

The logo for Weightmans, featuring the name in white text on a dark teal, wavy rectangular background.

Weightmans

Corporate Manslaughter and Incident Response MIDLAND TREE ASSOCIATION SEMINAR

9 December 2009

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Coming Up

- About me and you
- Incident response/ adverse event management
- Trees and changes in the law
- Corporate Manslaughter
- The problem with trees

Me and trees

- 1993 – Birmingham and TPOs
- 1995 – Aston expressway and TPO prosecution
- 1999– Kings Heath fatality
- 2005–2008: 3 tree fatalities, inquests, investigations
- 2007– SIM consultation, AA conference and Birmingham

Case Study

- Ash on bank adjacent to the highway
- Fungus? Fruiting bodies?
- Decayed roots
- Fails in dark, high winds
- Inaccessible and undetectable from ground level
- Holly bush obscures the decayed roots
- Inspection regime up to date and recorded
- No knowledge of defect

What happens next?



Immediate incident response

- What normally happens?
- Work related Deaths protocol /ACPO
- Powers of police and HSE/local authority
- Powers of arrest
- Privilege

Issues to consider

- Advice before interview
- Conflicts of Interest and funding
- Gathering evidence
- The police investigation
- Mechanical Inspection
- The inquest

The learning curve

- Preservation of evidence
- Securing the scene
- Dealing with staff
- The media turn up
- Evidence to the regulators

Crisis Management Plan

- Ostensible authority
- Enforcement Notices and business interruption
- Witnesses to the incident
- Interviews statements and the know all
- Internal investigation

WITNESS STATEMENT

(Criminal Justice Act 1967, s.9; Magistrates' Court Act 1980 ss.5A(3)(a) and 5B; Criminal Procedure Rules 2005, Rule 27.1)

Statement of: Dr XXXXX

Age: "over 18"

Occupation of witness: **POLICE DOCTOR**

Dated: 9 December 2009

This statement, consisting of () pages each signed by me, is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated in it anything which I know to be false or do not believe to be true.

Signed:

Dated the day of 2009

1. I attended on Mr SMITH, the tree inspector of the Council.
2. His speech was slurred and he seemed distant and unsteady on his feet.
3. He looked pale and visibly shaken by what he had seen.
4. He said he was extremely distressed to have helped recover the body.
5. I deemed that he was fit to be arrested and interviewed under caution.

The internal investigation

- The weather
- Direction of fall
- Inspection regime (actual and documented)
- The target zoning and foreseeable risks
- The use of experts

Practical suggestions

- Understand reasonable practicability
- Prioritise and target your key risk areas
- Document every decision
- “Retained / heritage trees” and the SIM guidance
- Remedial work **and** Risk Aversion

Liability for Individuals

- Gross Negligence Manslaughter
- s7 Health and Safety at Work Act 1974
- s37 Health and Safety at Work Act 1974
- NB – no personal liability under Corporate Manslaughter and Corporate Homicide Act 2007

Liability for Individuals

- r14 Management of Health and Safety at Work Regulations 1974
- s36 Health and Safety at Work Act 1974
- OC 130/8
- NB – reverse burden of proof and her Majesty's pleasure?

Worst case scenario?

Consent Connivance Neglect

Act or default

Endangering safety

Failing to do as you are told or act safely

Health and Safety Law

- Where Are We Now?
 - Health and Safety (Offences) Act 2008
 - Increased Penalties in the Magistrates Court
 - Organisations: Regulatory Offences – maximum sentence now £20 000
 - Individuals: Health and Safety at Work Act offences – punishable by imprisonment

Liability for Organisations

- Corporate Manslaughter and Corporate Homicide Act 2007
- s2 and s3 Health and Safety at Work Act 1974
- Associated Regulations – Managements of Health and Safety at Work Regulations 1999, Working at Height Regulations 2005, Control of Asbestos Regulations 2006

Risks and recent developments

- Sensible risk management and EMM
- R2 P2
- Reasonably practicable
- HTML
- Porter
- Chargot
- EGS Limited

Health and Safety Law

Where Are We Now?

