



The Corporate Manslaughter & Corporate Homicide Act 2007

The following paper is an abstract of a lecture delivered by Paul Raudnitz of QEB Hollis Whiteman Chambers to the South Eastern Branch of the National Federation of Demolition Contractors on 24th March 2009. The lecture was given in conjunction with Mike Warren, partner of BTMK Solicitors. This abstract is intended to be a short introduction to the new legislation for those potentially touched by it in industry and business.

Background to the Act

The Corporate Manslaughter and Corporate Homicide Act 2007 came into force on 6th April 2008.

The Act runs to 29 sections, has two schedules and a set of Guidance Notes.

Because the Act is so new, there is currently no case law on it – a number of the key terms at the centre of this Act are therefore yet to be clarified through the scrutiny of the courts.

The Act is a piece of *criminal* legislation, in which the relevant jurisdiction is the *criminal* jurisdiction:

- Proceedings would commence with a police investigation.
- If brought, proceedings would be brought by a criminal prosecution.
- Any trial would be a jury trial in the Crown Court.

What does the Act do?

The Act is designed to remove the difficulties experienced under the old law with proving the so called 'identification principle'.

Prior to the Act, the common law offence of 'manslaughter by gross negligence' governed the criminal liability of companies in this area.

QEB Hollis Whiteman Barristers

Queen Elizabeth Building, Temple, London EC4Y 9BS
DX LDE 482 Telephone 020 7583 5766 Fax 020 7353 0339
barristers@qebholliswhiteman.co.uk www.qebholliswhiteman.co.uk

The 'identification principle' was the requirement within the old law for the prosecution to prove that the act or omission causing the death was the act or omission of an individual who was the embodiment of the company. This was often difficult to do.

In essence, the new Act does two things:

- It abolishes the old offence of 'manslaughter by gross negligence' in its application to companies - at a stroke the new legislation removes all the difficulties inherent in proving the identification principle.
- In place of the old law, the Act introduces a new offence into UK criminal law. That offence is to be known as 'corporate manslaughter'.

Individuals

The position of individuals under the new Act remains unchanged:

- The new Act applies only to organisations.
- It has no application to individuals.
- Individuals will continue to be prosecuted under the old law of gross negligence manslaughter.
- The Act and the Guidance Notes clearly anticipate the possibility of concurrent proceedings, with, for example, the company prosecuted for corporate manslaughter whilst the directors and other responsible individuals are individually prosecuted alongside the company, with the old common law offence.

Scotland

In Scotland the offence of 'corporate manslaughter' is to be known as 'corporate homicide' (hence the title of the Act as a whole: 'The Corporate Manslaughter and Corporate Homicide Act').

The offence of 'Corporate Manslaughter' – the definition in the Act

The offence of corporate manslaughter itself is set out in Section 1 of the Act.

S1(1):

'An **organisation** to which this section applies is guilty of an offence if the way in which its activities are managed or organised
(a) causes a person's death, and
(b) amounts to a **gross breach** of a **relevant duty of care** owed by the organisation to the deceased'.

S1(3):-

'An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its **senior management** is a substantial element in the breach'.

The offence of 'Corporate Manslaughter' – the elements to be established

The offence can be boiled down to four essential elements:

The offence is committed where:

- There is an '**organisation**'.
- The way in which its activities are managed or organised causes a person's death.
- The way in which its activities are managed or organised amounts to a **gross breach** of a **relevant duty of care** owed to the deceased.
- The way in which its activities are managed or organised by its **senior management** is a substantial element in the breach.

'Organisation'

The Act only applies to '*organisations*' as defined by the Act. The definition is very broad indeed:

- Companies incorporated anywhere in the world.
- Corporations.
- Public bodies incorporated by statute (eg local authorities, NHS bodies).
- Government departments.
- Police Forces.
- Limited liability partnerships.
- All other partnerships, trade unions and employers' associations if the organisation concerned is an employer.

