

# New manslaughter law raises risk of reputational damage

**Publicity orders have been overlooked, but will play important role**

**Stephen Askins and Robin Acworth**

SAFETY standards in the marine and energy sectors have steadily improved over recent years. However, fatal accidents remain a risk; and the consequences for companies of a blameworthy death are about to become much more serious.

Under the UK's new Corporate Manslaughter and Corporate Homicide Act 2007 (CMCH), the potential penalties facing a company will go far beyond a fine.

Judges in the UK will soon be given the power to inflict deliberate reputational damage. Under the legislation deaths on UK registered ships and on all ships in UK territorial waters will come under scrutiny. Upon conviction the court has the power to issue publicity orders.

These orders have been widely over-

looked, but are an important and innovative feature of CMCH. On conviction, the judge can require the guilty company to publicise the details of the offence, the conviction and any remedial action ordered.

There are no formal guidelines at this stage but in the consultation on sentencing it was proposed that a publicity order should be imposed on every organisation convicted of corporate manslaughter.

The judge will decide how this publicity is to be given but, for example, a ferry or oil company could be ordered to display these details in advertisements or on the front page of its website.

This is potentially a substantial additional reputational risk although the real effect of this on a shipping owning company, particularly one based outside the UK, is unclear.

The judge, though, will be looking to maximise reputational damage by making the order as effective as possible.

With ever-increasing levels of media attention and scrutiny following fatal accidents in the UK, organisations increasingly need to review their safety standards

in order to maintain a positive reputation. The risk of a conviction for corporate manslaughter, and the likelihood of subsequent reputational damage, exists wherever the way a company's activities are managed or organised could cause a fatal accident.

The regime embraces all companies operating in or in connection with the shipping, shipbuilding, energy and offshore industries.

All companies operating in these sectors should review their operations to ensure that their management structures and internal cultures sufficiently promote a sound safety culture.

While the CMCH came into force in 2008, its provisions on publicity orders will only come into force after publication of sentencing guidelines, expected in the summer of 2009. CMCH created the statutory offence of corporate manslaughter.

The offence may be committed by an organisation (such as a company) if the way its activities are managed or organised causes a person's death and amounts to a gross breach of the relevant duty of care owed to the victim by the organisa-

tion. An organisation is likely to owe a duty of care to any individual whom it might injure. Although the failings of the senior management of the organisation must be a substantial element of the breach for criminal liability to be established, CMCH has removed the previous need to identify a "directing mind" of the organisation whose actions caused the death.

CMCH does not impose personal liability on the individuals within an organisation but individuals may still be convicted of gross negligence manslaughter or offences under health and safety legislation. Company directors may face disqualification under the Companies Act 2006.

CMCH does not only apply if the harm resulting in death is sustained in the UK. It will also apply where the harm is sustained on a ship registered in the UK or within UK territorial waters, or on (or within 500 m of) an energy installation in UK territorial waters or on the UK continental shelf.

Safety experts consider that an important element in improving safety is a culture favouring the open reporting of inci-

dents. An increased general threat of prosecutions could damage safety cultures.

We hope that the Director of Public Prosecutions, who has to authorise any prosecution, will take that into account when considering whether it is in the public interest to allow any particular prosecution.

However, it is to be expected that the DPP will, in many cases, be subject to media and political pressure to prosecute.

If an organisation is convicted of corporate manslaughter, it will face a combination of an unlimited fine, a remedial order and notably a publicity order.

Subject to the sentencing guidelines, a typical fine is likely to fall between 2.5% and 10% of average annual turnover over the previous three years. However, the fine could be increased beyond this by aggravating factors or previous convictions.

Remedial orders have been in use for some time under health and safety legislation and require the organisation to take specified steps to improve its performance.

Stephen Askins and Robin Acworth are with Ince & Co.

## MAIB issues fresh advice in wake of grounding

SEAFARER fatigue has once again been highlighted in a Marine Accident Investigation Branch flyer to the fishing industry on the grounding of the *Niamh Aine* last month, writes Sandra Speares.

The fishing vessel ran aground after the master fell asleep in the wheelhouse. The crew were successfully rescued from the vessel, which was declared a constructive total loss.

However, the MAIB's flyer said that "in different circumstances this accident could have resulted in not just the vessel being lost".

The flyer advised owners to consider the appropriate manning levels required for each voyage based on the hours the crew would have to work, and to introduce measures to ensure that each crew member was properly rested to avoid accidents. Owners should also ensure the bridge watch alarm is sited so that the watchkeeper is not able to cancel the alarm while seated in the wheelhouse chair.

The advice follows a commitment from Secretary of State for Transport Geoff Hoon last month that the UK would take a stronger line on seafarer fatigue. The minister was responding to recommendations made by the MAIB in its report on the grounding of the *Antari*.

Recommendations to the Department for Transport and the Maritime and Coastguard Agency following that grounding include pressing for an urgent review of the process and principles of safe manning at the Interna-



The *Niamh Aine* after running aground: the fishing vessel's master fell asleep in the wheelhouse

Irish Coast Guard

tional Maritime Organization "to reflect the critical safety issues of fatigue and the use of dedicated look-outs".

