

# health and safety briefing

November 2003

## Responsibilities of corporations and directors

Corporate health and safety issues have received much publicity over the last few years. Six senior railway and maintenance chiefs were recently charged with manslaughter and other offences under the Health and Safety at Work Act 1974 (the “1974 Act”) as a result of the Hatfield rail crash in October 2000, where an express train travelling from London to Leeds derailed at high speed, killing four and injuring many. The companies that employ them, Railtrack, the owners and operators of the rail network, now Network Rail, and Balfour Beatty Infrastructure Services, the rail renewals and maintenance firm responsible for the upkeep of the east coast main line at the time of the crash, face separate charges of corporate manslaughter.

The result of this increased focus on health and safety issues is that the public is demanding that corporations and directors be held responsible following deaths or injuries and the government is considering new regulations and law reforms.

This article:

- reviews the current statutory health and safety regulations and considers recent developments;
- outlines the current law of corporate manslaughter and considers the proposals for reform of the law and the new offence of corporate killing; and
- highlights some practical steps which directors can take to comply with their health and safety responsibilities.

Common law health and safety duties are not considered in this article: the article focuses on the statutory duties of corporations and directors under the 1974 Act and the law of manslaughter.

### Health and safety regulations

The 1974 Act sets out the health and safety duties of a company, its directors and managers and employees in (nearly) all

industries, occupations and processes. Numerous health and safety regulations designed to maintain or improve the standards of health, safety and welfare, have been made under the 1974 Act, including the Management of Health and Safety at Work Regulations 1999 (the “1999 Regulations”). Under the 1974 Act, local authorities have powers to appoint inspectors to secure compliance with the 1974 Act and other health and safety legislation (section 74).

The 1974 Act generally imposes strict criminal liabilities on employers and others, the only defence in certain cases being that all reasonably practicable precautions had been taken by the employer. The question of what is reasonably practicable, is a question of fact to be determined on the circumstances of each individual case and the burden of proof, on the balance of probabilities, is on the employer.

It is not open under the 1974 Act, for corporate employers to avoid liability by arguing that the senior directors, i.e. the “directing mind” of the company, had taken all reasonably practicable precautions and that the fault lay with a more junior employee.

This issue was argued in *R v British Steel plc* [1995] IRLR 310. British Steel's position

was that it was not responsible under the 1974 Act, section 3, for the actions of a supervising engineer, following a fatal accident to a subcontractor, as the supervising engineer was not part of the “directing mind” of the company and all reasonable precautions had been taken by the senior management to ensure the safety of the work. This argument was dismissed by the Court of Appeal.

This point was again argued in the case of *R v Gateway Foodmarkets Ltd* [1997] IRLR 189. In this case, the appellant company employed a firm of lift contractors to carry out regular maintenance and a call out service for all its stores. In contradiction of their instructions and unknown to the employer, one store developed a practice of manually rectifying a recurring defect to its lifts without calling out the lift contractors. A fatal accident occurred when the store manager fell through a trap door in the floor of the control room and down the lift shaft. The Court of Appeal held that the 1974 Act imposed strict liability, subject to reasonable practicability. In this case, the company could be liable under section 2(1) of the 1974 Act for a failure to take reasonable precautions at store management level, notwithstanding that all reasonable precautions to avoid risk of injury to the store manager had been taken at senior management level.

To summarise, the 1974 imposes a high standard of care on employers with strict liability, subject only in certain situations to the defence of reasonable practicability. Under the 1974 Act, the breach does not have to have been committed by the “directing mind” of the company for the company to be liable: even if the controlling directors of the company have taken all reasonable precautions, the company could still be liable if a breach occurs through

someone lower down the corporate ladder. As will be seen, this is different to the current law of manslaughter, where for a company to be convicted, the “directing minds”, i.e. those who actually control the company, must first be found liable.

Amendments to the Management of Health and Safety at Work Regulations 1999 and Fire Precautions (workplace) Regulations 1997 came into effect on 27 October 2003, and allow employees to bring civil claims for breach of the Regulations against their employers. As the 1999 Regulations cover a substantial range of health and safety duties, including obligations to carry out risk assessments, the amendments could create a significant impact in many areas. For example, employees with work-related stress or other personal injuries may now have an additional civil claim for damages for breach of statutory duty in addition to any negligence or contractual claims.

