

UK Airport operators' liability for corporate manslaughter as a result of terrorism, will Security Management Systems provide protection for the sector.

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Abstract

Corporate governance broadly refers to the mechanisms, relations, and processes by which a corporation is controlled and is directed; involves balancing the many interests of a corporation's stakeholders.ⁱ Since the financial crisis of 2008, much of the literature dealing with corporate governance has focused on the financial welfare of its stakeholders. However, following 9/11, civil aviation corporations have also had to take account of the physical welfare of their stakeholders when assessing the risks of terrorist attacks. After the recent attacks at Brussels and Istanbul airports there is little evidence that significant changes have occurred to secure safety in the public areas of airports in the UK, known as 'landside,'ⁱⁱ leading to the check in gates. This raises the question of whether, should the risk of terrorism attacks materialise and lead to the death of victims, there can be criminal liability on the part of airport operators.

This paper will consider the possibility of one form of criminal liability, corporate manslaughter, for airport operators who operate under a risk assessment model known as Security Management Systems (SeMS). In this paper, the following example will be used to highlight that potential possibility. An airport in the UK which has adopted SeMS but the individual senior manager responsible devolves the responsibility of implementation to a junior manager who fails to take additional precautions despite recent intelligence reports suggest the likely imminence of a Brussels airport style attack in the UK. The attack is carried out by an airport employee, who had not been properly vetted due to staff shortages. In the attack seven members of the public are killed and 50 are injured. The police and owners of the airport assumed all employees had been security vetted. The Crown Prosecution Service (CPS) considers the liability of the airport operator when it becomes clear the attack could have been prevented.

Keywords SeMS, Terrorism, Corporate manslaughter

Corporate Manslaughter

Companies have been liable to manslaughter proceedings since 1965. Until then, English law abided by the principle laid out by the 18th century Lord Chancellor Edward Thurlow who stated "a corporation has no soul to damn, and no body to be kicked."ⁱⁱⁱ Before the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA) came into force on 6 April 2008, it was possible for a corporate entity or company to be prosecuted for a wide range of criminal offences, including the common law offence of gross negligence manslaughter. However, in order for the company to be guilty, a senior individual who embodied the company (or had a 'controlling mind') had to be guilty of the offence. This was known as the identification principle.

The only conviction of a corporation for manslaughter through gross negligence, prior to the CMCHA, involved the company OLL Limited (OLLL) which was owned by Peter Kite and responsible for a tragic canoeing incident in Lyme Bay in 1993 in which four teenagers died. Peter Kite was convicted on the basis that he was directly in charge of the activity centre where the children were staying. He was jailed for three years (though the Court of Appeal subsequently reduced this to two years), and OLLL was fined £60,000. Throughout the 1980s and 1990s high profile incidents, such as the Herald of Free Enterprise and Clapham rail disaster, have demonstrated the difficulty in prosecuting companies for corporate manslaughter because of the lack of an identifiable controlling mind within the companies who could be said to be responsible for a death. Nevertheless, individual employees (and organisations) can similarly be charged over the same underlying incidents leading to death under the Health and Safety at Work Act 1974.

The CMCHA created a new offence of corporate manslaughter in the UK, though in Scotland it is called corporate homicide. Section 1 of the CMCHA created the offence whereby an organisation management is guilty of an offence 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 owed by the organisation to the deceased.

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 and on conviction the judge may impose an unlimited fine Sec 1(6) CMCHA.

The following needs to be proved:

- the defendant is a qualifying *organisation* Sec 1 (2) CMCHA;
- the organisation *causes* a person's death Sec 1 (1) (a) CMCHA;
- there was a *relevant duty of care* owed by the organisation to the deceased Sec 1 (1) (b) CMCHA;
- there was a *gross breach* of that duty Sec 1 (1) (b) CMCHA;
- a substantial element of that breach was in the way those activities were managed or organised *by senior management* Sec 1 (3) CMCHA; and
- the defendant must not fall within one of the *exemptions* exclusions from a duty of care from prosecution. Sec 2 (1) (d) AND Sec 3-7 CMCHA.

