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Health and Safety (Directors' Duties) Bill

Bill No 22 2004-05

The *Health and Safety (Directors' Duties) Bill*, (Bill 22 of 2004-05), is sponsored by Stephen Hepburn, who came third in the ballot for Private Members' Bills. It is due for second reading on 4 March 2005.

The Bill seeks to amend the *Health and Safety at Work etc Act 1974* and the *Companies Act 1985* to introduce positive health and safety obligations on company directors. The provisions would apply to England, Wales and Scotland, but not to Northern Ireland.

The measures are seen as a way to improve the health and safety performance of companies by ensuring directors take an active interest in whether the company is compliant with the law. It will also make it easier to hold directors accountable where their negligent or reckless failures result in death or serious injuries, although the Bill itself will introduce no offence or penalties in this area.

The Government has indicated its preference for voluntary guidance for directors as opposed to legislating in this area. A draft Bill to strengthen corporate manslaughter legislation has been promised. Other legislation on crown immunity and greater penalties for health and safety offences will be brought forward as parliamentary time allows. This paper sets the present Bill in the wider context of these issues.

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Summary of main points

Not all workplace deaths and injuries occur in major accidents – tragic deaths and injuries occur routinely on a daily basis. Health and Safety Executive (HSE) statistics indicate that some 70% of workplace fatalities follow management failures. At the moment health and safety requirements on company directors are voluntary. The Government promised to legislate in this area in 2000 at the time of the launch of its Revitalising Health and Safety Strategy. Latterly, it has indicated that it sees no need to legislate at this time although it is mindful of the need to honour pledges to legislate on the related offence of corporate manslaughter, the removal of crown immunity and greater penalties for health and safety offences.

Campaigners see the lack of any positive health and safety duties on company directors under the law as a weakness, and unjust, compared to the statutory duties placed on others. Although company directors have clear obligations in relation to financial matters – that if breached can be readily identified and punished by imprisonment - there are no comparable duties upon, individual directors relating to safety and the measures that they should take to ensure that their company's activities do not cause injuries or deaths.

Although the Government made a manifesto commitment to introduce a charge of corporate killing during this Parliament, the complexities of the law in this area mean that the draft Bill promised in the Queen's speech in November 2004 has yet to appear. Other draft legislation to reform company law is also thought likely. As neither Bill is expected to impose health and safety duties on directors, the Transport and General Workers Union (T & G),¹ along with the Union of Construction, Allied Trades and Technicians (UCATT)² are supporting Stephen Hepburn in his attempt to steer a Private Members' Bill through this Parliament, to impose positive health and safety duties on company directors.

This Bill was presented for first reading on 12 January 2005.³ The second reading takes place on 4 March 2005. The purpose of the Bill is to amend the *Health and Safety at Work Act etc.* 1974 and the *Companies Act 1985* in order to place a statutory health and safety duty on company directors as well as an obligation on large companies to appoint health and safety directors. Its measures would apply to England, Wales and Scotland.

[The Bill](#) and the Explanatory Memorandum [Bill 22-EN](#) can be accessed via the Internet.⁴

¹ <http://www.tgwu.org.uk/homepage.asp?NodeID=88397>

² www.ucatt.co.uk

³ HC Deb 12 January 2004 c311

⁴ <http://www.publications.parliament.uk/pa/cm200405/cmbills/022/2005022.pdf>
<http://www.publications.parliament.uk/pa/cm200405/cmbills/022/en/05022x--.htm>

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I Introduction

“...safety at work is, as it should be, the mark of a civilised society.”
(Gordon Brown, TUC Conference 9 September 2003)⁵

Not all workplace deaths and injuries occur in major accidents – tragic deaths and injuries occur routinely in all sectors on a daily basis. According to the Health and Safety Executive (HSE) some 70% of workplace fatalities are the result of management failures. At the moment health and safety duties on company directors are voluntary. The Government promised to legislate in this area in 2000 at the time of the launch of the Revitalising Health and Safety Strategy. Latterly, it has indicated that it sees the voluntary approach as the way forward.⁶

The lack of any positive health and safety duty on company directors under the law is seen by campaigners and families of those killed at work as a weakness, and unjust, compared to the statutory duties placed on others. Although company directors can be punished by imprisonment for financial irregularities there are no comparable corporate sanctions against individual directors when serious injuries or deaths occur. Although the Government made a manifesto commitment to review the law on corporate manslaughter and introduce a charge of corporate killing during this Parliament, the complexities of the law in this area mean that the draft Bill promised in the Queen’s speech in November 2004 has yet to appear. Other draft legislation to reform company law is also likely. As neither Bill is expected to impose health and safety duties on directors, the Transport and General Workers Union (T & G),⁷ along with the Union of Construction, Allied Trades Technicians (UCATT)⁸ are supporting Stephen Hepburn in his attempt to steer a Private Members’ Bill through this Parliament, to impose such duties on company directors.

A company has a separate legal identity from the directors that manage it and the people who work for it. Legal duties placed upon a company are not automatically placed on its directors; individual directors are not obliged to take any particular action to comply with the company’s obligations under the *Health and Safety at Work etc. Act 1974* (HSWA), although a director’s failure to act may mean that the company fails to comply with health and safety legislation and therefore commits an offence.

The purpose of the Bill is to amend the *HSWA* and the *Companies Act 1985* in order to place a statutory health and safety duty on company directors as well as an obligation on large companies to appoint health and safety information directors.⁹

⁵ Gordon Brown, TUC Conference 9 September 2003 <http://www.tuc.org.uk/congress/tuc-7058-f0.cfm>

⁶ HC Deb 20 January 2005 c354WH

⁷ <http://www.tgwu.org.uk/homepage.asp?NodeID=88397>

⁸ www.ucatt.co.uk

⁹ Directors with responsibility to ensure that the board has the necessary information to comply with the general duty

II Health and safety overview

A. The Health and Safety at Work etc. Act 1974

The *Health and Safety at Work etc. Act, 1974* (HSWA) is the overarching legislation governing health and safety in the workplace in the United Kingdom. Its non-prescriptive general duties¹⁰ are designed to keep the risks arising from work related activities as low as reasonably practicable.

Some of the essential features of Act are as follows:

- It requires all employers to provide for their employees, as far as is reasonably practicable, a healthy and safe workplace.
- It requires employers to ensure that persons not in its employment (including non-employees visiting the worksite, paying customers, passers-by and local residents) are not exposed to risks to their health and safety.
- It requires employees to take reasonable precautions for the safety of themselves and of others.

The *Health and Safety at Work Etc. Act 1974* imposes statutory duties on the following:

- Employees (section 7)
- The self-employed (section 3)
- Designers, manufacturers, importers and suppliers of goods and substances for use at work (section 6)
- Controllers of premises (section 4)
- Members of the public (8).