## Law of manslaughter

Where there is death in the workplace, charges of manslaughter may also be brought. A prosecution will be brought by the Crown Prosecution Service, not the enforcing authorities under the health and safety legislation.

There is no separate charge of corporate manslaughter: it refers to a charge of manslaughter against a corporation or its directors. Although it is a single offence, manslaughter is commonly divided, by lawyers, into two categories, voluntary and involuntary. A charge against a corporation and/or its directors is likely to fall within the heading of involuntary manslaughter, which means that there was no intention to kill or cause serious bodily harm, but the law considers that the person who caused the death was sufficiently blameworthy to attract serious criminal sanction. Involuntary manslaughter is divided into two categories:

- where death results from an unlawful act, which any reasonable person would recognise as likely to expose another to the risk of injury; and
- where death is caused by a reckless or grossly negligent act or omission.

Charges against corporations or directors are usually brought under the second category: the prosecution allege that the directors and/or the corporation have caused death through gross negligence; i.e. extreme carelessness.

### Individual liability

The test for an individual to be found guilty of involuntary manslaughter by gross negligence was laid down by Lord Mackay of Clashfern LC in *Adomako* [1995] 1 AC 171. The following criteria must be met:

- there must have been a breach of duty of care towards the victim who has died;
- the breach of duty must have caused the death; and
- the breach of duty must be characterised as gross negligence and therefore as a crime. This will depend upon the seriousness of the breach of duty committed by the defendant, in all the circumstances in which the defendant was placed when it occurred. It will be for the jury to consider whether the extent to which the defendant's conduct departed from the proper standard of care, should be judged as criminal.

Case law has held that there must be personal responsibility or personal misconduct by the accused, so that an accused would not be held to be criminally liable if the death had been caused by the negligence of others or in his absence. This can make it difficult to convict single directors of large corporations for manslaughter because it is difficult to establish that one person made all the relevant negligent decisions.

### Corporate liability

Under the current law there is no separate test that allows the courts to assess whether or not the corporation, as opposed to the directors, has acted with gross negligence. A corporation has no physical existence and the law has therefore had to develop a mechanism to hold corporations responsible for the acts and states of minds of individuals linked with the corporation. In the context of manslaughter, the principle of “identification” (otherwise known as the “directing mind” principle) is used. This

means that those who control the corporation (i.e. the directors) are treated as embodying it and only if the controlling directors are found guilty of manslaughter, can the corporation be separately convicted.

The directing mind test presents a problem for a prosecutor attempting to convict a company of a criminal offence. To make matters more complicated, there is ambiguity as to the definition of “controlling officers” and thus the directing minds. Three separate views were presented in *Tesco Supermarkets Ltd v Natrass* [1972] AC 153. Lord Reid said that the controlling officers were the board of directors, the managing director and perhaps other superior officers of the company. Lord Diplock and Lord Pierson said that the controlling officers were those who, by the memorandum and articles, were trusted with the exercise of the powers of the company. Viscount Dilhorne took a very narrow view and said that only a person in actual control of the operations or part of the operations of a company could be the directing mind. In particular, someone who was responsible to someone else could not be the directing mind. This confusion has not been resolved by subsequent case law.

The first conviction of a company for manslaughter was in *Kite v OLL Ltd*, Winchester Crown Court 8 December 1994, unreported. The case related to a canoeing accident at sea off Lyme Bay in which four teenagers drowned. OLL Ltd was a small business and the managing director was found guilty. The managing director was clearly the directing mind of the company, and the company itself was therefore automatically guilty as well.

