaughter offence in New Zealand. Therefore, any prosecution of a company will be limited to an offence against the HSEA (or the Health and Safety at Work Act 2015 from 4 April 2016). However, the Crimes (Corporate Manslaughter) Amendment Bill proposes to introduce the crime of corporate manslaughter. The explanatory note to the Bill states that its purpose is to fill a gap in New Zealand law that was demonstrated by the Pike River Mine Tragedy.

In its current form, the Bill would create an offence for an organisation if the way in which any of its activities are managed or organised by its senior managers:

- Causes a person's death
- Amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

An organisation that is found guilty of this proposed corporate manslaughter offence would be liable on conviction for a fine of up to \$10 million, and a senior manager of that organisation could be liable on conviction for a sentence of imprisonment not exceeding 10 years.

Comparison of current and proposed charges

Charge: Manslaughter (Crimes Act)

- **Maximum penalty:** Life imprisonment
- **Time limit for prosecution to file charges:** Unlimited
- **Defendant:** Individual only

Charge: Corporate manslaughter (**proposed only- not in force**)

- **Maximum penalty:** 10 years imprisonment for a senior manager, or \$10 million fine for an organisation
- **Time limit for prosecution to file charges:** Unlimited
- **Defendant:** Senior manager or an organisation

Charge: Offences likely to cause serious harm (Health and Safety in Employment Act 1992)

- **Maximum penalty:** 2 years imprisonment and \$500,000 fine
- **Time limit for prosecution to file charges:** 6 months from the time of the incident or the time that the incident became known to an inspector
- **Defendant:** Individual or a body corporate

Charge: Reckless conduct in respect of a duty (Health and Safety at Work Act 2015)

- **Maximum penalty:** 2 years imprisonment and \$500,000 fine

- **Time limit for prosecution to file charges:** 6 months from the time of the incident or the time that the incident became known to an inspector
- **Defendant:** Individual or a body corporate

The above points show the prosecutions under new health and safety legislation will become easier for WorkSafe with the increase in time for it to lay charges from six months to at least 12 months. The new Act also introduces more severe penalties for breaches, with an increase of maximum sentence from 2 years to 5 years imprisonment for an individual, however, these penalties fall well short of the maximum penalty for manslaughter.

Currently, a workplace death will only be sufficiently serious to result in a manslaughter conviction when an identifiable individual has caused the death by way of an unlawful act or omission that amounted to a major departure from the standard of care expected of the person. If corporate manslaughter is introduced, it will plug the culpability gap between manslaughter and breaches of health and safety legislation. Such a charge could recognise and punish serious organisational failings without necessarily having to identify an individual who was largely to blame for the death.

This article was written by Shaun Brookes and Philippa Moran for the ISN Magazine (November/December 2015).

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