Corporate Manslaughter and Directors Responsibilities for Health and Safety

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Overview

- The thrust of the new law and why the law was changed
- A worked example of a corporate manslaughter investigation
- Penalties on conviction
- Directors responsibilities for health and safety
- What you should be doing now
A quick look at manslaughter …

- Complete change in the way a company is convicted for “manslaughter”

- Organisation is guilty of the offence if the way in which its activities are managed or organised
  1. Causes a person’s death, and
  2. Amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.
Why the law has changed

- Manslaughter conviction of a company previously required the guilt of the "directing mind and will"
- No successful prosecutions of large companies
Pressure to change the law
The consequence

- A new law which will make it easier to convict companies for manslaughter
The new law in practice

- Fatal accident at a set of retail premises
- Man falls from height whilst trying to retrieve stock from shelving
Fatal accident triggers immediate attention from the regulator/s
Police presence at site

- Previously police could often rule out manslaughter very quickly
- Now, more difficult as they need to understand the management/organisation of the relevant activity
- Prolonged and substantial police involvement, may identify various failings
Other triggers

- Industrial disease causing death
- Very serious injury, likely to lead to death
Ingredients of the offence

- An organisation owed a duty of care to the deceased
- That duty was breached
- It was breached at a senior management level in the organisation
- The breach was a gross breach
- The gross breach was a cause of death
Duty of care

- The obligation to exercise a level of care towards an individual, as is reasonable in all the circumstances, to avoid injury to that individual or his property

- Based upon relationship between the parties
Legal obligations to take reasonable care include …

- Employers
- Occupiers of premises
- Suppliers of goods and services
- Companies carrying on construction and maintenance
- Companies carrying on any other commercial activity
Back to our example: the expected approach to work at height

- Assessment of whether work at height is avoidable
- Selection of suitable equipment
- Safe system of work
- Training of operative
- Effective supervision of operative
Breach of duty

- A failure to behave as a reasonable employer would, but taking into account your specific skills, knowledge and experience
Police – witness statements, search and seizure

- Witnesses, documents and other evidence
  - will identify the deceased and his relationship with any organisation (duty of care)
  - the nature of the activity he was undertaking and how he was performing it (breach of duty)
  - the extent to which the activity was planned
  - similar incidents
Methods used by the Police for asking questions

- Voluntary interview

- Arrest of individual who is suspected of an offence

- N.B. No compulsory powers, and cannot arrest on suspicion of corporate manslaughter
Next question – was there a gross breach of the duty of care?

- How far beneath the standard of reasonable did the employer fall?

- How serious were the failures?

- How much of a risk of death was there?

- Jury direction – Very, very bad or just bad?
Liaison with experts

- Such as HSE, independent experts and experienced officers
- Identifies the nature and seriousness of the failings
Guidance has a new status in corporate manslaughter cases

- HSE guidance concerning the activity will be admissible at trial
Evidence of short cuts

- Police may be told by other workers that the deceased often worked without protection, it was an accepted practice that was tolerated by managers

- Admissible at trial
At what level are the failures?

- Police will look at how high up the organisation the failings go
Senior Management

- People who play significant roles in relation to:

  1. The making of decisions about how the whole or a substantial part of its activities are organised or managed, or

  2. The actual managing/organising of the whole or a substantial part of those activities
Back to our example

- Failure by a line manager to select the correct equipment
- Failure by training officer/manager to provide proper training to the operative
- Failure by supervisor to provide effective supervision
More likely to meet the criteria

- Failing in company to have a risk assessment process for work at height
- Failing to issue procedures to its retail premises for work at height, failing to have an audit process in place to ensure sites use company procedures
- Failing to provide the appropriate equipment to sites
- Failing to provide any training for work at height
Maybe?

- Failure by local management team to issue internal procedures for assessing whether work at height necessary
Management failure caused death

- Medical evidence
If convicted, the penalties are ...

- Unlimited fine
- Remedial order
- Publicity order
So, what will a prosecution look like?

- Company charged with corporate manslaughter
- PLUS (maybe) manager charged with gross negligence manslaughter
- PLUS (maybe) company charged with breaching HSWA general duties
- PLUS (maybe) directors charged with breaching s37 HSWA
Advice

- Ensure your health and safety function is fully aware of the importance of guidance
- Ensure Directors are fully compliant with the new leadership guidance
- Ensure all activities, especially high risk activities, are being risk assessed thoroughly and audited
- Ensure staff are all aware of their responsibilities
- Review your emergency response plan
- Ensure you have 24-7 access to specialist lawyers and use them immediately if you have a workplace death
Myths about corporate manslaughter

1. The penalty is prison
Myths about corporate manslaughter

2. Directors can be charged with corporate manslaughter
Gross Negligence Manslaughter

- Grossly negligent act
- By a person who owed a duty of care to the victim
- Breaches that duty, and
- Causes death
- Prison sentence available
High profile example

- 58 Chinese immigrants died at Dover
- Sole air vent closed to avoid detection
- Dutch lorry driver found guilty of manslaughter, received 14 years imprisonment
Directors/Senior Managers and liability for health and safety offences

- Secondary liability
- Extension of liability of employer
Key duties under HSWA – the employer

- Section 2 – duty towards employees

- To take all reasonably practicable steps to protect the health, safety and welfare of their employees
Key duties employer cont.