The HSWA established the **Health and Safety Commission** (HSC), an independent body, which has a Chairman appointed by the Secretary of State. The HSC is responsible for administration of the Act, for promoting research, for providing an information and advisory service, and for submitting advice and proposals for new legislation (usually in the form of Regulations) to the Secretary of State after consultation with interested parties. The HSC's primary function is to make arrangements to secure the health, safety and welfare of people at work, and the public where they are affected by work activities.

The **Health and Safety Executive** (HSE) is the Executive arm of the Commission and assists in its functions. A director and two other members, assisted by area directors,

¹⁰ Statutory duties are distinct from common law duties of negligence. A breach of general duties will not give rise to civil liability; breach of statutory duties will give rise to civil liability.

manage HSE. In 2004 it employed 1605 inspectors.¹¹ It has day-to-day responsibility (in conjunction with local authorities) for enforcing health and safety legislation, having taken over the various original pre-HSWA Inspectorates. These include the factories, chemicals, agriculture, offshore oil and gas, nuclear and railways inspectorates.

B. What is the scale of workplace deaths and injuries?

Major disasters such as the Hatfield and Potters Bar rail crashes gain enormous media and public attention. Yet each day workers and members of the public are killed or injured in workplace incidents that rarely hit the headlines. At the same time, many injuries and deaths take place in the home, on roads or in public spaces. The following section analyses trends in deaths and injuries to assess whether workplaces are any more dangerous today than in the past.

1. Current and past trends in death and injury rates

The Revitalising Health and Safety Strategy was published in June 2000.¹² The Strategy set out the Government's ten-year plan for better health and safety; new targets to reduce workplace deaths, injuries and illness form its centrepiece. Half of the improvements were to be achieved by 2004/05. The following sections review recent trends in fatal and non-fatal injuries in work related incidents, work related illness and absenteeism. Brief comments are provided on current progress against the Revitalising targets.

a. Workers

The first Revitalising Target is to achieve a reduction in the rate of major and fatal injuries between 1999/2000 and 2009/10.

The Health and Safety Executive's *Highlights*¹³ report describes trends in injury and death rates each year. In 2003/04¹⁴ 235 workers¹⁵ were killed in work related accidents in Great Britain. This is equivalent to an increase of 3.5% on 2002/03, and is the second rise this century, after the downward trend in the 1990s. However, the rise is not statistically significant and is within the variation that would be expected. 114 (49.0%) of these occurred in the construction industry (70) and agriculture, forestry and fishing (44). The 21 people who died in the Morecambe Bay cockle picking incident accounted for 9.0% of all fatalities in 2003/04, which may have skewed the recent downward trend to some extent.

¹¹ HC Deb 16 November 2004 c1318W

¹² DETR Press Notice 402, *Tough New Targets to Cut Workplace Deaths, Injuries and Illness*-Prescott, 7 June 2000

¹³ HSE, *Health and Safety Statistics Highlights 2003/04*:www.hse.gov.uk/statistics/overall/hssh0304.pdf

¹⁴ Please note that all HSE statistics provided in this paper for 2003/04 are provisional only.

¹⁵ Includes employees and the self-employed

The ensuing figures display trends in fatal and non-fatal injuries in work related incidents. Related data may be found in tables A1 to A3 in the statistical appendix to this paper.¹⁶ Figure 1 displays the number and rate of fatal injuries to workers in Great Britain since 1992/93. Between 1992/93 and 2003/04 the number of fatal injuries to workers has fallen from 339 to 235. This is equivalent to a fall of 30.7%.

Figure 1: Number and rate of fatal injuries to workers



Figures 2 and 3 below show the number and rate of fatal injuries to workers broken down by those who are employees and those who are self-employed.

Figure 2: Number of fatal injuries to workers

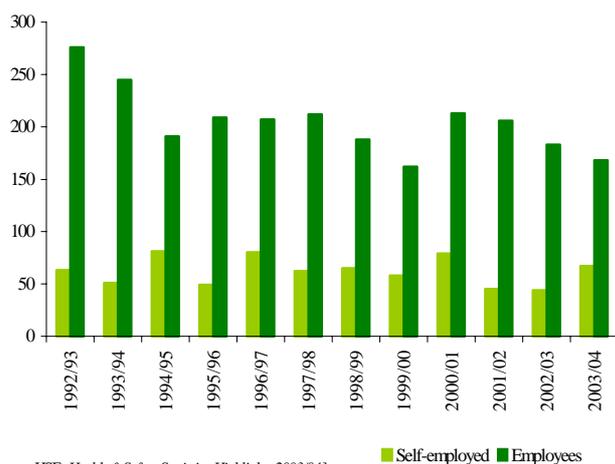
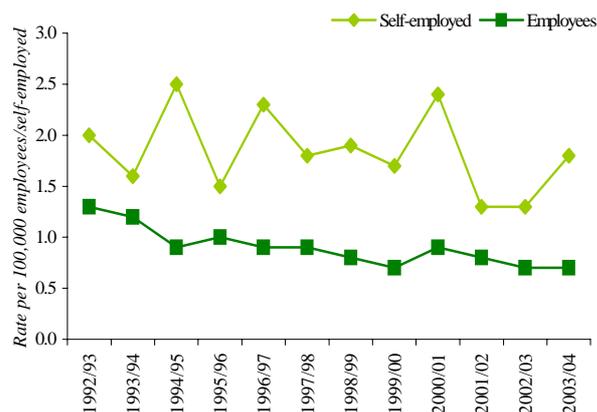


Figure 3: Rate of fatal injuries to workers

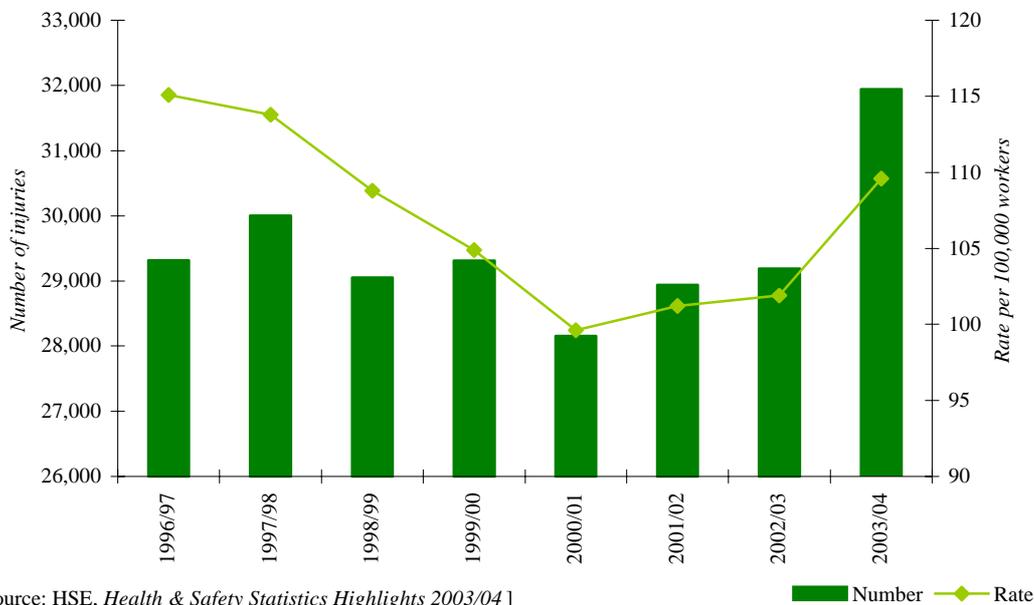


¹⁶ Data used to produce figures 1-10 and 12-19 are taken from the HSE's *Health & Safety Statistics Highlights 2003/04* and the supplementary tables to this publication. See: <http://www.hse.gov.uk/statistics/overpic.htm>.

