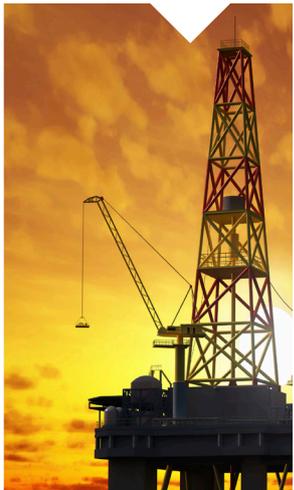


# ACCIDENTS IN THE UK WORKPLACE - PERSONAL LIABILITIES AND THE RISK OF PROSECUTION



## Accidents in the UK workplace - personal liabilities and the risk of prosecution

When a serious accident happens in the workplace, an investigation is immediately commenced by the Health and Safety Executive. In the case of a fatal accident, the police will also inevitably be involved.

Directors and line managers may be concerned to understand whether they may be considered personally liable for any serious injury or death and whether they might be at risk of criminal prosecution. Alison Newstead, an expert in health and safety law at Shook Hardy & Bacon International solicitors, explains the approach that is taken by the UK Health and Safety Executive and the potential penalties that an individual director or manager could face.

### When is an individual at fault?

Whilst the Health and Safety Executive's investigation into any accident will invariably focus on the activities of the company, its Enforcement Policy Statement clearly indicates that it should identify and prosecute individuals if it considers that prosecution is warranted. Investigators will therefore not only look at failings on the part of the company, but also those of individuals in the management chain.

In making such an assessment, the Health and Safety Executive will consider the role played by individual directors and managers within the company structure. Action is likely to be taken against an individual if the investigations reveal that a particular offence of the company was committed with the consent, connivance or was attributable to neglect of a particular individual.

Under section 37 of the Health and Safety at Work Act 1974, where an offence has been committed by a "body corporate"

(i.e. a company) and is proved to be committed with the consent or connivance of or to be have been attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate, he as well as the body corporate will be guilty of that offence and is liable to be proceeded against and punished accordingly.

- **Consent** - an offence will have been deemed to have been committed with the consent of a director, manager, secretary or similar officer if the individual actively sanctioned an action. For example, agreeing that a safety harnesses need not be worn when working at night in order to save time.
- **Connivance** - an offence will have been committed with the connivance of an individual if he has "wilfully shut his eyes" as to what was going on. This means that the individual knew that an unsafe state of affairs may have existed, but did not take any steps to avoid it. Case law suggests that the individual "was not actively encouraging [the course of action], but did nothing about it". For example, if an individual was aware of work being carried out on dangerous machinery without always employing the requisite safety guards.
- **Neglect** - this covers situations in which an individual failed to take steps that it was their duty to take. For example, failing to implement a specific health and safety policy for which the individual was responsible.

Under Section 37, an individual could face a maximum penalty of an unlimited fine and up to 2 years imprisonment for any contravention.

The Health and Safety Executive Enforcement Policy also indicates that, where appropriate, enforcing authorities should seek disqualification of directors under the Company Directors Disqualification Act 1986. Whilst this enforcement tool is available to the prosecuting authority, it is rarely sought by prosecutors or ordered by the courts. Nevertheless, the risk of a maximum 15 year disqualification remains. This is a substantial period and one which could have a devastating effect on an individual's career.

### Who may be prosecuted?

Liability does not attach to an individual according to a person's name or their role or job title. The focus is primarily on that person's authority and responsibility within the business. The Health and Safety Executive's investigation will concentrate primarily on the decision makers and how the businesses activities were managed and organised by them. The company's management structure will be scrutinised in order to identify those who may possibly be in the frame for an individual prosecution.

Two cases help to illustrate how the courts decide which individuals may be guilty of an offence:

- **Armour v Skeen [1977] IRLR 310** - this case involved an employee of Strathclyde Council who sustained fatal injuries when he fell from a scaffold on a bridge whilst it was being painted by the Council's roads department. The Council's Director of Roads was charged with offences under Section 37 of the Health and Safety at Work Act 1974, in that the offences that the company committed were attributable to his neglect. The council had issued a statement of safety policy which had laid down in general outline the duties of its various directors. The Director of Roads had issued no detailed safety instructions in respect of these guidelines. In this case, the court held *"Each case will depend on its particular facts, and on this issue, will turn on the actual part played [by the individual] in the organisation. Having regard to the position of the appellant in the organisation of the Council*

*and the duty which was imposed on him in connection with the provision of general safety policy in respect of the work of his department, I have no difficulty in holding that he came within the ambit of class of persons referred to in Section 37(1) HSWA".*

