February 5, 2016

Manslaughter in the Workplace.pdf

Neil J Foster

Manslaughter in the Workplace

The recent decision of the NSW Court of Appeal in *R v Moore* [2015] NSWCCA 216 (15 Dec 2015) contains some important guidance on the possibility of a charge of manslaughter being successful in relation to a death in the workplace. Unfortunately, there are still some uncertainties, some of them created by the slightly unusual set of facts in this case. But the case overall is an important reminder that carelessness or breach of statute causing death at work may be charged in a serious case as manslaughter, and not only under specific workplace safety legislation.

Facts

The incident that led to the proceedings occurred on 16 June 2003. The deceased worker, Mr David Hands, was a bricklayer working at the time for the firm KLA Bricklaying Pty Ltd ("KLA"). The sole director and only permanent employee of KLA was Mr Wayne Moore, the accused. In the course of constructing an internal wall inside a residential development, Mr Hands was walking near the wall when it collapsed and fell on him, killing him. The evidence showed that the wall had been constructed a few days beforehand, but had not been braced or attached to any other part of the building.

Other evidence proposed to be led by the Crown (for reasons noted below, this evidence has not been tested at trial yet) included an alleged statement by a site foreman, a Mr Didio, that he had observed the lack of bracing and suggested to the accused that the wall be supported, a suggestion that was rejected by Mr Moore- see Bathurst CJ at [30].

The Course of Proceedings

The proceedings came about in an unusual way. It will be noted that this decision comes some 12 ½ years after the event in question. In fact the foreman, Mr Didio, was first charged with manslaughter, on 8 Dec 2005, only to later be discharged at committal on 1 Sept 2006 (per Simpson JA at [165].) In the meantime Mr Moore had flown to the UK (he is a UK citizen and there seems to be no suggestion in evidence that he did so to evade these proceedings.) While a warrant for his arrest was issued fairly quickly, he was not located in the UK until 2009, and a formal request for extradition not made until 2012. He voluntarily returned to Australia, and after some other preliminary proceedings the current trial commenced in the District Court on 4 Aug 2014.

However, it became clear that the Crown's initial pleadings needed correction. In support of a duty of care required for a charge of manslaughter, the Crown had alleged that this duty was owed because Mr Moore was Mr Hands' "employer". On the facts as noted above this was clearly wrong; Mr Hands was employed by the company KLA, not personally by Mr Moore. (A feature of company law, of course, is that the company has its own "legal personality", and itself enters into contracts and may be legally liable for wrongs.) In the course of a debate on reformulation of charges the trial judge took the view that the Crown did not have an arguable case, even with this change of details, and hence ordered on 8 Sep 2014 that the proceedings be

permanently stayed. These proceedings represent the Crown's appeal against the order for a permanent stay.

Legal Issues

The Court of Criminal Appeal needed to deal with a number of legal issues:

1. Should the trial judge have permanently stayed proceedings, as matters stood at the time?
2. Given that a charge of so-called "involuntary manslaughter" required a finding that the accused owed the deceased a duty of some sort, on what could the duty be based?
    a. A statutory provision such as s 20 of the *Occupational Health and Safety Act* 2000 (NSW), then in force?
    b. A general duty as to safety of workers owed by a company officer of a company that employed workers?
    c. Some other general duty existing under the law of negligence, simply applying the established principles under *Donoghue v Stevenson* [1932] AC 562?
3. If a duty of some sort might be found, then should the matter be remitted to the lower court for further proceedings? Or should the charges be dismissed for some other reason?

1. Should the stay of proceedings have been ordered?

The CCA had to consider the general principles under which a trial judge can order a stay of criminal proceedings that have already been commenced. Since the purpose of this note is to focus on the substantive criminal issues around WHS proceedings, I won't spend much time on this. Briefly, Bathurst CJ suggested that in fact the judge ought not to have made the order he did. His Honour summarised the circumstances in which a judge can stay criminal proceedings before evidence has been led as, according to past authority, being restricted to those rare cases which are "foredoomed to fail"- see eg [15]. In this case, where the judge himself had conceded that some of the considerations put forward by the Crown created a "arguable case", the case clearly ought to have been allowed to proceed to trial- see [25].

The other members of the Court did not discuss this question in detail. Simpson JA seems to have framed the test such that if "the prosecution could not succeed", a stay was appropriate- see [139]. This test may not be intended to be different from "foredoomed to fail". Her Honour also agreed, for reasons noted below, that a duty was arguable, and hence that the decision to issue a stay was erroneous. So also did Bellew JA- see eg [259]. However, as will be noted below, Simpson JA took a different view to the other members of the court as to the ultimate outcome of the appeal.

