

**TURNSTONE LAW DIRECTOR, SIMON JOYSTON-BECHAL, HIGHLIGHTS DEVELOPMENTS IN HEALTH AND SAFETY LAW. HE LOOKS AT THE RISKS FOR DIRECTORS, SENIOR MANAGERS AND THEIR COMPANIES, PROVIDING PRACTICAL ADVICE ON REDUCING EXPOSURE AND STAYING OUT OF JAIL.**

In the area of health and safety, now is a time of both risk and opportunity for directors and senior managers. In recent years, the risks of criminal prosecution have grown and the importance of compliance with health and safety requirements has increased. But it is not all doom and gloom. Opportunity stems from greater clarity on what directors and senior managers have to do to comply with the law and clear guidance has been produced and recently updated, setting out how they can reduce both the risk of accidents happening ‘on their watch’ and also reduce their vulnerability to prosecution.

This guidance is contained in a joint publication by the Institute of Directors and the Health and Safety Executive – *Leading Health and Safety at Work: Actions for directors, board members, business owners and organisations of all sizes* (‘the IoD Guidance’). It provides practical guidance to directors on the steps they should be taking to lead the way in managing health and safety within their organisation. It is freely available on the HSE’s website<sup>1</sup>.

Four key risks have developed over recent years, all of which point towards increasing scrutiny on directors and underline the importance of complying with health and safety law and the IoD Guidance. They are: the risk of imprisonment for mainstream health and safety offences; medium sized and large organisations now being vulnerable to prosecution for corporate manslaughter; increasing fines; and the impact of recession. Let’s consider these in turn before going into more detail about practical solutions.

### **The first risk – imprisonment**

The stakes were raised by the Health and Safety (Offences) Act 2008, which introduced imprisonment for up to a two-year period as an option on conviction of a director or other employee for any of the mainstream health and safety offences.

Imprisonment is hopefully to be reserved only for a very serious wrongdoing – but beware that small failings can look greater with an unlucky outcome in terms of severity of injury and the benefit of hindsight. In practice, the courts have so far been more inclined to impose the penalty of a suspended prison sentence combined with a community service order when individuals have seriously neglected their duties and are convicted of mainstream health and safety offences. However, the threat still remains and this can hang over a potential defendant for several years after an accident until the criminal process is complete.

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<sup>1</sup> <http://www.hse.gov.uk/pubns/indg417.pdf>

## The second risk – corporate manslaughter

The Corporate Manslaughter and Corporate Homicide Act 2007 created a new manslaughter offence that can be committed by organisations. This new offence was designed to address difficulties with the previous law, which saw repeated high profile prosecutions that failed to convict medium-sized and large organisations following work related fatalities. The problem under the old law was the need to identify a ‘directing mind’ of the organisation who was himself guilty of manslaughter. This hurdle has been removed and the new offence focuses on the actions of all senior management, which means that it is now much easier for prosecutors to secure convictions.

The new offence of corporate manslaughter is committed if the way in which an organisation’s activities are managed by senior management causes a person’s death and amounts to a gross breach of a duty of care owed to the deceased. The offence is focused on failings at director and senior management level if these are a substantial element in the cause of the fatality.

The corporate manslaughter legislation sets out factors that may be taken into account by a jury when deciding whether to convict an organisation. These include in particular:

- First, the extent to which the evidence shows that there were **attitudes, policies, systems or accepted practices** within the organisation that were likely to have encouraged failure or to have produced tolerance of it.
- Second, any **health and safety guidance** that relates to the alleged breach.

The first of these jury factors now elevates to the status of criminal law previously ‘soft’ concepts such as the attitude of management to health and safety. After a fatality, the police in the course of their investigation now have to ask your employees questions such as “How seriously does senior management treat health and safety?” Would your employees say that the directors set a good example and have always taken health and safety issues seriously? Or would your employees say that the directors have turned a blind eye to matters that have arisen in the past, particularly if safety matters required additional training, staffing or funding? For the first time, following a fatality the evidence of staff members on these apparently soft questions of attitudes and accepted practices will be critical in determining whether a company has committed an offence of corporate manslaughter.

