

# Corporate Killing – the Punishments

In February, long awaited guidelines were issued for the courts on how to sentence companies for corporate manslaughter offences. Tim Hill, a partner at law firm Eversheds, explains what they will mean for those firms who end up in the dock.



For an organisation to be guilty of corporate manslaughter, there must have been a gross breach of care at senior management level.

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In February, the Sentencing Guidelines Council (SGC) published its definitive guidelines on how the courts should penalise organisations that are found guilty of corporate manslaughter or a health and safety offence which has resulted in a death.

Issuing its long-awaited guidelines, the SGC underlined that 'punitive and significant fines should be imposed, both to deter and to reflect public concern at avoidable loss of life'. As a result, despite watering down previous proposals, companies guilty of corporate manslaughter could face fines running into millions of pounds, whilst other health and safety offences that result in death can be expected to result in a six-figure penalty.

## The offence

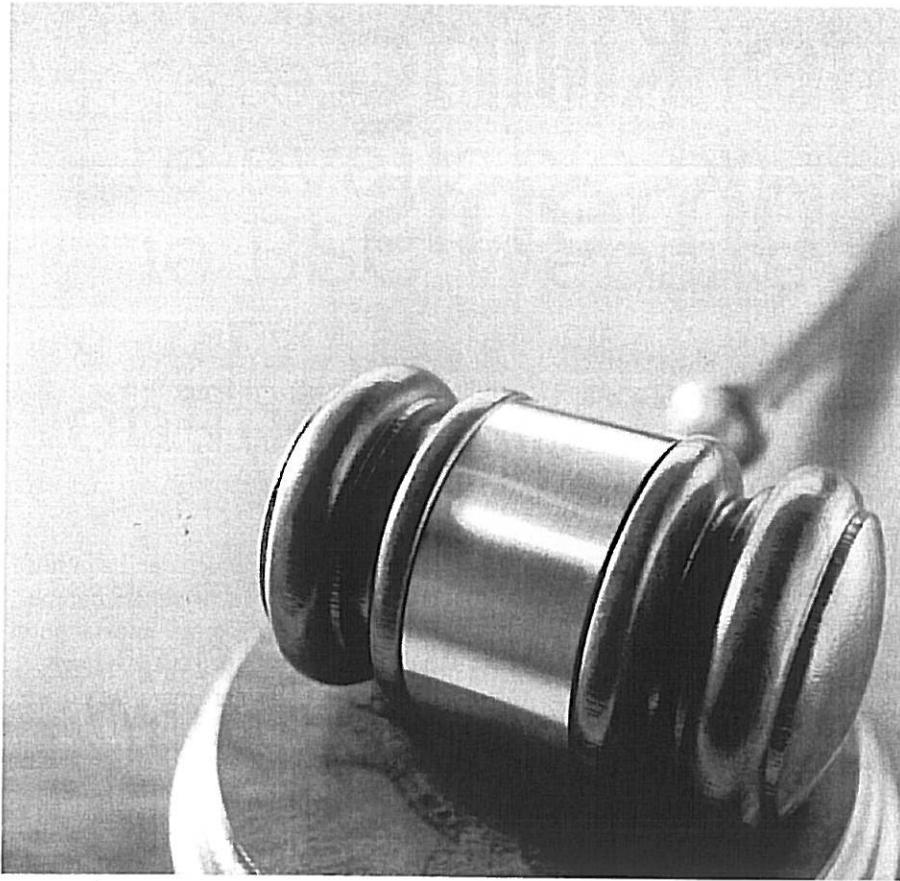
An organisation, which can be either in the private or public sector, can be found guilty of corporate manslaughter where death is shown to have been caused by a gross breach of its duty of care, as a result of the way in which its activities are managed or organised by its senior managers.

Health and safety offences resulting in death, typically under Sections 2 and 3 of the Health and Safety at Work Act 1974, are even broader on the basis that once a risk to the health and safety of workers or others is established, it is for the defendant to prove they did 'everything reasonably practicable' to ensure people's health and safety.

The SGC guidelines make it clear that for such offences the financial penalties must be punitive and sufficient to have an impact on the guilty organisation. As a result, no upper limit has been placed on fines and the guidelines state that for the offence of corporate manslaughter, the appropriate fine will 'seldom be less than £500,000 and may be measured in millions of pounds'.

In comparison, for health and safety offences that have caused death, the appropriate fine will 'seldom be less than £100,000 and may be measured in hundreds of thousands of pounds or more'.

Previously, if an organisation was found to have breached health and safety law and killed someone, the normal range for a fine was between £100,000 to £250,000. Therefore, we can probably expect to see an increase in the average fine handed down by the courts for these offences but with the average fine for corporate manslaughter running perhaps at



Corporate manslaughter fines 'should seldom be less than £500,000', says the SGC.

'The courts will have to take account of the firm's financial position'

several times that amount.

Having said that, many firms who find themselves in the dock in the future may well have cause to be grateful that the SGC ultimately rejected the proposal to link fines to a percentage of turnover, with an earlier draft suggestion of 5-10 per cent of turnover as being appropriate. In the end the SGC rightly rejected this proposal because it would have led to the possibility of astronomical fines and huge variations in fines for the same offence for different-sized companies.

