Corporate manslaughter.

It was a long time in the making, but from 6 April 2008 organisations in the UK face unlimited fines and publicity orders under a new criminal offence of corporate manslaughter (corporate homicide in Scotland). Is your business doing enough to manage its health and safety risks?

Background

In the UK approximately 12,000 people have been killed in work-related deaths since 1986. Companies, however, are rarely successfully prosecuted for manslaughter and a series of high-profile but failed prosecutions (e.g. following the Hatfield and Paddington rail crashes) have fuelled public perception that the current law is inadequate. At present, a company can only be convicted of manslaughter if the prosecution can prove beyond reasonable doubt that a “controlling mind” of the company caused death by gross negligence. In practice, it is extremely difficult to identify the controlling mind, particularly in a large company. Only small companies with simple management structures have therefore been successfully prosecuted.

The Corporate Manslaughter and Corporate Homicide Act 2007 (the Act) is the culmination of extensive lobbying by trade unions and other pressure groups to make it easier for large organisations to be successfully prosecuted for fatal accidents. It abolishes the existing common law offence for organisations to which the Act applies and it creates a new statutory offence and framework for convicting an organisation where gross management failure results in a person’s death.

After a turbulent 12-month passage through Parliament, the Act received Royal Assent on 26 July 2007 and largely comes into force on 6 April 2008.

The new offence in brief

An organisation will be guilty of the new offence in circumstances where:
the way in which its activities are managed or organised causes a person’s death; and
this amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased; and
the way in which its activities are managed or organised by its senior management is a substantial element of the breach.

This approach removes the requirement to identify a distinct controlling mind, which in the past has proved a major obstacle to convicting large organisations for gross negligence manslaughter. The new offence takes a more holistic approach and juries will look at the wider picture of decision-making by senior management (including an organisation’s health and safety culture) in assessing any alleged gross breach of duty of care.

Who can be liable?

Relevant organisations
The Act applies to corporations (including companies), partnerships, trade unions, employers’ associations, police forces and other government departments and public bodies listed in the Act.

Individual liability
First it was in, but now it is out: individuals cannot be personally liable under the Act. Whilst the conduct of the organisation’s senior management and others will be put under the microscope in examining liability, only the organisation itself can be liable for the statutory offence of corporate manslaughter. Directors, company officers and managers should, however, be aware that personal liability remains possible for other offences under health and safety legislation. Director disqualification proceedings under existing legislation also remain a risk.

Parent company liability
Moving up the chain, what about parent company liability? As a general principle, a parent company will not incur liability for the actions of its subsidiaries as distinct legal entities.

However, the Act opens up the potential for parent company liability for corporate manslaughter in certain circumstances. If the breach that caused the death was sufficiently attributable to senior management failures in the parent company then parent company liability is possible. In assessing this, the court will look at the degree of control and supervision exercised by the parent company over the subsidiary, particularly in relation to health and
safety matters. For groups with integrated or centralised management, this may render their holding company much more vulnerable than previously.

What is a gross breach of a relevant duty of care?

The prosecution will need to show that there has been a “gross breach” of a relevant duty of care. A breach constitutes a gross breach if the conduct in question “falls far below what can reasonably be expected of the organisation in the circumstances”. This will be a question for the jury on a case by case basis. However, the Act does give statutory guidance to the jury on how to assess whether a breach is gross. In particular, a jury must consider:

– whether the organisation failed to comply with health and safety legislation;
– how serious that failure was; and
– how much of a risk of death it posed.

The jury may also consider:

– the extent to which the health and safety culture of the organisation (including attitudes, policies, systems and accepted practices) encouraged or tolerated any such failure; and
– any relevant health and safety guidance.

The Act sets out a broad definition of relevant duties of care owed by organisations. It does not create any new categories of duty but refers to those that already exist under general principles of negligence. Whether a duty of care exists in any particular case will be decided by the judge. It is important to remember that organisations owe duties not just to their employees but to a broad range of others affected by their activities.

“Relevant duty of care” includes duties owed:

– to employees or other workers (e.g. to provide a safe system of work)
– as occupier (e.g. to ensure that buildings are safe)
– in connection with supplying goods or services (e.g. transport providers to provide safe transport or NHS bodies to provide safe medical treatment)
– in connection with commercial activities (e.g. mining)
– in connection with construction or maintenance work, or in using plant and vehicles (e.g. road maintenance by public bodies)
– to people held in detention or custody.