The second factor allows a jury to take into account relevant health and safety guidance when considering whether the offence of corporate manslaughter has been committed. The offence is aimed at the actions of senior managers. Therefore, the most relevant guidance is the IoD Guidance. This is a significant development because health and safety guidance does not generally have the full force of law. However, the corporate manslaughter legislation elevates the IoD Guidance to the status of being a relevant factor to take into account when determining whether an offence has been committed. So, directors and senior managers are advised to understand the IoD Guidance and apply its principles in their organisations.

In practice, the police are now being drawn to interview directors and senior managers following a work related fatality to determine whether corporate manslaughter may have been committed. It is now appropriate for the police to ask a director, in the course of their investigation, whether he or she is familiar with the IoD Guidance and what he or she has done to implement it. If you can say that you have read the Guidance or had a training session on it and that you have applied some of the core actions and guidelines to your organisation (even if you have not completed every one), this factor will work to protect the company from a corporate manslaughter prosecution. If your answer falls

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short, the police will have put in place one of the building blocks for a successful prosecution of the company, alongside a personal prosecution of you as a director for gross negligence manslaughter.

### The third risk – increasing fines

Fines on conviction in health and safety cases have historically been criticised for being too low. However, in recent years fines in cases involving fatalities have routinely been in the hundreds of thousands of pounds for single fatalities and in the millions of pounds where large companies are convicted of causing multiple fatalities.

In February 2000, new sentencing guidelines were published for corporate manslaughter and other health and safety offences causing death<sup>2</sup>. These guidelines heralded higher levels of fines in relation to offences causing death.

The starting point is that “fines must be punitive and sufficient to have an impact on the defendant”. The guidelines go on to provide more specifically:

- **In relation to health and safety offences causing death: “the appropriate fine will seldom be less than £100,000 and may be measured in hundreds of thousands of pounds or more”.**
- **In relation to corporate manslaughter: “the appropriate fine will seldom be less than £500,000 and may be measured in millions of pounds”.**

The guidelines also state that, in considering how serious the offence is, a court should ask “How far up the organisation does the breach go?” This will involve a consideration of whether directors and senior managers have been taking appropriate steps to manage health and safety, which leads us back once again to the issue of whether the IoD Guidance has been understood and implemented by senior management.

### The fourth risk – recession

As a consequence of the recession and the continuing challenging economic environment, businesses across the country have been under considerable pressure to work more efficiently, including by reducing staff numbers. Directors need to be alert to the potential unintended consequences for safety when reducing staff.

Health and safety is easily forgotten when caught up in redundancy programmes, even if a specific safety budget survives when savings are made elsewhere. Directors should take positive steps to ensure that the impact on health and safety from potential job cuts is carefully considered. For example, are safety critical supervisory or managerial roles being considered for redundancy? Would the remaining staff tell an inspector that, although they have been well trained and know what they have to do to achieve a safe workplace, they no longer have the time to perform their ‘softer’ health and safety duties since staffing has been cut?

A failure to consider these matters is likely to affect the sentence that would be applied upon conviction. The sentencing guidelines set out a list of ‘aggravating features’ which will lead to a higher sentence being imposed if a company is convicted. These include “cost cutting at the expense of

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<sup>2</sup> *Corporate Manslaughter & Health and Safety Offences Causing Death, Definitive Guideline*, Sentencing Guidelines Council, February 2010.

safety". So the impact of a programme of redundancies or cutting health and safety budgets needs to be carefully considered to ensure that unintended consequences are avoided.

Combined, these four risks substantially increase the importance of ensuring that directors effectively manage health and safety and 'set the right tone at the top'.

## **Personal criminal liability and how to avoid it**

In light of the risks that have been considered above, an important consideration for all directors and senior managers is the extent to which they can personally be criminally liable for work-related accidents. There are three offences that can be committed by directors and senior managers who fail to manage health and safety properly: gross negligence manslaughter; an offence under section 7 of the Health and Safety at Work etc. Act 1974 (HSWA); and an offence under section 37 of the HSWA. Directors can also face disqualification from acting in a managerial capacity.

