

Fleet Risk Management

A brief guide to the Corporate Manslaughter and Corporate Homicide Act 2007 and Occupational Road Risk

On 6 April 2008 the Corporate Manslaughter and Corporate Homicide Act came into force, making it possible to prosecute a company if a death is caused by a gross breach of its duty of care. This includes at-work road deaths.

The offence

Previously, to convict an organisation of manslaughter following a work-related death, it had to be proved that someone senior in the organisation, often referred to as the “directing mind”, was also guilty of manslaughter. This made prosecuting large organisations difficult.

The new offence does away with the requirement to prove the guilt of a “directing mind”. In the future an organisation will be guilty of corporate manslaughter if death is caused by a gross breach of its “Duty of Care” towards its employees and third parties that is substantially due to senior management failure. Thus the failures of a number of senior managers can be aggregated to prove the case.

The Jury will be asked to consider how serious the organisation’s failure was and how much of a risk of death it posed. The Jury may also take into account the “attitudes, policies, systems or accepted practices” of the organisation relevant to the failure (in other words the organisation’s “safety culture”) and relevant Health & Safety guidance. From a general Health & Safety point of view this would include the Health & Safety Executive’s (HSE’s) Successful Health & Safety Management (HSG65) and specifically for Occupational Road Risks (ORR) HSE’s Driving at Work: Managing Work-Related Road Safety (HSG382).

Causation

The breach of duty does not have to be the only cause or indeed the major cause of death, only one of the causes.

Who will investigate?

The Police will investigate with the assistance of the HSE. An updated edition of the Police Road Death Investigation Manual has been published and contains sections on corporate accountability for road deaths.

What will the police be looking for?

The police will consider how ORR has been managed. The starting point will be HSG382. This considers the three elements of ORR to be:

- The vehicle (e.g. was it roadworthy?)
- The driver (e.g. was he/she fit to drive or was he/she competent?)
- The journey (e.g. was he/she asked to drive too great a distance in the time available?)

The fact that an employee has taken a cash option in place of having a company car does not mean the organisation can contract out of its “Duty of Care”. The issue is whether the driver was driving on the organisation’s business.

Expect the way in which an organisation manages ORR to be compared with the way it manages Health & Safety risks in other parts of its business. A further significant issue is likely to be how the organisation monitors, audits and reviews ORR. For example, checking an employee’s driving licence, ensuring roadworthiness and following procedures for monitoring schedules, driver hours/distances and driver behaviour.

Need to know more?

For more information contact Colin Bailey or Andrew Milverton on 0118 940 6175 at Cassey Miller James today.

Details of our offices and telephone numbers can be found on our website at www.cmj.co.uk

Continuous assessment

You will be expected to regularly monitor vehicle maintenance, accident and damage records, traffic offences and other driver behaviour. Then you will need to have a system in place that can identify those at risk so that you can take effective measures to reduce it.

Health and safety

If there is a prosecution, organisations are likely to be prosecuted for breaching the Health & Safety at Work Act 1974 (HSWA) as well as the new offence. An organisation would be guilty under the HSWA if it failed to take reasonably practical steps to prevent exposure to its employees (Section 2) or non-employees (Section 3) of risks to Health & Safety arising from its business.

A conviction does not require proof of a failure by senior management nor is it necessary to prove that failure caused death – only an exposure to risk. Although there is no specific Health & Safety legislation relating to ORR this does not prevent a prosecution under the HSWA.

Fines

As with a breach of HSWA, a convicted organisation will face an unlimited fine. The starting point will be the level of fines imposed for serious breaches of HSWA where the organisation's failure is found to have caused or contributed to the death.

The insurance position

What insurance will do is pay compensation to insured parties and the associated legal costs. What it will not do is make your business and people safe, replace key people and assets, run your business for you during an investigation, pay any fines, prevent criminal culpability, replace your customers, clients and sales, repair public image and business reputation, or restore your share price.

Only the rigorous application of a practical system to manage work related road safety can protect your company from such consequences.

Personal responsibility

Mistakenly, people believe the new Law means there will be no prosecution of directors or senior managers; however senior individuals can still be prosecuted under the existing Law for manslaughter (which is not altered by the Act) under Section 37 HSWA if the Health & Safety failure is caused by the consent, connivance or neglect of a director.

An individual convicted of work related manslaughter is likely to receive a custodial sentence of around two to three years. In 2007 a Managing Director was fined £75,000 and ordered to pay costs of £103,500 for a breach of Section 37 HSWA.

The Court of Appeal ruled in a previous case that a director can be guilty of breaching Section 37 HSWA through neglect even if he/she did not have direct knowledge of the relevant failures that led to the incident but ought to have done so.

It is now very clear that Section 37 of the HSWA presents considerable danger for management and directors alike:

Work-related road safety is a risk that has to be assessed like any other workplace risk. Clear guidance is given in HSG382 'managing work-related road safety'. Given the nature of the risk and that driving is part of our everyday lives, it will be difficult for any director or manager to say he does not understand the risk.

Why ‘senior’ can mean ‘junior’

What places a manager in the category of “senior management” is whether his functions are as described by Clause 1 (4) (c) - see below. The person who has these functions may have a modest position in the organisation’s hierarchy and may not be “senior” in any other sense.

The forthcoming Corporate Manslaughter and Corporate Homicide Act, Clause 1 (4) (c) states:

“senior management”, in relation to an organisation, means 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.

So a relatively junior manager who fits the definition may find himself bearing the burden for widespread systemic bad practice.

What should you do about it?

If you are responsible for the health and safety of employees in any capacity – and that includes at work driving – you need to ensure that you have risk-assessed their duties and the environment in which these duties are performed.

You will need to manage that risk so that it is constantly minimised. You will also need to demonstrate that you have proper systems in place to manage risk and safeguard employees as well as other persons affected by your company’s business activities.

Identifying and managing the risk through appropriate remedial action will enhance the organisation’s day to day operational capacity and efficiency as well as allowing it to comply with its “Duty of Care” responsibilities.