There are exceptions for emergencies, public authorities, child protection, policing and military activities.
Who is senior management?

The new offence uncouples individuals from the test for corporate liability (i.e. no need to show a controlling mind). However, analysis of the senior decision-making processes which led to the death remains an important part of the picture. The prosecution must show that the way in which senior management organised or managed the organisation’s activities was a substantial element of the breach.

The Act defines senior management as those who play a significant role in managing, organising or making decisions about the management or organisation of all or a substantial part of the organisation’s activities. This will include:

- those in central strategic or financial roles or with central responsibility for regulatory compliance, e.g. for health and safety;
- those in senior operational management roles.

Depending on the particular corporate and management structures of the organisation, it may also include the following (even if they are relatively not very senior within the group or organisation as a whole):

- national managers in international organisations;
- regional managers in national organisations;
- managers of different operational divisions.

The prosecution will not need to prove that individual senior managers were in breach of duty, only that, collectively, senior management played a substantial part in the organisation’s breach.

Penalties

An organisation convicted of corporate manslaughter faces an unlimited fine. In addition to fines, the courts can also impose remedial orders and, in a new development for England and Wales, publicity orders, which will have significant adverse reputational impact.

Penalties for corporate manslaughter

- Unlimited fine
- Remedial order: requires an organisation to take specified steps to remedy any management failure that led to death
- Publicity order: requires an organisation to publicise the fact that it has been convicted of the offence, together with specified information about the offence, the level of fine imposed and the terms of any remedial order made.
Sentencing guidelines for corporate manslaughter are expected in autumn 2008 and will assist the court on levels of fines to impose. These could well be significant. A consultation last year recommended that fines for corporate manslaughter should be significantly higher than for offences under other health and safety legislation. In particular, it indicated that fines of between 2.5% and 10% of average annual turnover should be imposed, or more if there are significant aggravating factors. The practical effect of calculating fines by reference to annual turnover is that very large organisations may face significantly higher fines than under previous legislation. By way of example, the largest fine imposed to date for a health and safety offence resulting in death was £15 million in the Scottish case of Transco. The fine represented less than 1% of Transco’s annual turnover, so a fine of nearer 10% of its turnover would represent a significant increase.

Steps to reduce prosecution risk

Preventing fatal accidents is the best protection against prosecution. Effective risk assessment and management systems play a key role in minimising the risk of a fatal accident occurring. If a fatal accident does occur, an organisation which has implemented appropriate health and safety safeguards will be less vulnerable to prosecution.

Guidance such as that produced jointly in 2007 by the Health and Safety Commission and the Institute of Directors (Leading Health and Safety at Work) is available to help organisations with their health and safety policies.

Organisations can reduce the risk of fatal accidents occurring by:

− Developing and embedding a culture of safety throughout the organisation, and ensuring this is taken seriously at board level;
− Carrying out regular formal risk assessments to identify and evaluate risks, then minimising or avoiding them where possible;
− Delegating responsibility for health and safety to sufficiently experienced and qualified individuals and monitoring it regularly;
− Applying effective monitoring and reporting systems and supporting them with documented processes and clear paper trails;
− Applying any relevant health and safety guidance from the Health & Safety Executive and other regulators or bodies;
− Proper training and supervision of employees, contractors and others;
− Fully enforcing health and safety procedures and applying internal disciplinary proceedings for breaches; and
− Regularly reviewing systems and processes, and adapting them to technical progress to develop safer conditions.
Industries which are inherently more dangerous should also include crisis planning in their health and safety strategies.

Useful links

- Corporate Manslaughter and Corporate Homicide Act 2007
- Explanatory Notes to the Act prepared by the Ministry of Justice
- Consultation on sentencing guidelines, Sentencing Advisory Panel, 2007

Need help?

Contact us. We have one of the world’s leading environment, health and safety teams. Our global team has internationally recognised experience in advising clients on EHS risks, delivering successful tailored training programmes, and helping develop and implement effective EHS governance structures. We have represented clients in complex prosecutions, and our global reach allows us to provide a seamless service to companies operating in multiple jurisdictions.

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