Airports as qualifying organisations

Don't you have to say first that an organisation includes a corporation? Corporations for the purpose of Sec 1 (2) CMCHA means a body which is incorporated, usually a company limited by shares or guarantee. It usually has a suffix such as private limited company Ltd or a public limited company Plc^{iv}. It includes other organisations such as local authorities^v and NHS Trusts^{vi} which have been incorporated. Airports are caught by this provision as many airports are operated through organisations that have been incorporated as a Plc or Ltd for example, BAA Ltd or Gatwick Airport Ltd. The Manchester Airports Group (M.A.G) is the country's largest UK-owned airport operator. It is a private company with shareholdings owned by a number of public authorities.^{vii} It operates four airports: Stansted, Bournemouth, East Midlands and Manchester which in total serve around 42 million passengers every year.^{viii}

Duty of care

Section 1 (1) (b) CMCHA; has been developed from the common law principles of duty of care and gross breach of that duty, therefore some understanding of those principles are necessary. The common law means judge made law or case law often where an area of law was absent of a statute like the CMCHA. Once the statute becomes law, for example the CMCHA, the case law decided before the statute will serve to underline the principles of that statute, in the case of CMCHA a duty of care and gross breach of that duty. The cases decided after the statute is enacted enables the judiciary to apply the statute in a more purposeful way by reviewing any cases that have been decided under the statute essential the cases act as precedents or persuasive decisions.^{ix} It is important to understand that a statute and particularly cases decided under the statute such as the CMCHA gives more certainty what the law is to claimants and business organisations.

The “duty of care” is the responsibility one person or business has to be reasonably careful (or to use “reasonable care”) when dealing with others who could be anticipated to affected by that person/organisation’s dealings. In the law of tort, a person who breaches the duty of care by acting negligently or recklessly is liable for any harm another person suffers as a result of the first person’s breach of duty. There has been a number of cases to support this principle, the most famous case being *Donoghue v Stevenson* [1932] AC 562 House of Lords.

Mrs Donoghue went to a cafe with a friend. The friend bought her a bottle of ginger beer and an ice cream. The ginger beer came in an opaque bottle so that the contents could not be seen. Mrs Donoghue poured half the contents of the bottle over her ice cream and also drank some from the bottle. After eating part of the ice cream, she then poured the remaining contents of the bottle over the ice cream and a decomposed snail emerged from the bottle. Mrs Donoghue suffered personal injury (from shock) as a result but she was not able to bring an action for breach of contract because she was not a party to the contract. That was between her friend and the owner of the cafe. Instead Mrs Donoghue brought a successful claim against Stevenson, the manufacturer of the ginger beer and this case established the modern law of negligence and the neighbour test, which stated: ‘You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.’ Airports, by virtue of the Occupiers Liability Act 1984, are already liable to

provide passengers in airport buildings with a duty of care to protect them from injury on the premises by reason of any danger due to the state of the premises or to things done or omitted to be done on them.^x

Gross breach of duty of care

Gross negligence manslaughter is a form of involuntary manslaughter where the defendant is ostensibly acting lawfully. Involuntary manslaughter may arise where the defendant has caused death but neither intended to cause death nor intended to cause serious bodily harm and thus lacks the mens rea (guilty mind) of murder. In *R v Adomako* [1994] 3 WLR 288 the House of Lords (now the Supreme Court) set out the essential ingredients of involuntary manslaughter by breach of duty. The facts of the case were that D, an anaesthetist, failed to observe during an eye operation that the tube inserted in V's mouth had become detached from the ventilator, causing V to suffer a cardiac arrest and eventually die. The Court found D guilty of manslaughter by gross negligence, which is established where D breached a duty of care towards V that caused V's death and that amounted to gross negligence.