2. The law of "involuntary manslaughter" and its application here

I have previously discussed the law of manslaughter in its application to workplace accidents in some detail in an earlier article.[1] To sum up, quoting from the previous article:

[1] Neil J Foster, "Manslaughter by Managers: The Personal Liability of Company Officers for Death Flowing from Company Workplace Safety Breach" (2006) 9 *Flinders Journal of Law Reform* 79-111.

> 'Involuntary' manslaughter… is behaviour that causes death but which does not have quite the same seriousness as murder. After a period of doubt it seems settled now that under Australian law there are two varieties of 'involuntary manslaughter': 'negligent' manslaughter, and 'unlawful and dangerous act' manslaughter.[2]

In the most recent consideration of involuntary manslaughter by the High Court, *Burns v The Queen* [2012] HCA 35, French CJ at [7] described the second of the two varieties of manslaughter noted above as "manslaughter by an unlawful and dangerous act carrying with it an appreciable risk of serious injury".

Interestingly, despite the fact that a statutory obligation was discussed in the case, s 20 of the *Occupational Health and Safety Act* 2000, this second option of "unlawful and dangerous act" manslaughter does not seem to have been considered in these proceedings.[3] The relevance of the provision, however, as will be noted below, was seen in the possibility that it may have created a "duty". At para [22] in *Burns,* French CJ commented that:

> A frequently cited taxonomy of the duties of care that may support a charge of involuntary manslaughter was set out by Yeldham J in *R v Taktak*[4]. According to that taxonomy, which should not be regarded as exhaustive, criminal liability may arise for breach of a duty of care owed to another where[5]:
>
> - A statute imposes the duty.
> - The duty arises from a certain status relationship.
> - The duty arises from a contract.
> - The duty arises from the voluntary assumption of the care of another, so secluding a helpless person as to prevent others from rendering aid.

In "negligent" manslaughter, then, a statute may be relied on for creation of a duty, as well as the more common case where a common law duty of care arising from the law of negligence may be relied upon.

In *Moore*, the law on the issue of "negligent" manslaughter was summarised as follows by Bathurst CJ:

> [64] It was common ground between the parties that the requisite elements of the offence in question were set out correctly by the Full Court of the Supreme Court of Victoria in *Nydam v R* [1977] VR 430. In a passage approved by the High Court in *Wilson v The Queen* [1992] HCA 31; 174 CLR 313 at 333; *The Queen v Lavender* [2005] HCA 37; 222 CLR 67 at [17]; *King v The Queen* [2012] HCA 24; 245 CLR 588 at [29] and *Burns {v The Queen* [2012] HCA 35; 246 CLR 334} at [19], the Court in *Nydam* made the following remarks (at 445):

---

[2] Foster, above n 1, at 81, citing *Wilson v The Queen* (1992) 174 CLR 313, *Nydam v The Queen* (*'Nydam'*) [1977] VR 430, and *R v Lavender* [2005] HCA 37.

[3] See Bathurst CJ at [11]: "It was common ground between the parties that for liability for manslaughter of this nature to arise, the accused had to owe a duty to the deceased, which was breached in a gross fashion, meriting criminal punishment." This seems to imply that the prosecution were not seeking to rely on "unlawful and dangerous act" manslaughter, but on the "gross negligence" version. It is suggested in the conclusion of this paper, below, that the decision not to rely on "unlawful and dangerous act" manslaughter may have been a mistake.

[4] (1988) 14 NSWLR 226.

[5] (1988) 14 NSWLR 226 at 243-244 per Yeldham J, citing *Jones v United States of America* 308 F 2d 307 (1962).

> "In order to establish manslaughter by criminal negligence, it is sufficient if the prosecution shows that the act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment."

[65] Although this passage refers to a negligent act, it was not disputed that the offence could arise from an omission. However, as French CJ pointed out in *Burns* at [21], "issues of duty of care and criminally negligent breach of duty arise most acutely in cases of involuntary manslaughter by omission". In that context, both the plurality and Heydon J stated that "courts must be circumspect in identifying categories of relations that give rise to a previously unrecognised legal obligation to act": *Burns* at [107], [128].

(a) A common law duty of care

The main issue that was addressed by the Court was whether Mr Moore himself (as distinct from the company KLA) could be said to have owed a "duty" to behave carefully in relation to the deceased worker's safety. The trial judge had correctly noted that the High Court in *Andar Transport Pty Ltd v Brambles Ltd* [2004] HCA 28; 217 CLR 424 had held that a director of a company does not, by virtue of that status alone, owe a duty of care in the law of negligence to a worker of the company. Bathurst CJ agreed, noting at [68] that:

> that the mere fact that a person is a director of a corporation does not found a duty to provide a safe system of work for the corporation's employees.

