

# SORTING OUT THE LAW ON HOMICIDE PROSECUTIONS AGAINST CORPORATIONS

*By César de Castro*



The recent rise in construction accidents in New York City over the past two years has spurred an increase in criminal investigations and/or prosecutions in connection with these incidents. From the most recent prosecutions in the Bronx in connection with the fire at 236 E. 178th St. that claimed the lives of two firefighters, to the indictments in the Deutsche Bank fire and the 51st Street crane collapse, courts and juries are being asked to determine whether corporations, acting through high managerial agents, are guilty of criminal negligence or ordinary negligence. The issue can be very complicated and often comes down to an intensely subjective analysis that leaves litigants unclear whether there is any genuine distinction between ordinary negligence and criminal negligence, or whether it is simply a matter of prosecutorial discretion.

Under New York Penal Law §125.10, a person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person. Penal Law §15.05(4) defines criminal negligence as the failure to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

A person is guilty of manslaughter in the second degree when he recklessly causes the death of another person. An individual acts recklessly when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. As with criminal negligence, the risk must be of such nature and degree that disregard of the risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

The distinction between criminal recklessness and criminally negligent conduct, therefore, turns on the actor's awareness of the risk. For reckless conduct, the actor must be aware of the risk and consciously disregard it. By contrast, for criminally negligent conduct, the actor simply fails to perceive the risk.

The distinction between ordinary negligence and criminal negligence as applied to criminally negligent homicide and manslaughter in the corporate context has been analyzed in only a limited number of New York cases. New York's highest court has not provided clear guidance on the issue yet, but the decisions of the lower courts appear to turn on the issue of the foreseeability of death or serious physical injury by the defendants. The cases suggest, however, that one cannot attempt to predict the outcome in a close case by considering foreseeability, but can make a prediction by analyzing the egregiousness or blameworthiness of the conduct engaged in by the corporate defendant. Questions such as whether the corporate conduct violated applicable rules, regulations or laws, as well as whether such violations were coupled with egregious conduct, are important to the outcome. Unfortunately, the question of whether conduct should subject a corporation to criminal prosecution is subjective to some degree and often the result of prosecutorial discretion.

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