- R v Cotswold Geotechnical Holdings Limited
 - Death of employee, Alexander Wright, on 5 September 2008
 - Company faces allegations of Corporate Manslaughter and offence contrary to s2 Health and Safety at Work Act 1974
 - Director also being prosecuted for Gross Negligence Manslaughter and offence contrary to s37 Health and Safety at Work Act 1974

Health and Safety Law

- Where are We Now?
 - Facts:
 - Small Gloucestershire company – annual turnover £330 000
 - Employee died when sides of a pit that had been excavated as part of a site survey collapsed
 - In court – February 2010

Corporate Manslaughter

- Current law and the change in liability
- Timescale
- Individual liability unchanged
- Causation
- What difference will it make?

Corporate manslaughter of old

Corporate Liability for manslaughter

- Individual grossly negligent
- Individual so senior as to be identified as the mind of the company
- Limitations of previous law in relation of corporate bodies

Corporate Manslaughter and Corporate Homicide Act 2007

s1 (1):

“An organisation...is guilty of an offence if the way in which its activities are managed or organised—
(a) causes a person’s death, and
(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased”

s1 (3)

“An organisation is guilty of an offence...only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach...”

Ingredients of Corporate Manslaughter

- Managed or organised
- By its senior management
- Substantial element
- Spot the loopholes?

Gross Breach

- Conduct far below standards reasonably expected [SIM?]
- Risk gap analysis
- Health and Safety Culture and directors' responsibilities
- The position of individuals

at Interview

Suspects for gross negligence manslaughter

Conflicts of interest

Key Terms and Their Meanings

- “Relevant duty of care”
 - Duty owed under the law of negligence:
 - To employees
 - As occupier of premises
 - As supplier of goods and services
 - When constructing or maintaining buildings, infrastructure or vehicles or when using plant or vehicles

Senior management defined

S1(4) An organisation is guilty of an offence only if the way in which its activities are managed or organised by its senior management is a *substantial element* in the breach referred to in subsection (1)

- ie The persons who play *significant roles* in
- The making of 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

Key Terms and Their Meanings

- “Senior Management” within your authority:
 - Organisation Structure
 - Who has Responsibility?
 - How is responsibility delegated?
 - Monitoring / review
 - Cotswold Geotechnical Holdings Ltd?

Consequences – Criminal Prosecutions

- Sentencing Guidelines Council
 - Magistrates' / Crown Courts
 - Remedial Orders
 - Publicity orders
 - Fines / imprisonment / disqualification?
 - Penalties against public bodies

Corporate risks

- Corporate Manslaughter
- Duties to protect safety
- Publicity and reputation risk
- The inquest and Rule 43
- The public enquiry

Consequences – Criminal Prosecutions

- Sentencing Guidelines Council
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Heads Up

- Sentencing Guidelines Review (Offences Act)
- Directors Disqualification
- Stockwell shooting
- IOD and ACPO documents

Section 1(1)

- An organisation is guilty of an offence if the way in which its 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

Likely effect of new provisions

- More prosecutions
- Higher fines
- More individuals investigated
- More individuals convicted

But its not all bad news

- Remedial Orders: S9
- Financial penalties/interrelation with HSWA 1974.
Principles *R v Howe & Sons (Engineering) Ltd (1999) 2 AER 249*
- Doncaster MBC £400,000
- Southampton NHS Trust £60,000
- Essex CC £200,000
- Paddington disaster £2M (2004)
- Transco £15M
- Barrow £125,000

Need to act/react at early stage

- Early identification of injuries
- Notification
- Escalation
- Attendance at scene / police station
- Systemic failings/ Underlying causes
- Issues as to appropriate steps to take in defending any action

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Questions and lucky winner.....



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