

The first organisation in England & Wales has been fined under the Corporate Manslaughter and Corporate Homicide Act 2007 ("The Act") and subsequently failed to win a right to appeal against the conviction and £385,000 penalty.

The company was considered to be in gross breach of its duty of care towards the fatally injured person, due substantially to the way in which senior management had organised their activities.

This prosecution highlights that other organisations must ensure that they fully understand the duties and obligations of this Act in order to avoid the human and financial costs of significantly inadequate management.

## The Act

To be guilty of corporate manslaughter an organisation must have:

- a relevant duty of care to the fatally injured person;
- be in gross breach of its duty;
- that gross breach must come about because of a senior management failing;
- the harm causing the death must be sustained in the UK; and
- the death must be a foreseeable consequence of the breach.

Three key areas are:

### 1. Duty of Care

A relevant duty of care is defined by reference to the law of negligence. In essence, this means established relationships such as those between employer and employee will be covered, but also the foreseeably injured third party such as a prospective customer or visitor. Organisations which can owe a duty of care include companies, bodies created by royal charter or statute, partnerships, and some government departments. Organisations providing custodial services are also likely to be covered by the Act shortly.

### 2. Gross Breach

Having established a duty of care exists, the jury will be asked to consider whether the conduct of the organisation has fallen **far below** what could be reasonably expected in the circumstances. The jury must consider whether there has been a failure to comply with health and safety legislation; how serious that failure was; and how much of a risk of death was posed.

The jury may also consider the extent to which evidence shows that attitudes, policies and systems are accepted practices within the organisation and are likely to have encouraged such failure, or produced a tolerance of it. In essence if the failure to manage safety runs through the very fabric and culture of the business this may amount to a gross breach.

### 3. Senior Management Failing

Critically, a gross breach must have come about because of the way in which senior management has organised its activities. This must also be a substantial element of the breach.

However, there is no definition of senior management. It will **not** be based on job titles, rather an assessment of whether managers are responsible for all, or a substantial part, of the operation of the organisation.

Whilst there is no explicit legal requirement on directors to manage safety, the implied requirements of the Health and Safety at Work Act 1974 ("HSWA") and this Act mean that senior managers will be required to show commitment to managing safety. This includes taking positive, visible steps to ensuring that safety arrangements are both in place and effective<sup>1</sup>.

## First Prosecution

Cotswold Geotechnical Holdings Ltd was the first company to be prosecuted under the Act. It was a small (six employee) business, with a sole director (Peter Egan). It had a small turnover of about £300,000 and was just breaking even at the time of the accident. Its role was to investigate ground conditions on sites prior to construction work.

The facts of the accident are relatively straightforward. The company was assessing the ground conditions for some new houses. To do that they had dug a number of trial pits. However,

<sup>1</sup> Guidance produced by the Institute of Directors and the Health and Safety Executive ["Leading Health and Safety at Work – [http://www.iod.com/MainWebSite/Resources/Document/HSE\\_guide.PDF](http://www.iod.com/MainWebSite/Resources/Document/HSE_guide.PDF)] sets out those building blocks.

there was no risk assessment in place for the digging of these pits. One of the pits collapsed on an engineer, suffocating him.

The company was charged with corporate manslaughter and a breach of the HSWA, for a failure to reduce the level of risk to its employees to a level as low as reasonably practicable. Peter Egan was also charged with gross negligence manslaughter and a breach of the HSWA.

By the time the case came to be prosecuted, Peter Egan was extremely unwell. On the third application by the Defence, the judge agreed that it would not be fair to try Mr Egan and charges against him were dropped.

However, the case against the company proceeded on the basis that there was no unfairness. This was despite the fact the Company was not in a position to give evidence on its behalf (Mr Egan being the only person who could sensibly do this), nor could Mr Egan give substantial instructions or deal with difficult issues.

All contested cases of corporate manslaughter (where a not guilty plea is entered) will be heard by a jury. The jury found the company guilty and it was fined £385,000. It sought permission to appeal, which was refused.

## Issues

It has been widely observed that this case will do little to give medium size and large organisations guidance when trying to understand their obligations under the Act. However, it has raised some relevant points:

- The prosecution could have been brought under the old law of common law corporate manslaughter, because the 'directing mind' of the company was also prosecuted for gross negligence manslaughter. However, the difference is that even though the case against Mr Egan was dropped, the corporate manslaughter prosecution could continue. This would not have been possible under the old law.

- The Act allows corporate manslaughter and HSWA prosecutions to be dealt with together. Under the HSWA the Defendant has to show it took all reasonably practicable steps to reduce risk, a reverse burden of proof. However under the Act the prosecution has to show beyond all reasonable doubt that the corporate manslaughter offence is made out. This is a very difficult tension for a jury to resolve. Perhaps with this in mind the CPS dropped the HSWA offence.

- The issue of where the burden of proof lies in a corporate manslaughter prosecution remained live in this case. In this case the prosecution accepted the burden of proof for demonstrating breach of the relevant health and safety legislation, largely because of the abuse arguments raised by the Defence concerning Mr Egan's health. However, this was fact specific and may not operate to set a precedent. Indeed this was specifically stated by the Court of Appeal when refusing permission to appeal.

- The fine was well in excess of the company's annual turnover. Relevant guidelines say a sentence for corporate manslaughter will rarely be below £500,000. Giving sentence, the honourable Mr Justice Field commented: "It may well be that the fine I am going to impose and the terms of its payment will put this company into liquidation. If that is so that is unfortunate, but it is unavoidable and it is a consequence of this serious breach of duty committed by the company." For medium to large size firms convicted of the offence a fine into the millions could conceivably be imposed.

- Remedial and publicity orders can form part of the sentence. The judge made no remedial order, saying that the HSE was best placed to take any steps required. The question of a publicity order did not arise because the offence had been committed before that part of the Act had come into force.

## The Future

There are more corporate manslaughter prosecutions in the wings, but there is no sense that the CPS is taking test cases. One suggestion that has been made is that there haven't been any cases against large companies because senior management failures may well be pre-Act and there is an argument that that would be inadmissible evidence. That is not clear.

However, the case of Cotswold Geotechnical indicates that, where a corporate manslaughter prosecution is brought, it can be expected this will be pursued aggressively to verdict with the potential for a significant fine on conviction. Companies should consider whether they have a robust safety management system in place and what steps they can take to reduce the risk of any isolated failure being attributable to a 'senior management' failing of sufficient seriousness to be caught by the offence.

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