



The following update has been produced in association with Masons - one of the most highly regarded specialist law firms in Europe.

Introduction

On 5 October 1999, thirty-one people died in the Ladbroke Grove train crash. It then took nearly 4 years for the British Transport Police and the Crown Prosecution Service to conclude that there was insufficient evidence to charge any individuals with manslaughter for these deaths. The HSE, on the other hand, took just 6 months to obtain the record £2 million fine imposed on Thames Trains on 5 April 2004.

At first glance, these cases seem to confirm that whilst fines against companies are increasing, individuals remain immune from prosecution.

However, as often happens, reading the headlines can give a misleading impression of what is actually happening in day-to-day life. In fact, there are at present a number of proposals to increase the number of individuals fined and imprisoned following breaches of health and safety legislation. This Bulletin sheds light on these current developments and provides advice on how to minimise the risk of prosecution as an individual.

HSE Prosecutions

In July 2003, the Health and Safety Commission updated the HSE and Local Authority Enforcement Policy which Inspectors refer to when deciding what health and safety enforcement action to take. One of the aims of the Enforcement Policy is to hold duty holders, including directors and managers, to account where they have failed in carrying out their responsibilities. The policy now states that inspectors:

*"...should identify and prosecute ... individuals ...
In particular they [Inspectors] should consider the management chain and the role played by individual directors and managers and take action against them where the inspection or investigation reveals that the offence was committed with their consent or connivance or to have been attributable to neglect on their part..."*

The second part of the quote refers to prosecutions brought against senior members of an organisation under s. 37 of the Health and Safety at Work etc. Act 1974 (HSWA). However, any employee (including an employee director) may also be prosecuted under ss. 7 or 8 of the HSWA for:

- failing to take reasonable care of his/her own or other people's safety -s.7(a)
- failing to co-operate with his/her employer's requirements for complying with health and safety legislation -s.7(b)
- intentionally or recklessly interfering with or misusing anything provided in the interests of health, safety or welfare (e.g. PPE) -s.8

One of the aims of the Enforcement Policy is to hold duty holders, including directors and managers, to account where they have failed in carrying out their responsibilities.

To "Seek an early opportunity, as Parliamentary time allows, to provide the course with greater sentencing powers for health and safety crimes." UK Government 2000 Strategy.

Since 1989, at least 16 fatal accidents have led to manslaughter convictions - 7 of which came to court last year. There are already another 8 cases awaiting trial in 2004/5.

But Can I Be Sent To Jail?

It is true that at present jail sentences are only available following a conviction for:

- manslaughter (culpable homicide in Scotland) - up to life imprisonment;
- contravening an improvement or prohibition notice -up to 2 years;
- breaching a licence condition (e.g., asbestos licence) or explosives requirement -up to 2 years;
- failing to comply with a court remedy order (rarely used) - up to 2 years.

Aside from manslaughter (where imprisonment is the only penalty available for an individual), the most common penalty imposed on individuals for health and safety offences is a fine (typically up to £5,000 for breaches of s. 7 or up to £20,000 for breaches of s. 37) and, rarely, disqualification from acting as a company director for up to 15 years. These fines may be unlimited if the case is sufficiently serious to warrant hearing by the Crown Court (which most workplace fatalities will be).

In 2002/3, the HSE prosecuted 22 directors/managers (convicting 11 individuals with an average fine of less than £3,000) and 19 employees (convicting 14 with an average fine of less than £900). Although 5 individuals have served prison sentences for health and safety offences, no one has yet been sent to jail this century.

It is possible that the headlines are misleading - many cases against individuals take several years to come to court because they follow fatal accidents, which often trigger lengthy police investigations. In addition, few individuals plead guilty, which slows down the court process.

However, pressure groups and trades unions are lobbying for a change in the law to allow the Courts to use the potent deterrent of imprisonment more often. A Private Members Bill, the *Health and Safety at Work (Offences) Bill*, is listed for its second reading in May 2004. If enacted, the Bill would raise the level of fine that the Magistrates' Courts can impose to £20,000 and introduce prison sentences of up to 2 years for almost all offences.

The main changes to penalties are set out in the table on the next page.

