

Corporate Risk A directors' responsibility

1 April 2009
Stanley House



Overview of Health & Safety Legislation

Recent Changes

Martin Crabtree
Partner



Overview

- Health and Safety at Work Act 1974
- The European Influence
- The Political Agenda
- The importance of the victim



Road Safety Act 2006

- Section 20 – Causing death by driving without due care and attention.
 - Maximum imprisonment 5 years
- Section 21 – Causing death by driving when:
 - a) Unlicensed
 - b) Disqualified
 - c) Uninsured
 - Maximum penalty 2 years imprisonment



Corporate Manslaughter and Corporate Homicide Act 2007

- Section 1 (1)
“An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised:
 - A) Causes a person’s death; and
 - B) Amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased”



Corporate Manslaughter and Corporate Homicide Act 2007

- Section 1(3)
“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”



Corporate Manslaughter and Corporate Homicide Act 2007

- Section 18

“An individual cannot be guilty of aiding, abetting, counselling or procuring the commission of an offence of corporate manslaughter”



Corporate Manslaughter and Corporate Homicide Act 2007

- Penalties
 - Unlimited fine (recommended to be linked to turnover)
 - Publicity Order
 - Remedial Order
- An individual can still be prosecuted for “*gross negligence*” manslaughter (outside the terms of the Act)



Health & Safety (Offences) Act 2008

- Came into force 16th January 2009
- Increases maximum fine in Magistrates’ Courts for breaches of health and safety legislation from £5,000.00 to £20,000.00
- Magistrates’ Courts and Crown Courts now have power to impose a Custodial sentence upon an individual found guilty of certain health and safety offences



Health & Safety (Offences)
Act 2008

- Magistrates' Court maximum 6 months imprisonment
- Crown Court – 2 years imprisonment



Health & Safety (Offences)
Act 2008

- *“Our enforcement policy targets those who cut corners, gain commercial advantage over competitors by failing to comply with health and safety law and put workers and the public at risk”.*

Judith Hackett - Chair HSE



Health & Safety (Offences)
Act 2008

- *“Jail sentences for particularly blameworthy health and safety offences committed by individuals can now be imposed reflecting the severity of such crimes, whereas there were more limited options in the past”*

Lord McKenzie - Minister for DWP



Health & Safety (Offences)
Act 2008

- The Act does not impose additional duties on individuals or businesses. It increases the penalties and therefore the deterrent
- Any individual in the workplace – employees, management and directors can be found guilty of health and safety offences
- The Burden of Proof



Health & Safety (Offences)
Act 2008

HSE Guidelines for prosecution:

- Where a death was a result of a breach of the legislation;
- There was a reckless disregard of health and safety requirements;



Health & Safety (Offences)
Act 2008

- There have been repeated breaches which give rise to significant risk, or persistent and significant poor compliance;
- False information has been supplied wilfully or there has been an intent to deceive



Case Study

R v Mehmet Parlack/Watchacre
Properties Limited (October 2008)

- Prosecution under Regulatory Reform (Fire Safety) Order 2005 following Fatal Fire
- No prosecution for Common Law Manslaughter



Case Study

- Eight breaches of the Regulations including:
 - a) failure to risk assess, and
 - b) failure to provide appropriate fire fighting equipment
- 4 months imprisonment and £21,000.00 fine



Insurance Position

- No insurance cover available for a fine
- There may be cover for your legal costs in your insurance policy



Avoidance of Prosecution

- Ensure adequate and effective systems and procedures are in place
- Have an effective system for carrying out risk assessments and training
- If you have Safety Policies in place, make sure they are adhered to
- Always be aware of the issue of Health and Safety





When the Police/Health and Safety Executive call

Practical advice on surviving a prosecution/investigation

Greg Earnshaw
Partner



A new age of Corporate Responsibility

- Fatalities and serious injury in the workplace continue to result in a high number of prosecutions
- This trend will continue particularly in the light of
- The Corporate Manslaughter and the Corporate Homicide Act 2007
- Increased penalties for breaches of the Health and Safety at Work Acts



Who will Investigate?

- Serious injury accidents will be investigated by the Health and Safety Executive
- In the case of a fatality the investigation will be by both the Police and the Health and Safety Executive
- How should I deal with the investigation?



Some common approaches

- often later shown to be wrong – but not always – I will just tell them what happened
- May or may not be the right thing
- Information volunteered can be used in subsequent court proceedings
- An investigator/prosecutor cannot be blamed for using information that supports a prosecution



Another Approach

- I will say nothing/refuse to answer questions/go no comment
- The danger of failing to answer questions in an interview is that an adverse inference may be drawn at trial (section 34 Criminal Justice and Public Order Act 1994)



Horses for Courses

- It is important to understand the investigators powers
- Police powers are contained in PACE
- Powers of HSE inspectors are contained in section 20 HSWA
- The Police have the power of arrest whereas an HSE inspector does not
- The Police can require someone to be interviewed under caution an HSE inspector cannot



Sounds complicated but....

- You must not underestimate the importance of interviews at the investigation stage
- **R-v-Howell (2003) CLR 405.** The court of appeal described the police interview and the trial as being "part of a continuous process in which the suspect is engaged from the beginning"



The importance of interviews

- Interviews can be used in evidence at trial
- Adverse inferences can be drawn at trial by failing to raise a defence when interviewed



They are here....

- What is the correct approach to a request for an interview?
- Depends – who is asking?
- An HSE officer under section 20 of the Health and Safety at Work Act can require those who have information relating to an incident to provide that information to the inspector and require a written statement setting out such information



Section 20 Powers

- Refusal is a criminal offence
- But a section 20 statement cannot be used as evidence against that individual



Interview Options

- In each case it is a matter upon which you will need careful legal advice
- Three approaches
- 1) No comment interview



Interview options cont....