Lord MacKay LC:

“ ...gross negligence...depends...on the seriousness of the breach of the duty committed by the defendant in all the circumstances in which he was placed when it occurred and whether, having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in the jury's judgment to a criminal act or omission.”

The essential ingredients of involuntary manslaughter by breach of duty include:

- proof of the existence of the duty;
- breach of that duty causing death; and
- gross negligence which the jury considered justified a criminal conviction.

The Adomako case is helpful in understanding involuntary manslaughter by gross breach of duty of an individual. How? The application of the same facts under Sec 1 (b) CMCHA against an organisation may provide a different result because unlike the case law the court would be required to review the exceptions in Sec 2 (1) (d) CMCHA and contemplate whether the facts were 'sufficiently' gross to warrant criminal conviction.^{xi}

In the facts of our case outlined in the abstract the allegation of negligence is that the airport operator failed to exercise reasonable care when it engaged an employee without completing background security checks. The fact that the airport was either understaffed or a junior member of staff made the decision is irrelevant. The question of whether these facts would amount to gross negligence would require further examination by a jury of what information was available to the management about the risk of an impending terrorist attack. The probity of the employee who helped carry out the attack who was not risk assessed according to normal security procedure would be relevant and how integral they were to the attack. The question of whether the attack would have gone ahead regardless of background checks and the employee being refused employment by the airport would all be factors in deciding whether the airport came within Sec 1 (1) of the CMCHA and causation s1(1)(a) the organisation *causes* a person's death.

Security Management Systems (SeMS)

Since 9/11 security planning at UK airport has been influenced by a number of reports. Sir John Wheeler in 2002 and Boys Smith in 2006^{xii} resulted in legislative changes to aviation security. The Policing and Crime Act 2009, which highlights the principle of joint accountability, endorsed the Multi-Agency Threat and Risk Assessment (MATRA) and required airports to engage with risk assessment of security threats with other stakeholders.

The SeMS system is not new to aviation security, Indeed its roots can be traced back to general administration, industry and the sector following 9/11.^{xiii} The International Air Transport Association (IATA) made the implementation of a SeMS a requirement from March 1 2007.^{xiv} According to Salter^{xv} a number of airlines and national regulatory bodies complied including Air Canada, KLM and Northwest Airlines. The New Zealand Civil Aviation Authority recommendation is the latest Civil Aviation Authority (CAA) strategy to improve the management of aviation security. Its purpose in the UK, according to recent CAA SeMS guidance notes, is to help entities meet European internal quality control provisions of articles 12, 13 and 14 of EC 300/2008.^{xvi} Although SeMS is not yet compulsory in the UK, the aviation

sector has been encouraged to engage with it so that it will be more transparent that it has met its legal obligations.

The purpose of SeMS is to provide senior personnel at airports with a high level overview of security risks by adapting the principles of SeMS and therefore maintain the integrity of security. SeMS allows the potential requirement to manage airport security from an outcomes-focused, risk-based approach and provides an opportunity for airport operators to consolidate similar functions.^{xvii} The CAA has been clear in its advice to airport operators that it is not requiring them to input another system of security but merely to adapt their existing system to SeMS.

SeMS and accountable management

As previously mentioned, in order to secure a conviction of corporate manslaughter under Sec 1 (3) of the CMCHA, activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1). The case law before the CMCHA would refer to 'a controlling mind or lack of one'

SeMS is very clear about creating accountability with responsibility and for that reason the 'buy in' is that senior management is engaged and responsible for the programme.^{xviii} The framework for SeMS is clear that the airport entity should appoint an individual who has sufficient responsibility, leverage and power to implement decisions. The framework recommends that the Accountable Manager be at the level of Chief Executive Officer (CEO) or equivalent within the organisation.^{xix} It is accepted that the Accountable Manager is likely to devolve this responsibility to an experienced security manager, nevertheless for the system to retain integrity the Accountable Manager must still have overall responsibility for SeMS.

