

Loss Prevention Standards

Corporate Manslaughter and Sentencing Guidelines

Introduction

The Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA) came into force on 6 April 2008. The legislation provides a new approach to punishment in circumstances where a work-related death has occurred irrespective of whether it is the death of an employee or a member of the public.

The UK has the lowest level of workplace and work-related fatalities in Europe. However, there has been concern and debate about the small number of prosecutions for manslaughter, the percentage that go to court and that the majority fail to succeed. Prosecutions of larger firms generally fail, whilst the few successful prosecutions have been against smaller companies.

Historic Position

Following a work-related death a number of enforcement options were available to the Health and Safety Executive (and Local Authorities):

- Prosecution under Health and Safety at Work etc. Act 1974
 - Section 2: Company, for employee deaths
 - Section 3: Company, for deaths of persons who are not employees
 - Section 7: Individuals, for personal failure
 - Section 37: Senior persons
- Prosecution for gross negligence manslaughter of both the "directing mind" and the company

The courts had determined that in general corporate bodies, such as companies, could not be prosecuted for manslaughter. In order for a company to be successfully prosecuted for manslaughter, it was necessary to identify a senior person within the organisation (the controlling or directing mind) and to successfully prosecute them for manslaughter. Only when the directing mind has been found guilty can the company be found guilty.

It has generally proved relatively easy to identify the controlling or directing mind of smaller organisations. However, in larger organisations such as large Public Limited Companies (PLCs), it has been difficult, if not impossible to establish a close connection between senior members of management and the activities that resulted in the death. Thus, the manslaughter prosecution generally failed.

In contrast, in smaller firms, the managing director or equivalent is usually much more closely involved in the day to day running of the business and so can be successfully prosecuted for Gross Negligence Manslaughter, thus allowing prosecution of the company.

Current Position

The CMCHA serves to remove this apparent inequality and ease the task of prosecution following a workplace death or fatality. This should mean that larger companies could, in the future, face a greater risk of prosecution. The new legislation allows companies to be charged with Corporate Manslaughter (Corporate Homicide in Scotland).

Who is Covered by the CMCHA

A wide range of organisations and corporate bodies are covered by the CMCHA and could face prosecution following a workplace or work-related fatality, including:

- Employers
- Partnerships
- Some Crown Bodies, the Police Force, etc.
- Companies within large groups are regarded as separate entities; a parent company would not necessarily be prosecuted for management failures within their subsidiary companies that have resulted in a fatality

Note: The CMCHA does not provide for the prosecution of individuals although they could still be charged with health and safety offences and Gross Negligence Manslaughter, just as previously. It is also not possible to charge an individual with "assisting or encouraging" in the new offence.

Duty of Care

The main offence under the CMCHA is concerned with a breach of the "duty of care" which arises from:

- Employing people
- Supplying goods and services
- Ownership and control of premises
- Undertaking any commercial activity including construction and maintenance work
- Using or keeping vehicles, plant and dangerous substances

Basis for Conviction

An organisation will render itself liable for conviction if the way in which it manages and controls its activities falls far below the standard expected. This is essentially a test of "gross negligence", and in order to determine this, the courts will consider what legislation applied and what industry or trade guidance and best practice information was available and should have been followed.

The court will also consider whether a member of senior management through their negligence, has caused or contributed to the cause of a fatal accident. Although a precise definition of the term 'senior management' is not given, the guidance states they would be someone who has responsibility for and control over a large or substantial part of the organisation. Exactly who would be regarded as senior management depends upon the nature of the organisation and how it organises its activities. Guidance from the Ministry of Justice states that it would include not only those in central or "headquarters" functions, e.g. Finance Director, but also those with senior operational responsibility, e.g. Works Manager, Maintenance Manager or equivalent.

Other Aspects of the CMCHA

A number of other parts of the CMCHA that should be noted:

- The CMCHA applies across the United Kingdom (UK); England, Wales, Northern Ireland and Scotland
- The CMCHA can not be used to prosecute following work-related deaths outside the UK
- Crown immunity is reduced
- Deaths in custody; due to a lead-on period such could not be prosecuted until September 2011

Penalties

The CMCHA sets out a number of penalties that may be used following a successful prosecution:

- Fines: the CMCHA allows for unlimited fines
Note: this aspect is no different to the position under existing legislation which allows for unlimited fines for more major cases and/or those health and safety prosecutions taken in the higher courts
- See reference later in this document to *Sentencing Guidelines*
- Remedial Orders: the company may, if found guilty, receive a remedial order requiring them to make good the situation/workplace within a specified period
Note: this is equivalent to the existing sanction of Improvement and Prohibition Notices
- Publicity Order: the court may require the company to publicise the circumstances of the accident that resulted in the workplace fatality, the particulars of the offence, the fines, etc.