However, as his Honour went on to say, there are *other* factors that may create a duty of care between two persons who are working together, especially where one controls the work of the other, and the fact that one is a director of the company does not of itself "immunise" them from civil liability.

> [75] However, it does not seem to me that the effect of *Andar* is to preclude the imposition of a duty on an employee who is also a director to take reasonable steps to prevent harm being occasioned to fellow employees, regardless of the circumstances in which the duty is said to arise. *Andar* was dealing with the non-delegable duty of an employer to provide a safe system of work, not **generally with circumstances in which an employee (whether or not a director of the employer) can owe a duty to his or her fellow employees**. As discussed below at par [114], in the particular circumstances of the present case, the respondent's control over the site may be a factor that would support the imposition of a duty of care. (emphasis added)

In another article, I have previously explored the personal civil liability of directors for harm to employees, and also concluded that there are circumstances where such liability may arise, and where a duty of care may be owed.[6] That article refers to a number of the overseas cases mentioned in the *Moore* decision.[7] It concludes that there are circumstances where an

[6] Neil J Foster, "Personal civil liability of company officers for company workplace torts" (2008) 16 *Torts Law Journal* 29-68.

[7] See, for example, *Berger v Willowdale AMC* (1983) 145 DLR (3d) 247, discussed at para [36] of *Moore* and at pp 49-50 of the 2008 article; *Yuille v B&B Fisheries (Leigh) Ltd* (1958) 2 Lloyd's Rep 596 discussed at para [53] of *Moore* and pp 48-49 of the 2008 article. At para [56] of *Moore* the respondent distinguished *Yuille* by referring to later comments by Willmer LJ in *The Anonity* (1961) 2 Lloyd's Rep 203 (also reported as *F T Everard & Sons, Ltd v London and Thames Haven Oil Sharves, Ltd* [1961] EWCA Civ J0710-1), saying that the earlier decision in *Yuille* "depended on its own particular facts". While the phrase "particular facts" was used by Willmer LJ in the later decision (at p 17 of the EWCA transcript), his Lordship was not addressing directly the issue of personal liability of a

Australian court could find that a company director owes a personal duty of care in relation to the safety of a company employee, especially where the director exercises a high degree of actual control over the work being done.[8] In *Moore* Bathurst CJ went on to find that arguably a duty of care would exist here, based on the foreseeability of harm, the vulnerability of the deceased to a lack of care by Mr Moore in providing support for the wall, an assumption of responsibility undertaken by Mr Moore in signing off on a safety plan for the worksite, and in the control over the workplace.[9] Other factors, noted in previous decisions as the "salient features" of cases where a duty of care could be found,[10] included the relative ease of taking appropriate precautions and the lack of any issue of "indeterminacy" of liability.[11]

The other members of the Court agreed that a duty of care may well have been possible. Simpson JA commented:

> [193] It has long been recognised, in the civil law, that one employee might be liable to another for injury resulting from a casual act of negligence, as distinct from injury resulting from an unsafe system of work, as to which the employer has a non-delegable duty. Liability for casual acts of negligence is consistent with what I have called the foundational case, *Donoghue v Stevenson*…The clear implication is that the employee responsible for the injury does have that liability, arising out of a duty of care in accordance with "the neighbour principle" stated in *Donoghue v Stevenson*.
>
> [194] This is to say no more than **that the mere fact that KLA, as employer, owed a duty of care to Mr Hands to provide a safe system of work did not have the corollary that the respondent could not also owe Mr Hands a duty of care**. Whether he did, and if so, what it entailed, will hinge upon the factual circumstances, not all of which were known at the time of the decision, and which were to be the subject of determination by a jury. (emphasis added)[12]

Bellew J agreed at [258]-[260] that such a duty was possible.

Since these were arguably issues that might be established at trial, it was clear that an argument that such a duty of care existed for the purposes of a charge of "gross negligence manslaughter" was not "foredoomed to fail", and the trial ought to have been allowed to proceed on this charge- see [122].

(b) A duty based on statute?

As noted above, the Court of Criminal Appeal in *Moore* did not say that they were considering the traditional "second limb" of involuntary manslaughter, "unlawful and dangerous act" manslaughter. However, in the context of considering "criminal negligence" manslaughter, the Court considered, as well as the common duty of care under the law of negligence, the possible application of a duty owed by Mr Moore to Mr Hands under s 20 of the *Occupational Health and Safety Act* 2000 (NSW) ("OHSA 2000").

