

# On the face of it...



## JULY 2010 NEWSLETTER

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## COMMON LAW MANSLAUGHTER CONVICTION

With all the recent hype surrounding The Corporate Manslaughter and Corporate Homicide Act 2007 which created a new statutory offence for corporate entities we must not forget that the current manslaughter laws for individuals still apply.

The recent case of *R v Winter* [2010] EWCA Crim 1474 provides an example of the type of conduct which constitutes gross negligence leading to convictions for manslaughter in common law rather than using the new Corporate Manslaughter Act.

### The facts

On 3 December 2006 there was a fire at Marlie Farm, Ringmer which was a site used by Festival Fireworks (UK) Limited, a father and son business, to store fireworks. The fire spread to a metal shipping container in which fireworks were stored. The container exploded killing two employees of the fire service, a Watch Commander and a Media Awareness Officer who was filming the fire.

The defendants' explosives licence granted them permission to store fireworks of hazard type 3 and 4 only. The prosecution sought to prove that, in addition, type 1 fireworks were also stored within the container. That was significant because unlike fireworks of a lower hazard type, type 1 fireworks once alight can cause spontaneous combustion in other fireworks nearby. It was alleged that:

- ⊗ type 1 fireworks were found elsewhere on the premises and in other premises owned by one of the defendants;
- ⊗ the defendants had previously been warned about the storage of type 1 fireworks by a Dangerous Goods Safety Adviser; and
- ⊗ the defendants had told their insurers that they had removed type 1 fireworks from the site when they had not.

The jury also heard evidence regarding the defendants' contrasting conduct towards the fire brigade once they arrived at the scene. Mr Winter Senior was described by the judge as being "*obstructive and*

*objectionable*" and misleading fire officers by stating that the container contained wood. In contrast his son had spoken to numerous fire fighters saying "*If that goes up, we'll have to be miles away*", and other words to that effect. He was so emphatic in telling the emergency services to evacuate that he was arrested for a breach of the peace and removed from the site. The judge was critical, however, that he had failed to spell out the specific risk.

### **Comment**

The first question was whether the defendants owed a duty of care towards the two fire service employees. As this issue is a matter of law the answer was determined by the judge, who found that a duty of care was owed. He stated that "*the essence of the duty which is alleged is a duty to take proper care in the storage and handling of explosives...those duties must be owed to all persons who are on the site or in the surrounding vicinity and could be injured by an explosion*".

The jury was required to decide whether the breach caused the deaths and, if so, whether the breach should be characterised as gross negligence and therefore a crime. The judge decided that in short, it is for the jury to set the relevant standard and to determine how far below the standard the defendants' conduct fell and whether it constituted manslaughter.

On the facts of the particular case it is perhaps not surprising that Mr Winter was convicted. His son was also convicted despite the greater assistance he gave to the fire brigade. Mr Winter was sentenced to seven years imprisonment and his son received five years which was subsequently reduced upon appeal to four years.

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## DIRECTORS AND OFFICERS INSURANCE FOR FINES?

Insuring against fines, in the UK, is against public policy, however insurers may wish to reconsider the wording of their exclusion following the events that occurred during the acquisition by Morrisons of Safeways in May 2004. A court ruled that Safeway/Morrisons could bring an action against its former directors to recover an amount that it had paid as a fine following an Office of Fair Trading (OFT) investigation.

### **The facts**

Following allegations by the OFT that certain Safeway directors had breached the Competition Act 1988, Safeway/Morrisons admitted the breaches and entered into a fast track settlement agreement with the OFT.

Having received indications from the OFT that the penalty would be in the region of £10m Safeway/Morrisons brought a claim seeking indemnification from its former directors and employees for this amount plus the costs they had incurred.

A legal rule known as “ex turpi causa” prohibits a claimant from bringing an action that arises from its own illegal act. The former directors and officers attempted to use this rule in their application for summary judgement to have this claim struck out.

In his interpretation of the rule the Judge stated that the unlawful conduct must be that of the claimant and not conduct for which the claimant was vicariously liable and it must also contain an element of reprehensibility, which he said existed in this case. The Judge pointed out that Safeway/Morrisons were not “personally” at fault although the acts of its former directors were attributable to them by virtue of the law of agency. Furthermore Safeway/Morrisons could not be held directly responsible for the actions of their former directors nor directly guilty of a reprehensible act and as such the “ex turpi causa” defence may not stand up.