- Section 3 – duty towards non-employees
- To ensure, so far as is reasonably practicable, that persons not in their employment are not exposed to risks
- Protects public, sub-contractors, clients etc
How directors commit offences – the current law

Section 37 HSWA:

“Where an offence is committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, company secretary, and similar office holder, he as well as the company shall be liable”.

- Breach punishable with a fine and disqualification but in future will include prison
IOD/HSC “Leading health and safety at work”

- Sets out an agenda for the effective leadership of health and safety
- 3 essential principles – strong and active leadership from the top, worker involvement and assessment and review
- SHOULD be followed
Guidance – its status in corporate manslaughter cases

- HSE guidance admissible at trial
IOD/HSC “Leading health and safety at work” - Action

- 4 actions

1. planning the direction for health and safety policy
2. delivering health and safety
3. monitoring health and safety
4. formal review of performance
(1) Plan the direction for health and safety policy – **core actions**

- Contents of policy statement critical
- Should set out the role of the board
- Should set out the role of each member of the board
- Should require the board to take ownership of the key health and safety issues faced by the organisation
- Should require the board to decide how best to communicate, promote and champion health and safety
Planning the direction – good practice

- H&S should appear regularly on the agenda
- Chief Executive critical role
- H&S director – useful and sends a strong signal
- Set targets
- Non-executive directors as scrutineers
(2) Deliver health and safety – core actions

- Adequate resourcing of H&S
- Obtain competent advice – both internally and externally
- Ensure Risk Assessments process is being followed
- Involve employees. Get their opinions and thoughts
- Consider implications of new working processes and new personnel
Delivering health and safety – **good practice**

- Visible leadership
- Consider H&S when making senior management appointments
- Procurement standards
- Assessment of H&S arrangements of contractors, partners, suppliers
- H&S subcommittee
- H&S training to the Board
(3) Monitor health and safety – core actions

- Appropriate weight given to “prevention” (pre-incident) and “cure” (post-incident)

- Periodic audits of the effectiveness of management structures and risk controls

- Impact of change is reported to the board

- Procedures to implement new and changed legal requirements and other external developments
Monitor health and safety – good practice

- Effective monitoring of absence/health to alert the board of underlying problems
- Collection of data to help benchmark performance against competitors
- Staff appraisals to include their contribution to H&S performance
- Regular performance data of company and its contractors
- Involve staff in monitoring
(4) Review health and safety – core actions

- Formal review at least once per year
- Should scrutinise whether H&S policy reflects current priorities, plans and targets
- Examine whether systems have been effective in keeping board informed
- Should report H&S shortcomings
- Decide improvement actions and appropriate timescales
Review health and safety – good practice

- Recording performance in annual reports to investors and stakeholders
- Extra site visits to gather information prior to the formal review
- Celebrations of good performance
How can directors and senior managers protect themselves and their company?

- Diligently carry out the functions you have been assigned, and be able to demonstrate what you’ve done for health and safety
- Respond to H&S problems without delay
- Allocate adequate time for H&S
- Familiarity, compliance with and promotion of policies
- Understand what good health and safety looks like
- Understand your H&S management strengths and weaknesses
- Judge managers and staff on health and safety
The Future

- New corporate manslaughter legislation will lead to improved health and safety management and engagement
- Investigations likely to be fuller and therefore slower
- More charges
Questions?

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Corporate Manslaughter and Fatality Sentencing Guidelines

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Overview

- Position prior to the Sentencing Guidelines?
- What do the guidelines say?
- What does the future hold?
Position prior to the sentencing guidelines

“In setting fines for Corporate Manslaughter the courts should consider the same issues that are taken into account when setting fines under health and safety legislation”

The Ministry of Justice.
What were the general principles?