Between 1992/93 and 2003/04 the number of fatal injuries to the self-employed increased by 6.3% from 63 to 67. In contrast the number of fatal injuries to employees fell by 39.1% from 276 to 168 over this period. The HSE notes that there are proportionally more self-employed workers in higher-risk industries.

Figure 4 shows the number and rate of major injuries to workers in Great Britain since 1996/97.¹⁷ In 2003-2004 31,941 workers suffered major injuries, such as fractures, amputations and injuries leading to resuscitation or 24 hour admittance to hospital. This equates to a 9.4% increase on the previous year. Between 1996/97 and 2003/04 the number of major injuries to workers has increased from 29,320 to 31,941. This is equivalent to a rise of 8.9%.

Figure 4: Number and rate of major injuries to workers

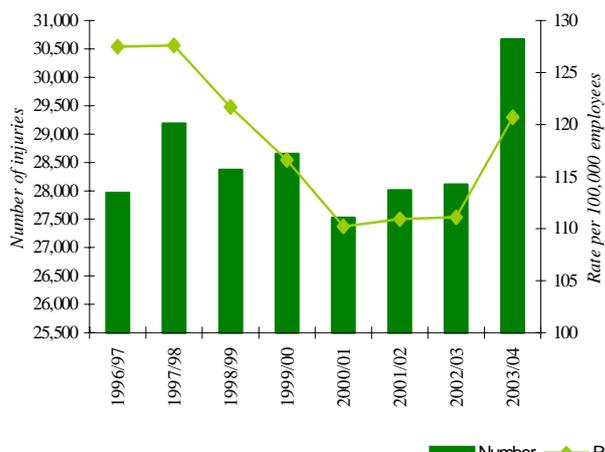


The Major incident reporting rate fell steadily each year from 1996/97 to 2001/02 but has since risen to 109.6 per thousand employees in 2003/04. The number and rate has increased in the service sectors, retail and wholesale trades, public administration, hotel and catering, transport and business. How people perceive and report incidents may influence reporting figures; employees who are worried about their job security may under-report incidents or accept them as occupational hazards. This is particularly the case with self-employed or agency workers. Yet under reporting of near misses is a critical area to be addressed; under reporting means the same incidents continue to occur with no record and therefore no action taken.

¹⁷ Examples of major injuries include: fractures (except to fingers, thumbs or toes), amputations, dislocations (of shoulder, hip, knee, and spine) and other injuries leading to resuscitation or 24 hour admittance to hospital.

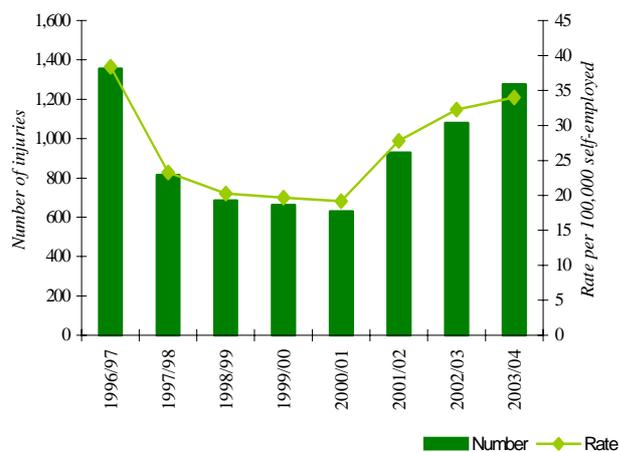
Figures 5 and 6 below show the number and rate of major injuries to workers since 1996/97 for employees and the self-employed respectively. Notably, over one third (37.0%) of reported major injuries to employees are caused by trips and slips. Lifting, carrying and manual handling accounts for 14.0%, whilst falls from height and being struck by moving or falling objects each account for 13.0% of major injuries. Since 1996/97 the number of major injuries to employees has increased from 27,964 to 30,666; a rise of 9.7%. Conversely, over the same period the number of major injuries to the self-employed has fallen from 1,356 to 1,275; a fall of 6.0%.

Figure 5: Number and rate of major injuries to employees



[Source: HSE, Health & Safety Statistics Highlights 2003/04]

Figure 6: Number and rate of major injuries to self-employed

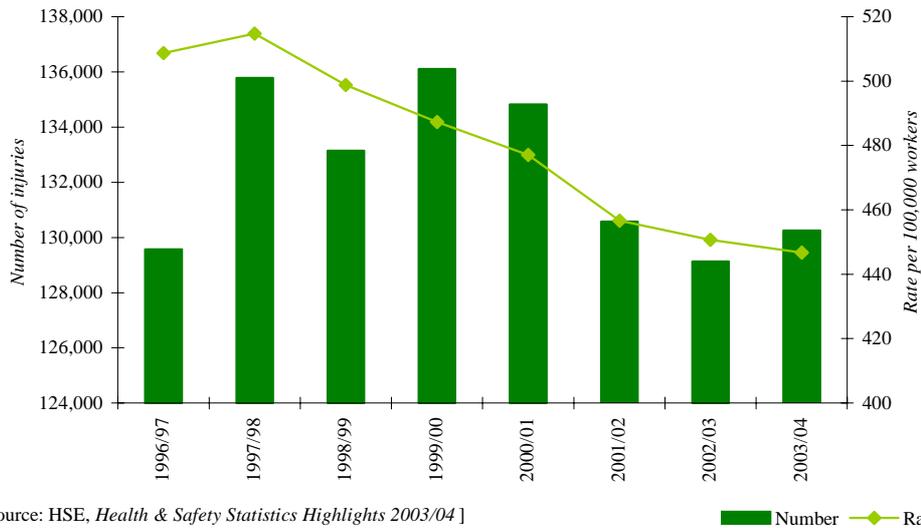


[Source: HSE, Health & Safety Statistics Highlights 2003/04]

Figure 7 below shows the number and rate of over three day injuries¹⁸ to workers in Great Britain since 1996/97. Between 1996/97 and 2003/04 the number of injuries over three days to workers has increased marginally from 129,568 to 130,247. This is equivalent to a rise of 0.5%.

