

CORPORATE MANSLAUGHTER LAW

Chapter One: An Introduction & Overview

After a long and tortuous path the new corporate killing law has been agreed.

This is an important development relevant to everyone involved in industry and will be of particular interest to senior managers and directors. What I'm doing here is to use this report to set out the key points of what the law says and to explain in more detail what it appears to mean in practice.

My message is that those who are actively seeking to satisfy their health and safety responsibilities should have nothing to fear from the new law, but that it is important not only to be clear what should be done, but equally committed to making sure that it is done.

I am not - nor do profess to be - a lawyer. The opinions expressed in this Report are mine alone and should not be used for the basis of legal considerations.

I believe my interpretation reflects the lawmakers' intentions, but I strongly suggest that you consult your own legal advisors to clarify your own specific corporate manslaughter responsibilities.

o **What Does The Law Say?**

The new law is called 'the Corporate Manslaughter and Corporate Homicide Act 2007'. It will come into force on April 6 2008. Full text of

the Act is available on the HMSO website at
<http://www.opsi.gov.uk/acts/acts2007/20070019.htm>

○ **Organisations or individuals?**

The offence can only be committed by an organisation.

An individual cannot be convicted of corporate manslaughter (in England, Wales or Northern Ireland) or corporate homicide (in Scotland).

Individuals' actions are relevant to the issue in that if there is a death, it is the way that activities are managed or organised by 'senior management' that governs corporate guilt or otherwise. However such senior managers cannot, themselves, be found guilty of corporate manslaughter or corporate homicide.

○ **When can the offence be committed? - The duty of care**

The offence can be committed where the organisation holds a relevant duty of care under the law of negligence i.e. a duty owed;

- To employees or other people working for or performing services for it; or
- As an occupier of premises;
or
- In connection with supply of goods or services, construction or maintenance, commercial activity, or use or keeping of any plant vehicle or other thing.

○ **What is the nature of the offence?**

If a duty of care is held (see above) there is an offence if the organisation's conduct amounts to a breach of that duty of care which falls "far below" what can reasonably be expected of the organisation in the circumstances'

○ **How is "far below" decided?**

There is no explicit formula. In effect it will be for juries to decide on the facts of individual cases.

The Act **requires** juries to consider

- Whether any health and safety legislation was breached; and if it was
- How serious that failure was; and
- How much of a risk of death it posed.

The Act **allows** juries to consider how the evidence in court shows

- The health and safety culture that prevailed.
- Alignment with relevant guidance from enforcing authorities e.g. The Health & Safety Executive (HSE).

Note: In any corporate manslaughter case compliance with HSE guidance on the duties of directors and senior managers will be of particular interest to courts and juries. Companies would be well advised to consider their senior management arrangements in light of it. Further information is on the HSE website at this link (<http://www.hse.gov.uk/pubns/indg417.pdf>).

Juries are also permitted to consider “any other matters they consider relevant”. This does not appear to be limited to what is presented in evidence in court.

○ **The importance of senior management**

Senior managers are important to the issue because whether or not the organisation has fallen ‘far below’ is only insofar as its activities are managed or organised by its senior management. Failure by, for example, a foreman cannot in itself lead to an organisation being convicted of corporate manslaughter. However, if the foreman’s shortcomings are the product of senior management’s failure then this could lead to successful conviction of the organisation.

○ **Who are senior management**

It is defined as the persons who play significant roles in

- The making of decisions about how the whole or a substantial part of an organisation's activities are to be managed or organised, or
- The actual managing or organising of the whole or a substantial part of the same activities.

In short this means those who make the main decisions about what should happen across the organisation (usually directors) and those with overall responsibility for making sure it does happen across the organisation (e.g. the Chief Executive and his immediate team)

○ **What are the penalties**

- Organisations convicted are liable to an unlimited fine.
- On conviction the prosecution may apply for a remedial order specifying steps to put right whatever caused the offence to happen.
- On conviction the court may require the organisation to publicise in any way the court decides fit, the fact that it has been convicted, why, how much it was fined and the requirements of any remedial order.