Case Studies

The first company to be prosecuted under the CMCHA was a small firm of geotechnical engineers which employed some eight persons and had a turnover of approximately £250,000. Following the death of an employee in an unsupported excavation, a fine of £385,000 was payable over a ten year period. A personal prosecution of the Managing Director for common law manslaughter was also brought but dropped on the grounds of his ill health.

An employee of a Northern Ireland farm was killed in November 2010 when a metal bin fell from the forks of a forklift truck whilst it was being cleaned. The forklift truck was being driven by a director of the farm. In May 2012 the farm was fined £187,500 with costs of £13,000. As with the firm of geotechnical engineers, this case did little to clarify the operation of the CMCHA; the farm was a small business lacking in the complex management structure that the CMCHA was designed to test and hold to account.

Other prosecutions have followed including that of a shelving and storage manufacturer employing less than 150 employees. Subsequent to an employee falling through a fragile roof, a fine of £480,000 was imposed.

In several of the cases so far initiated, personal prosecutions for gross negligence manslaughter have been initiated against directors or senior managers of the organisation concerned. In one case, a director was also personally prosecuted under the provisions of the Health and Safety at Work etc. Act 1974 and fined £183,000. He was also banned from being a director of any company for five years.

The Crown Prosecution Service (CPS) reported the opening of 63 cases of Corporate Manslaughter in 2012, a 40% increase in those opened in the previous year. Many more cases are therefore likely to be brought before the courts.

Sentencing Guidelines

In November 2015 the Sentencing Council published its definitive guideline, replacing the previous guideline published in 2010. The new guideline took effect for cases where sentencing was passed on or after the 1st February 2016 regardless of when the offence took place.

The 2015 guideline has produced a step change in the level of fines imposed for Corporate Manslaughter offences particularly for larger organisations.

The new guideline takes an approach which seeks to determine the seriousness of the offence and then basing the fine on the level of seriousness determined, the financial size of the organisation and thereafter considering any aggravating and mitigating factors.

The seriousness of the offence is determined by considering:

- How foreseeable was serious injury?
- How far short of the appropriate standard did the offender fall?
- How common is this kind of breach in the organisation?
- How widespread was the non-compliance?
- Was there more than one death, or a high risk of further deaths, or serious personal injury in addition to death?

The new guideline specifies a 'starting point' and a range of fines for different sizes of organisations based on turnover (or generally for a public body, gross budget or revenue).

The specified fine levels are:

Size of organisation by turnover and culpability	Starting point for fine	Range of fines
Over £50m (Large)		
High culpability	£7.5m	£4.8m to £20m
Lower culpability	£5m	£3m to £12.5m
£10m to £50m (Medium)		
High culpability	£5m	£1.8m to £7.5m
Lower culpability	£3m	£1.2m to £5m
£2m to £10m (Small)		
High culpability	£800,000	£540,000 to £2.8m
Lower culpability	£500,000	£350,000 to £2m
Under £2m (Micro)		
High culpability	£450,000	£270,000 to £800,000
Lower culpability	£300,000	£180,000 to £500,000

NB: For very large organisations with a turnover of over £50m the guideline indicates that the fine levels may need to exceed the range shown above.

The actual fine is also affected by aggravating and mitigating factors (in addition to a statutory aggravating factor of previous similar convictions) which are as follows:

Aggravating factors: Cost-cutting at the expense of safety; deliberate concealment of illegal nature of activity; breach of any court order; obstruction of justice; poor health and safety record; falsification of documentation or licences; deliberate failure to obtain or comply with relevant licences in order to avoid scrutiny by authorities; offender exploited vulnerable victims.

Mitigating factors: No previous convictions or no relevant/recent convictions; evidence of steps taken to remedy problem; high level of co-operation with the investigation, beyond that which will always be expected; good health and safety record; effective health and safety procedures in place; self-reporting, co-operation and acceptance of responsibility.

Key Action Steps

- The CMCHA does not impose any new responsibilities upon employers and others who may be involved with workplace fatalities
- The CMCHA in itself does not in any material way increase the available penalties but see the references to Sentencing Guidelines above
- In order to reduce the chance of being prosecuted for Corporate Manslaughter, an organisation should ensure that all existing legislative requirements are identified and satisfied

Additional Information

- [Health and Safety Executive: Guidance on Corporate Manslaughter](#)
- [Barbour](#)
- [Corporate Manslaughter and Corporate Homicide Act 2007](#)

Further risk management information can be obtained from [Aviva Risk Management Solutions](#)

Please Note

This document contains general information and guidance and is not and should not be relied on as specific advice. The document may not cover every risk, exposure or hazard that may arise and Aviva recommend that you obtain specific advice relevant to the circumstances. AVIVA accepts no responsibility or liability towards any person who may rely upon this document.