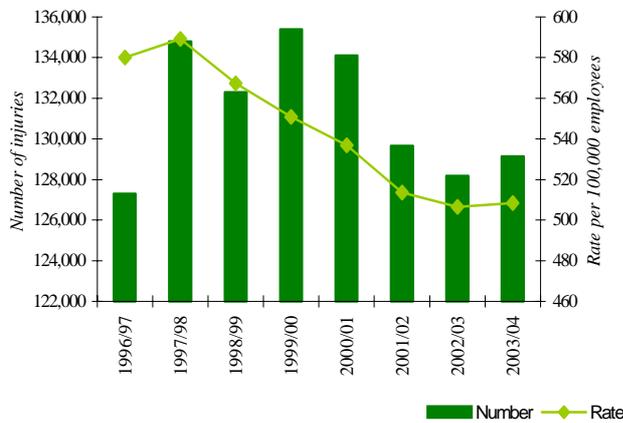
¹⁸ Over three day injuries include injuries to workers that lead to their absence from work, or inability to do their usual job, for over three days.

Figure 7: Number and rate of over three day injuries to workers



Figures 8 and 9 show the number and rate of injuries over three days to employees and the self-employed since 1996/97. Since 1996/97 the number of injuries over three days to employees has increased from 127,286 to 129,143; a rise of 1.5%. Conversely, over the same period the number of injuries over three days to the self-employed has fallen from 2,282 to 1,104; a fall of 51.6%.

Figure 8: Number and rate of over three day injuries to employees



[Source: HSE, Health & Safety Statistics Highlights 2003/04]

Figure 9: Number and rate of over three day injuries to self-employed



[Source: HSE, Health & Safety Statistics Highlights 2003/04]

In terms of the first Revitalising target, it is difficult to assess whether the target is being met at the halfway stage, or will be met by 2009. The fatality and major injuries rates increased in the twelve months to March 2004, although the three-day rate fell. The *Health and Safety Bulletin* reports that the signs overall are somewhat ambiguous,

partially due to possible increases in reporting levels, and under-reporting in the self-employed sector.¹⁹

b. Members of the public

Members of the public are also killed in workplace settings. In 2003/04 371 members of the public were killed in workplace related accidents in Great Britain; some of these were children. Farm accidents and trespassing incidents, including on railways and construction sites, are common causes of child deaths in workplaces. The death of an eight year old on Merseyside after accessing the electrified track through poorly maintained fencing attracted fines totalling £285,000 to the companies responsible.²⁰ 13,575 members of the public suffered non-fatal injuries in workplace related accidents in the reporting period.

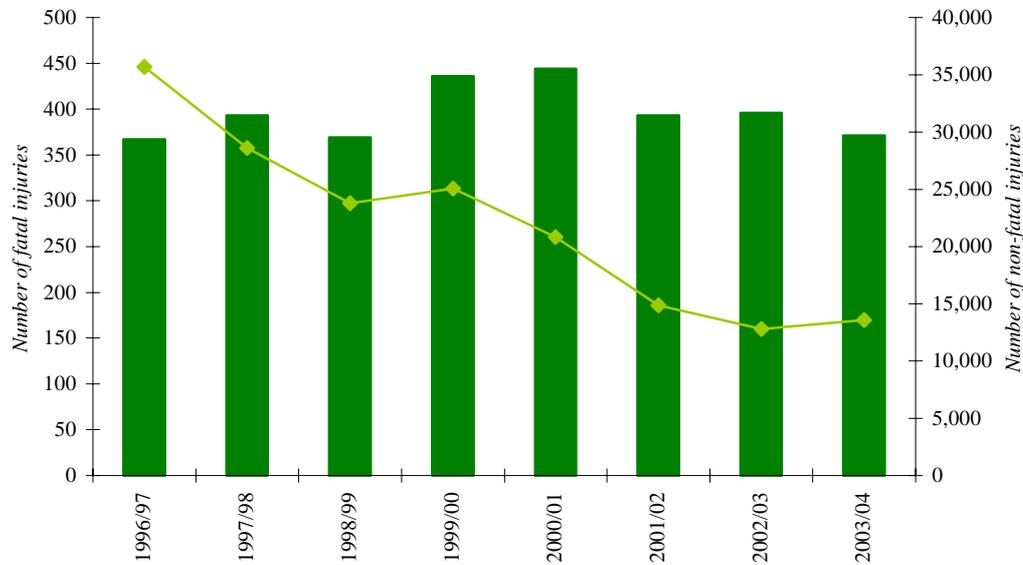
Figure 10 displays recent trends in the level of members of the public being killed or injured in workplace settings in Great Britain. Related data may be found in table A7 in the statistical appendix to this paper. The level of fatal injuries has remained broadly consistent over the time-period shown. Compared with 1996/97 the number of fatal injuries to members of the public has marginally risen by 1.1% from 367 to 371 fatalities. In contrast the number of non-fatal injuries²¹ has fallen significantly from 35,694 in 1996/97 to 13,575 in 2003/04; a fall equivalent to 62.0%. Significantly, 98.0% of all non-fatal injuries to members of the public in 2003/04 occurred in service industries.

¹⁹ Revitalising targets four years on: still too soon to measure, *Health and Safety Bulletin* 335 January / February 2005

²⁰ Inadequate line-side fencing child death fine, *RoSPA Occupational Safety and Health Journal* January 2005 p4

²¹ A non-fatal injury to a member of the public is reportable if it results in the injured person being taken from the site of the incident to hospital.

Figure 10: Number of reported fatal and non-fatal injuries to members of the public



[Source: HSE, *Health & Safety Statistics Highlights 2003/04*]

■ Fatal injuries ◆ Non-fatal injuries

c. *Work related illnesses and absenteeism*

The Second target in the Revitalising Health and Safety Strategy requires a 20% reduction in the rate of new cases of work-related illness by 2009/10. The third target is a 30% reduction by 2009/10 in the rate of days lost to work related injuries and ill health.

The Self-Reported Work-related Illness Survey 2003-04 shed new light on work related ill health. Other data was obtained through the Industrial Injuries Scheme, the Health and Occupation Reporting Network (THOR) and death records for occupational diseases. The results estimate that last year over 2.2 million people suffered from ill health they thought was work related; although the numbers have been falling since 1999, more than half the cases (1,108,000) were musculoskeletal (MSK) disorders affecting the back and upper limbs, and one in three new cases cite MSK as the cause. Stress related illness is also on the rise; 2 in 5 of reported new cases of ill health cite stress as the cause.

Other commonly reported illnesses were depression and anxiety, and diseases such as asthma, dermatitis and occupational deafness. It is also estimated that each year around 6,000 people die from occupational cancers and illnesses due to past exposures at work. Around 3,500 of these are attributable to exposure to asbestos.

In terms of the progress against the second Revitalising targets, HSE notes that performance has improved for MSK disorders, breathing or lung problems, skin problems, but there has been a deterioration for stress, depression or anxiety, although numbers reported to specialist doctors have declined a little since a rise in 2001.

