



Health and Safety: Criminal Liability for the Wrongs of Contractors

Management of contractors remains a complex subject, both legally and in practice. The issue often draws the focus of the regulators: safety matters falling between the cracks may lead to serious incidents, for example, on construction sites or in the waste or care sectors, and will often lead to prosecution or other enforcement action.

Having recently considered the Supreme Court's view of the civil liability of Barclays Bank to pay compensation to the victims of assaults perpetrated by an independent contractor carrying out medical examinations, I commented in passing on the [criminal law position](#). So how do health and safety duties work where contractors are concerned?

Is the employer automatically responsible for the contractor's mistakes?

In a trial last year, an experienced prosecutor told the court that the defendant in that case (our client) was vicariously liable for the failings of its employee. In other words, if the jury found that the employee got it wrong, then the employer was guilty of the offence. That prosecutor, however, was himself completely wrong.

In 1996, the House of Lords considered a case in which a maintenance contractor was carrying out work in a tank at a chemical plant. An employee of the contractor suffered serious burns when a flash fire occurred during that work.

The chemical plant operator appealed against its conviction, in part, on the basis that the relevant duty in the Health and Safety at Work etc Act 1974 was, in essence, a criminal version of the duty of care owed under the civil law of negligence. The court rejected that argument. It said that the two concepts are quite different.

When you think about it, it may be appropriate in certain types of civil case that compensation be paid by an employer if an employee makes a mistake, but that is a backward looking process: it looks at a problem that has already occurred with a view to working out who should pay for losses suffered. It cannot be appropriate for criminal responsibility to work in the same way.

So what is the nature of the duty?

In contrast, health and safety duties are forward looking. They are imposed upon employers, the self-employed, employees and others and have a preventative aim. They require a safe working environment to be achieved, and failure to comply with the duties is a crime. That is because the law is there primarily in order to protect those whom may not otherwise be in a position to fully protect themselves, whether because they are at work or affected by the work of other people.

The duties are also non-delegable. In a case involving the serious injury of a child at a swimming pool, the swimming pool operator argued that the incident occurred due to the lack of supervision by the child's father, rather than its own failings to properly supervise what was going on in the water. The Court of Appeal decided that that argument was as unattractive as it sounded – any failings on the part of the poor father did not alleviate the pool operator of responsibility. We can therefore also say that the health and safety duties of one person run concurrently with those of others.

In broad terms, health and safety duties require identification and a subsequent assessment of the risks associated with any given work activity, so that measures can then be put in place to control those risks so that they are minimised or eliminated altogether.

Countering problems in the employer – contractor relationship

Prosecutions of contractors as well as those who contracted them arise in ways which are many and various. Because of the non-delegable and concurrent nature of the duties, both can be convicted of the failure to achieve the state of affairs required to carry out the work to the standards of safety required by law.

Examples of the types of territory where things can go wrong, and the sorts of steps that can be taken on both sides to ensure they do not, include:

- Not checking that the contractor is competent. If a contractor has a specialism that the employer does not, this can be a tricky exercise. However, the contractor can be asked to provide evidence of relevant training or licences, and vetting prospective contractors' previous health and safety performance might include taking up references.
- Inadequate planning of the work. As a starting point, contractors' risk assessments and safe systems of work should be provided to the employer, and someone with appropriate competence should consider whether the control measures are appropriate. Guidance published by the Health and Safety Executive, trade organisations and the like can provide a good basis for this process. Think also about whether the work of one contractor might impact the work of others, and how co-operation and co-ordination between groups of workers can be managed, for example through a permit to work system.

- Lack of resource. This is a two way street. The work needs to be carried out by people who are appropriately trained and have the right PPE and other equipment, but similarly an environment needs to be created to allow the work to be carried out safely, for example, by allowing adequate time and space.
- Poor monitoring. Whilst it is not a legal requirement to breathe down contractors' necks, regular briefings or tool box talks, as well as progress meetings, are a useful way of keeping work on track. Checks should be made to ensure that contractors stick to the plans of work and that any unsafe working practices are addressed quickly.

What if something does happen?

If the unthinkable happens, there can be key differences in the way in which the employer and contractor fall to be dealt with, whether in terms of the response to a criminal investigation, to a prosecution or upon sentence. It is not inevitable that the one is culpable to the same extent as the other, if at all, or that the consequences will be the same, despite the nature of the duties explained above. The need for early legal advice cannot be stressed enough.

If you have a query about liability for the work of contractors, please contact our [regulatory solicitors](#) by emailing online.enquiries@la-law.com or calling 01202 786340.