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EURO-AMERICAN LAWYERS GROUP

THE SCOTTISH LEGACY OF TRANSCO?

AN EURO-AMERICAN LAWYERS GROUP BRIEFING ARTICLE

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Transco Plc made Scottish Legal history in 2002 by being the first company to be prosecuted for the common law crime of culpable homicide in Scotland. The charge was thrown out after the Scottish Appeal Court hearing in June 2003. Transco will always be associated in the UK with the £15 million fine imposed in August 2005 for the fatal Larkhall explosion. But what will the true legacy be?

After a serious incident such as Hatfield or Larkhall, there is a public perception, whether spurred on by the media or not, of a need “for blood”. There is a demand for individuals such as a company director or chief executive, rather than an overworked manager, to be held personally responsible and accountable for the death of loved ones.

At present, it is felt that the Health & Safety at Work Act 1974 (HSWA) with its maze of Regulations do not provide sufficient statutory authority for an appropriate prosecution of the alleged responsible offender where such fatal incidents occur. Is there a need for further legislation or are there adequate legislative tools there already? Is it really practicable or realistic to find an individual such as a company director or chief executive personally responsible and/or accountable?

Background

The Transco prosecution arose out of a massive explosion in December 1999. Four members of a family at a house in Larkhall were tragically killed and considerable damage was caused to neighbouring properties.

After the matter was fully investigated by the Health & Safety Executive, Transco was subsequently charged with firstly, culpable homicide and secondly numerous health and safety breaches over a 13 year period between 1986 and 1999, under Section 3 of the HSWA.

The investigations revealed that Transco had since at least 1986, been responsible for the transmission and distribution of gas to the public in the Larkhall area.



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The Charges against Transco

The Health and Safety charges claimed that Transco had failed to ensure public safety by exposing the public to risk or danger of injury. The main charges related to the failure “to devise, institute, implement, and maintain any adequate or effective safety policy, or strategy, for the use, maintenance, inspection, repair or replacement of ductile iron pipes “etc.

Transco had apparently encountered ductile iron pipe failings on seven prior occasions. These stretched as far back as 1986 in Whitworth in England until as recently as 1998 in Runcorn. In the knowledge that Transco was aware of these pipe failings and the risk of gas escape, the Crown sought to prove that Transco had failed to devise an appropriate strategy or policy to address the problem.

Following a 6-month trial, a jury found Transco guilty of all of the alleged health & safety breaches. The Judge indicated that he had difficulty concluding from the evidence which managers were most to blame for what happened or were responsible for the health and safety of the Larkhall gas mains. Transco attempted to blame the explosion on a leak from within the house despite overwhelming evidence to the contrary. That argument was severely criticised by the judge. This defence, in his view, served to demonstrate that “the corporate mindset of Transco had shown little or no remorse” for the tragedy.

As a consequence of the guilty verdict, Transco was fined £15 million. The highest fine ever imposed in the UK for a health & safety breach.

What lessons can be learned from this tragic incident?

Currently, it is impossible under the common law of Scotland to prove a charge of culpable homicide without naming an individual who could be said to be the “directing mind” of the accused company. A company cannot be judged to have the state of mind of a human being to commit a crime.

Previously, the Criminal Court of Appeal in Scotland had held:-

1) that a company could not be held to have the mind of its agents.2) that it was wrong to attribute the state of mind of another, who had been in a similar position earlier, to one individual who was at a particular point in time regarded as the directing or controlling mind and will of the company. Companies, and public utilities in particular, need to have greater regard not only for their employees but also members of the public who may be affected by their acts or omissions during the exercise of their operations.



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In future, the “directing mind“ of companies, and public utilities, will have to ensure: -

- 1) that they have appropriate maintenance, repair, and record keeping procedures in place,
- 2) that there is a proper system of collating, analysing, and taking action where there are reported faults, (especially if repeated),
- 3) that there is effective monitoring of the replacement or repair of faults and that adequate records are kept,
- 4) that such procedures require to be reviewed,
- 5) that there are proper, adequate, and effective auditing procedures in place to monitor any strategy,
- 6) that lack of action could be regarded as a clear failure to have regard for public safety.

What now?

In England, a draft Corporate Manslaughter Bill has been published by the Government. It applies to England and Wales only. The Bill highlights certain checks as to whether or not the activities of the “senior managers” caused a fatality through a “gross breach” of a duty of care.

“Senior manager” is defined as someone who plays a significant role either in the decision making of how a company’s activities are managed or in the actual management of those activities.

On one view, the English Bill lacks teeth. There is no intention to prosecute directors, officers, or managers personally for corporate manslaughter or to introduce imprisonment.

In Scotland, the Justice Minister has set up an expert panel to consider a new law of corporate culpable homicide but it is not expected to report until sometime in 2006. Meanwhile the debate goes on. The Scottish Executive is still considering the position. Some Scottish politicians want the facility to prosecute senior managers where there has been negligence.

Arguably, the existing provisions of the HSWA are sufficient, if properly enforced. In addition, section 37 of HSWA already provides the Crown with the necessary powers to take action against individual directors, managers, and officers where a failure can be attributed to their neglect, consent, or connivance. Employees can be prosecuted under section 7 of HSWA if they have not taken reasonable care for the health and safety of themselves or other persons. The only



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difference at the moment is that there is no specific statutory charge of corporate manslaughter in Scotland or England.

While there may be no real need for reform, the legacy of Transco may make reform inevitable.

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