

Risk Management Briefing

Corporate Manslaughter

Updated February 2021

Introduction

This briefing sets out the background to the offence of corporate manslaughter, how it might arise in the context of construction and engineering projects and what risks it may pose for companies in this sector.

In 2008, the Corporate Manslaughter and Corporate Homicide Act 2007 (the “Act”) introduced the statutory offence of corporate manslaughter. The statutory offence was first tested in the Courts in 2011, which led to a successful prosecution against the defendant company. Successful prosecutions have continued to be brought against companies since the introduction of the Act.

It is important to note that the prosecutions are by no means limited to large companies, in fact the majority of charges brought have involved small to medium sized companies.

Background

Historically, in order to prosecute a company for manslaughter, it was necessary to identify an individual who could be described as ‘the embodiment of the company itself’. It was only possible to convict a company if an individual was also found guilty of the offence of manslaughter. Therefore, if it was not possible to prosecute and convict an individual, a prosecution against a company could not succeed.

This led to great difficulties in prosecuting companies for manslaughter as it was not always possible to identify a ‘controlling mind’ who also had sufficient *mens rea* or ‘mental state’ to

be convicted of an offence. This was even more complicated in larger companies where no single individual was responsible for health and safety matters.

Consequently, there were very few successful prosecutions of companies for manslaughter. A series of disasters during the 1980s and 1990s led to calls for the companies involved to be prosecuted for manslaughter. This was highlighted by inquiries following disasters such as the Herald of Free Enterprise, the Kings Cross fire and the Clapham and Southall Rail crashes all finding the companies involved to be responsible (but no individual could be identified) and subjected them to serious criticism. The Act was introduced following these disasters and comprehensive reports on the issue.

Additionally, to address issues with identifying those responsible for construction site health and safety where there are multiple contractors involved, the Construction (Design and Management) Regulations (“CDM Regulations”) were introduced in 1994 (and subsequently revised in 2007 and again in 2015). Under the CDM Regulations, a principal designer and a principal contractor are responsible for site health and safety where a development involves more than one contractor during the pre-construction and construction phases respectively. This is to try and impose a structure of responsibility for health and safety on a site and avoid entities passing the buck.

The offence of corporate manslaughter

An organisation will be guilty of corporate manslaughter under the Act where it is established that:

- a) the way in which its activities are managed or organised causes a person’s death; and
- b) such conduct amounts to a gross breach of a relevant duty of care by the organisation to the deceased.

To be considered a gross breach, the conduct must fall far below what can reasonably be expected of the organisation in the circumstances. Further, management failure need not be the sole cause of the person’s death, but must be a cause of the person’s death.

The definition of organisation is broad and includes corporations (whether incorporated in the UK or overseas), a department or other body, police force, partnerships (including limited partnerships), trade unions or employers’ associations.

The way in which an organisation’s activities are managed or organised by its senior management must be a substantial element in the breach. Therefore the individual failings of employees within the organisation will not be sufficient to satisfy the requirements under the Act. Further, senior management cannot simply delegate all of its health and safety responsibilities to avoid falling within the remit of the offence.

Senior management includes those persons who play significant roles in making decisions regarding how the whole or a substantial part of the organisation’s activities are managed and organised. This definition will include persons within the direct chain of management and also those in strategic roles.

How corporate manslaughter arises in the context of UK construction and engineering projects

For corporate manslaughter to arise, the organisation must owe a relevant duty of care. Under the Act, a relevant duty of care means a duty owed by an organisation under the law of negligence, and may include one of the following duties:

- a) a duty to employees or other persons working for or performing services for the organisation (such as an employer's duty to provide a safe system of work to its employees or to contractors, secondees or volunteers);
- b) a duty as occupier of premises (such as an occupier's duty to ensure a building is kept in a safe condition);
- c) a duty in connection with the supply of goods or services; carrying on any construction or maintenance operations; any other activity on a commercial basis; or the use or keeping of any plant, vehicle or other thing, for the organisation (such as a duty to ensure that adequate safety precautions are taken).