The Ministerial Taskforce for Health, Safety and Productivity²² was set up to work with HSC/E to deliver targets for reducing days lost through sickness absence in the public sector from an average of 10 days down to 7.5 days per person. The overall rate of lost days has fallen from 180,000 per 100,000 workers in 2000-02 to 170,000 in 2003-04. This equates to 38.6 million lost working days over the year (8.8 million for injuries and 29.8 million for ill health). Stress related illness accounted for 12.8 million days lost, whilst MSK accounted for 11.8 million.²³

Initial feedback from a pilot study in the Department of Work and Pensions found that working days lost by sick leave fell by nearly three days when occupational health professionals worked with line managers. A delivery plan is in the process of being drawn up.²⁴ The HSE is spearheading a new campaign, 'Government Setting an Example'.²⁵

2. International comparison

Table 1 below displays the incidence rate, per 100,000 persons employed, of fatal injuries in work in a number of European countries between 1994 and 2002.²⁶ Of the countries displayed, in 2002 the UK had the second lowest incidence rate of fatal accidents (1.3 per 100,000 persons employed). In comparison, Spain had an incidence rate of 4.3 in 2002 and in 2001 Portugal recorded an incidence rate of 9.0 fatal accidents per 100,000 persons employed.

Between 1994 and 2002 the largest percentage fall for an EU country in the number of fatal accidents at work has been in Sweden where the level fell by 74.5% from 235 in 1994 to 60 in 2002. The only increase in fatal injuries recorded in EU countries over this period was in Ireland where the level rose by 6. In the EU (15 countries) there were 4790 fatal injuries at work compared with 6423 in 1994, equivalent to a fall of 25.4%. Since statistics in other countries are collected on a different basis international comparisons are difficult; for example, include deaths travelling to and from work. Full fatal injury statistics for selected EU countries may be found in table A10 in the statistical appendix to this paper.

²² www.hse.gov.uk/gse/sickness.pdf

²³ Revitalising targets four years on: still too soon to measure, *Health and Safety Bulletin* 335 January / February 2005

²⁴ Tackling sickness absence in public service workers *RoSPA Occupational Safety and Health Journal* January 2005 p5

²⁵ <http://www.hse.gov.uk/gse/>

²⁶ Please note that data in table 1 varies in terms of methodology and definition to United Kingdom specific data contained in this paper.

Table 1: Rate of fatal accidents at work: European comparisons*Per 100,000 persons employed*

	1994	1995	1996	1997	1998	1999	2000	2001	2002
Belgium	6.0	5.9	5.5	3.1	3.1	3.3	3.1	3.8	2.6
Denmark	2.8	3.3	3.0	2.3	3.1	2.2	1.9	1.7	2.0
Germany	3.7	3.0	3.5	2.7	3.0	2.4	2.1	2.0	2.5
Greece	4.3	4.3	3.7	2.8	3.7	6.3	2.7	2.9	3.8
Spain	7.0	7.0	5.9	6.3	5.5	5.0	4.7	4.4	4.3
France	4.3	3.5	3.6	4.1	4.0	3.4	3.4	3.2	2.6
Ireland ^(b)	3.9	4.2	3.3	7.1	5.9	7.0	2.3	2.6	2.6
Italy	5.3	4.8	4.1	4.2	5.0	3.4	3.3	3.1	2.1
Luxembourg	..	..	..	..	..	..	6.8	1.7	2.4
Netherlands	..	..	..	3.0	..	2.3	2.3	1.7	1.9
Austria	5.3	6.7	6.0	5.3	5.1	5.1	5.1	4.8	5.1
Portugal	8.4	7.9	9.8	8.3	7.7	6.1	8.0	9.0	..
Finland	3.6	2.8	1.7	2.8	2.4	1.8	2.1	2.4	2.0
Sweden	2.1	2.3	2.1	2.2	1.3	1.1	1.1	1.4	1.2
United Kingdom	1.7	1.6	1.9	1.6	1.6	1.4	1.7	1.5	1.3
Norway	..	..	..	1.4	4.3	2.4	3.8	3.2	3.1
EU (15 countries) ^(b)	3.9	3.7	3.6	3.4	3.4	2.9	2.8	2.7	2.5
Euro-zone ^(b)	4.6	4.2	4.1	3.8	4.0	3.3	3.2	3.1	2.9

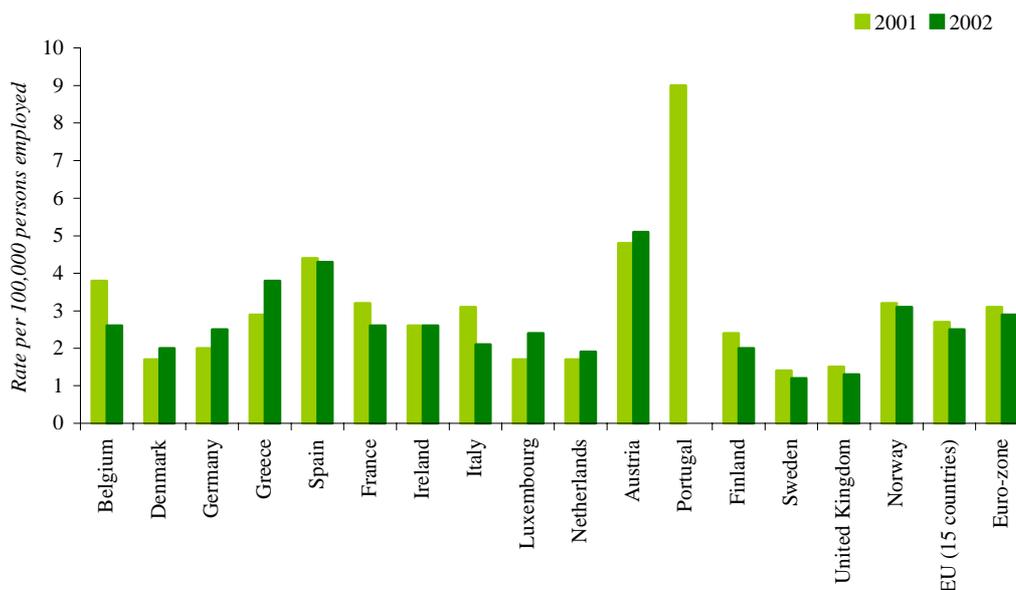
Notes: .. Not available

(a) Figures for 2002 are provisional values only.

(b) From 1998 figures exclude road traffic accidents and transport accidents on board any means of transport in the course of work.

Source: Eurostat, *Eurostat Statistics in Focus - Theme 3 - Accidents at Work in the EU*

Figure 11 below compares rates in 2002 with 2001 rates for each of the countries in the above table.