Chapter Two: **What Does It Mean In Practice**

○ **Organisations or individuals?**

It is quite clear. Individuals cannot be prosecuted for corporate manslaughter or corporate homicide under any circumstances.

This does not mean that if individuals behave so recklessly that their own actions cause someone else's death, they cannot be prosecuted for straightforward manslaughter. They still can be. This applies to anyone at work and not just senior managers. However, to sustain a manslaughter charge strong evidence is required to show beyond all reasonable doubt that the death arose explicitly from the actions of the individual concerned. We consider that such reckless conduct is, at worst, extremely rare in normal UK engineering construction circumstances.

The new law does nothing to alter the entirely separate duties held by individuals under the Health and Safety at Work Act – in particular Section 7 (duties of employees), Section 8 (no person to intentionally or recklessly interfere) and Section 37 (offences by directors managers etc where a corporate offence under HSW is due to their neglect).

○ **The duty of care**

The Act is limited in its scope to those activities covered by the duties of care it mentions. In practice these duties cover all the activities undertaken by engineering construction companies. It is difficult to envisage how anything done by Alltask or its associated companies during their business is not somehow connected with either,

- Their employees or other people they are working with or for; or
- Their occupation of premises; or
- Supply of goods or services; or
- Construction or maintenance; or
- A commercial activity; or
- The possession or use of plant or any other thing.

It is safe to assume that anything any Alltask or associated company does during any of its business is liable to the corporate manslaughter legislation.

○ **The importance of senior management**

This notion is central to the whole purpose of the Act. Whether or not an organisation is guilty is judged against what the **senior management** did or did not do.

Note that it says senior management. It does not say senior health and safety management.

One of the key aims of the legislation is to drive health and safety management higher up the senior decision making agenda. By referring simply to senior management it places an onus on all senior managers to take account of health and safety matters in their decision-making. For instance the Act is aimed not only at directors with specific H&S responsibilities, but also at finance directors whose decisions can have a profound impact on risk.

○ **What should senior management conduct look like?**

There is much guidance available on senior management involvement in H&S too detailed to reproduce here. We believe these are key principles

- Organisations must be able to demonstrate that H&S is on their decision-making agenda in the same way as e.g. finance
- Organisations must have a relevant and up to date policy for health and safety which they can show senior managers have commissioned, considered and approved.
- Organisations must be able to show that senior managers are active and positive in satisfying themselves that they know what is really going on in their organisations; and
- That where failure is noted they are equally active and positive in requiring it to be put right

In all the above the emphasis is about really deciding, really knowing, and really doing. In short, “walking the walk rather than talking the talk”.

The Herald of Free Enterprise disaster http://www.maib.gov.uk/cms_resources/HofFE%20part%201.pdf is widely seen to have been a touch paper for this new legislation. In that case the organisation had various procedures and standards written down. But senior management appeared indifferent to whether those theoretical aspirations were brought to life – which the judge described as ‘infected with the disease of sloppiness from top to bottom’. Had the new offence been available then, there would undoubtedly have been a prosecution under it.

‘Saying what you should do is one thing, but making sure that it really happens is quite another’

Organisations need to be able to demonstrate real senior management commitment to both to avoid falling foul of corporate manslaughter law.

○ **Who are senior managers?**

All directors are senior managers.

All their decisions are potentially relevant to whether or not the organisation is guilty of corporate manslaughter.

All Chief Executive Officers (CEO’s) and their immediate subordinates responsible for decision making or delivery of particular aspects across the whole of the organisation **should be considered senior managers.**

Others further down the executive management chain may or may not be senior managers. The key criteria is whether the person

‘plays a significant role in the actual managing or organising of a substantial part’

of the organisation’s activities.

What is substantial? This is ultimately a matter of judgement for a court to decide, but I suggest that the following question is a useful guide.

Would the person's management performance in his/her role have a substantial effect on the success of the company as whole?

