

WING TIPS

New corporate manslaughter legislation – no hiding place for companies

The key provisions of the Corporate Manslaughter and Corporate Homicide Act 2007 (the Act) came into force on 6 April 2008.

Under the Act, an organisation will be guilty of the new offence of “corporate manslaughter” (“corporate homicide” in Scotland) if the way in which its activities are managed or organised causes a death and amounts to a gross breach of the relevant duty of care to the victim.

What is the background?

Prior to the new Act, a corporate body could be guilty of the common law offence of manslaughter by gross negligence, often known as “corporate manslaughter”. However, before the company could be convicted, a “directing mind”, namely a senior individual who could be said to embody the company in his/ her actions and decisions, also had to be guilty of the offence.

It was often difficult to identify and then to assign culpability to a “directing mind”, especially in large and complex organisations. As a consequence, there were a number of high profile failed prosecutions. Although the law in Scotland in relation to culpable homicide is different from that in the rest of the UK, the same issues of identifying a directing mind arose in this context.

The Government, in introducing the Act, stated that the focus of the new offence is the way in which the activities of an organisation are run, rather than the guilt of individuals within the organisation. In this way, it is expected that the problems hitherto encountered in holding corporations and other organisations criminally liable for their actions or omissions will be overcome.

What is the new offence?

Section 1 of the Act makes an organisation guilty of corporate manslaughter if the way in which its activities are managed or organised:

- causes a person's death; and
- amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.

The offence is called corporate manslaughter in England and Wales and Northern Ireland and corporate homicide in Scotland. In England and Wales proceedings for the offence require the consent of the Director of Public Prosecutions; in Northern Ireland by the Director of Public Prosecutions in Northern Ireland; and in Scotland by the Procurator Fiscal.

The Act abolishes the common law offence of manslaughter by gross negligence in its application to organisations that can commit the offence under the Act, so there is no double jeopardy.

It is to be noted that only an organisation can commit the offence. An individual cannot be guilty of it. Further, an individual cannot be guilty as a secondary participant in the offence, for example, by aiding, abetting, counselling or procuring the commission of the offence. However, an individual can still be liable for gross negligence or unlawful act manslaughter or health and safety offences.

Who does the new offence cover?

The Act states that the organisations that can commit the offence are:

- corporations (wherever incorporated);
- most government departments and public bodies;
- police forces;
- partnerships, trade unions or employers' associations, that are employers.

Proceedings can be brought against UK and overseas partnerships and will be brought in the name of the partnership.

In a significant departure from the previous law, Crown immunity no longer protects servants or agents of the Crown. The Act has provisions so that such Crown bodies will generally be treated as if they are corporate bodies independent of the Crown in respect of the duties that they owe, and that their actions are attributable to them, rather than to the Crown. Similar provisions are made with respect to the armed forces and police forces.

What is the relevant duty of care?

The new offence only applies where an organisation owed a duty of care to the deceased under the law of negligence (whether common law or statutory). Broadly, this covers duties owed by an organisation:

- to its employees or other people working for the organisation or performing services for it;
- as occupier of premises;
- in connection with: – the supply of goods and services; – construction or maintenance operations or when using plant, vehicles and other items; – any other activity on a commercial basis. Any rule of the common law is to be disregarded where it has the effect of preventing a duty of care from being owed:

- by one person to another by reason of the fact that they are jointly engaged in unlawful conduct;

- to a person by reason of his acceptance of a risk of harm.

By way of example, in relation to the first of these points, the fact that a worker and his company were carrying out work that was illegal will not of itself remove the duty of care owed by the company to the worker if the worker dies. The second of these points ensures that the company may still owe a duty of care even if the worker had signed a disclaimer. The duty is owed to people in custody and other detainees for whose safety the organisation is responsible, although this part of the Act is not yet in force. The Act excludes from its ambit public functions, as well as certain other conduct in the public sphere, such as specified activities in the context of military operations or hazardous training, law enforcement, emergencies, child-protection and probation.

What constitutes a gross breach?

A breach of the duty of care by an organisation is only a gross breach if the conduct falls far below what can reasonably be expected of the organisation in the circumstances. The Act states that an organisation is only guilty of the offence if the way in which its activities are managed or organised by its senior management is a substantial element in the breach. Here, senior management means the persons who play significant roles in:

- the making of decisions about how the whole or a substantial part of its activities are to be managed or organised; or

- the actual managing or organising of the whole or a substantial part of those activities.