- No sentencing tariff
- Aggravating factors
- Mitigating factors
- Consistency was not the primary objective
- No relationship between turnover/profit
SENTENCING TRENDS UP TO 2010
Southall Train Crash

- 7 dead, 150 injured
- In 1999 Great Western Trains fined £1.5 million
Ladbroke Grove

- 31 dead, 400 injured
- In 2003 Thames Trains fined over £2 million and Network Rail £4 million
Larkhall fatal explosion

- 4 dead, none injured
- In 2005 Transco fined £15 million for a fatal explosion
Hatfield rail disaster

- 4 dead, 70 injured
- In 2006 Network Rail fined £3.5 million and after Balfour Beatty £7.5 million
In 2008 John Pointon & Sons fined £620,000 for a single fatality. Reduced to £460,000 on appeal.
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<td>1 558</td>
<td>1 618</td>
<td>1 241</td>
<td>1 047</td>
<td>1 041</td>
<td>1 058</td>
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<td>Number of convictions</td>
<td>1 427</td>
<td>1 203</td>
<td>1 243</td>
<td>957</td>
<td>831</td>
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<td>10 015 346</td>
<td>7 085 922</td>
<td>11 193 737</td>
<td>8 735 840</td>
<td>23 150 876</td>
<td>12 208 829</td>
<td>11 189 475</td>
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Background to the new guidelines
In 2008 the Sentencing Advisory Panel suggested a controversial approach to sentencing.

- Fines fixed by reference to % of annual turnover.

- Provided an example to back up this argument. BAE systems and Macob Administration each fined £80,000 for health and safety offences.

- The BAE fine represented just 0.4% of the company’s pre tax profits but the Macob fine represented 54% of its profits
Considered the proposal and rejected it.

Formula could risk an unfair outcome with fines varying wildly.

Difficult to apply to public and third sector bodies.

May result in corporate reorganisations designed to avoid the impact of any fine.
About the new guidelines
Sentencing Guidelines Council Definitive Guideline

- Applies to the sentencing of organisations after 15 February 2010
- Definitive guidelines produced for both Corporate Manslaughter and Health and Safety breaches which were a significant cause of death.
- www.sentencing-guidelines.gov.uk
- What should the Courts consider
1. How serious is the offence?

- How foreseeable was the serious injury?
- How far short of the standard did the defendant fall?
- How common is this kind of breach in this organisation?
- How far up the organisation does this breach go?
2. Are there any aggravating features?

- Whether there has been more than one death
- A very serious personal injury in addition to the death
- Failure to heed warnings or advice
- Cost cutting at the expense of safety
- Deliberate failure to obtain or comply with relevant licences
- Injury to vulnerable persons
Are there any mitigating features?

- A prompt acceptance of responsibility
- A high level of cooperation with the investigation, beyond that which will always be expected
- Genuine efforts to remedy the defect
- A good health and safety record
- A responsible attitude to safety such as commissioning of expert advice or consultation of employees
4. Financial resources of the organisation?

- Size is relevant

- The means of any defendant are relevant to a fine (best practice will be to request the last 3 years accounts)

- “The court should, however, look carefully at both turnover and profit, and also at assets, in order to gauge the resources of the defendant…”
5. What are the consequences of a fine? - relevant

- Effect on the employment of the innocent
- Effect upon the provision of services to the public
- Whether the fine will have the effect of putting the defendant out of business
6. What are the consequences of a fine?
- irrelevant

- Effect upon any shareholders or directors

- Prices charged by the organisation might in consequence be raised, unless the Defendant is a “monopoly supplier of public services”

- Liability to pay any civil compensation

- Cost of meeting any Remedial Order
7. Is a Compensation Order appropriate?

- Civil matter unless the defendant is uninsured and payment may not otherwise be made.
8. What level should the fine be?

- Must be punitive

- Corporate Manslaughter – seldom less than £500,000 and may be measured in millions of pounds

- Health and Safety offences - seldom less than £100,000 and may be measured in hundreds of thousands of pounds or more.
9. Early guilty plea?

- Reduce by up to one third
- Saving in Court time
- Avoid trauma for witnesses
10. Consider an order for costs

- Investigative costs
- Legal costs
- Able to challenge?
11. Consider a Publicity Order

May require publication of:

- the fact of conviction
- specified particulars of the offence
- the amount of any fine
- the terms of any remedial order
12. Consider a Remedial Order

- A defendant ought by the time of sentencing to have remedied any specific failings
- If it has not then a remedial order should be considered
- The costs of compliance should not ordinarily be taken into account
Guidelines in Practice – health and safety

- Health and Safety case: *R v Bodycote Hip LTD*

- Court of Appeal on 30th March 2010

- Bodycote Hip Ltd fined £533,000 and ordered to pay prosecution costs of £200,000 at first instance

- “Both fine and costs were upheld on appeal. The Court confirmed that the result would have been the same using the new guidelines”

- Profit before safety
Guidelines in practice – corporate manslaughter

- Yet to be seen
- First prosecution in Court
- Small company
- Unlikely to provide much assistance
The future for sentencing?

- Larger fines
- Higher costs awards
- More publicity
- Wider reputational damage
What can your business do?

- Expert legal advice at early stage
- Control of investigation
- Limit charges
- Limit aggravating features
Questions?

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