Figure 11: Rate of fatal accidents at work: European comparisons[Source: Eurostat, *Eurostat Statistics in Focus - Theme 3 - Accidents at Work in the EU*]

3. Comparison with road deaths and home accidents

Compared with 606²⁷ fatal workplace injuries to workers and members of the public in 2003/04, there were 3,508 fatal injuries as a result of road accidents in Great Britain in 2003.²⁸ HSE estimates that up to a third of all road traffic accidents involve somebody who is at work at the time.²⁹ This may account for over 20 fatalities and 250 serious injuries every week. Additionally, there were 2,994 fatal injuries in the home in 2002.³⁰

In 2003 there were 33,707 serious injuries as a result of road accidents, compared with 31,941 major injuries to workers in the workplace in 2003/04. Further historical statistics on road deaths may be found in table A9 in the statistical appendix to this paper.

C. What are the priority areas for health and safety enforcement today?

The world of work has changed much in the thirty years since HSWA was enacted. Fewer people are employed in heavy industries or expect jobs for life. Many more people are employed in service sectors, and within smaller businesses,³¹ possibly working part-time, or on temporary contracts, or self-employed. The workforce is also ageing and more women are in employment than thirty years ago. Although these days there is greater flexibility to balance home and work commitments, stress has become a feature of work related ill health today, as have musculoskeletal (MSK) problems associated with more sedentary or automated occupations and the introduction of computer and IT equipment. Hence the focus of health and safety enforcement work is changing, too.

The HSC Strategic Plan 2001/04³² identified eight priority areas that visiting inspectors are required to focus their enforcement activities on. The rationale is to tackle the most significant hazards and industries where large numbers are employed, the incidence rate of injuries or ill health is high, and where there are drivers to deliver success.

The hazard programmes identified include falls from height, workplace transport, musculoskeletal disorders, work related stress and slips and trips. The priority sectors identified include construction, agriculture and the health services.

²⁷ 235 workers and 371 members of the public

²⁸ DfT, *Road Casualties in Great Britain 2003, Main Results*.

²⁹ *Driving at work: Managing work-related road safety* INDG 32 HSE September 2003
<http://www.hse.gov.uk/pubns/indg382.pdf>

³⁰ ONS, *Mortality Statistics; injury and poisoning 2002*, Table 13.

³¹ It is estimated that there are over three million businesses in Britain that employ fewer than ten employees. In research for the HSC Greenstreet Berman concluded that the large number of SMEs (small and medium sized enterprises) presented a challenge to the enforcing authorities' reliance on traditional contract-based methods. *Health and Safety Bulletin* 334 December 2004.

³² <http://www.hse.gov.uk/aboutus/plans/hscplans/plan0104.htm>

HSC's Business Plan 2003-2004 notes that it is refocusing its resources to deliver the eight priority programmes. Approximately £33million of HSE staff resource (24% of HSE staff by salaries) was allocated to delivering the priority programmes in that year. A detailed breakdown of the allocation can be found in the Plan.³³

Although inspection and enforcement activity account for the most significant portion of staff time, time is also spent developing guidance and standards, and developing and sharing good practice.

a. The Construction industry

Of the priority sectors, deaths and injuries in the construction industry in the UK continue to be cause for concern. In 2003/04 70 workers died in the construction industry. This accounts for nearly one third (29.8%) of all fatalities of workers in that year, yet in March 2004 workers in the construction industry only accounted for 7% of all workforce jobs. A detailed statistical assessment of accidents and fatalities can be found at the end of this paper.

A number of trade unions have been campaigning for improvements in accident rates in this area. A background on health and safety issues in the construction industry can be found in Library Note SNSC-01702 *Health and Safety – Construction Industry*.³⁴

The current HSE workplan for 2003-04 sets out a Construction Priority Programme³⁵ to achieve the targets and plans set at the 2001 Construction Health and Safety Summit:

- A reduction of incidence rate of fatal and major injuries by 40% by 2004/05 (and 55% by 2009/10).
- A reduction of incidence rate of cases of work-related ill health of employees by 20% by 2004/05 (and 50% by 2009/10).
- A reduction in number of working days lost per 100 000 workers from work-related injury and ill health by 20% by the end of 2004/05 (and 50% by 2009/10).

The National Audit Office concluded that the construction industry was unlikely to realise the target it set itself in 2001 of a 40% reduction in deaths and major injuries by 2005 and a 55% reduction by 2010.³⁶

Table 2 below displays the number of fatal injuries at work in the construction industry by country in the EU. The number of fatal accidents per annum in the construction sector across Europe fell between 1994 and 2002. However, the fatal and non-fatal injury rate

³³ HSC Business Plan 2003-2004 <http://www.hse.gov.uk/aboutus/plans/hscplans/plan0104-05.htm>

³⁴ <http://hcl1.hclibrary.parliament.uk/notes/ses/snsc-01702.pdf>

³⁵ HSE Construction Priority Programme <http://www.hse.gov.uk/construction/pdf/plan200304.pdf>

³⁶ *HSE: improving health and safety in the construction industry*. Report by the Comptroller and Auditor General, HC531 2003/04, NAO, ISBN 0 1029 2805 3 www.nao.org.uk

for the sector is twice the EU sectoral average. Small and Medium Sized Enterprises (SMEs) employing less than 10 employees have higher non-fatal accident rates than larger firms, of over 250 employees, possibly due to resource issues, but also working in sub-sectors where the risks may be higher.³⁷ Notably, as a proportion of all fatal injuries at work, fatal injuries at work in the construction industry have increased from 22.7% in 1994 to 25.4% of the total in 2002.

Table 2: Number of fatal accidents at work: Construction industry

	1994	1995	1996	1997	1998	1999	2000	2001	2002	% change 1993-2002	Proportion of all fatal accidents	
											1994	2002
Belgium	36	40	32	32	18	30	27	35	25	-30.6	26.1%	24.3%
Denmark	14	15	13	12	12	10	13	9	7	-50.0	18.7%	12.3%
Germany	348	310	286	248	233	221	193	163	187	-46.3	22.6%	19.7%
Greece	31	34	27	21	31	30	21	24	38	22.6	37.3%	54.3%
Spain	271	287	238	245	241	244	229	226	246	-9.2	23.9%	30.6%
France	223	197	224	226	226	172	201	188	165	-26.0	24.0%	20.5%
Ireland	10	14	7	15	15	14	11	17	21	110.0	20.0%	39.6%
Italy	331	310	276	272	293	289	274	258	233	-29.6	25.0%	24.1%
Luxembourg	4	4	4	8	4	2	6	1	2	-50.0	40.0%	20.0%
Netherlands	..	13	13	30	30	26	25	25	28	..	..	30.8%
Austria	16	90	45	51	47	49	50	32	39	143.8	5.9%	17.9%
Portugal	66	71	76	96	96	83	102	139	..	..	22.3%	..
Finland	10	12	6	13	10	9	9	11	6	-40.0	19.2%	12.5%
Sweden	17	15	12	12	9	6	13	12	12	-29.4	7.2%	20.0%
United Kingdom	78	79	90	80	65	81	105	80	69	-11.5	30.0%	32.5%
Norway	..	..	..	2	11	6	6	3	10	..	..	26.3%
EU (15 countries)	1,457	1,491	1,349	1,361	1,330	1,266	1,279	1,220	1,217	-16.5	22.7%	25.4%
Euro-zone	1,317	1,348	1,207	1,257	1,244	1,169	1,148	1,119	1,129	-14.3	22.8%	25.3%