The Explanatory Notes to the Act state that this covers both those in the direct chain of management as well as those in, for example, strategic or regulatory compliance roles.

The Ministry of Justice's guide to the Act¹ states that exactly who is a member of an organisation's senior management will depend on the nature and scale of an organisation's activities. Apart from directors and similar senior management positions, roles likely to be under consideration include regional managers in national organisations and the managers of different operational divisions.

What particular issues will the judge and jury look at?

The duty of care

In criminal proceedings generally, questions of fact are decided by the jury and questions of law are decided by the judge. Accordingly, whether a particular organisation owes a duty of care to a particular individual is a question of law and will be decided by the judge. However, under the Act, and in a departure from the norm, the judge will make findings of fact necessary to decide that question. The Explanatory Notes to the Act state that the questions of fact that the judge will need to consider will "generally be uncontroversial". It remains to be seen whether this will be the case.

The Explanatory Notes also state that the facts decided by the judge will only be decided for the purposes of the duty of care question and, if they otherwise affect the case, they will be for the jury to decide. There is no comment on the possibility that the judge and jury could come to different conclusions in respect of the same set of facts.

A gross breach

If it is established that an organisation owed a relevant duty of care to a person, then it falls to the jury to decide whether there was a gross breach of that duty. As part of this, the jury must consider whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the alleged breach. If it did, the jury must consider 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 evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged failure to comply with the health and safety legislation referred to above, or to have produced tolerance of that failure.

It may also have regard to health and safety guidance that relates to the alleged breach. Such guidance means any code, guidance, manual or similar publication that is concerned with health and safety matters and is made or issued (under a statutory provision or otherwise) by an authority responsible for the enforcement of health and safety legislation. Health and safety offences

Another point to note is that where in the same proceedings there is a charge of corporate manslaughter and a charge against the same defendant of an offence under the health and safety legislation arising out of the same circumstances, the jury may, if the interests of justice so require, be invited to return a verdict on each charge.

An organisation may even, in certain circumstances, be charged with a health and safety offence after it has been convicted of corporate manslaughter.

What are the penalties?

- an unlimited fine;
- a remedial order to take specified steps to remedy defects;
- a publicity order requiring the guilty organisation to publicise certain matters relating to the offence.

This provision is likely to come into force in Autumn 2008.

What practical matters should organisations look out for now the Act is in force?

The responsibilities placed on organisations should not substantively change as a result of the new offence. The Act is based on duties of care in the existing law of negligence and does not replace health and safety legislation. However, the new offence will increase the likelihood of successful prosecutions of organisations for corporate manslaughter, with the financial and reputational damage that can result. As such, it brings into sharp focus the need for proper management in respect of health and safety matters:

- **Managing safety:** organisations should review their management of safety issues. Not only must organisations set up proper systems and controls, they must ensure that these systems and controls work. As the Ministry of Justice's guide to the Act states, factors that the courts might consider will range from "questions about the systems of work used by employees, their level of training and adequacy of equipment, to issues of immediate supervision and middle management, to questions about the organisation's strategic approach to health and safety and its arrangements for risk assessing, monitoring and auditing its processes";
- **Senior management:** if an incident does occur, the prosecuting authorities will scrutinise closely senior management. As a result, senior management must be actively involved in ensuring that an organisation meets its health and safety responsibilities. This will involve establishing the "hard" controls of proper management, training and reporting structures, as well as the "soft" controls required to maintain a compliance culture;
- **Individual liability:** even with the introduction of the new offence, individuals may still be liable under criminal law. Although an individual cannot commit an offence under the Act, he or she can still be liable for gross negligence or unlawful act manslaughter or health and safety offences. As

such, all individuals within an organisation need to continue to understand their legal responsibilities;

- Managing legal risk: organisations must ensure that they properly identify and manage the relevant legal risks, as well as the practical issues relating to health and safety. For example, their insurance cover must be sufficient and they should consider preparing a plan for dealing with the legal and regulatory consequences of serious health and safety incidents, including possible investigations, criminal charges, adverse press coverage and civil claims.

The Act provides the basis for a more effective regime in this area and there is no doubt that the prosecuting authorities will want to use it. Conviction will bring very severe consequences both to organisations and those who run them. As such, it is imperative that the appropriate advice is received to prevent problems arising and, if they do, that they are dealt with promptly and effectively.

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