High profile prosecutions against large corporations have unanimously failed because the Crown Prosecution Service has been unable to convict a single director of manslaughter, and the directing mind of the company has to be individually guilty of manslaughter before the company can be found guilty. For example, in *R v P&O European Ferries (Dover) Ltd* [1991] 93 Criminal Appeal Reports 72 (the Herald of Free Enterprise Disaster case) the case against the corporation failed because there

was insufficient evidence to convict the individual defendants. Turner J rejected the suggestion that the principle of aggregation be introduced, which would have allowed the faults of different individuals to be aggregated for the purpose of convicting the company. Situations have therefore arisen, following disasters, where inquiries have found corporations at fault and meriting serious criticism and the corporations have been successfully prosecuted under the 1974 Act, but these corporations have not been convicted under the law of manslaughter.

More recently the issue was raised against in *Attorney General's Reference (No. 2 of 1999)* 2000 3 All ER 182 (the case relating to the Southall Rail Crash). Following an adverse decision at first instance, the Attorney General asked the Court of Appeal for clarification of the law relating to corporate manslaughter and specifically whether a non-human defendant could be convicted of manslaughter by gross negligence in the absence of evidence establishing the guilt of a human individual. The Court of Appeal ruled that a defendant could be convicted of gross negligence manslaughter without evidence of his state of mind, but that the guilt of a human had to be established before a non-human could be convicted. The Court of Appeal stated that until Parliament reformed the law, the identification principle was the only basis for corporate liability for manslaughter caused by gross negligence.

### **Proposed reforms: corporate killing**

In May 2003, the government announced that a draft bill on reform of the law relating to corporate manslaughter would be produced. The bill is expected in autumn 2003. The government has, however, indicated that the criminal liability of individual directors may not be targeted in the forthcoming legislation, and the focus will be on companies.

A draft bill has been a long time in coming. The Law Commission produced a report entitled "Legislating the Criminal Code: Involuntary Manslaughter No 237" as far back as 1996. In May 2000, the government produced a consultation paper, "Reforming the Law on Involuntary Manslaughter: The Government's Proposals," which is still the most recent document on

this matter. The Home Office has stated that the reason for the delay was that, after the consultation paper was produced in 2000, a full regulatory impact assessment was required, to look at the cost of implementing the new legislation. It is, however, likely that there has been pressure from the private sector to moderate the proposals.

The government's consultation paper was based on the Commission's report, but was intended to concentrate on those areas likely to be more contentious, or where the government took a different view from the Commission. The government recognised the need to balance the continued success of business corporations with the need for reform. It agreed that there should be a new offence of corporate killing, and accepted the Commission's proposals for the new offence, which were as follows:

- the offence of corporate killing could be committed if the defendant's conduct in causing the death fell "far below" what could reasonably be expected;
- the corporate offence would not require that the risk be obvious or that the defendant be capable of appreciating the risk;
- the corporate offence would be committed if the death was caused by a management failure by the corporation; i.e. a failure in the way in which the corporation's activities were managed or organised to ensure the health and safety of persons employed in or affected by those activities;
- a management failure would be regarded as the cause of death even if the immediate cause was the act or omission of an individual; and
- individuals within the corporation could still be liable for offences of reckless killing and killing by gross carelessness, as well as the corporation being liable for the offence of corporate killing.

The government, however, went further than the Commission, particularly in relation to enforcement. For example, the government proposed that:

- parent companies or other group companies should be liable if a subsidiary could not pay fines or could not be held responsible; and

- any individual who could be shown to have had some influence on or responsibility for the circumstances in which a management failure, falling far below what could reasonably be expected, was the cause of a person's death, should be subject to disqualification from acting in a management role, in any undertaking carrying on a business or activity in Great Britain. Currently, under section 2 of the Company Directors Disqualification Act 1986, a director who has been convicted of a health and safety offence can be disqualified from holding office for a maximum period of 15 years.

The government also invited comments on whether action should be taken against individual officers in relation to the offence of corporate killing and whether officers should be liable to imprisonment in separate criminal proceedings. In addition, comments were invited on whether proceedings should be instituted to freeze the property and assets of companies to prevent directors transferring assets or dissolving the corporation before fines could be paid. If this proposal becomes law, it could put the survival of some corporations in danger.