Extent and territorial application

The offence only applies if the '*harm resulting in death*' is sustained in the United Kingdom, or in a set of very limited contexts outside the UK:

- The UK's territorial waters.
- On a British ship, aircraft or hovercraft.
- On an oil rig or other offshore installation already covered by UK criminal law.

The '*harm resulting in death*' will typically be the physical injury that proves to be fatal.

In the majority of cases, the physical injury causing the death and the death itself will occur at the same time in the same location.

But death may occur some time after an injury takes place and it may occur outside the UK. As long as the initial harm was sustained in the UK, then the Courts have jurisdiction, even if the person ultimately dies abroad.

And, as long as the initial harm occurs in the UK jurisdiction, it is irrelevant that the responsible organisation is incorporated abroad: foreign organisations are all potentially liable under this legislation for injuries leading to death that occur here.

Conversely, no company is liable under this legislation for any harm resulting in death that occurs outside the defined jurisdiction (ie, if a British worker employed by a British company suffers harm abroad resulting in death, then the company is not liable under this new Act).

'Relevant duty of care'

For the new offence to apply, the organisation concerned must have owed a '*relevant duty of care*' to the deceased.

What is a '*relevant duty of care*'?

- This Act does not create new duties of care.
- It simply lists certain existing duties of care which are now to be regarded as '*relevant*' to this offence.

'Relevant' duties are set out in section 2 of the Act and include:

- Employer duties.
- Occupier duties.
- Duties connected to supplying goods and services.
- Duties connected to commercial activities.
- Duties connected to construction and maintenance work.
- Duties connected to using or keeping plant or vehicles.

When is a breach of relevant duty of care a 'gross breach'?

'Gross breach'

- S1(4)(b): 'A breach of a duty of care is a 'gross' breach if the conduct alleged to amount to a breach of that duty falls *far below* what can reasonably be expected of the organisation in the circumstances'.
- In practice what will and will not be held to be a 'gross' breach is likely to be a matter to be decided by the jury in each case.

'Senior management'

The final constituent of the offence is the '*senior management*' element:

S1(3): 'An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach'.

A substantial part of the failing must have occurred at a *senior management* level.

What is '*senior management*' for these purposes?:

S1(4)(c): '.....the persons who play significant roles in-
(i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or
(ii) the actual managing or organising of the whole or a substantial part of those activities.'

The Guidance Notes suggest that the definition will probably include:

- Those carrying out 'headquarters' functions (central financial/strategic/health and safety roles).
- Those in senior operational management roles.

N.B. 'Exactly who is a member of an organisation's senior management will depend on the nature and scale of an organisation's activities. Apart from directors and similar senior management positions, roles likely to be under consideration include regional managers in national organisations and the managers of different operational divisions'.

Conclusion: the 'post-Act' world

In summary, the key difference between the old law and the new is that under the new law the prosecution will not have to prove the so called 'identification principle'.

Under the new Act, the prosecution only has to prove that senior management failings were a 'substantial element' in the breach of duty, which led to death. That is likely to be rather easier to establish in most cases.

The Guidance Notes make clear that:

- The new offence is concerned with the way in which an organisation's activities are managed or organised.
- Under the new law the courts will look at management systems and practices across the organisation and at whether an adequate standard of care was applied to the fatal activity.
- Juries will be required to consider the extent to which an organisation was in breach of health and safety requirements, and how serious those failings were.
- They will also be able to consider wider cultural issues within the organisation, such as attitudes or practices that tolerated health and safety breaches.

The Notes suggest that factors which might be considered could be:

- Questions about the systems of work used by employees.
- Levels of employee training.
- Adequacy of equipment.
- Issues of immediate supervision and middle management.
- Questions about the organisation's strategic approach to health and safety.
- Arrangements for risk assessing, monitoring and auditing company processes.

Where these are found wanting and prosecutions lead to convictions, then the message from the Guidance Notes is that fines are expected to be very substantial.

Paul Raudnitz
May 2009