Corporate manslaughter: where’s the proof?

Five years to the month after the new corporate manslaughter offence came into force, the health and safety team at lawyers Eversheds wonders why it hasn’t netted any big fish.

A "directing mind" at the top of the company was responsible for the events that led to the death.

For large companies, it was a seemingly impossible task for the prosecution to link the actions of a "directing mind" to the death. A public inquiry after the Zeebrugge ferry disaster in 1987, when 193 people died, found a corporate "disease of sloppiness" but individual liability could not be attributed to one directing mind. Complex corporate structures and divisions of responsibility among management acted as culprits for large organisations. The Act was intended to change that.

Seniority barrier

But five years after its introduction, no large firms have been brought to court. Is it simply that there are no such cases warranting a prosecution, or does the law not fit larger organisations?

It’s not that there are no big suspects. Workplace deaths have decreased but the same failings and lack of controls can be found now, as before April 2008, for both small and large organisations. So there must be a reason why fatalities at large organisations are being investigated but no corporate killing prosecution is brought.

The Act says "an organisation is guilty of an offence ... only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach".

While the purpose of the new law was supposedly to focus on the entire management of an organisation, its reference to "senior management" restricts this scope.

The Act has broadened inquiries beyond looking at just one directing mind, but still requires prosecutors to prove that senior managers played a substantial role in the alleged breach. Local or mid-level failings are not enough, regardless of how widespread or gross they might be.

It is also important to consider the role of the CPS. Prosecuting a large organisation will attract a lot of media attention and legal scrutiny. It is likely to cost the prosecuting authority significantly more — in terms of gathering evidence and time in court than the cases it has brought so far. So the CPS is probably reluctant to proceed against a large organisation where there is some doubt about the potential success of the case. Every prosecution under the Act has resulted in conviction; it would be a brave prosecutor to select a case that had a chance of failure.

There was also an initial belief in 2008 that corporate manslaughter convictions may make it impossible for a company to survive, particularly one that provides contracting services — like Cotswold Geotechnical (see box, right) and therefore there may be a reluctance to expend the employer of a large workforce when a charge under the HSW Act may achieve a more satisfactory outcome.

Finally, a lack of prosecution of large organisations may reflect better use of health and safety law, and the changes made by the Health and Safety (Offences) Act 2008. When deciding whether to bring corporate manslaughter charges, there is often the more attractive prospect of conviction for health and safety offences.

Fines for most health and safety offences are now unlimited and those at the upper end have increased; for those that cause death, sentencing guidance now places the starting figure at £100,000. The punitive value of a corporate killing conviction can almost be bettered by the sanctions available under health and safety law and the lower threshold for conviction further sweetens the deal.

It was thought that the new offence might also increase the likelihood of guilty pleas to traditional offences under health and safety law. The HSW Act may achieve a more satisfactory outcome. But five years after its introduction, no large firms have been brought to court. Is it simply that there are no such cases warranting a prosecution, or does the law not fit larger organisations?

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Corporate hygiene

The following steps may help an organisation avoid a corporate manslaughter charge:

- On your personnel chart, define who is a senior manager. Check their job descriptions and assess their safety competency.
- Review health and safety policies; are they up to date, achievable and focused on key operating risks?
- Train the board on health and safety and update the training yearly.
- Encourage near-miss reporting.
- Link employee bonuses at senior level to a safety performance indicator.
- Consider what internal and external audits say about safety. Ensure that matters are properly escalated and difficult decisions are not put off.
- Review procedures to ensure compliance with changes to the law, such as amendments to the Construction (Design and Management) Regulations 2007 next year.
- Create or update a crisis-management plan and train senior teams in how to implement it. Include your lawyers’ details on the plan.

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