It appears that SeMS provides a clear line of responsibility for airport security. Consequently, airport operators who adopt SeMS, but fail to abide by its recommendations, could be found to satisfy the remit of Sec 1 (6) of the CMCHA. This will still require the Accountable Manager to have been grossly negligent in applying SeMS or in managing employees to whom they have devolved responsibility as in in the example set out in the abstract.

Prosecutions under the CMCHA

Since the introduction of the CMCHA there have been a number of prosecutions. However, there is a tendency to prosecute for breaches of health and safety rather than corporate manslaughter. Nevertheless, successful charges have been brought under the CMCHA of which the following are examples.

The CPS in April 2009 authorised its first charge of corporate manslaughter against Cotswold Geotechnical Holdings Ltd (CGH) under the CMCHA in relation to the death of Alexander Wright on 5 September 2008.^{xx}

Mr Wright, a junior geologist employed by CGH, was taking soil samples from inside a pit which had been excavated during a site survey when the sides of the pit collapsed and crushed him to death.^{xxi}

Peter Eaton, a director of CGH was charged with gross negligence manslaughter as well as an offence contrary to Section 37, Health and Safety at Work Act 1974. CGH was also charged with failing to discharge a duty contrary to Section 33, Health and Safety at Work Act 1974. In addition, Kate Leonard, reviewing lawyer, Crown CPS Special Crime Division, explained:

“Under the Corporate Manslaughter and Corporate Homicide Act 2007 an organisation is guilty of corporate manslaughter if the way in which its activities are managed or organised causes a death and amounts to a gross breach of a duty of care to the person who died. A substantial part of the breach must have been in the way activities were organised by senior management. I have concluded that there is sufficient evidence for a realistic prospect of conviction for this offence.”

Although Eaton was later found to be unfit to stand trial CGH was convicted in 2011. Since then a number of other prosecutions have been brought.

Table 1^{xxii}

Name of organisation	H&S charges brought against the organisation (Y/N)	Charges brought against individuals for health and safety (H&S) or common law (gross negligence) manslaughter	Outcome of the case and year of outcome	Sentence on conviction (Fine)
Cotswold Geotechnical Holdings Ltd	Y	GNM and H&S	Guilty plea 2011	£385,000
Lion Steel Equipment Ltd	N	GNM and H&S	Guilty plea 2012	£480,000
Princes	Y	H & S	Guilty plea 2013	£134,579.79
Mobile Sweepers (Reading) Ltd	Y	GNM and H & S	Guilty plea- 2014	£183,000
Sterecycle (Rotheram) Ltd	N	GNM	Guilty plea -2014	£500,000
Cavendish Masonry Ltd	Y		Guilty plea - 2014	£150,000
Peter Mawson Ltd	Y	GNM and H & S	Guilty plea -2015	£220,000
Pyranha Mouldings	Y	H & S	Guilty plea -2015	£200,000
Huntley Mount Engineering Ltd	Y	GNM	Guilty plea -2015	£150,000
CAV Aerospace Ltd	Y		Guilty plea - 2015	£600,000
Linley Developments Ltd	Y	GNM and H & S	Guilty plea - 2015	£200,000
Kings Scaffolding Ltd	N	GNM	Guilty plea - 2015	£300,000
Baldwin's Crane Hire Ltd	Y		Guilty plea - 2015	£700,000
Cheshire Gate and Automation Ltd	N	GNM	Guilty plea - 2015	£50,000
Sherwood Rise	Y	GNM & H & S	Guilty plea - 2015	£300,000

Most of the cases referred to in Table 1 above are Small Medium Enterprises (SMEs) from the engineering and building sectors. The size of these companies has played an important factor

in the CPS being able to bring action against the senior management. There has been a clear causal link between the managements' decision making and their duties of care.

