

Corporate manslaughter - Don't

By Robert Cholmondeley



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AFTER years of deliberation the Corporate Manslaughter Act comes into force on April 6, 2008. Driven by public opinion and a Government manifesto pledge, the Act will make it easier to bring prosecutions against organisations where a management failure has led to a death.

Failures

Prior to the introduction of the Act an organisation could only be successfully prosecuted for corporate manslaughter if the Crown could identify, prosecute and secure the conviction of an individual for gross negligence manslaughter; the individual being a directing or controlling mind of the company. In effect this was easier to do in small organisations, and consequently many of the prosecutions against larger organisations ended in expensive failures such as those following a number of rail disasters.

Breach of Duty of Care

However, from April this year, an organisation will be guilty of corporate manslaughter if the way in which its activities are managed or organised causes a person's death and amounts to a 'gross breach' of a relevant duty of care to the deceased. To be deemed a gross breach the organisation's conduct must 'fall far below what could reasonably have been expected of the organisation in their circumstances'. Furthermore, the contribution of senior management must be regarded

by the jury as a substantial element in the breach of duty.

It is worthwhile considering that companies will owe a duty of care in most situations, including:

- as an employer to employees and others;
- as an occupier of premises;
- when supplying goods and services.

Damage to Reputation

Given that the Act deals with a statutory homicide offence the fines for corporate manslaughter convictions will almost certainly be significantly higher than under health and safety law. This fact, when considered with the stigma and reputational damage of such a conviction, will place enormous financial pressures on a business which does not take its



get caught in the Act

responsibilities seriously; the Act provides the courts with a new power to make a 'publicity order', so that guilty companies will be required to publicise the details of their convictions which could affect third party trading decisions with them. All firms should, therefore, make health and safety a priority at board level.

Directors Liability

Whilst no directors or individuals will be prosecuted under the new law (and there will be no sentences of imprisonment under it), company officials should remember that prosecutions can be brought against them personally under the Health and Safety at Work etc Act 1974, and for manslaughter by gross negligence. In these

circumstances individuals can be, in extreme cases, subject to an unlimited fine or even a term of imprisonment.

Consequences

Expectations are that there will be ten to 20 convictions per annum under the new Act. However, its introduction will, without doubt, lead to more aggressive and in depth investigations with the Police having primacy. Collective actions of directors and senior managers will be more closely scrutinised in attempts to prove senior management involvement in breaches of duty. This focus on conduct could increase the likelihood of parallel health and safety charges being brought against those individuals within the organisation who make decisions. Additionally, a company which suffers a conviction may find it necessary to sue the director(s) or manager(s) responsible in order to recover financial losses resulting from a fine or damage to reputation.

Insurance Protection

All companies need to review their existing insurance arrangements and, if necessary, they should purchase Entity and Directors & Officers Liability protection. It is important that such policies do not contain an 'absolute bodily injury' exclusion, and will respond to legal defence costs in the event of a Corporate Manslaughter prosecution.

For further information on corporate manslaughter, health and safety or any insurance issues, please contact Robert Cholmondeley on 01772 555073 or robert.cholmondeley@taypat.co.uk

What Action to Take

- ✓ Ensure that your Health and Safety Policy, Procedures and Risk Assessments cover all your business activities and that they are robust and reviewed regularly.
- ✓ Obtain information from the Institute of Directors website – 'Leading Health and Safety at Work' www.iod.com
- ✓ Ensure that health and safety is a priority at board level – appoint a Health and Safety Director.
- ✓ Train board members in relation to their health and safety responsibilities.
- ✓ Arrange appropriate insurance cover for legal defence costs and civil awards resulting from actions against your company directors and officers.
- ✓ Arrange appropriate cover for legal defence costs for your company (Entity defence cover).