For instance a project manager in charge of everything the company does on a major contract is a key figure. Even though he does not have a company wide remit, the effects if he fails to deliver for the company are significant. He would probably be considered a senior manager. On the other hand a supervisor at the same site does not have the same impact and would not be considered a senior manager.

○ **What is “far below” what can reasonably be expected’?**

This is ultimately a matter of judgement to be decided in individual cases by the court. There will undoubtedly be different opinions. One man's reasonable behaviour could well be another's 'far below'. However the Act sets out how juries should answer the question and this forms a good framework to start.

Chapter Three: **Things The Jury MUST Consider**

Was there a breach of health and safety legislation?

Taking account of the variety of modern H&S legislation (and especially the implications of “**so far as reasonably practicable**” which underpins all of it) if someone has been killed there will almost certainly have been a breach of some sort, at least a prima facie one

How serious was the failure to comply with legislation?

- Was it a one off event or did it represent the normal state of affairs in this company?
- How long did the failure last?
- Did they know about it? For how long?

- Was the breach obvious or more difficult to recognise? (e.g. were machine guards completely absent or was it that there was a small gap)

- **How much of a risk of death did the breach pose?**

- How many employees were exposed to the risk?
- Did it extend to other companies' employees/ How many?
- Did the risk extend to the public? How many
- Did the breach pose a big risk of death by itself or did a range of other things have to be in place as well? How many? How likely/foreseeable were they?

- **Things the jury may (and almost certainly will) consider**

In both of the following two categories juries can only consider the issue on the basis of evidence that has been put forward during the trial. They are not allowed to speculate, for instance, on whether there were similar previous shortcomings if this was not made clear during the trial.

- **Attitudes, policies, systems, practices within the organisation**

- Did the company stand to gain financially by not addressing the issue?
- If so was this deliberate or coincidental?
- Was there any company policy aimed at the issue that caused the death?
- Was it relevant to the real situation or merely 'going through the motions'?
- Had any senior managers ever questioned compliance with it?
- Were there any previous similar breaches?
- Did any senior managers ever respond to any of them?
- Are there any records of senior managers ever addressing the matter?
- If there are did they do nothing or decide some action?
- If they did was it ever implemented?

- If senior managers were unaware of the issue should they have been? Senior managers cannot be expected to know everything, but should they have made themselves aware as far as this issue is concerned?
- If they were not is that because they didn't understand its importance or because they did but couldn't be bothered to deal with it?
- What did workers say they do in reality?
- Were workers ever challenged by their line managers over non compliance?
- Is there an H&S disciplinary procedure? Has it ever been used?
- Had workers or safety reps ever raised concerns about the issues?
- If so did the company respond to them?
- If not is it because such reports are discouraged or not sought?

All the above are examples of the sort of things that juries may consider. Readers will doubtless be able to think of many more. Juries can only consider these matters if they are raised in evidence during a trial. In practice though, if the matter has got to the serious stage of a corporate manslaughter hearing in the Crown Court, it can be assumed that a very wide range of such matters are paraded before the jury.

All of them flow from compliance or otherwise with key principles for what senior management conduct should look like (see previous paragraph). In essence those who are already actively pursuing good senior management practice should not fear falling foul of corporate manslaughter trials. But we emphasise again it is not just saying what should be done, but being able to convincingly demonstrate that it is being done

Chapter Four:

Compliance with Health & Safety Guidance

In this case health and safety guidance only means guidance from relevant enforcing authorities such as HSE. It does not include other guidance such as that from Trade Associations or Manufacturers. (Nonetheless in the dynamics of a court hearing it is entirely possible that attention will be drawn to non 'official' guidance with semi-quasi legal status e.g. The National Access & Scaffolding Confederation's "**THE NASC**" Technical Guidance Note TG20:05).

In practice HSE guidance defines what acceptable standards are. However remember that the corporate manslaughter offence is conduct falling "far below". 100% compliance with guidance advice is not required to guarantee defence against a corporate killing charge. Any contravention of guidance advice needs to be substantial to legitimately contribute to the conclusion that conduct fell 'far below'. Simplistically speaking 99% compliance probably isn't far below, but 1% compliance is.