---

director in that case; he was simply denying that it was necessary to find a director personally liable in order to make a quite different finding that the director behaved with "no fault" for the purposes of a provision in s 1 of the *Merchant Shipping Act* 1900. The later case casts no doubt at all on the binding effect of the earlier decision in *Yuille*.

[8] See Foster (2008), above n 6, at 46, contrasting the decision in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540.

[9] *Moore*, at [108]-[114].

[10] See the oft-cited decision of Allsop P in *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258, (2009) 75 NSWLR 649 at [102] ff.

[11] *Moore,* at [115].

[12] See also Simpson JA at [239]-[241], in support of a common law duty of care which ought to have been explored at trial.

The OHSA 2000 has now been repealed and replaced by the *Work Health and Safety Act* 2011 (NSW) ("WHSA".) But at the time s 20 provided as follows:

20 Duties of employees

(1) An employee must, while at work, take reasonable care for the health and safety of people who are at the employee's place of work and who may be affected by the employee's acts or omissions at work.

(2) An employee must, while at work, co-operate with his or her employer or other person so far as is necessary to enable compliance with any requirement under this Act or the regulations that is imposed in the interests of health, safety and welfare on the employer or any other person.

Maximum penalty:

(a) in the case of a previous offender – 45 penalty units, or

(b) in any other case – 30 penalty units.

It was accepted that Mr Moore, as well as being the sole director of the firm KLA, was also an employee of the firm.[13] (This is not an uncommon circumstance, given the separate "legal personality" of a company.) Mr Hands, who had been temporarily engaged to do bricklaying, was of course "at the employee's place of work" and was clearly likely to be affected by Mr Moore's directions and omissions as his supervisor.

It seems hard to deny that s 20 created a duty in broad terms owed by Mr Moore to Mr Hands to "take reasonable care for [his] health and safety." Indeed, in her analysis Simpson JA at [217] takes this approach to the general duty, noting that there is no need to find that s 20 itself creates a manslaughter charge, simply that it creates a relevant duty. (However, her Honour added that the issue needed to go to the jury in order to determine whether this general provision meant that there was a specific "duty" to brace the wall.)

However, Bathurst CJ takes a different approach. To summarise, in effect his Honour sees the issue as one of legislative intention: could it be said that "the legislature intended to… subject an employee to potential liability for manslaughter" (at [89].) His conclusion, at para [94], was that the legislature "did not intend for a contravention of the duty in s 20 to give rise to a liability for manslaughter".

With respect, it seems that this approach may be questioned. The broad statements of the law of manslaughter quoted previously do not make the question of whether a relevant "duty" was breached hinge on Parliamentary intention. That would of course be a relevant question if it were claimed that s 20 gave rise to *civil* liability, in accordance with the law on "breach of statutory duty".[14] But, as his Honour notes at [91], the exclusion of civil liability from s 20 by the provisions of s 32 of the OHSA 2000 had no logical consequence for the question whether s 20 could be used to generate a "duty" element for a criminal charge of manslaughter.

[13] See, eg, Bathurst CJ at [1].

[14] For detailed analysis of this tort see Foster, "The Merits of the Civil Action for Breach of Statutory Duty" (2011) 33 *Sydney Law Review* 67-93; Foster & Apps "The neglected tort — Breach of statutory duty and workplace injuries under the Model Work Health and Safety Law" (2015) 28(1) *Australian Journal of Labour Law* 57-76.

Bellew J at [255] also supports the approach of examining Parliament's intention on this issue, in concurring with the Chief Justice. However, I remain convinced that on this point the judgment of Simpson JA seems more in accord with authority. The law of negligent manslaughter has its own logic, developed through a long course of common law decisions. The passage on the matter quoted by the Chief Justice from Gillies at para [76] notes simply that: "The spectrum of legally recognised duties grounding liability for an omission is an open-ended one, given that such duties can arise from statute as well as the common law". There is no separate requirement that Parliament, in creating the duty, should have addressed its mind to the question whether that duty might be "picked up" by the law of manslaughter.

That is not to say that all that needs to be shown is a breach of the statute. Passages quoted above show that there must be "such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment." The "criminal punishment" concerned, of course, must be the punishment attached to manslaughter. But there seems no *prima facie* reason why one employee might not commit an act which is so grossly careless (especially given that the statutory standard under s 20 is "reasonable care"), and with such a high risk of death or grievous bodily to another person present at the workplace, that manslaughter would be an appropriate finding.