Note: .. Not available

Source: Eurostat, *Eurostat Statistics in Focus - Theme 3 - Accidents at Work in the EU*

III Company law and Directors' Duties

A. Current company law

1. Who is to blame for workplace deaths and injuries?

According to research by the Health and Safety Executive (HSE) over 70% of workplace fatalities are preventable; many can be attributed to management failures yet fewer than 30% result in prosecution for a health and safety offence.³⁸ The outcome of inquiries into

³⁷ *European Statistics on Accidents at Work 2001 survey*
<http://agency.osha.eu.int/publications/magazine/7/en/index.htm>

³⁸ *Safety Lottery: How the Level of Enforcement of Health and Safety Depends on Where you Work* Centre for Corporate Accountability / Unison 2003
<http://www.corporateaccountability.org/dl/LocAuth/safetylottery.pdf>

a number of major disasters found that, failures at managerial levels were at least as important as technical failure and human error, in causing the accidents. HSE reports:

For example, in the report of the Public Inquiry into the Piper Alpha disaster, Lord Cullen stated: “I am convinced from the evidence...that the quality of safety management by operators is fundamental to offshore safety. No amount of detailed regulations for safety improvements could make up for deficiencies in the way that safety is managed by operators” (Cullen, 1990, pg. 301) Similarly, Mr. Justice Sheen (1987, pg. 14) investigating the sinking of the Herald of Free Enterprise concluded, “a full investigation into the circumstances of the disaster leads inexorably to the conclusion that the underlying or cardinal faults lay higher up in the company...From top to bottom the body corporate was infected with the disease of sloppiness.”³⁹

The Bill’s campaigners are seeking to place a statutory duty on company directors to motivate leaders to establish and maintain a good safety climate and a reduction in death and injuries. The following section outlines current company law and duties on directors and questions if legislation can indeed motivate companies to improve their safety record.

2. What are a company’s general duties under the law?

The general duties of directors, both executive and non-executive, are based upon a mix of common law requirements and principles and statutory requirements set out in the Companies’ Acts and other legislation.

The first category is the fiduciary duties owed to the company as a whole. They contain a degree of overlap and are for the most part derived from case law and are therefore not easily summarised. The independent Company Law Review Steering Group (CLRSG) has looked at them as part of the overall review of company law that has taken place over a number of years. The CLRSG recommended that they be set out in statute as a clear statement of the scope of directors’ duties. A draft schedule setting out these general duties appeared in the CLRSG report – *Modern Company Law: Final Report*.⁴⁰ It is essentially a codification of the case law and is a helpful summary of these duties. The schedule is summarised below:

1. A director must act in accordance with the constitution of the company
2. A director must act in good faith to promote the success of the company
3. A director must not delegate his powers unless specifically authorised to do so

³⁹ The role of managerial leadership in determining workplace safety outcomes Prepared by the University of Aberdeen for the Health and Safety Executive, HSE Research Report 044 2003
<http://www.hse.gov.uk/research/rrpdf/rr044.pdf>

⁴⁰ *Modern Company Law For A Competitive Economy: Final Report* [URN 01/942], 26 July 2001 Annex C

4. A director must exercise the care, skill and diligence that would be exercised by a reasonably diligent person in his position and with his knowledge
5. A director must avoid conflicts of interest
6. A director must not abuse his position for personal gain
7. A director must not receive benefits from third parties
8. Directors have special duties, where a company is likely to default on debts or is likely to be unable to avoid insolvent liquidation.

CLRSO has taken the opportunity of the review to clarify and extend the common law duties of directors. For example, there is a greater recognition in the schedule of the directors' responsibilities to groups other than just shareholders, for example to employees.

The second set of duties is that imposed by Companies' Acts and associated legislation, most important of which is the insolvency legislation.

It may be something of a surprise to find that there is no requirement in company law for a company to have a board of directors, but of course most do and company statute law imposes a variety of obligations upon them. Indeed, if a company does not have a director statute law describes the functions and authority exercised within a company and, regardless of what their title may be, defines the person exercising those powers as a director.

Many of the powers of a director are set out in the Model set of Articles of Association of a company – essentially the rules which govern the internal workings of a company – known as Table A. These set out the directors' roles in the management of meetings, registration of documents, alteration of capital, the winding up of a company etc. Other sections of the legislation set out the directors' power to bind the company in contracts with third parties, thus third parties are entitled to expect a company to honour contracts made by directors, regardless of the limits set internally on their capacity to make contracts.

The law also imposes upon directors the duty to ensure that the company prepares and registers various documents according to timetables set out in the legislation. For example, it is the directors' duty to ensure that company accounts and a Directors' report (including the new Operating and Financial Review currently in a draft regulation) are produced each year. Directors also have the associated responsibilities of the appointment of auditors and ensuring that the company maintains adequate accounting records.

A discrete area of law is that concerning insolvency proceedings. The *Insolvency Act 1986* (IA) imposes various duties on directors designed to protect the interest of creditors rather than shareholders. Responsibilities exist not just from the point of formal insolvency onwards but also in the preceding period when a company might still be trading but have no realistic long term chance of escaping insolvency proceedings. Under the Act there is the serious offence of wrongful trading (IA S 214) which supplements an

older offence of fraudulent trading (CA S 458). Directors could find themselves personally liable for substantial debts if convicted of either. For example, in the case of fraudulent trading a director could be sentenced to seven years imprisonment and/or an unlimited fine. Directors thus convicted could also be disqualified from holding a directorship in the UK for a period of up to 15 years.

3. What are the current duties relating to health and safety?

Under the *Companies Act 1985*, a company has a separate legal identity from the directors that manage it and the people who work for it. Legal duties placed upon a company are not automatically placed on the company's directors; individual directors therefore are not obliged to take any particular action to comply with the company's obligations under the *Health and Safety at Work etc. Act 1974* (HSWA), although their failure to act may mean that the company fails to comply with health and safety legislation and therefore may be committing an offence.

Companies have a general legal duty to maintain a safe workplace. Section 2 of HSWA states; "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." Prosecution for failures in their duty under sections 2 and 3 of HSWA is the main instrument by which negligent companies are pursued for health and safety offences in the UK today.

Companies cannot avoid liability for any breach of general duties under HSWA by arguing those senior managers and the 'directing mind', or anyone to whom a duty may have been delegated, did all that was required of them. There may be limited mitigation against absolute obligations and criminal liabilities under HSWA if the employer is able to establish that all reasonably practicable precautions had been taken to ensure that employees and others were not exposed to risks to their health and safety by the way the company conducted its business.