Importantly, the above duties are imposed on organisations and not on individuals such as directors, managers, construction designers or consultants. Therefore, only an organisation may be liable under the Act, not an individual. Individuals may however be liable under the common law offence of gross negligence manslaughter, under the Health and Safety at Work etc. Act 1974 or the CDM Regulations.

A corporate manslaughter offence will generally arise due to systematic failures by an organisation and its senior management.

Prosecutions

Cotswold Geotechnical Holdings Limited ("Cotswold") became the first company to be convicted of the offence of corporate manslaughter under the Act in 2011.

The case was brought against Cotswold following the death in 2008 of a junior geologist, Alex Wright, who was killed when the 3.5 metre deep unsupported trial pit which he was working in, collapsed. The company's sole director, Mr Eaton, had been on-site that day and was aware when he left in the evening that Mr. Wright was working alone in the trench.

Serious safety issues were identified which included that Mr. Wright was a junior employee, with little training or experience; was working alone; the pit had no protective shuttering in contravention of industry specific guidance and previous HSE advice; no risk assessments/method statements for trial pit work had been produced and the company's working practices and health and safety policy were outdated.

The jury found that the company's working practices were 'wholly and unnecessarily dangerous' and it ignored well-recognised industry guidance.

A fine of £385,000 was imposed, which was less than the £500,000 minimum fine recommended by the Sentencing Guidelines Council, but represented a figure greater than Cotswold's turnover for the previous year.

Following the successful prosecution of Cotswold, a limited number of successful prosecutions have been brought subsequently in the Courts. The majority of corporate

manslaughter charges brought against organisations generally involve small to medium sized companies, with a limited number of directors and simple management structures.

Notwithstanding that the maximum penalty that may be awarded against an organisation is an unlimited fine, to date smaller fines (less than £1 million) have generally been awarded.

It is anticipated that prosecutions for corporate manslaughter will be brought in relation to the Grenfell Tower fire incident which occurred in June 2017 killing approximately 70 people. The Grenfell Tower inquiry was set up in 2017 following the incident to determine the faults and circumstances surrounding the incident, in particular, regarding design, construction and management of the building and compliance with relevant building and the safety requirements.

On 30 October 2019, the Honourable Sir Martin Moore-Bick published his findings in relation to phase 1 of the inquiry and this highlighted significant failings of the London Fire Brigade and the design and construction materials. The inquiry is ongoing and it is expected that any decision to prosecute companies under the corporate manslaughter provisions will be made after the conclusion of the public inquiry.

Implications / risks for construction designers and consultants

If convicted of corporate manslaughter under the Act, an organisation will be liable for an unlimited fine and, if deemed appropriate, an order publicising the conviction details of the offence and the level of fine imposed. A Court may also impose a remedial order requiring the organisation to remedy the breach or any deficiency in the organisation's health and safety policies, systems or practices that are relevant to the breach.

Therefore, companies will need to consider the financial and reputational risks associated with conducting themselves in such a way that may lead to a conviction under the Act.

It is therefore important to:

- a) ensure that all relevant industry standards and guidance are met;
- b) that risk assessments are undertaken wherever necessary;
- c) review the management and lines of responsibility for health and safety;
- d) review all relevant health and safety policies;
- e) review any reporting procedures; and
- f) undertake to amend and/or implement such policies and procedures where necessary.

It is therefore important for organisations within the construction and engineering industry to ensure that senior management develop and regularly review the health and safety management practices of the organisation, adopt a proactive approach to health and safety management and are aware of the nature and extent of the duties owed to individuals

This Risk Management Briefing is for information only, and insurance or legal advice should be taken to cover your particular circumstances.

This briefing was prepared by compiled by Lucy Bruce Jones of Norton Rose Fulbright LLP, with the CIC Liability Panel, chaired by Professor Sarah Lupton.

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