



Employment Offences

Criminology Class 21-22 October 2008
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Introduction

- Overview of lectures
- Today - Occupational Health and Safety
- Examining issues of accountability and responsibility of business (i.e. companies and their senior managers) under the criminal law for causing death and personal injuries to their staff, or the public, through the business activity.
- Tomorrow – round up of other links between criminal law/employment and finish with a Question Time debate



Structure of Health & Safety lecture

- 1. EC Competence in Health & Safety at Work
- 2. Use of criminal law – compared with civil law – to implement obligations, with particular reference to the UK: case *C-127/05 Commission –v UK 2007*
- 3. Corporate criminal responsibility: special legal problem; re: fatal accidents – public demand for greater accountability/responsibility of companies and their officers
- 4. Unsuccessful prosecutions following *Herald of Free Enterprise* and *Transco* disasters
- 5. Corporate Manslaughter and Corporate Homicide Act 2007 – attempt to satisfy that public demand



1. EC Competence in Health and Safety at Work

- Useful starting point
- With greater EU integration, it's no longer feasible for member states to act alone in health and safety matters
- Between 1958-86: tended to be sector-led or hazard-led, introducing very specific and detailed rules of harmonisation.
- Article 137 TEC, introduced by Single European Act 1986, affirmed EC competence in health and safety of workers.

EC Competence: Article 137 EC



- http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html
- See: Art.137(1)(a); 137(2) – significance of majority voting
- **Shared** competence between EC/EU and member states – states can impose higher duties than the basic EC provision
- ‘Working environment’ = place of work, which could include the home i.e. ‘home-working’.
- Workers’ participation is important in health and safety – information and consultation plays a part



Framework Directive

- Further to Art.137 - EC Directive 89/391 introduced measures to encourage improvements in health and safety of workers.
- Key principles: prevention or avoidance of risks: information, consultation and training.
- <http://eur-lex.europa.eu/en/legis/20081001/chap05202010.htm>
- NB Articles 5 and 6



Framework Directive

- Article 5(4) – only derogation is for exceptional events, whose consequences are unavoidable despite all due care
- *C-127/05 Commission –v- UK [2007]* challenge to UK's implementation of Directive in ECJ
- Article 6 sets out employer's general obligations.
- Following on from this, a series of 'daughter' directives were adopted to give more detailed provision for specific circumstances, such as:
- Dir 89/654 on minimum health and safety requirements for the workplace



'Daughter' Directives

- Dir 89/655 on use of work equipment (amended 2001)
- Dir 89/656 on use of personal protective equipment in the workplace
- Dir 90/269 on manual handling of loads
- Dir 90/270 on VDU equipment
- Dir 92/85 – measures to encourage improvements in health and safety of pregnant workers, those recently given birth and breastfeeding



Art 137: a broad competence..

- Working Time Directive – remember this is based on Health & Safety grounds
- Essentially this is a matter affecting the contract of employment, indirectly it is a matter of health and safety
- *C-84/94 UK –v- Council [1996] ECR I-5755* – unsuccessful challenge to the legal basis of the Directive



EC 'Soft Law'

- See 'Social Partners' Agreement on Work-related Stress', October 2004, particularly in relation to '*Cross*' case.
- Communication on Social Agenda 2005 – proposals for 2007-12 – preventive approach linked to economic and social benefits
- Q for lawyers is: are EC laws civil or criminal? What sort of enforcement regime is intended?



2. Use of criminal law

- So, we ask:
- What is the relationship between civil and criminal law in regard to health and safety?
- How is the Framework Directive implemented by member states? How is it enforced?
- If civil law, by employees; if criminal, by the state
- Is it more important to compensate the individual victim than to satisfy public desire for justice/vengeance?
- Or should we simply pursue both aims with equal vigour?



Civil or criminal?

- Framework directive leaves matter to member states
- UK chose criminal law – Health & Safety at Work etc. Act 1974 (original versions pre-dates Directive by 15 years)
- Breaches of the Act, or of Regulations, may lead to sentences of **unlimited fines** and/or a maximum term of **imprisonment for two years**.
- In 2007, challenged by EC Commission in ECJ: Case *C-127/05 Commission –v- UK*



Commission –v- UK

- Art.226 infringement proceedings
- Alleged failure to implement Art.5(1) of Dir 89/391 correctly
- Section 2(1) of HSWA 1974 provides: *'It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.'*
- How does it compare with Art 5 of Dir 89/391?