Post-Brussels

Since Brussels, security at airports across Europe has increased. There has been a rise in security personnel patrolling landside as opposed to just airport lounges to give passengers assurance. Reassurance policing, according to Innes (2004), has now become a strategy adopted by many police forces. This strategy focuses on police visibility, targeting signal disorder or, as Innes terms, 'signal crimes'.^{xxiii} Whilst Innes' assertions were founded on policing in community neighbourhoods with the support of Neighbourhood Watch Schemes and Community Officers, they nevertheless can be applied to UK airports to counter terrorist attacks. The visibility of policing patrolling airports incorporating Innes' concept of modern policing in the community.^{xxiv} The 'signal crime' in this case is terrorism, and passengers are not only aware of the security threat but are often willing and supportive to subject themselves to more prolonged security checks because the only alternative is not to fly,. The visibility at UK airports of patrolling police with firearms, police vehicles parked off road and near roundabouts and police stations located at large airports has served as a reassurance to passengers and a deterrent to terrorists but at the same time has provided legitimacy to exert greater police powers to the perceived risk.^{xxv}

The recent landside attacks cast doubt on whether increasing policing presence is enough. Should Europe adopt strategies from countries with more aviation terrorism experience e.g. Israel's know-how mined from decades of actual and attempted airport? attacks and a 1972 terrorist attack that killed 26 people at what is now Ben Gurion International Airport outside Tel Aviv has made Israeli aviation security the industry's gold standard.^{xxvi}

Israel applies a system called 'security circles'. This screens passengers from the time they arrive at the airport until they board the plane. Passengers are screened at the airport's periphery, their body language observed as they take their suitcases from their cars to the trollies, their tickets and passports inspected as soon as they join the check-in line, they are

stopped a second time to answer a series of questions and only then can they proceed to the check-in counter.^{xxvii}

One might reasonably infer that increasing security processes in line with the terrorist threat at airports would be likely to diminish any potential liability for corporate manslaughter under Sec 1 (1) of the CMCHA in the event of an attack. This would be true provided the risks are being actively managed with identified security processes and personnel. In simple terms management will know what needs to be done but the question is whether that has been carried out properly or negligently/recklessly as in the example given in the abstract. All organisations will at times be under pressure because of employment sickness, high turnover or under recruitment of staff, particularly in airports. SeMS appears a positive step in the process of creating clear lines of responsibility for security managers but the question is what process exists to ensure managers are carrying out their roles and ensuring resilience is built into the security process.

Conclusion

The CMCHA will only be properly tested when a large company, with a complex management structure, whose directors are distant in the structural hierarchy from the operational employees who are responsible for the act that causes the death. Until there is a large company involved in a multiple fatality incident, it is unlikely we will see how the CMCHA can cope with the type of case it was designed to deal with. The public's confidence in the ability of the system to hold negligent companies to account will likely only return with the successful prosecution of a large corporation following a serious incident.^{xxviii}

SeMS should not be seen as a way of exposing senior management of airports to corporate manslaughter charges but rather the opposite, namely to prevent any such exposure. It is very easy to see the emergence of bureaucracies which fail to outline clear lines of responsibility only to later be caught out when disasters occur. The recent Grenfell Tower fire in West London exposes that problem and criminal charges including corporate manslaughter charges may be brought in time.^{xxix} Another example is the Hillsborough football disaster in 1989 when 96 football fans died. In June 2017, after a long line of reviews

and enquires, six people were charged with various offences including manslaughter by gross negligence, misconduct in public office and perverting the course of justice for their actions during and after the disaster. ^{xxx}

The CAA have so far resisted advising UK airport operators to create a wider security circle before check-in. The rationale appears to be that this strategy would only place the threat elsewhere rather than eradicate the threat. There is also a logistical problem in adopting this security process given the significantly higher passenger numbers in the UK than in countries such as Israel.