If a director or senior manager's actions are grossly negligent and cause a person's death, it is possible that he or she could be charged with gross negligence manslaughter. This is the same very serious offence that individuals are charged with when they are alleged to have unintentionally caused death outside the workplace context.

All employees, including directors, can also be charged with the general offence under section 7 of the HSWA of failing to take reasonable care for the health and safety of themselves and others affected by their acts or omissions at work.

However, the most common charge made against directors is under section 37 of the HSWA. This provides that a director personally commits an offence if a health and safety offence is committed by his organisation and if it has been committed with the director's consent or connivance, or is attributable to his or her neglect. 'Neglect' is the more worrying concept for directors. It goes beyond the facts and circumstances that they are actually aware of and involves a consideration of what the director should have known or found out about. The courts have expressed the matter as follows:

***"The question, at the end of the day, will always be.... whether.... the officer in question of the company should have, by reason of the surrounding circumstances, been put on enquiry so as to require him to have taken steps to determine whether or not the appropriate safety procedures were in place" (R v P Limited, 2007).***

The lesson here is that it is important for directors to be proactive in managing safety. They can no longer adopt the approach of simply dealing with issues as they arise. It will depend on all the circumstances as to how far each director ought reasonably to go and the reasonable degree of involvement should take into account that specific director's role in the organisation. However, a 'hear no evil, see no evil' defence will not suffice in the face of poor health and safety management. Courts will consider what a director ought reasonably to have done when faced with the issue of whether a director's behaviour falls within the category of 'neglect' – a question which is again likely to be considered by reference to the IoD Guidance.

## **Practical advice**

The main practical advice, the importance of which has been stressed throughout this article, is to familiarise yourself with the IoD Guidance and consider how best to implement it within your organisation. The Guidance represents an opportunity for directors and senior managers to reduce

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their personal exposure and that of their organisation to all the criminal risk factors identified above. It is not very long and is written in plain English, having recently been redrafted to make it even clearer.

The IoD Guidance includes a practical ten point Health & Safety Checklist, which is designed to allow directors to assess their safety performance.

Other key areas to consider include your organisation's safety policies and procedures and its incident response procedures. Care should be taken to ensure that any promises in your health and safety policy are achievable and appropriate to the realities of your business.

Business leaders have faced criminal investigation as a result of over-ambitious statements in health and safety policies. It is not uncommon for a chief executive or chairman to sign a publicly available statement accepting that "I take ultimate responsibility for health and safety within the organisation". We are dealing here with the criminal law and the maker of such a statement may not necessarily realise or accept that he or she should face criminal conviction whenever the organisation has breached health and safety law. So, these statements and policies deserve specialist health and safety legal review to reduce the likelihood of potential hostages to fortune.

The appraisal process can be an effective way of motivating individuals to consider their health and safety performance. In most organisations, an appropriate strategy would be to include health and safety performance as an assessed criteria or an objective in the appraisal forms of all employees at all levels. If a senior manager's appraisal performance is dependent on the health and safety performance of his or her team, it is much more likely that the message of the importance of prioritising safety will successfully cascade down through the organisation.

In the unfortunate event that an accident does occur within your organisation, it is important that employees and managers know how to respond both in terms of managing the immediate aftermath and then managing the investigation that is likely to follow. These procedures should be captured in an incident investigation protocol that has been drafted with specialist legal input, so that in appropriate situations the confidentiality benefit of legal privilege will be engaged.

In the event of a serious incident, the Health and Safety Executive, local authority or the police are likely to conduct a criminal investigation. There are some serious errors that an organisation might make from the outset, reducing the chances of being able to defend a criminal prosecution or civil compensation claim. Equally, there are tried and trusted ways of avoiding the legal pitfalls. Notably, there are important steps that can be taken to support employees who are subject to the criminal interview process. Specialist legal advice is required from the outset.

We are operating in an environment in which it has never been more important for directors and senior managers to set the right 'tone at the top', in order to protect themselves and their organisation from criminal prosecution. This potential threat should nonetheless be seen as an opportunity to focus on training for directors and senior managers, in order that they understand their duties and the active steps they need to take to reduce the chances of accidents happening. At the same time, this will reduce their vulnerability to prosecution.

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