The MAIB, which issued its business plan for the coming year earlier this month, has a number of objec-

tives. These include developing new regulations following the introduction of an EU directive to be applied to marine accident investigation, developing a new database to replace the existing Marine Incident Database System, and improving the data analysis

capabilities of the MAIB.

It also plans to assist Red Ensign Group members "to develop the means to comply with the IMO, and where appropriate, EU requirements for the provision of a marine accident investigation branch function".

## Indian ruling challenges foreign arbitration

A RECENT judgment in the Indian Supreme Court could have a significant bearing on any international commercial arbitration with an Indian dimension, according to Sarosh Zaiwalla, senior partner at Saiwalla & Co, writes Sandra Speares.

In the April edition of the Arbitrator, Mr Zaiwalla explains that the ruling in the case of *Venture Global Engineering v Satyam Computer Services* found that an award debtor can bring an independent action in India to set aside a foreign arbitral award on Indian public policy grounds when the successful party seeks enforcement under the New York Convention against that award in his home state.

Mr Zaiwalla writes: "Looking at this judgment, in one sense it does open the door for challenges to an international arbitration award rendered outside India before Indian courts under the Arbitration and Conciliation Act, 1996, section 34, which, it was believed, did not apply to New York Convention awards." However, the judgment has arisen out of unusual facts in the case "where there were questions of illegality under Indian law involved in the performance of the award in India by the unsuccessful party".

He notes it was the non-Indian party to the arbitration that was allowed to challenge a London Court of International Arbitration award in India after the successful Indian party had chosen to enforce the award in the US.

Mr Zaiwalla says that in reaching its decision, the Indian Supreme Court "made clear that its decision is confined to the case where an International Commercial Arbitration Tribunal has made an award which requires performance in India, but such performance is based on disregard of Indian law or breach of Indian law, then the Indian Court will give leave to challenge the award under section 34 of the 1996 Arbitration Act".

He added the court also considered that Satyam had "consciously and deliberately sought to avoid the provisions of the Indian Arbitration Act 1996 as well as the Indian Companies Act 1956 and Foreign Exchange Management Act 1999 by seeking to use the contempt jurisdiction of the US courts".

Central to the judgment was the court's interpretation of a clause in the agreement between the parties that provided that "notwithstanding anything to the contrary in this agreement, the shareholders shall at all times act in accordance with the Companies Act and other applicable Acts/rules being in force in India at any time".

## Brazil legislation aims to spur investment in gas

BRAZIL has finally enacted gas legislation aimed at attracting investment competition in the natural gas sector. The law firm CMS Cameron McKenna says the impact of the new law has already been felt, with the announcement that a private group was investing \$1.25bn to build a liquefied natural gas regasification plant, writes Sandra Speares.

The law firm said that the oil and natural gas industries in Brazil developed under the framework of the Petroleum Law 1997, which provided for hydrocar-

bon exploration and production concessions. Companies were supervised by the Brazilian National Agency of Petroleum.

"Under this regime, gas transportation was subject to the authorisation of the ANP and was often perceived as an anti-competitive system where little information on prices and capacity was made public," CMS Cameron McKenna said in its Law Now newsletter.

In addition, the natural gas chain in Brazil was highly concentrated, with Petrobras controlling the wholesale mar-

ket and gas transportation pipelines and the legal monopoly in the hands of local distribution companies, which prevented consumers from having direct access to the wholesale market, the law firm said.

The new gas law did not change the current upstream regime or LDC monopoly rights, but it did create incentives to attract new investors. It introduced a new concession regime for the domestic transportation of natural gas. Cross-border pipelines still came under the ANP's authorisation.

Both the government and private entities would be able to put forward proposals to build or expand pipelines using public/private partnerships.

CMS Cameron McKenna said that the new legislation aimed to encourage competition in the downstream sector by allowing companies to apply to the Minister of Mines and Energy to import, export, store and process natural gas.

It also gave consumers the right to build a supply pipeline in the event of the LDC being unable to do so.

## China revises its anti-monopoly regulations

CHINA'S Ministry of Commerce has issued further revisions to its anti-monopoly regulations following the latest round of public comment.

According to the US law firm Hogan & Hartson, five draft interim measures are covered. They address pre-concentration notifications; the ministry's draft pre-con-

centration review; evidence collections on concentrations under the notification thresholds; investigation of disposition of proposed transactions which are suspected of competitive harm; and those that meet the notification thresholds but for which parties are suspected of having failed to fulfil the notification require-

ments.

Hogan & Hartson said that "certain substantive rules in the new drafts are stated more clearly, such as the consequences of a failure to file a notification properly."

"In addition, procedural rules have been added to some measures, including rules regarding who may initiate hearings,

how business operators may express and defend their views to Mofcom, and the procedures enforcement officials must follow in investigating a business entity's failure to notify."

The draft measures clarify some definitions that were previously unclear, including the definition of the word 'control'.

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