Commission –v- UK

- Complaint was that qualification of the duty exceeded margin available under Art. 5(4) of Directive
- EC Commission's two criticisms:
- (1) it limits liability of employers for accidents at work – Art 5(1) imposes an unqualified, absolute duty on employers – i.e. 'no fault' liability; Art (4) did not allow 'reasonableness' criteria, but only exceptional circumstances



Commission –v- UK

- Slight overlap with..
- (2) HSWA 1974 s.2(1) restricts scope of employer's duty to his employees i.e.:
- Employers should assess risk of accidents – even if no precautions are required, if an accident happens, the employer should still be liable
- Complaint that the SFAIRP defence restricts that unlawfully



UK's response

- (1) Art 5(1) is about ensuring safety; it's silent about provision of accident compensation and form of liability
- Criminal law is a more effective deterrent to achieve directive's aim
- Criminal law imposes 'automatic personal liability' – civil claims are underwritten by insurers
- SFAIRP defence means: *'a gross disproportion between, on the one hand, the risk to the safety and health of workers and, on the other hand, the sacrifice, whether in money, time or trouble that the adoption of the measures required to prevent that risk from arising would have involved and that the risk itself was insignificant in relation to that sacrifice'*



Commission –v- UK

- Finally, Art. 6(2) means that the employer's obligation is relative, not absolute
- (2) Art 5(1) imposes a general duty on employers to ensure a safe workplace only
- Expressed in broad terms; no reference to a result to be achieved or consequences of any breach.
- Arts. 6-12 set out precise content of that duty, subject to EC's general principle of proportionality
- Thus, UK argued the SFAIRP defence does not restrict the scope of that general duty in a way which is contrary to the Directive's intended outcomes.



ECJ Judgment

- ECJ's opinion was: Commission had failed to discharge its onus of proof under Article 226 in respect of either of its allegations concerning the UK's failure to transpose Directive 89/391 correctly.
- ECJ went further and stated its preference for the UK's interpretation of the Directive's terms, outlined above, on both the substantive points.

3. Corporate Criminal Responsibility

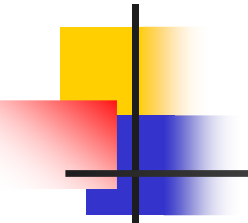
- [Criminal law imposes ‘automatic personal liability’] – *taken from UK’s response to Commission*
- What about limited companies?
- Are criminal sanctions really effective – unlimited fines for breaches of HSWA?
- Can individuals be prosecuted for Health & Safety breaches?
- S.37 of HSWA allows prosecution of company directors – rarely been used successfully. Why not?



Elements of criminal responsibility?

- Common law systems recognise two key elements in criminal responsibility
- *Actus reus* and *Mens rea*
- Criminal or unlawful act or omission
- Guilty intention
- e.g. walk out of a store carrying goods you have not paid for;
- e.g. you stumble and bang into someone, knocking them over

Corporate criminal responsibility

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- What is the legal difficulty in prosecuting limited companies?
 - Has a separate, legal *persona* – distinct from its members and officers
 - It's not a 'natural person' – a company forms *mens rea* through its directors or employees
 - Corporate liability may be vicarious or personal
 - Vicarious – liable for acts of employees/agents
 - Personal – is liable through 'identification' principle – offender was 'a directing mind and will' of the company



Corporate criminal liability

- At common law, *mens rea* must always be proved by the prosecution.
- In crimes created by statute, *mens rea* must be proved unless it is specifically excluded by the statute – it is not excluded by HSWA 1974
- Thus, the ‘identification’ principle must be applied.
- *Tesco Supermarkets –v- Nattrass [1972] AC 153 – ‘the Board of Directors, the Managing Director and perhaps other superior officers of a company who carry out functions of management and speak and act as the company’.*



Controlling mind?