The effect of this ruling is that Safeway/Morrisons are able to bring an action against its former directors to recover the fine that had been imposed upon them. Since the fine was not imposed upon the directors their D&O policy exclusion for fines and penalties would very likely not be enforceable.

### **Impact on D&O insurers**

In practice, a company is unlikely to pursue its former (or current) directors unless they are backed by the "deep pockets" of D&O insurers. However, although D&O policies generally exclude recovery for fines or penalties, policies often do not specify whether that means fines imposed on the company or the director. If a trend develops for companies to pursue directors for the recovery of fines (and this case is the first of its kind in England to suggest that might be possible), then the impact could cause D&O insurers to reconsider the policy exclusions.

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## **THIRD PARTIES (RIGHTS AGAINST INSURERS) ACT 2010 – THE REPERCUSSIONS OF THE FIRST CHANGES IN 80 YEARS**

In the usual course of events if a third party suffers loss or injury because of the actions of a wrongdoer (the Insured), the third party claims against the Insured for compensation. The Insured would then claim against its insurance for indemnification. However, if an Insured company is insolvent the claimant is unable to pursue a claim against the Insured and would become a creditor.

The Third Parties (Rights Against Insurers) Act 1930 provides special protection to third parties allowing the transfer of the Insured's rights under the insurance policy to the third party provided it had first obtained a judgment against the Insured which would then enable them to bring a claim directly against the Insurer.

The new Third Parties (Rights against Insurers) Act 2010 which is expected to come into force in April next year, allows third parties to obtain direct access to the Insurer for the extent of their liability and avoids the need for multiple proceedings for just one incident. It also removes the requirement to pursue the Insurer and Insured separately as their liability can be decided under the same proceedings, making the process easier and more cost effective. Relevant information must be provided by the Insurer within 28 days or the courts can enforce a compliance order.

This new Act should not be confused with the Contracts (Rights of Third Parties) Act 1999 which allows any person who is not a party to a contract, to enforce a term of the contract where it expressly provides that he may and where the term may be of benefit to him. This Act however does not apply where there is no intention for the relevant term to be enforceable by the third party and as such many insurers include a clause in their professional indemnity policies to state that it is not their intention for any rights under the policy to be transferred to any third party.

It is highly unlikely that an Insurer would be able to contract out of the Third Parties (Rights against Insurers) Act 2010 by use of a clause in the wording as there is no provision within the Act allowing it, in contrast to the Contracts (Rights of Third Parties) Act 1999 where such provision exists.

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# To carry the load you need the right support



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## **DIRECTORS AND OFFICERS LIABILITY EXPOSURE ANALYSIS**

As a writer of D&O insurance we at Angel Underwriting are always on the look out for signs of changing exposures in the corporate sector. One of the ways we do this is to keep an eye on the levels of corporate insolvencies, corporate investigations and director disqualifications. As these levels rise then the likelihood of increased litigation is a real possibility.

We also look at levels of redundancy claims. The more redundancies there are, the greater the potential for a disgruntled ex-employee bringing an action for wrongful dismissal against their employer. Such employment related actions could be covered by the optional Employment Practices Extension to the D&O policy.

We monitor these factors utilising the Insolvency Service annual report. The 2009-10 report has just been released and we have reproduced some of the more interesting statistics below.

### **Insolvency Cases**

During the 2009-10 year the official receivers dealt with 77,898 new insolvencies cases (72,480 bankruptcies and 5,418 companies). Whilst the figures for the last couple of years have been fairly constant, the increases over the last six years are more meaningful. A summary of these is shown in the table below.

<b>Insolvency Cases</b>	
2004-05	42,039
2005-06	58,991
2006-07	69,939
2007-08	67,218
2008-09	78,029
2009-10	77,898

## Director Disqualification Orders

During 2009-10, the Service secured 1,388 disqualification orders and undertakings against directors of failed companies, compared to 1,281 in 2008-09. The total number of disqualification orders and undertakings against directors (not just of failed companies) during 2009-10 was 2,164 versus 1,517 for 2008-9 an alarming 42% increase, in addition to a 25% increase from the year before, as shown in the table below.