In the circumstances of this case, it seems unlikely that any different result would follow depending on whether a negligent manslaughter charge were laid based on the common law duty of care, or that under s 20. The reason this is so, is that s 20 essentially replicates the common law. This was a deliberate decision by Parliament. Other duties owed under the OHSA 2000 by employers and those in charge of workplaces were framed as "absolute" obligations, not qualified in the statement of the offence by reasonable care. (There was, however, a defence of "reasonably practicable" which was available under s 28.) But the duty owed by an employee to other workplace participants was carefully not set so high, being framed so that the prosecution had to prove a lack of reasonable care as part of the offence.

However, it is still in my view unfortunate that the majority approach to the "statutory duty" limb of negligent manslaughter adopted by the Chief Justice and Bellew J is based on the question of statutory intention. In this respect the approach of Simpson JA is to be preferred as more consistent with the general common law of manslaughter.

3. The outcome of the proceedings

In my view, as noted above, the Court of Appeal in *Moore* were perfectly correct to say that a charge of negligent manslaughter, based on a possible common law duty of care owed by Mr Moore to Mr Hands, should on principle have been allowed to proceed to the jury. But the question of whether the trial should *now* be allowed to proceed is a different one.

I have noted above that the original incident took place in 2003. The Court of Appeal were all concerned that the lengthy passage of time between the events and the charge being heard may have created the possibility of injustice to the accused. However, the Chief Justice and Bellew J held that on

general principles, the question of whether to proceed with a prosecution was one for the DPP (manslaughter not being subject to a limitation period, as opposed to a direct charge under s 20 OHSA 2000, which was subject to a period of 2 years.) Doubts were expressed at [127] about the strength of the case (as Bathurst CJ says, while there was carelessness, arguably it was not at the extreme end of the scale, the deceased himself being a qualified bricklayer who apparently did not see the danger), and a query raised about whether a statement that was taken at the time could be used in the absence of a caution having been given, at [129].[15] There was also a reluctance to allow the prosecution to rely on a common law offence if that had been done simply to avoid the expiry of a statutory limitation period- see [130]. But the DPP were to make the final decision. On this point Simpson JA dissented, holding that matters had gone on for so long that it was no longer fair to the accused to allow a trial to proceed- see [249].

I am not of course privy to deliberations in the DPP. A worker died, and there were serious failures in what seem to be elementary safety precautions. But on balance, and given the strongly expressed doubts of even the majority of the Court here, I suspect that a re-trial will not be held.

However, the decision of the Court is still a very important one. Key features of the decision, noted above, which will have important long-term implications, include:

- The director of a company will not *automatically* owe a duty of care to see to the safety of all company employee, simply by virtue of their status as director.
- However, where a director has acted in a way going beyond mere formal "governance", to make decisions (or in some cases to fail to make decisions) that have a foreseeable impact on the safety of workers, and especially where a director is involved in a "hands on" way in directing work, they *may* owe such a duty.
- A common law duty of this sort may be used as the basis of a charge of "negligent manslaughter" where a worker has died, and where there has been a serious falling short of the standard of care that would be expected, justifying a criminal penalty.

There are some matters that are still in some doubt following from the decision, however, or at least issues where I think more could have been said.

- One area is in the formulation of a negligent manslaughter charged based on a duty derived from statute, as opposed to a common law duty. The majority here support an approach which requires the court to consider whether Parliament intended that the relevant statutory duty found a manslaughter charge; I have suggested that Simpson JA's approach, which is simply to examine whether the duty exists, and then apply this as part of the manslaughter analysis, is to be preferred.
- There is still some uncertainty as to why the prosecution chose not to rely on what I have called the "second" form of involuntary manslaughter, "unlawful and dangerous act carrying with it an appreciable risk of serious injury". Perhaps it may have been thought that s 20 was too "minor" a provision

[15] See OHSA 2000, s 65(2)(b).

> to rely on. But it is clear that a breach of s 20 could indeed be a "dangerous" act in appropriate circumstances, and the chance that a fully constructed wall might collapse on a passing worker seems both a risk of "serious injury" and to be "appreciable". Perhaps in the circumstances where such an incident had not happened before it may have been "foreseeable" but not as high as "appreciable". Still, it is to be hoped that this option for an alternative charge will not be forgotten in future cases where it may be appropriate.

Those in charge of workplaces must know that decisions that they take, or choose not to take, may have serious consequences for those who work for them and generate profits. Where those serious detrimental consequences include death, and there has been a seriously careless or illegal act leading up to it, they need to be aware that a charge of manslaughter is a real possibility. The decision in *Moore* makes that very clear.

Associate Professor Neil Foster
Newcastle Law School, NSW

5 Feb 2016