- Directors may delegate responsibility to lower management – who may have a discretion to act without further instruction
- Are those persons the ‘mind of the company’? Probably not
- Yet, in *Meridian Global Funds Management Asia Ltd –v- Securities Commission [1995] WLR 413*, knowledge of an investment officer was attributed to the company



'Aggregation'

- Can the requirements of the identification doctrine be satisfied by 'aggregating' the knowledge, or states of mind, of a number of corporate officers, so as to satisfy the *mens rea* element of a crime?
- The answer is no – though there is a slight difference in approach between England and Scotland, but with the same result
- Particularly been attempted to secure convictions of companies for corporate manslaughter and corporate homicide.



4. Corporate manslaughter Corporate homicide

- In UK alone, about 200 fatal accidents occur each year in the course of employment
- Public dissatisfied with use of HSWA to deal with breaches of health and safety that cause death – insufficient penalties
- Disapproval of perceived lack of responsibility and punishment of company officers
- Prosecutors then attempted to use common law crimes of manslaughter (England) and culpable homicide (Scotland) against companies and their officers
- Why not murder?



Manslaughter/homicide

- What is Involuntary manslaughter or culpable homicide?
- Unintentionally causing death: after an assault, or another criminal act, or from criminal recklessness
- Normally arises from lawful acts, recklessly committed e.g. business activity (but could involve unlawful acts instead e.g. ‘punch’)
- Civil negligence is not enough – need criminal recklessness – ‘outrageous’ conduct – a ‘cavalier attitude’ to human safety



Corporate liability for homicide

- Extremely difficult to secure conviction of company or its officers for this crime
- Due to ‘identification’ principle and courts’ rejection of ‘aggregation’ theory
- Two examples of disasters which illustrate this – one from England; one from Scotland

Herald of Free Enterprise

- 1987





Zeebrugge disaster 1987

- [BBC ON THIS DAY 6 1987 Hundreds trapped as car ferry capsizes.mht](#)
- [BBC ON THIS DAY 8 1987 Zeebrugge disaster was no accident.mht](#)



Zeebrugge disaster

- *P&O European Ferries (Dover) Ltd. (1991) 93 Cr. App. R 72*
- 190 persons were killed – bow doors left open
- Coroner's Inquest (Eng) – jury's verdict of unlawful killing
- Coroner found numerous failings – catalogue of incompetence at many levels of operation, management and design
- Irresponsible management decisions contributed to operational dangers – “all concerned in management, from board of directors to junior superintendents were guilty of faults”
- But: prosecution failed – could not ‘identify’ an individual or individuals who satisfied legal criteria for liability



'Transco plc' - gas explosion

- Larkhall, Scotland 1999 – gas explosion
- [BBC NEWS Scotland Pictures from the Larkhall blast.mht](#)
- [BBC NEWS Scotland Transco faces court over deaths.mht](#)
- *HM Advocate –v- Transco plc 2002 JC* – failure to maintain safe gas supply – leaking pipes – ignited and caused explosion, killing family of 4 persons



HMA –v- Transco plc

- Prosecution failed: not possible to attribute to the company, knowledge of individuals held either alone or collectively through committees or delegated groups
- In other words, identification test failed and aggregation disallowed as not legitimate
- Convicted of breach of HSWA – fine of £1 million.
- Reduced, by Appeal Court, to £250,000



5. Corporate Manslaughter and Corporate Homicide Act 2007

- Introduced to deal with public demand for greater corporate liability in fatal accidents
- Format of liability under s.1 – if person's death is caused by *“a gross breach of a relevant duty of care by the organisation to the deceased”*
- Gross breach = *“where conduct alleged...falls far below what can reasonably be expected of the organisation in the circumstances”*
- ‘Senior management’ test – possibility of inconsistency?
- No individual responsibility – only corporate



The 2007 Act

- In deciding whether it's a 'gross breach of duty', a jury must consider (s.8):
- Whether there's a failure to comply with any health and safety legislation or guidance and if yes, how serious the failure was
- Also: evidence of attitudes, policies, systems or accepted practices likely to have encouraged or tolerated any such failures



The new regime

- Sanctions?
- Court may issue a remedial order
- Impose a fine
- Order company to publicise its conviction and sentence, including a remedial order
- Effective sanctions, or not?



Conclusion

- Act is criticised for not going far enough
- State is, allegedly, wary of scaring business away
- Fear of competition from state's with less onerous, rigorous legal regimes
- Possibly, need EC competence to extend to ensure one legal regime in EU relating to corporate criminal responsibility?