Director disqualification orders			
	Directors	Directors of failed companies	Total
2007-08	1,205	1,145	2,350
2008-09	1,517	1,281	2,798
2009-10	2,164	1,388	3,552

## Investigations into Live Companies

The Insolvency Services' Companies Investigation Branch (CIB) can exercise powers to conduct confidential investigations into the affairs of live companies in response to complaints from the public, regulators, prosecuting authorities and others. These investigations are fact-finding and may lead to a number of outcomes including the winding up of the company, disqualification of its directors or disclosure of information obtained to prosecuting authorities or to other regulators.

During 2009-10, the CIB received 5,989 new complaints about the actions of live limited companies, which represents a 44% increase on the 4,153 complaints received during 2008-09 which itself represents a the 15% increase from the previous year. This clearly shows a trend which is increasing at an alarming rate.

Investigations into live companies	
2007-08	3,619
2008-09	4,153
2009-10	5,989

Where such investigations require the involvement of the company it is inevitable that the company will need to respond and produce information to justify its actions. Often this would involve the company consulting with its legal or financial advisors (solicitors or accountants) and result in out of pocket expenses. A Directors and Officers policy offers protection for costs such as these for the Directors and Officers and if the optional corporate liability extension is bought, it would also cover the company.

## Redundancy Claims

In 2009-10, The Insolvency Service Redundancy Payments Offices dealt with 138,287 new claims for redundancy payment entitlement, down from 164,083 claims received the previous year. The number for 2008-09 was more than double the level from the year before.

Number of claims for redundancy	
2004-05	78,397
2005-06	91,516
2006-07	86,066
2007-08	76,416
2008-09	164,083
2009-10	138,287

During 2009-10, the demographic of cases received changed from a few cases with large numbers of employees' claims (e.g. Woolworths), to more cases with fewer employees. Payments made to redundant employees during 2009-10 exceeded £530 million from the National Insurance Fund.

Whilst the vast majority of redundancies will pass off smoothly, it is likely that increases in the number of redundancies will result in an increase in the number of allegations of wrongful dismissal and claims of discrimination. These types of actions are protected by the optional Employment Practices Liability extension on a Directors and Officers insurance policy.

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## DIRECTORS IN THE DOCK

### Health and Safety - Director Disqualified

In February 2007, twenty-three year old Mr Wayne Simpson was installing a new racking system when he fell more than nine metres onto a concrete floor at the construction site where he worked. The accident left him paralysed from the chest down.

The Health and Safety Executive successfully prosecuted SDI Group Ltd and Steel Construction Ltd. A director of R M Berwick Steel Erection Services Ltd also pleaded guilty to breaching health and safety regulations.

They were fined a total of £170,000 plus £47,000 costs with the Director of RM Berwick Steel Erection Services Ltd being disqualified as a director for four years.

Mr Berwick (the Director of RM Berwick Steel Erection Services Ltd) was brought into the proceedings as the health and safety offences were deemed to have been attributable to his neglect as the managing director of his company.

Under the Health and Safety at Work etc Act 1974, an employer has a duty to ensure that their employees are not exposed to health and safety risks and they have a duty to ensure the health and safety of their employees, the defendants were considered to have failed to comply with these duties.

Actions brought by government agencies, including the Health and Safety Executive and The Insolvency Services' Companies Investigation Branch, would be covered by a Directors and Officers insurance policy (in order for the company to be covered they would have to have bought the corporate liability extension) however it should be noted that whilst the defence costs would be covered, any fine imposed would not be as this is against public policy.

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## Increased Protection for Whistleblowers

In a recent whistleblower case the Employment Appeal Tribunal has extended the scope of whistleblowing protection.

Mr X was originally employed by company "A" and then later by company "B". Company "A" was a client of company "B" who oversaw and evaluated safety procedures and operations. Mr X was dismissed after two years of service with company "B" for gross misconduct when he disclosed confidential information to his previous employer (company "A") regarding safety issues.

After his dismissal Mr X began consultancy work for company "A" with the possibility of other consultancy work in the future. However, when company "A" found out that the reason for Mr X's dismissal was gross misconduct for his disclosure of confidential information they decided not to extend the consultancy work as anticipated.