HSWA Section	Present Maxima	Proposed New Maxima
Sections 2, 3, 4 and 6: the general duties on employers and others.	Magistrates Court: a fine not exceeding £20,000. Crown Court: an unlimited fine.	Magistrates Court: 6 months imprisonment and/or a fine not exceeding £20,000. Crown Court: 2 years imprisonment and/or an unlimited fine.
Section 7: duty on employees.	Magistrates Court: a fine not exceeding £5,000. Crown Court: an unlimited fine.	Magistrates Court: 6 months imprisonment and/or a fine not exceeding £5,000. Crown Court: 2 years imprisonment and/or an unlimited fine.
Section 8: duty not to interfere with or misuse things provided for health and safety.	Magistrates Court: a fine not exceeding £5,000. Crown Court: an unlimited fine.	Magistrates Court: 6 months imprisonment and/or a fine not exceeding £5,000. Crown Court: 2 years imprisonment and/or an unlimited fine.
Contravening other H&S Regulations (e.g., CDM, MHSWR etc.)	Magistrates Court: a fine not exceeding £5,000. Crown Court: an unlimited fine.	Magistrates Court: 6 months imprisonment and/or a fine not exceeding £20,000. Crown Court: 2 years imprisonment and/or an unlimited fine.
Section 20: (e.g., failure to provide information; leave premises undisturbed after an incident or answer an inspector's question).	Magistrates Court: a fine not exceeding £5,000.	Magistrates Court: 6 months imprisonment and/or a fine not exceeding £20,000. Crown Court: 2 years imprisonment and/or an unlimited fine.

The Bill is likely to run out of Parliamentary time before being passed – unless it obtains Government support. This is possible as the Government may want to be seen to be implementing its commitment made in the 2000 Revitalising Health and Safety – Strategy Statement to:

“seek an early opportunity, as Parliamentary time allows, to provide the courts with greater sentencing powers for health and safety crimes. The key measures envisaged are to extend the £20,000 maximum fine in the lower courts [and] the power to imprison for most health and safety offences.”

What About Manslaughter?

Perhaps the greatest risk of imprisonment comes after a fatal accident. The police (including the British Transport Police), Crown Prosecution Service and the HSE have signed a joint protocol on the investigation of work-related deaths. This has resulted in greater co-operation and liaison between the enforcing authorities. It is necessary first to charge an individual who represents the *directing mind* of a company with gross negligence manslaughter before the company itself can be charged with corporate manslaughter. The well-publicised difficulties in prosecuting directors of large companies for gross negligence manslaughter have led to the CPS examining potential prosecutions of “coal-face” employees: supervisors, site managers and contracts managers.

Manslaughter convictions can **only** result in a jail sentence (up to life imprisonment, although sentences are often suspended) – there is no option to impose a fine.

Despite its 1997 manifesto pledge, the present Labour Government has still not introduced a law of corporate killing.

However, the Home Office still claims to be committed to a new law. Many see a change in the law as the only way to bring large companies to book following disasters like Ladbroke Grove. The draft Bill published in 2000 also seeks to reform the law of manslaughter to make it easier to convict individuals on a “lesser” charge of *“killing by gross carelessness”* – which was intended to carry a jail term of up to 10 years.

All may become clearer after 29 April, when Home Office Minister Baroness Scotland QC is due to address a conference organised by the Centre for Corporate Accountability, which also has TUC support for the urgent introduction of corporate killing.

Conclusion

It is clear that both the HSE and the police/ CPS are increasingly looking to prosecute and convict individuals: the pressure groups and TUC would like those convicted to go to jail. One statistic shows this trend very well: since 1989, at least 16 fatal accidents have led to manslaughter convictions – 7 of which came to court last year. There are already another 8 cases awaiting trial in 2004/5.

Top Tips

Simple steps you can take to minimise your risk of prosecution include:

as an H&S Advisor: make sure you are only advising within your field of competency – seek specialist advice if you are unsure.

as a Manager: make sure you and your team know, understand and follow company procedures on health and safety; flag up health and safety hazards and deal with them; and ensure you cover absences effectively (both planned and unexpected). If someone is acting-up in a new role – make sure their training covers the new role and that they are supported by someone senior who can give advice.

as a Director: discuss health and safety at every board meeting and action recommendations promptly.

If an accident does happen: seek specialist legal advice immediately after the incident and before preparing any accident investigation report, to enable any report to be protected against disclosure in any civil or criminal proceedings.

Legislative Advice Provided By...

Helen Grice is a Solicitor at Masons specialising in health and safety. She can be contacted by telephone on 0161 2348234 or by email at helen.grice@masons.com