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Delegated Duties and Willful Blindness: Just How Far Can a Director Shirk Corporate Liability? *R v Winterton (Andrew)* [2018] EWCA Crim 2435

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ABSTRACT

This case comment analyses the decision of the Court of Appeal (Criminal Division) in R v Winterton [2018] EWCA Crim 2435, which offers appellate clarification of the prospective threshold of gross negligence manslaughter and of the legal boundaries of operational delegation in high-risk industries. The appeal arose from a fatal trench collapse at a residential construction site and turned on whether a construction site manager and company director could discharge his personal duty of care by delegating statutory safety oversight to an unqualified subordinate. By distinguishing R v Rose [2017] EWCA Crim 1168 and R v Rudling [2016] EWCA Crim 741, and by aligning the case with R v Adomako [1995] 1 AC 171 and R v Misra [2004] EWCA Crim 2375, the Court affirmed that the individual executive oversight recognised in section 37 of the Health and Safety at Work etc. Act 1974 is not discharged by delegation. The comment shows how Winterton erects a barrier against executive wilful blindness, confirming that where an obvious and serious risk of death is present, a director's failure to inspect may constitute the criminal omission on which gross negligence manslaughter rests.

Keywords: gross negligence manslaughter, directors' duties, non-delegable duties, Health and Safety at Work etc. Act 1974, corporate liability, wilful blindness

I. BACKGROUND AND FACTUAL MATRIX

On 4 September 2014 Shane Wilkinson, a labourer on a building site in the village of Collyweston in Northamptonshire, was killed when a drainage trench collapsed on him. The development, undertaken by Conquest Home LLP, comprised nine new-build houses, and the L-shaped trench had been dug in front of and beside one of them for the laying of drainage pipes.¹ It was some two metres deep, and its sides were not battered back but were left vertical and unsupported.² At about 3 pm Mr Wilkinson was standing either in the trench or at its edge

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¹ *R v Winterton (Andrew)* [2018] EWCA Crim 2435, [3] (Eng.).

² *Id.* [6].

when it collapsed. He was buried in earth and rubble and suffered severe blunt force trauma to the head, which caused a large skull fracture from which he died.³

Andrew Winterton was the construction site manager and a director of Conquest, and he accepted at trial that he had overall responsibility for health and safety on the site.⁴ His case was that the site foreman, Jaroslav Kondrats, referred to at trial as Jarek, kept an eye on matters when he was not there, carried out risk assessments, decided on individual tasks and was in charge in his absence. Mr Kondrats' own evidence was materially different, for apart from a scaffolding course he had received no health and safety training and, although he was the appellant's "right hand man", his responsibilities ran to matters such as loading and unloading materials, responsibility for health and safety and for seeing that the work was done properly and safely remaining with the appellant.⁵ The prosecution relied on the foreman's want of qualification in resisting the submission of no case to answer.⁶

David Wonford, a civil engineer called by the prosecution as an expert witness, told the jury that a report prepared before construction began had concluded that the soil was likely to be loose with hard spots and prone to collapse, so that the sides of the trench should have been battered back to 45 degrees or those inside protected by a trench box. He added that no competent principal contractor would have allowed the work to proceed without battering, that he did not consider Clearview Demolition competent to do it, and that Mr Wortley's inability to manage health and safety would have been obvious to a site manager who had looked at the excavation.⁷ The day before the collapse Paul Burrows, an employee of Anglian Water who had come to assess the drainage system for adoption, saw how the trench was being dug and said that it needed support and was unsafe to work in, although the stretch he viewed was not the stretch that gave way and he did not think the appellant had been present.⁸ The prosecution's case was that the appellant, who visited the site daily and had to walk past the trench to reach the houses under construction, could not have failed to see how it was being dug; alternatively, if he did not know, he should have known, because health and safety was his responsibility and he had both hired Clearview Demolition and retained the task of monitoring its work.⁹

Winterton was convicted in the Crown Court at Northampton of the gross negligence manslaughter of Mr Wilkinson and of three counts alleging breaches of sections 7 and 37 of the

³ *Id.* [3].

⁴ *Id.* [4].

⁵ *Id.* [5].

⁶ *Id.* [12].

⁷ *Id.* [7].

⁸ *Id.* [8].

⁹ *Id.* [9]–[10].