- 2) Give a full interview
- 3) Handing in a statement. Often the best approach in a work related incident is to read out a prepared statement. Note the requirement is to put forward a defence, not necessarily to answer the investigators questions



Open all hours



Legal representation involves

- A mix of experience of representing clients in criminal cases and an ability to understand the clients' business
- Explaining funding (insurance cover?)
- Dealing with conflicts



Legal representation involves cont....

- Dealing with the coroner in the case of a fatality (remember the family of the deceased)
- Dealing with the press
- The use of experts (litigation privilege)
- Taking legal points

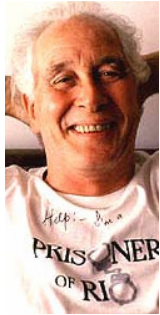


Legal representation involves cont....

- Ascertaining what is being investigated, who is doing the investigating; considering the client's instructions and at all times acting in the best interest of the client
- 24 hour cover
- Experts in our field



Ronnie Biggs



 forbessolicitors.

Health and Safety Issues for Employers

Peter Byrne
Partner and Head of Employment
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Duty of Care

- Employers have responsibilities for the health and safety of their employees
- Also responsible for any visitors to their premises such as customers, suppliers and the general public

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Risk Assessments

- In order to comply with their duty of care, an employer should undertake a risk assessment to identify possible health and safety hazard
- If identify any risk, need to put in place “control measures”
- Should appoint a “competent person” with health and safety responsibilities



Competent Person

- Usually in a small firm, one of the owners
- Alternatively, a member of staff trained in health and safety



Risk Assessments

- If employing five or more people there must be
 - an official record of what the assessment finds
 - A formal health and safety policy, including arrangements to protect employees’ health and safety



The Duty of Care in practice

- Employers must:-
 - Make the workplace safe
 - Prevent risks to health
 - Ensure plant and machinery are safe to use
 - All materials are handled, stored and used safely
 - Provide adequate first aid facilities
 - Inform employees of any potential hazards at work



The Duty of Care in practice

- Set up emergency plans
- Make sure ventilation, temperature, lighting and toilet washing and rest facilities all meet minimum requirements
- Provide the right work equipment and ensure it is properly maintained and used
- Prevent or control exposure to substances that may damage health
- Take precautions against risks caused by flammable or explosive hazards, electrical equipment, noise or radiation



The Duty of Care in practice

- Avoid potentially dangerous work involving manual handling
- Provide health supervision as required
- Provide protective clothing etc free of charge
- Ensure the right warning signs are provided and maintained
- Report certain accidents, injuries, diseases and dangerous occurrences to either the HSE or local authority, dependant on the relevant regs.



Practical solutions

- Make sure workplaces are properly ventilated
- Keep temperatures at a comfortable level
- Light premises so employees can work and move about safely
- Keep the workplace clean and tidy
- Ensure workrooms are large enough to allow easy movement
- Provide suitable workstations
- All equipment and premises to be well maintained



Practical solutions

- Ensure floors, walkways, stairs and roadways are safe to use
- Protect people from falling from height or into dangerous substances
- Store things to minimise the risk of injury
- Fit openable windows, doors and gates with safety devices if needed
- Provide suitable washing facilities and clean drinking water
- If necessary, provide employees with somewhere to get changed and store clothes



Practical solutions

- Set aside areas for rest breaks and to eat meals
- Ensure employees take appropriate rest breaks and their correct holiday entitlement
- Make sure that employees who work alone, or offsite, can do so safely



Points to Note

- Where employees from different firms are employed on one job, the main contractor will then be responsible for co-ordinating the work in a safe manner and must inform all employees of possible hazards whether they are his actual employees or not
- Where the employee is sent to work for someone else but remains employed by the same employer but an accident happens at the place where he has been sent to work, the responsibility may fall on the original employer



Practical solutions

- It is always advisable for employers to have a written code of conduct, rules regarding training & supervision, and rules on safety procedures. This should include information on basic health and safety requirements
- Leaflets and posters giving warnings of hazards are always advisable



Issues

- Potential claims
 - Civil liability for injury
 - Criminal liability for breach of Regulations and Statute
 - Employment Tribunal claim for unfair dismissal
 - Employment Tribunal claim for Constructive unfair dismissal



Issues

- Potential considerations
 - Stress
 - Bullying
 - Drugs and alcohol



Unfair Dismissals

- Employer gives employee instruction to carry out task
- Employee refuses alleging breach of health and safety
- Employee disciplined and dismissed
- If Tribunal finds that the instruction was unreasonable on health and safety grounds, will be unfair dismissal
- Employers must provide safe system of work



Health and Safety

- Employment Rights Act 1996 Section 100
- Protection for employees designated as Health and Safety Representatives
- Prevents them being penalised for carrying out their proper functions
- If dismissed for health and safety activity, automatically unfair.
- Minimum basic award £4700
- Compensatory Award – No upper limit



Whistleblowing

- Protecting workers who make specific types of disclosure that reveals employer misconduct
- Qualifying Disclosures
 - Criminal offence
 - Failure to comply with a legal obligation
 - Danger to the health and safety of any individual
 - Danger to the environment
 - Concealment of any of the above



Whistleblowing

- Disclosure made to
 - The employer
 - An appropriate public authority
 - A legal adviser
- If dismissed for a protected disclosure being made automatically unfair
- Compensatory award – no limit
- Have a whistleblowing policy!!!!



Constructive unfair dismissal

- Implied term that employer will provide a safe system of work
- If employee resigns as a result of an unsafe system of work, may be fundamental breach of contract
- If resigns in response to that breach, can bring a claim for constructive unfair dismissal
- Basic award – maximum £10500
- Compensatory award – maximum £66000