The Employment Appeal Tribunal took the expansive approach in protecting Mr X for the detriment he suffered with company "A" despite the fact that the protected disclosure took place while he was employed by company "B". Company "A" subsequently appealed the Employment Tribunal's decision but this was dismissed and the appeal judge found that although it first seems that the Public Interest Disclosure Act 1998 protects a worker in his/her current employment the wording of the statute could also relate to any previous employment position. He said "it is protection, rather than the identity of the employer, which is central to this."

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## ANGEL JUTE BAG COMPETITION

Now that summer is well under way you have probably got all your holiday plans sorted and your suit cases packed. All you have to do now is remember your Angel Jute bag and a camera and you can enter our "I use Just One Bag" competition and have the chance to win £500 worth of travel vouchers.

To enter the competition, all you have to do is take an Angel eco friendly jute shopping bag somewhere "special," take a photograph there including both you and the bag, and send the picture to us.

The picture needn't be somewhere exotic or far away it just needs to be something "special", so it could be you and the bag posing with a famous person, or on top of a mountain, in a submarine, at a concert, or on the London Eye. The most "special" in the opinion of our judge will be the lucky winner!

Launched at the Angel Underwriting Broker Forum in Exeter, the new jute bag has been designed with this competition in mind.

If you have not yet got your hands on one of our bags then Gary Green, Angel's Business Development Executive, will be happy to arrange a visit and deliver one to you in person or can drop him a note and he will be pleased to put one in the post for you.



you

To give you an example of what we are looking for, there are some examples on our website. To see them, visit our website competition pages at [www.angelunderwriting.com/uk/Media/JuteBagCompetition/JuteBagCompetitionGallery.aspx](http://www.angelunderwriting.com/uk/Media/JuteBagCompetition/JuteBagCompetitionGallery.aspx). We have already had a few entries and there are promises of more to come so the competition is hotting up.

The competition is open to agents registered with Angel Underwriting and is free to enter. There is no limit to the number of pictures you can submit. Entering is easy, all you have to do is go to

**angel**

<http://www.angelunderwriting.com/uk/Media/JuteBagCompetition.aspx> from where you can upload your pictures.

All pictures will be judged by Mark Shreeve, Director of Angel Underwriting, whose decision will be final. All entries must reach Angel Underwriting by 30<sup>th</sup> September 2010 and must include the entrants name and contact details. The winner will be notified shortly afterwards and announced in the October 2010 Angel Newsletter.

If you are not already registered as an Angel agent you can call 01206 215500, email [gg@angelunderwriting.com](mailto:gg@angelunderwriting.com), or go to [www.angelunderwriting.com](http://www.angelunderwriting.com) and register on line to be able to take part in the competition.

Entries can be emailed to Angel at [gg@angelunderwriting.com](mailto:gg@angelunderwriting.com).

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## ANGEL FANTASY FOOTBALL LEAGUE

### 2010/11 SEASON

It seems like only yesterday that we were all cheering with delight as our national team gave the world an exhibition on total domination by humiliating the mighty USA, Algeria and Slovenia in the world cup finals. With two goals from the group stages we were well deserving of our place in the knock out stages. I don't know about you but I for one was proud that I was neither French nor Italian! And that is all I will say on the matter other than roll on the European Championships in 2012, COME ON ENGLAND!!

With that shambles only just behind us and for those of you who have not lost your enthusiasm for the beautiful game, it is almost time for the start of the new season which means we are again rolling out the Angel Underwriting Fantasy Football Competition. But before we get on to that let's have a quick look back at the 2009/10 season.

Congratulations to Gareth Williams who scooped first prize last season with an outstanding example of how to maintain a lead without too much trouble making it two years in a row for Manchester based managers. It's about time the southern regions stepped up to the plate! Gareth didn't achieve a top 100 finish in the national competition like our previous winner however he shamed his colleague Kevan Haughton into third place after a closely fought end of season between the two of them. Well done also to Mark Preston for his second position only 16 points behind Gareth. Our winner from two years ago, John Veal, was again snapping away with a very good 6<sup>th</sup> position although not quite managing to get within 200 points of the winner.

Angel Underwriting's charge was lead by Premium Accounts Manager Paul Norman who narrowly beat Business Development Executive Gary Green thanks to Frank Lampard's penalty miss in the FA cup final! Underwriting Assistant Felix Cofie's last round haul of 9 points dropped him to third position in the Angel staff battle. Overall it was a very poor

performance by the Angel staff who failed to penetrate the top ten for the first time since we started the competition!