- **R v Boal [1992] 3 ALL ER 177** - an individual was employed as an assistant general manager of a book shop and had responsibility for the day to day running of the shop, but was given no training in management, health and safety at work or fire precautions. The general manager of the shop went on holiday and left the assistant manager in charge. During this period, serious breaches were found in respect of the requirements of the Fire Certificate at the book shop premises. The assistant general manager was prosecuted and convicted of contraventions of the relevant fire precaution provisions. On appeal, this decision was overturned. The Court of Appeal held that *"the intended scope of [Section 37] is, we accept, to fix with criminal liability only those who are in a position with authority, the decision makers within the company who have both power and responsibility to decide corporate policy and strategy. It is to catch those responsible for putting proper procedures in place; it is not meant to strike at the underlings".*

The duties of employees are also set out under Section 7 of HSWA 1974. In accordance with Section 7, it is the duty of every employee whilst at work to:

- (a) take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work; and
- (b) as regards to any duty or requirement imposed on his employer or any other persons under any of the relevant statutory provisions, to cooperate with him so far as necessary to enable that duty or requirement be performed or complied with.

Thus, it is possible that an individual may face prosecution if he has not taken reasonable care for the health and safety of himself and other persons. Failure to abide by these provisions could see a maximum penalty of an unlimited fine or 2 years in prison, or both.

## When will the Health and Safety Executive pursue employees?

The Health and Safety Executive does not generally like to pursue individuals. It is often better to focus on the failings of the corporate entity in order to ensure wholesale change within the company. However, when a company has taken all reasonably practicable steps to ensure compliance with the relevant health and safety legislation, the enforcing authority are then likely to look to employees to see if there are any shortcomings in relation to their actions.

A prosecution will not go ahead unless there is sufficient evidence to support a realistic prospect of conviction and the prosecution has to be deemed to be in the public interest. In deciding whether a prosecution is feasible, the Health and Safety Executive will therefore review any previous warnings that were given- in particular to that individual- and also check whether the employee followed systems laid down by the particular company.

The Health and Safety Executive will also look at the public interest test as laid down in the Code for Crown Prosecutors and review a number of considerations before deciding whether to prosecute an individual. These include:

- whether the matter was, in practice, clearly within the director or manager's effective control
- personal awareness of the circumstances surrounding, or leading to the offence
- failure to take obvious steps to prevent the offence
- previous advice/warnings received regarding matters relating to the offence
- personal responsibilities and matters related to the offence, such as the individual manager personally instructed, sanctioned or positively encouraged activities that significantly contributed or led to the offence

- whether safety was knowingly compromised for personal gain, or commercial gain of a body corporate, without undue pressure from the body corporate to do so
- whether a prosecution would be viewed as fair, appropriate and warranted.

In addition to offences under HSWA 1974, individuals could also face the possibility of common law gross negligence manslaughter. In such circumstances, an individual's grossly negligent behaviour could be deemed to have caused a person's death. The maximum sentence for such a death is life imprisonment. There are many examples of individuals being sent to prison for individual gross negligence manslaughter (mainly directors of small companies) and such convictions are likely to continue.

## How should Directors protect themselves?

Firstly, prevention of serious accidents is obviously the best course of action. There is a plethora of guidance available to directors to assist them in complying with their health and safety obligations and ensuring best practices are put into place. The Institute of Directors and the Health and Safety Executive have jointly published a useful guide "*Leading Health and Safety at Work*", for directors and board members which sets out an "*agenda for the effective leadership of health and safety*", focussing on a 4 point agenda: plan, deliver, monitor and review. The HSE has also published "*Successful Health and Safety Management*" which sets out what health and safety means, how to achieve it and how to maintain it. Some contend that these publications could be used by the HSE as evidence of non-compliance with best practice (and thus assist in supporting a prosecution). However, ignoring this advice and guidance (which is freely available) would certainly not be recommended. Indeed, it could be used as evidence in defending any prosecution by showing that appropriate steps were taken by individuals within organisations.

If the worst did happen, and a serious accident occurred within the workplace, the company's lawyers would swing into action very quickly and manage the company's defence strategy. Directors and managers should be aware that the company's lawyers are just that – lawyers acting on behalf of the company. If there is any suggestion that an individual's own actions may be called into question, separate legal advice needs to be taken quickly. Whilst a company's lawyer may attend HSE interviews with individuals this is likely to raise objections from the HSE (as to potential conflicts) and could place individuals in a difficult situation; there are many occasions when the interests of an individual may differ to that of the company. Independent legal assistance should therefore be offered without delay to those who may be potentially vulnerable and consideration given as to whether the company will meet such costs.

## Conclusion

After a serious incident, individuals need to consider quickly whether they may be a target for an individual prosecution and act on this quickly, seeking legal advice as to their potential exposure and guidance as to how they should navigate through the investigation, interview and possible prosecution process.



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