Health and Safety at Work etc. Act 1974. He was sentenced to four years' imprisonment on the manslaughter count and to 12 months' imprisonment concurrent on each of the statutory counts, and was ordered to pay £20,000 towards the prosecution's costs together with the statutory victim surcharge.¹⁰ Conquest was convicted of health and safety offences and fined a total of £55,000.¹¹ Dean Wortley, who traded as Clearview Demolition and had been hired by the appellant to excavate the trench with a digger, was acquitted of manslaughter but convicted of health and safety offences and sentenced to 12 months' imprisonment.¹²

II. THE SCOPE OF THE APPEAL

Winterton sought permission to appeal on five grounds, the first of which was in essence a repetition of the submission of no case to answer made at the close of the prosecution's case.¹³ He subsequently added a further ground, Ground 3.1, which was that the judge had erred in law in directing the jury that it was entitled to consider what the appellant ought to have known about the way the trenches were being dug at the time of any breach of duty, in reliance on the decision of the Court of Appeal in *R v Rose*.¹⁴ The single judge refused permission on Grounds 1 to 5 and granted permission on Ground 3.1 alone. The application was not renewed on Grounds 2 to 5, and the Court accordingly said no more about them, while the renewed application on Ground 1 was heard alongside the appeal.¹⁵

Ground 3.1 therefore supplied the sole substantive issue. The complaint was directed at question 34 of the judge's route to verdict, which asked the jury whether it was sure that the appellant "knew about this or should have known about this", the antecedent being that the excavation presented an obvious risk of death to those on the site.¹⁶ For the appellant it was argued that, on the ratio of *Rose*, he could be guilty only if he had actually seen the trench in an unsafe state with someone working inside it, that there was no such evidence, and that the words "or should have known about this" were wrong in point of law.¹⁷ It was further submitted that the trench had been excavated and backfilled in two sections over seven days, which supported his evidence that he had never seen it in the condition others described, and that the jury might have

¹⁰ *Id.* [1]; Health and Safety at Work etc. Act 1974, c. 37, §§ 7, 37 (UK).

¹¹ *Winterton*, *supra* note 1, [2].

¹² *Id.* [2], [4].

¹³ *Id.* [18].

¹⁴ *Id.* [19]; *R v Rose* [2017] EWCA Crim 1168, [2018] QB 328 (Eng.).

¹⁵ *Winterton*, *supra* note 1, [20].

¹⁶ *Id.* [16].

¹⁷ *Id.* [22].

allowed the statutory convictions to fix him with a foreseeability that was retrospective rather than prospective.¹⁸

III. JUDICIAL REASONING AND THE ALIGNMENT OF PRECEDENT

The Court dismissed both the renewed application and the appeal. On the renewed application it held that, even on the appellant's own account of the governing law, there was evidence from which the jury could conclude that he was actually aware of the method of excavation, that it was dangerous, and that it carried a serious risk of death. There was no issue as to the existence of a duty of care to the workers on the site, and whether the negligence alleged was so gross as to be criminal was a question for the jury.¹⁹

On Ground 3.1 the Court took the ratio of *Rose* to be that the question of available knowledge and risk is always to be judged objectively and prospectively as at the moment of breach, and not but for the breach, and that the factual matrix is critical.²⁰ It then distinguished *Rose*, and *R v Rudling* with it, rather than applying either. The optometrist in *Rose* and the general practitioner in *Rudling* were not sufficiently alerted, and had no cause to be alerted, to a risk of death on the facts available to them at the time of their respective breaches. In each the prosecution had invited a retrospective scrutiny of foreseeability built on the eventual outcome of a condition that could have been detected sooner had the duty been performed, rather than showing that the risk should have been apparent prospectively at the moment of the failure to investigate further.²¹

Winterton's case was different in kind. A photograph of the excavation, which had been in the jury bundle and was handed to the Court on the appeal, demonstrated workmanship that posed a real and significant risk of death, and there was evidence from which the jury could conclude either that the appellant had actual knowledge of it or that he had adopted a wilful blindness or ignorance towards what would necessarily be a deep drainage trench in unstable ground and therefore intrinsically dangerous. His duty of care to those on the site was continuous throughout the excavation, and the breach was ongoing from the point at which the trench had reached a stage requiring battering or other support and required a workman to enter it to lay the pipes.²² The factual matrix was that it was a question of when, not if, the trench would collapse, and that was or should have been apparent to anybody.²³

¹⁸ *Id.* [23].

¹⁹ *Id.* [25].

²⁰ *Id.* [26] (quoting *Rose*, *supra* note 14, [80], [85]).

²¹ *Winterton*, *supra* note 1, [28]; *R v Rudling* [2016] EWCA Crim 741 (Eng.).

²² *Winterton*, *supra* note 1, [27].

