

With specific health and safety duties for directors looking likely **Michael Appleby** examines s37 of the Health and Safety at Work, etc. Act 1974 and, in particular, the reverse burden of proof argument.

Putting it in reverse

SECTION 37 HSWA

Directors' duties are firmly back at the top of the health and safety agenda. As reported in the January issue of SHP the Health and Safety Commission instructed the HSE to "explore possible ways of imposing duties on directors of private sector and public bodies". As a consequence s37 of the Health and Safety at Work, etc. Act 1974 (HSWA) is now under review.

Much has been written about the outcome of the recent criminal prosecution concerning the Hatfield train crash of 2000. However, less attention has been given to some of the rulings made by the trial judge during the course of the proceedings. One of these rulings concerned section 37.

A prerequisite for a director to be convicted of an offence under s37 is that the company of which he/she is a director is guilty of a health and safety offence itself. Sections 2 and 3 of the HSWA require employers to conduct their businesses so as to ensure, "so far as is reasonably practicable", employees and non-employees (respectively) are not exposed to risks to their health and safety.

These are strict liability offences subject only to the defence under s40 HSWA that the employer did all that was reasonably practicable to prevent the exposure to risk. In practical terms this means that to convict, the prosecutor simply has to prove there was an exposure to risk by the employer. The onus then shifts to the employer to avoid conviction by proving s/he did all that was reasonably practicable to prevent the exposure. This is known as a reverse burden of proof.

Where the employer is a company that has committed an offence under the HSWA and it is proved this offence was committed with the 'consent' or 'connivance' of, or 'attributable to any neglect' by, any director or senior manager, then they too are guilty of an offence.

There was little dispute at the



Illustration by Arthur Phillips

Hatfield trial as to when a director was guilty of s37 by consent or connivance: the director had to know of the material facts that constituted the company's offence and either agreed to that offence being committed, or culpably acquiesced in it. The issue was when would a director be guilty of s37 by reason of 'neglect'?

The prosecution argued that to convict on the basis of neglect it needed only to prove the defendant was under a duty to act in relation to the material facts upon which the guilt of the company was based, and that the company's offence was attributable to a "material degree" to the defendant's neglect of that duty. It was then for the defendant to prove

"it was not reasonably practicable for him to discharge that duty, or do more than he did".

In other words, the prosecution argued the reverse burden of proof applied not only to the prosecution of a company but also to the prosecution of a director if neglect was being alleged.

The judge rejected this submission.

The judge considered the White Paper that led to HSWA. In the Paper criminal sanctions were recommended to be extended to appropriate individuals but only in cases where there was something more than inadvertence, or common law negligence, or failure to achieve an objectively judged standard of

care. He concluded:

“To the extent. . .section 37 goes into the boardroom. . .in search of criminal responsibility, in my judgment, it does not do so in search of the merely careless or purely negligent officer. It is looking to place within its reach those whose seniority and subjective knowledge of the fact constituting criminal conduct by their company is such that an extension of criminal liability to them in their personal capacities is just and proper”.

It is what you know

In terms of the meaning of ‘neglect’ the judge quoted the authority of the Scottish case of *Wotherspoon v HM Advocate* 1978 JC 74. Here the court held that in considering whether there has been neglect:

“[T]he search must be to discover whether the accused has failed to take some steps to prevent the commission of an offence by the corporation to which he belongs if the taking of those steps either expressly falls, or should be held to fall within the scope of the functions of the office which he holds. In all cases accordingly the functions of the office of the person charged with a contravention of section 37(1) will be a highly relevant consideration for any judge or jury, and the question whether there was, on his part, as the holder of the particular office, a failure to take a step which he could and should have taken will fall to be answered in light of the whole circumstances of the case, including his state of knowledge of the need for action, or the existence of a state of fact requiring action to be taken of which he ought to have been aware”.

The judge interpreted “ought to have been aware” as meaning where the defendant turns a blind eye in circumstances where he/she had suspicion or belief of the material facts of the company’s offence but, because he/she feared the answer might be unpalatable, did not want to know more.

The judge ruled that to convict, the prosecution must prove:

1. The company is guilty of a health and safety offence. To this offence the reverse burden of proof applies if the company argues it did all that was reasonably practicable to prevent the exposure to risk.
2. The director had a duty to inform himself/herself of the facts that constituted the company’s offence.
3. He/she had a duty to act in relation



Company directors can no longer afford to be relaxed about their health and safety responsibilities

- to those facts.
4. He/she was neglectful of those duties in that he/she either knew, or ought to have known but shut his/her eyes to the fact, that there were reasonably practicable steps which he/she could have taken but did not.
 5. The company’s offence could be attributable to that neglect.

This ruling is not binding upon other judges but it will be persuasive. There are those who believe that if this approach is correct it will be virtually impossible to convict a director of a large company of s37 HSWA neglect.

Reverse burden of proof

A prosecutor’s job will, of course, be much easier if he/she can rely on a reverse burden of proof causing the director to demonstrate how he/she was not neglectful. Last year, the Republic of Ireland passed its Safety, Health and Welfare Act 2005. As explained by Geoffrey Shannon in his article in last month’s SHP (‘A different light, p43), section 80 of this Act is the equivalent to the UK’s s37 HSWA. The Irish, in their legislation, have made it quite clear the reverse burden of proof applies to a director being prosecuted when his/her company is guilty of a health and safety offence. Perhaps the HSC will wish to consider following suit.

It is unlikely an argument that such a reverse burden of proof is a breach of a director’s human rights would be successful.

In *R v Davies (David Janway)* (2003) ICR 586 an individual who was an employer was convicted of a breach of s2 HSWA. The Court of Appeal considered an argument that the reverse burden imposed on an individual by s40 HSWA, when prosecuted with this offence, was not compatible with the presumption of innocence under article 2 of the European Convention of Human Rights, enacted into our domestic law by the Human Rights Act 1998.

The Court of Appeal rejected the argument. It held the burden imposed by s40 HSWA was justified, necessary, and proportionate in the context of the Act. It noted a breach of the duty did not carry a risk of imprisonment, only a fine. The court also commented that breaches of health and safety law were not truly criminal offences.

Prosecuting with intent

Like a breach of sections 2 or 3 HSWA, a convicted director can only be fined. However, the prosecution can, in addition, apply for disqualification under the Company Directors’ Disqualification Act 1986. The maximum period in the magistrates’ court of disqualification from acting as a director is five years but in the Crown Court it is 15 years.

The HSC’s current Enforcement Policy Statement already makes it clear that it is the intention to consider prosecuting directors when companies are in breach of health and safety law and to seek disqualification if convicted. It reads:

“Prosecuting authorities. . .should consider the management chain and the role played by individual directors and managers, and should take action against them where the investigation reveals that the offence was committed with the consent or connivance, or to have been attributable to neglect on their part [and] where appropriate, should seek disqualification of directors”.

Given the HSC’s desire to strengthen directors’ health and safety responsibilities it seems likely that its enforcement policy will be pursued with more vigour in the future. While company directors may be breathing a sigh of relief that the Government’s Corporate Manslaughter Bill does not propose personal liability, they may wish to keep an eye on the section 37 developments, as this may ultimately in reality prove more of a personal threat. ■