

Michael Appleby discusses a recent high-profile rail-industry case, which demonstrates how duties between main and sub-contractors are strongly interrelated rather than independent of each other.

A pair of them in it

NON-DELEGABLE DUTIES

When a company has delegated part of the delivery of its undertaking to a competent contractor, how should the courts view their respective culpability when there is a health and safety failure?

This was an issue that was before the Old Bailey in September this year, when sentencing Network Rail (formerly Railtrack) and Amey Rail for breaching section 3 HSWA 1974 in relation to a train derailment at Southall in 2002. The companies both pleaded guilty and were fined £200,000 and £300,000, respectively.

Following privatisation of the railways Railtrack became the owner and controller of the infrastructure and contracted out elements of its undertaking to different companies. One element was maintenance of the track, which was sub-contracted to Infrastructure Maintenance Contractors, or IMCs (however, in 2003, maintenance was taken back nationally in-house for reasons unconnected with this incident).

Amey Rail was the IMC for the section of track where the derailment occurred – at a set of crossing points near Southall station. The bolts of two fishplates holding lengths of rail together had fallen out and the fishplates fractured in two. Part of a fractured fishplate became lodged in the throat of the crossing, causing the wheels of one of the carriages of a passenger train to strike this fishplate and derail the train. Fortunately, no one was injured.

One of the major causes was found to be the failure to maintain ballast and drainage at the derailment site, which was the IMC's responsibility.

Network Rail acknowledged that it remained responsible for meeting the appropriate maintenance standards, even when the work is contracted out to an IMC. The judge accepted Network Rail had adequate and appropriate systems in place, but Network Rail conceded that it failed to implement these systems properly and, in particular, that more direct and intrusive control of Amey's duties was probably justified.



Illustration by Arthur Phillips

Network Rail sought to put its failure into context by pointing out that Amey employed 2250 people on maintenance in the region of the accident, whereas Network Rail had only 25 supervising track engineers. It was submitted that Network Rail was effectively only in breach of section 3 HSWA because Amey was in breach. The company described its duty as “parasitic”. The judge stated: “[U]nder the relevant Regulations, Network Rail’s duties are without prejudice to the overarching duty imposed by section 3 of the [HSWA] to ensure the safety of persons who may be affected by the conduct of others. . . As an independent contractor Amey Rail had a corresponding duty to conduct its undertaking in the same manner. It is important to understand that these two duties are, as they should be, strongly interrelated rather than completely independent of each other; the duty of each is non-delegable. It is for that reason I did

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not care for the description “parasitic duty” when applied to the duty of Network Rail. It is free-standing and should not be diluted.”

This is in line with other cases, such as *R v Mersey Docks and Harbour Company* [1995] 16 Cr App Rep (S) 806. Here, a harbour company had failed to take adequate precautions to avoid an explosion, which killed two men, on a vessel that had previously carried a dangerous cargo. The Court of Appeal stressed that the duty under section 3 HSWA was non-delegable and it was no mitigation for the company to say it had relied on the master of the vessel to ascertain whether there were dangerous areas on the vessel.

It is clear a company delegating part of its undertaking to a contractor will not escape liability for a breach in that undertaking merely because it was due to the contractor’s failure. Further, the courts will view such a breach as being more than just a ‘technical’ one by the company. ■