Remember too that the corporate manslaughter offence is related only to the conduct of senior management's management and organisation. Guidance sets out many detailed technical requirements. For instance the forklift truck training approved code of practice has much to say on the nature and frequency of operator training. Say for instance that a completely untrained and inexperienced 16 year old was put to work on a forklift truck (FLT), it turned over and the person was killed. This would be a substantial contravention of that guidance, which any jury would register. But suppose that the company concerned was a nationwide logistics organisation with a carefully considered FLT driver training policy which it was able to demonstrate had been effectively and actively applied across all its other locations. The accident occurred because the junior site manager at one location flouted the company's policies, which he was well aware of. Whilst the guidance was not followed this was not really a function of the way senior managers managed or organised activities. So in this case it would not (or should not) increase the likelihood of conviction of corporate manslaughter. On the other hand if the same company did not have an appropriate FLT training policy, or it was consistently not applied, then non compliance

with the HSE guidance in those circumstances would considerably increase the chance of conviction.

○ **Any other matters the jury considers relevant**

This is clearly a wide-ranging notion. It appears to override the restriction above on juries to only consider what has been presented in evidence. It is impossible to predict what individual juries will consider relevant in individual cases. The following seem likely candidates though.

- The organisation's response subsequent to the death
- Its previous record
- Expressions of remorse.
- Public concern

Those facing a charge of corporate manslaughter would be well advised to anticipate how juries may see such factors in their case and take account of it in the evidence they submit.

Chapter Five: **Penalties**

○ **Fines**

The primary sanction is an unlimited fine. Unlimited fines are already available in Crown Courts for offences under the Health and Safety at Work Act (HASAWA). In recent years some extremely large HASAWA fines have been handed down running into millions. I confidently anticipate that if workplace deaths are dealt with under corporate killing law, the fines will be much higher.

○ Remedial orders

The prosecution may apply for and the Court may make a remedial order on a convicted organisation.

Remedial orders compel the organisation to take specified action. These orders are limited in that what they specify has to reflect issues involved in the original death. In practice though, orders could well be far reaching, since broader health and safety management across organisations as a whole is central to the entire notion of corporate manslaughter/homicide.

Remedial orders must have regard to representations made and evidence produced from both prosecution and defence. Thus there is an opportunity for convicted companies to explain and clarify relevant information so that what the order specifies can take it into account.

Before any such orders are made courts are required to consult with the relevant enforcing authority i.e. HSE. In this way orders should take account of anything arising from earlier HSE action such as Improvement or Prohibition Notices. It should also help ensure that remedial orders are drafted with the benefit of professional health and safety expertise.

○ Publicity order

This is a new principle of health and safety enforcement. We anticipate that courts will be inclined to use it freely against those convicted of the serious offence of corporate killing.

Adverse publicity could be very damaging to an organisation's commercial future, particularly those for whom maintaining brand is a key competitive factor.

If an organisation is convicted the court may order it to publicise the fact and if so that publicity must set out;

- That the organisation has been convicted of the offence;
- The particulars of the offence;
- The fine that was imposed;

- And the terms of any remedial order handed down.

The Act does not specify what form the publicity takes. It leaves it to the court to specify this. Thus it could range from a notice in a local newspaper to a schedule of announcements on national TV. Presumably the larger the organisation and the more extensive its operations, the more extensive the requirements of any publicity order are likely to be.

The Act lays particular emphasis on making sure that convicted organisations comply fully with publicity orders. The court must set a deadline for compliance with any publicity order. It also allows the court to require the organisation to prove to HSE that it has complied with the order.

If a publicity order is not complied with then the organisation can be prosecuted for this. If it is the prosecution will be on indictment - not summarily in the Magistrate's Court. This clearly signals how seriously the publicity principal was seen by legislators. We fully expect that courts will take the hint and use publicity orders robustly.

Convicted organisations will not be able to get away with publishing a small news item on page 28 of their local newspaper next to the report about Mr Smith's missing cat!

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Daniel Fincham – Chief Executive, Alltask Ltd.

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