²³ *Id.* [28].

On that footing the Court placed the appellant in the position of the anaesthetist in *R v Adomako* and the doctors in *R v Misra*. The warning signs and the serious and obvious risk of death were there for such defendants to see, and they either saw them and ignored them, or failed to see them in circumstances that would provoke an objective observer to say that on the facts, and in their position, they should have done.²⁴ The judge's directions of law were accordingly not in error, nor was the formulation of his route to verdict, and the appeal against conviction was dismissed.²⁵

IV. COMMENTARY ON DELEGATION, WILFUL BLINDNESS, AND EXECUTIVE LIABILITY

Winterton is a short judgment, but it settles a question of practical consequence for anyone who runs a workplace through subordinates: how far a delegation of operational safety can discharge a director's own duty of care.

A. The non-delegable nature of executive safety duties

Section 37(1) of the 1974 Act makes a director, manager, secretary or other similar officer of a body corporate personally guilty of an offence committed by the body corporate where that offence was committed with his consent or connivance, or was attributable to any neglect on his part.²⁶ The appellant was convicted under that section as well as under section 7, and the reasoning on the manslaughter count runs in the same direction. Tactical and administrative tasks may be handed down; the duty of oversight that attaches to the office is not extinguished by handing them down. The Court's treatment of the appellant's duty of care as continuous throughout the excavation is another way of saying that the delegation to Mr Kondrats never interrupted it.²⁷

A director who delegates site safety retains an active duty to satisfy himself that the delegate has the training, qualification and resources to discharge it. On the foreman's own evidence he had been on a scaffolding course and nothing more, and his actual work was the loading and unloading of materials.²⁸ The expert evidence pointed the same way at the level of the contractor, since a principal contractor is expected to engage a competent contractor and there was nothing to show that Conquest had seen any documentation establishing that Mr Wortley could manage

²⁴ *Id.* [29]; *R v Adomako* [1995] 1 AC 171, 187 (HL) (appeal taken from Eng.); *R v Misra* [2004] EWCA Crim 2375, [2005] 1 Cr App R 21 (Eng.).

²⁵ *Winterton*, *supra* note 1, [30].

²⁶ Health and Safety at Work etc. Act 1974, c. 37, § 37(1) (UK).

²⁷ *Winterton*, *supra* note 1, [27].

²⁸ *Id.* [5].

health and safety at all.²⁹ A delegation of that quality does not answer the duty. It relocates the appearance of compliance without relocating the risk.

B. Wilful blindness as criminal omission

The most useful contribution of the decision is its handling of prospective objective knowledge. The Court did not require proof that the appellant had looked into the trench and appreciated the danger. It was enough that the danger was open, continuous and visible to anyone crossing the site, and that he either saw it and did nothing or shut his eyes to it.³⁰ Where the hazard is of that character, a failure to carry out the most basic inspection is not an administrative lapse that happens to precede a death. It is the omission on which the manslaughter count rests.

The limit the Court placed on *Rose* matters as much as the holding. *Rose* protects a defendant whose breach consists in not carrying out the very investigation that would have revealed the risk. It does not protect a defendant whose breach consists in not looking at what was already in front of him.³¹ Confining *Rose* in that way keeps “should have known” a workable standard for open site hazards, rather than turning it into an invitation to reason backwards from the death, which is precisely what the prospective test was designed to prevent.³²

C. The interplay between corporate and individual liability

The shape of the prosecution shows the two tracks of enforcement running together. The corporate entity was convicted of health and safety offences and fined a total of £55,000, a penalty directed at organisational failure.³³ That penalty did not exhaust the response. The individual who held the safety function was convicted of manslaughter, imprisoned for four years, and failed in his appeal against that conviction.³⁴ Corporate liability here operated alongside individual accountability rather than in place of it, and it is the individual limb that carries the deterrent weight, since a fine is absorbed by the entity while a custodial sentence is not.

The lesson of *Winterton* is a plain one, and the plainness is what gives it force. Executive status confers authority over the conditions in which other people work. The duty to look at those conditions travels with the authority, and it cannot be discharged by passing it to a subordinate who was never equipped to receive it.³⁵

²⁹ *Id.* [7].

³⁰ *Id.* [27], [29].

³¹ *Id.* [28].

³² *Id.* [26].

³³ *Id.* [2].

³⁴ *Id.* [1]–[2], [30].

³⁵ Health and Safety at Work etc. Act 1974, c. 37, § 37 (UK); *Winterton*, *supra* note 1, [27], [30].

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