

In a blow to the HSE, the Court of Appeal recently decided that employers *can* “blame” employees for health and safety failures if they can prove that they, the employers, did everything reasonably practicable to prevent such failures, explains **Michael Appleby**

When the boss can pass the buck

REASONABLE PRACTICABILITY

Regulation 21 of the Management of Health and Safety at Work Regulations 1999 (MHSWR) provides that any act or default of an employee will not “afford an employer a defence” when being prosecuted for a health and safety breach. The Regulation was designed to prevent employers escaping conviction by blaming the exposure to risks on the failures of its employees.

An employer has a duty under sections 2 and 3 of the HSWA 1974 respectively to ensure employees and non-employees are not exposed to risks to their health and safety “so far as is reasonably practicable”. Section 40 provides a defence to a criminal prosecution if the defendant employer can prove it was “not reasonably practicable to do more than in fact was done”.

In the interlocutory appeal by the HSE on a point of law in *R v HSE Interlocutory*, Case No 0601564B5 [2006] EWCA Crim 1156, the Court of Appeal ruled on 22 May 2006 that reg.21 did not stop employers showing they had acted “so far as is reasonably practicable” when their employees had been negligent and thus being able to mount a defence under section 40. This is a blow to the HSE.

Reg.21 came about as a result of the Court of Appeal ruling in *R v Nelson Group Services (Maintenance) Ltd* [1998] 4 All ER 331. The defendant company installed, serviced, and maintained gas appliances. One of the company’s fitters had removed a defective and dangerous gas fire in a private house. The trial judge directed the jury that if it found the fitter had been negligent by not capping the gas pipe, the company was guilty of a breach of section 3 HSWA. The jury convicted.

The Court of Appeal, quashing the conviction, said an employer was not precluded from relying on section 40 merely because an employee carrying out the work was careless or omitted to take a precaution. The employer



Illustration by Arthur Phillips

could show it had done all that was reasonably practicable by proving appropriate training, instruction and a safe system of work existed.

It was held in the interlocutory appeal that *Nelson* was still good law, despite the introduction of reg.21. The Court of Appeal neatly sidestepped some of the more complex arguments regarding the interaction between primary legislation (HSWA) and secondary (MHSWR) to find that the phrase “so far as reasonably practicable” in itself was not a defence but part of the “qualified duty” under the HSWA. As it was not a defence, reg.21 did not apply to determining what was reasonably practicable.

The first signs that the Court of Appeal was concerned about the operation and drafting of reg.21 surfaced in the successful appeal against sentence in *R v Transco* [2006] EWCA Crim 838 where the fine was reduced from £1 million to £250,000 (see SHP News, May). In this case the court commented in its judgement: “[W]e were...a little puzzled as to how such a fault by an employee infringed section 3 HSWA”.

Subsequently, the Health and Safety Executive appealed the decision. In a statement, it said: “When the Court of Appeal found against the HSE on two points of law it acknowledged these are important issues and, as a result, certified two questions as being of particular public importance, which might now require the judicial consideration of the House of Lords. The HSE therefore intends to invite the House of Lords to look at those questions and to provide definitive guidance.”

In the meantime, before any recalcitrant employer reaches for the champagne, care should be taken to interpret the judgement correctly. Around 80 per cent of work-related accidents involve human error. The HSE’s publication *Reducing error and influencing behaviour* (HSG 48) makes it clear human error is risk that has to be assessed like any other, and appropriate control measures put in place.

An employee who has failed will not automatically provide a defence to a prosecution of an employer if that employer’s safety systems are found to be wanting. ■