#### Deciding on the fine

Under the new guidelines, the courts will have to take account of an organisation's financial position but first they must assess the seriousness of the offence and any aggravating or mitigating factors.

For the guidelines to apply, a significant causative link between the conduct of the offending body and the death that occurred, must be established. It is possible that the question of causation in some health and safety offences will be hotly contested and difficult to prove. However, given that a person has lost their life following the breach, it is

likely that the courts will be keen to find a causative link, however tenuous it may be.

If the court concludes that the defendant's conduct was a significant cause of the death then the guidelines state that a range of factors will affect the seriousness of an offence.

However, the starting point for the court will be to ask:

- How foreseeable was serious injury?
- How far short of the applicable standard did the defendant fall?
- How common is this kind of breach in the organisation?
- How far up the organisation did the breach go?

Having resolved these questions, the court is at liberty to ratchet up the seriousness of the offence by taking other factors into account, such as whether more than one person died in the incident, failures to heed warnings – whether from inspectors or staff – and any suggestion that the organisation had cut costs at the expense of health and safety.

#### Mitigation

The court will of course have a duty to consider any mitigation that will assist the organisation. The guidelines suggest that the usual mitigating factors are relevant – such as early acceptance of responsibility, a previously good safety record and genuine efforts to remedy the breach, as possible mitigating factors.

However, it is interesting to note that mere co-operation with the investigation will no longer be enough to count as a mitigating factor. Instead, an organisation must have provided a 'high level' of co-operation to the investigation, beyond that which will always be expected, in order for its co-operation to be a factor in easing its culpability.

#### Financial standing

It is only then, having established how serious the offence was, that the court should take into account the financial standing of the organisation. The guidelines say that the law must expect the same behaviour from a small firm as it does of a large firm. However, the SGC adds that the financial means of any defendant will be relevant when deciding on the level of a fine to be imposed upon them.

If found guilty, the defendant will be required to provide information on its financial circumstances for the previous three years. The court will then gauge the resources of the defendant and increase or decrease the level of fine accordingly.

The guidelines make it clear that the court should not give any consideration to the effect a fine may have on the shareholders. However, it should consider the impact the penalty may have on the employment of innocent people, the provision of public services and whether the fine could cause the organisation to cease operating. However, it says that in particularly bad cases this last consideration may be seen as an acceptable consequence.

### Bad publicity

As well as the potential for the courts to impose significant seven-figure fines, the introduction of Publicity Orders will strike fear into board rooms across the country. Publicity Orders will only be an option in the case of corporate manslaughter convictions, but should 'ordinarily be imposed' in such cases, says the guideline.

The driver behind Publicity Orders is to ensure that the conviction becomes known to shareholders in the case of companies and local people in the case of public bodies. In nearly all corporate manslaughter cases a Publicity Order will be imposed. The Order will specify the exact wording of the announcement and where it is to be made, for example on the organisation's website and/or insertions in the local and national press.

### Draft of the Order

It will concern any defendant to know that the prosecution will be able to serve a draft of the Order for the court to endorse. The Order should detail the fact of the conviction, particulars of the offence and the amount of any fine. Given that an Order will be drafted by the prosecution it is likely that its wording will be highly contentious. The court may also stipulate that any statement from the defendant attempting to reduce the impact of the Order must be separated from it and must be clearly identified as such.

The Government's intention is that a Publicity Order should act as both a deterrent and a punishment. Ultimately, however, the effect on the reputation of an organisation could be so damaging as to potentially threaten its continued operation.

The above guidelines will apply to all corporate manslaughter and health and safety cases where the offence has caused death, and which appear before the courts after 15 February 2010. They will apply even if the incident occurred a number of months or even years ago.

### What should organisations do?

The reality is that if an organisation now suffers a fatality, it has to expect an intensive police-led investigation and needs to be prepared for what that entails by considering in detail its crisis response and management plans. Employers also need to make sure that every member of their organisation understands their role and responsibilities in such a situation.

There should no longer be any question that good health and safety is a main board issue and relying solely on a health and safety manager and their team is not enough. Imagine if the police were to ask you to describe the health and safety culture of your organisation, whilst in a personal interview under caution at the police station...

### Conclusion

Fines for health and safety offences have been rising for a number of years and in some respects all these guidelines do is formalise the level of fine an organisation can expect if it is guilty of an offence that leads to a death.

However, the consequences for an organisation and the individuals involved in an incident that results in a work-related death are now all too apparent. The prospect of a six or seven-figure fine alone would be enough of a deterrent for many

organisations, never mind the potentially devastating imposition in corporate manslaughter cases of a Publicity Order.

As for the individuals involved, whilst there is no separate offence of aiding and abetting corporate manslaughter, the offence of individual gross negligence manslaughter still remains as a possibility. So too does the threat of up to two years in prison for individual directors, managers or employees for health and safety breaches following the enactment last year of the lesser known Health and Safety (Offences) Act 2008.

Organisations should, therefore, be in no doubt that demonstrating a strong health and safety culture is now as strategically important as dealing with any other business risk.

With the first corporate manslaughter prosecution due to commence later this year (of Cotswold Geotechnical Limited), it will be very interesting to see how the courts decide to implement the new guidelines in practice and whether that will provide the necessary incentive for organisations to get their own houses in order.

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