The duty of care for corporate manslaughter extends to all security measures the Accountable Manager is responsible for and which expose the public to danger. The Accountable Manger essentially has to carry out two functions. The first is the evidential trail that the Accountable Manager would have to show in order to prove he/she had exercised the duty of care. In this instance evidence of regular meetings with all stakeholders, security staff development, risk assessment plans, evidence of those plans and security processes had been carried out and regularly recorded. Secondly, the Accountable Manager, would only have to prove he/she was compliant with the current CAA' and good practice would show of continual staff development of senior management. If such evidence were forthcoming the Accountable Manager and the organisation would be absolved from liability under Sec 1 (1) of the CMCHA.

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- ⁱ Bob Tricker 'Corporate Governance' (Oxford Press 2009)
- ⁱⁱ Landside means at departure or arrival gates before entering security screening
- ⁱⁱⁱ Edward Thurlow, 1st Baron Thurlow (9 December 1731 – 12 September 1806) referred to in John Coffee 1981 "No soul to damn: No body to Kick": An scandalized inquiry into the problem of corporate punishment. Michigan Law Review 79 (3): 386-459
- ^{iv} Companies Act 2006 s3-6
- ^v Local Government Act 1972 s2(3)
- ^{vi} National Health Service and Community Care Act 1990 s 5(5)
- ^{vii} MAG Annual Report and Accounts 2014/15, 5
- ^{viii} Manchester Airport Group <http://www.magworld.co.uk/magweb.nsf> accessed 1 August 2016.
- ^{ix} Neil Parpworth 'Constitutional & Administrative law' 9th edition Oxford Press.
- ^x Occupiers Liability Act 1984 s 1
- ^{xi} Anne Lodge Gross Negligence Manslaughter on the Cusp: 'The Unprincipled Privileging of Harm over Culpability' JCL 81 (125) 2017
- ^{xii} Louise Butcher 'Aviation Security' House of Commons Standard note 2011
- ^{xiii} Mark B Salter 'SeMS and sensibility: Security management systems and the management of risk in the Canadian Air Transport Security Authority', Journal of Air Transport Management 13 (2007) 389-398
- ^{xiv} *ibid*
- ^{xv} *Ibid* 390
- ^{xvi} Security Management Systems (SeMS) 'A guide note for accountable Managers' CAA 2014.
- ^{xvii} Goodwin, S and Christenson K, 'Security management systems: An opportunity for airport operators' Journal of Airport Management. Autumn 2013, Vol. 7 Issue 4, p326-331
- ^{xviii} Framework for an Aviation Security Management System (SeMS) CAA 2014
- ^{xix} *Ibid* p7
- ^{xx} CPS http://www.cps.gov.uk/news/latest_news/124_09/index.html accessed 12 November 2016
- ^{xxi} *ibid*
- ^{xxii} CPS Corporate manslaughter statistics following a freedom of information Act 2000 request
- ^{xxiii} Martin Innes, 'Reinventing Tradition' reassurance, neighbourhood security and policing', [2004] Criminal Justice, Sage Publications
- ^{xxiv} Alex Dennis and Peter J. Martin 'Symbolic interactionism and the concept of power' [2005] The British Journal of Sociology vol 56, iss 2, 191-213
- ^{xxv} *ibid*
- ^{xxvi} Michele Chabin, Special for USA TODAY Published April 21, 2016 retrieved at <https://www.usatoday.com/story/news/world/2016/04/21/brussels-attacks-airports-israel-tips-security/82989738/>
- ^{xxvii} *ibid*
- ^{xxviii} Austin Stoton. Austin Stoton, practices from 2 Bedford Row, 'Corporate manslaughter act five years on – Directors in the firing line' Feb 2013
- ^{xxix} BBC News London fire: 'What happened at Grenfell Tower?' <http://www.bbc.co.uk/news/uk-england-london-40272168> 19th July 2017 accessed 12 September 2017
- ^{xxx} The Hillsborough Independent Panel <<http://hillsborough.independent.gov.uk/report/>> accessed 10/10/17