The Commission's proposals in relation to individual liability were accepted by the government, i.e. the creation of two separate offences of unintentional killing, namely reckless killing and killing by gross carelessness. In addition, the government proposed a third individual offence where death resulted from the intentional or reckless causing of a minor injury.

The current indications are that a corporate killing bill will be produced this autumn, but that the proposals will not be as radical and far-reaching as it was at first thought. It is unlikely that the liability of individual directors will be targeted, although there are some who are still lobbying for these reforms to be included in the new proposals. In any event, however, directors could still be prosecuted under the current law of manslaughter, although as discussed, it is difficult to convict directors of large corporations, owing to the fact that there must have been personal negligence on the part of the accused director for there to be

a conviction. The new proposals are likely to relate solely to the liability of corporations, and will make it easier for corporations to be prosecuted for failure to comply with health and safety responsibilities. The courts will be able to impose unlimited fines on conviction of corporations, and it is likely that these fines will be much higher than those previously imposed under the 1974 Act (the record under the 1974 Act is £1.5 million for Great West Trains for the Southall Rail disaster in 1997). In addition, some of the additional remedies and enforcement provisions, which were set out in the government's May 2000 consultation paper, may survive, and some of these could have a serious financial impact on corporations.

## Practical steps which directors should take to comply with their health and safety responsibilities

In July 2001, the Health and Safety Commission published a guidance note on directors' responsibilities for health and safety. The guidance recommended board level responsibility, which includes strong leadership and also ensuring that the board of directors is kept informed, on a regular basis, of the company's health and safety risks and of any new legislation or guidance. One way to achieve this may be to appoint a health and safety director who would be charged with keeping the board informed about such issues.

Directors also need to ensure that risk assessments are carried out on an on-going basis, as most business decisions will have health and safety implications. For example,

new work practices or the use of new materials should be assessed from a health and safety perspective. In addition to assessing the risk, directors need to ensure that procedures for dealing with the risks are well documented, so that these can be produced to the Health and Safety Commission, if necessary. These procedures should include dealing with minor events as well as disaster management plans.

However, to avoid liability under the 1974 Act and to prepare for the introduction of a corporate killing offence, it is not enough for directors to assess the risks, draft a policy and inform employees of its existence. The policy must actually be carried out by all employees at all levels, as can be seen from the Gateway case, because a breach by an employee (at any level) can cause the company to be held liable under the 1974 Act and fined. In addition, the proposed new offence of corporate killing would be committed if the death was caused by a "management failure" by the corporation. This would bring the offence more in line with the 1974 Act, as the company could be convicted if there was a failure in the way in which the corporation's activities were managed or organised by all employees.

It is therefore essential that health and safety managers within corporations educate, train and supervise employees (including temporary staff and employees of other employers working on site) on health and safety issues including; (i) the risks employees face; (ii) steps they can take to guard against such risks; and (iii) the duties they are under and the need to cooperate.

Directors could also discipline employees for failure to comply with health and safety rules and procedures.

Health and safety procedures and regulations have become much more sophisticated over the last decade. This trend is set to continue and, as the expected legislation concerning corporate manslaughter demonstrates, all individuals within a company must be vigilant.

### Further information

For further information please contact

#### Howard Watson

+44 (0)20 7466 2088

howard.watson@herbertsmith.com

#### Lynne Atherton

+44 (0)20 7466 2053

lynne.atherton@herbertsmith.com

If you would like to receive more copies of this briefing, or would like to receive Herbert Smith briefings from other practice areas, or would like to be taken off the distribution lists for such briefings, please email [sally.henderson@herbertsmith.com](mailto:sally.henderson@herbertsmith.com) or call business development on 020 7466 3500. You can also contact us to say whether you would prefer to receive these publications in a printed or electronic format.

© Herbert Smith 2003

The content of this briefing does not constitute legal advice and should not be relied on as such. Specific advice should be sought about your specific circumstances.

Herbert Smith, Gleiss Lutz and Stibbe are three independent firms which have a formal alliance assisting them in delivering cross-border services to their respective clients.



[www.herbertsmith.com](http://www.herbertsmith.com)

Herbert Smith in association with Gleiss Lutz and Stibbe