**And so to this season.** There are a few changes to the rules again this year so please make sure you read them carefully as excuses will not be tolerated. To make it easier for you we have reproduced them for you below:

### **Formations and substitutions**

You can choose 11 players and 1 substitute to form your team and you have £100m to spend. You can choose between five formations 4-4-2, 4-3-3, 4-5-1, 5-3-2 or 3-5-2 and switch between them during the season.

### **Make transfers**

You'll have 32 transfers available to you during the season. You can make up to 16 transfers before December 28, 2010. Then another 16 transfers to use for the remainder of the season (Note: Unused transfers cannot be carried forward). A slight change this year means that transfers made before the earliest scheduled kick-off will score points on the same day and you can make as many transfers as you like at a time. Players brought in after the first scheduled kick-off time each day will not score points until the following day.

### **Transfer amnesty**

Up to kick off of the first Premier League game on Saturday 14th August, a transfer amnesty operates so you can make as many transfers as you wish meaning you can register with any players and then fine tune your selections up until 12.45 pm on 14<sup>th</sup> August.

### **Team Captain**

You must nominate one of your players as Captain – he'll score double points for your team (minus points are doubled too!). You'll be able to change your Captain nomination 5 times up to December 28, 2010, and a further 5 times after this date. You can swap your substitute into your team at anytime without using up any of your transfer allocation. If you promote your substitute before the first scheduled kick-off on any day, then he will score points for you the same day (assuming he plays!). If you move your Captain to your subs bench, then the oncoming player DOES NOT take over the captaincy. If however you transfer your captain out of your team the incoming player will take over as captain and you will not lose a captain change.

### **Scoring Points**

The game will start with the first Premier League matches scheduled for 12.45 pm on 14th August 2010. The scoring is the same as last year but for those of you who need reminding it is as follows:

#### All players

- ⊗ Full appearance +2 pts
- ⊗ Part appearance +1 pt
- ⊗ Win bonus +3, Draw bonus +1 pt
- ⊗ Goal scored (inc penalty shoot-outs) keeper/defender +10 pts, midfielder +8 pts, striker +5 pts
- ⊗ Key contribution to a goal +3 pts

- ⚪ Yellow card –2 pts (2 yellow cards leading to a red card will count –5 pts)
- ⚪ Sent off –5 pts
- ⚪ Missed penalty (inc penalty shoot-outs) – 5 pts

For defenders and goalkeepers only:

- ⚪ Clean sheet (players completing full match only) +4 pts
- ⚪ Clean sheet (players completing part of a match only) +2 pts
- ⚪ Goal conceded –1 pt

For goalkeepers only:

- ⚪ Penalty saves (inc shoot-outs) +5 pts (for these points to be awarded the goalkeeper must have touched the ball with some part of his body)

Your nominated captain scores double points.

Scores and leader boards will be updated daily on the Daily Mail Website.

Points will also be scored in FA Cup matches (that is why they refer to penalty shoot outs in the scoring system).

### How to enter

If you had a team in the daily mail league last year (which is the platform we are using again this year) then the login details you used for last year will still be valid. Go to <http://fantasyfootball.dailymail.co.uk/> and follow the link to “log in or register for free now”. When registering please use your real name as The Manager so that we get a clue as to who you are, please try and resist putting in something funny.

Once you have selected your team you will need to select a name for your team, PLEASE DO NOT USE ANYTHING RUDE OR OFF COLOUR AS YOU WILL BE DELETED (Stuart!). Once you have selected your team click on the “mini leagues” link at the top of the page in the light green band and select “Join”. You should then type “ANGEL UNDERWRITING” in the “join league” section DO NOT TYPE IT IN THE “CREATE LEAGUE” SECTION (Dan!!) as that will set you up a new league all for yourself. The PIN number to join ANGEL UNDERWRITING is 8001236. Once you have joined please send an email to [gg@angelunderwriting.com](mailto:gg@angelunderwriting.com) telling me your team name, who you are and who you work for so that we are able to award the prize at the end of the season. You are limited to one team per person, anyone who enters more than one team will only have their lowest entry count in the competition. Please feel free to pass this to your colleagues, we had 106 teams last year and we are hoping for more this season.

Good luck everybody!

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