

Criminal law of health and safety

Professor Diana Kloss

Hon FFOM, barrister

What is the criminal law?

- It is designed to punish offenders against the community as a whole
- Prosecutions are brought by public officials (CPS, HSE, Procurator Fiscal) in the name of the head of state: R v Smith
- They are brought in the criminal courts (magistrates, Crown Court in England and Wales)
- The burden of proof is beyond a reasonable doubt (certain so that you are sure)
- A conviction leads to punishment, not primarily compensation (which is a matter for the civil law). Punishment is usually deprivation of liberty and/or a money fine. Fines are paid to the court not the victim

Health and Safety at Work Act 1974

- General duties of the employer. Should do what is **reasonably practicable** to ensure the health safety and welfare of:
 - Section 2: employees
 - Section 3: non-employees within the foreseeable area of risk eg sub-contractors, members of public on the site

ACOP

- Puts meat on the bone of regulations but after the Lofstedt review: “Reclaiming health and safety” some were withdrawn and others amalgamated
- Section 17 HSWA special status
- Compare HSE Guidance

Liability of OH under the HSWA

- Section 3 has been held to apply to an OH provider company
- R v Audio Medical Services (2012)
- Both the company and the managing director were fined because they were providing health surveillance for work with vibrating tools but employing unqualified nurses to do it, therefore putting employees of clients at risk

Individual liability

- Section 36: a person who has caused another to be in breach of the law can be convicted of an offence
- R v Lockwood (2001)(hygienist)
- R v Hooper (2004) (safety officer)
- Section 37: Director, manager, secretary or similar officer of corporation can be convicted if neglect responsible for the corporation's offence

Employees

- Section 7
- It shall be the duty of every employee while at work:
 - (a) to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work; and
 - (b) as regards any duty or requirement imposed on his employer or any other person by or under any of the relevant statutory provisions to co-operate with him so far as is necessary to enable that duty or requirement to be performed or complied with
- R v Deaney (2017) Care worker sentenced to 4 months in prison under section 7(a) for neglecting vulnerable adult while on her mobile phone

Risk assessment

- Reg 3 Management of HSW Regs 1999
- ACOP withdrawn
- A risk is not a hazard
- The hazard is the circumstance with the potential to cause harm, the risk is the likelihood that this potential will be realised

Statutory health surveillance

- Eg under COSHH, Vibration, Noise, Asbestos, Lead etc: only applies to employees not contractors or agency workers
- Duty on employer to provide health surveillance and on employee to present himself during working hours and at his employer's cost for health surveillance
- Employer must create a HEALTH RECORD with only basic facts. This is not confidential to OH. In addition OH will have confidential clinical records

Do you need consent?

- The regulations do not place a duty on health professionals, only on employer and employee
- HSE guidance is that the doctor/nurse does not need consent to report fit/unfit/fit with adjustments, but GMC and FOM guidance is that if the only risk is to the employee and not third parties consent is needed
- Compromise: you can report to the employer or the HSE that there is a problem without naming the employee
- You can report that the employee has withdrawn consent to a report without consent

RIDDOR 2013

- Where a work-related disease covered by the regulations is diagnosed in writing by a registered medical practitioner (might be GP or OH) the employer must report to the HSE, but
- There is no duty on a health professional to report and confidentiality means that OH should not report without consent unless others are at risk
- A report from a nurse does not activate the duty to report

Enforcement

- HSE and local authorities have powers to:
- Inspect
- Advise
- Issue notices: prohibition and improvement
- Prosecute: last resort
- Magistrates: unlimited fine, prison for up to 6 months
- Crown Court: unlimited fine, prison for up to 2 years

Manslaughter

- There are 2 relevant offences of manslaughter:
- Gross negligence manslaughter: where an individual kills a person by an act or omission of gross negligence (not just carelessness)
- R v Adomako (1995)
- R v Honey Maria Rose (2017)
- Corporate Manslaughter and Corporate Homicide Act 2007: can only be committed by a corporation

Corporate manslaughter

- Must be a gross failure in a duty of care by senior management of the company
- R v Maidstone and Tunbridge Wells NHS Trust (2016)
- Trust acquitted

Sentencing guidelines

- Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline (2016)
- 1. Court first considers culpability: very high, high, medium or low
- 2. The considers risk of harm in a scale from 1 (highest) to 4 (lowest)
- 3. Then look at the organisation by reference to turnover: micro (under £2m); small (£2-10m); medium (£10-50m); large (£50m plus).

Example

- Medium organisation with high culpability causing category 1 risk the starting point is £950K
- The judge then considers aggravating factors (previous convictions, poor health and safety record) and mitigating factors (no previous convictions, good safety record)
- Large organisation with high culpability and harm category of 1 maximum fine under HSWA is £10m (manslaughter £20m), but where turnover significantly greater than £50m fines could be even higher

Economic impact

- In some cases it will be acceptable for the organisation to be put out of business but if the profit margin is small the court may reduce the fine
- The court can allow time to pay
- There is a reduction of a third for a guilty plea but it must be at the first opportunity (first appearance in magistrates) and is reduced as the proceedings continue

Gross negligence manslaughter

- Sentencing Council currently consulting on sentencing for manslaughter
- Current guidelines cover corporate manslaughter but not gross negligence manslaughter (maximum sentence is imprisonment for life)

Fees for intervention

- A fee is payable to the HSE if:
- A person has been contravening or has contravened health and safety laws; and
- An inspector is of the opinion that the person has done so and notifies the person in writing of that breach
- Fine is £129 an hour
- Not where inspector merely gives advice
- Right of appeal, shortly to independent panel of lawyer chair plus 2 members experienced in H and S

Civil liability

- Action for breach of statutory duty for breach of health and safety regulations was abolished by the Enterprise and Regulatory Reform Act 2013
- Where the worker is seeking compensation they have to prove negligence, a failure to take reasonable care causing foreseeable damage