Since December 1999 companies incorporated in the UK and listed on the London Stock Exchange (LSE) have been subjected to the LSE's corporate governance requirements. This requires boards of directors to identify, evaluate and manage their significant risks and to assess the effectiveness of their internal control systems. The Combined Code on Corporate Governance (known as the Turnbull Report) advocates a level of controlled risk determined by opportunities and threats. These risk-based assessments are made at corporate level within an internal review and monitoring process.

Campaigners and supporters of this Bill say that, although company directors are exempt from any positive statutory health and safety duties, there are no individuals within a company more important to ensuring that a company operates safely than company directors.

It is company directors who have the power to decide:

- The level of resources that their company puts into safety.

- The extent to which managers within their company prioritise safety
- Whether or not their company is subject to proper safety audits
- Whether their Company is proactive in identifying unsafe practices and how those practices can be changed

“So, as far as existing health and safety law is concerned, the privilege of power comes without the burden of responsibility.”⁴¹

4. What voluntary guidance is available to directors on health and safety?

The HSC published voluntary guidance on directors’ duties in July 2001.⁴² It does not have the status of an Approved Code of Practice. It imposes no legal requirements and carries no penalties for breaching it.

An Approved Code of Practice (ACoP) as designated under s.16 of HSWA has no statutory force but a prosecutor can take to court a failure to comply with a provision of the ACoP as proof that the defendant has contravened the regulation to which the offence relates. The present Bill states that consideration should be given to codes of practice issued or approved by HSC under section 16 of HSWA when determining the ‘reasonable steps’ that directors should take to comply with their duties under the Bill.

The 2001 guidance is aimed at commercial enterprises, as well as public bodies and voluntary organisations. It encourages companies to nominate a director who will champion health and safety matters in the organisation, and to ensure that individual members of the board recognise their personal liabilities and responsibilities under the law. The organisation should also have a clear health and safety policy, and ensure that all board decisions reflect the organisation’s health and safety policy.

5. What are the penalties on company officers?

Since most of the duties of directors towards their company are based in common law principles, a breach of those principles would most likely be remedied by a civil action for damages. Thus the level of damages would be proportional to the size, or consequence, of the breach. It is very difficult, therefore to generalise comment on their level. For example, Equitable Life is currently pursuing actions against some of its ex-directors for £1.7 billion. The main statutory punishments are imprisonment, fines and/or disqualification from holding a directorship (under the provisions of the *Company*

⁴¹ Directors’ Duties - T & G briefing pack January 2005

⁴² Directors responsibilities for health and safety INDG343 HSE 02/02
<http://www.hse.gov.uk/pubns/indg343.pdf>

Directors Disqualification Act 1986). Illustrated offences together with the punishment are listed below:

Companies Act 1985: offences

Section	General nature of an offence	Punishment ¹
110 (2)	Making a false statement as to the value of shares	Two years or a fine; or both
173 (6)	Making a false statement with respect to repayment of capital	Two years or a fine; or both
223 (1)	Company failing to keep accounting records	Two years or a fine; or both
389A(3)	Officer of company making false or misleading statements to auditors	Two years or a fine; or both
450	Destroying or mutilating documents, falsifying documents or making false entries.	Seven years or a fine; or both
458	Being a party to carrying on company business with intent to defraud creditors or for a fraudulent purpose	Seven years or a fine; or both

Note: (1) Maximum sentence on indictment.

Source: *Palmer's Company Law vol 4, A 0499*

The lack of specific health and safety duties makes it difficult, and sometimes impossible, to prosecute directors for either manslaughter or for health and safety offences as a result of corporate failures.

In order to prosecute directors and senior managers for health and safety offences, it is necessary to show that an offence by the company was the result of their consent, connivance or neglect. Section 37 of HSWA states: "Where a 'body corporate' commits a health and safety offence, and the offence was committed with the consent or connivance of, or was attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, then that person (as well as the body corporate) is liable to be proceeded against and punished." In order to prosecute directors for manslaughter it is necessary to show the death was the result of gross negligence on their part.

The number of company directors and other senior corporate officers prosecuted and convicted for offences under section 37 of the HSWA in cases following HSE investigations since 1996/97 is contained in table 3 below.

Table 3: Prosecutions under S. 37 of Health & Safety at Work Act 1974*Number of company directors and other senior corporate officers*

	Number of prosecutions	Number of convictions
1996/97	17	15
1997/98	6	5
1998/99	9	9
1999/00	17	12
2000/01	16	15
2001/02	16	11
2002/03	18	9
2003/04	12	10

Source: HC Deb 20 January 2005 1062W

It is not possible from the figures to identify convictions that resulted in imprisonment of directors. Imprisonment is only an option in a very limited number of cases under HSWA; of course, directors may be imprisoned for other offences, including manslaughter, deception, and falsification of company documents and records.

The maximum penalty that can be imposed at a Crown Court for a breach of Section 2(1) of the HSWA is an unlimited fine. Company directors convicted of a breach of HSWA Section 37 may be disqualified, for up to 2 years, from being the director of a company, under s2 (1) of the *Company Directors Disqualification Act 1986*.

6. What is the average fine levied on companies for health and safety offences?

In 2003/04 818 duty-holders were convicted following HSE Field Operations Directorate investigations in Great Britain. The average fine per case was £13,947 compared with £8,846 in 2002/03; an increase equivalent to 57.7%. Of the 818 duty holders convicted in 2003/04 20 were fined in excess of £100,000. Excluding such fines, the average fine in 2003/04 was £9,415, compared with £8,054 in 2002/03 (when five duty holders were fined in excess of £100,000). This constitutes an increase of 16.9% on the year.⁴³

7. Will scheduled company law reform change anything?

New draft legislation announced in the Queen's Speech would "clarify directors' responsibilities". The draft bill will largely be based on the 2002 "Modernising Company Law" white paper.⁴⁴ The Government has said the draft Bill will simply codify directors' existing common-law duties "without changing the essential nature of those duties". Consequently, the Government's draft bill will focus primarily on responsibilities in relation to areas such as a company's creditors, customers, shareholders and suppliers. Health and safety duties are not included.

⁴³ <http://www.hse.gov.uk/enforce/off03-04/off03-04.pdf>

⁴⁴ <http://www.dti.gov.uk/cld/review.htm>

B. Promoting a safety culture

1. What is the value to a company of having a good health and safety record?

It is difficult to find a reliable way of measuring the value to a company of having a good health and safety record. Research for the HSE⁴⁵ suggests there are a number of ways of looking at the matter. By looking purely at costs it appears there are financial advantages to be gained. Accidents generate costs that could be avoided by expenditure on precautions, which would be lower than the cost of the accident. By tackling the underlying causes, accidents and costs can be minimised and profits increased. Legal obligations will also be met. Productivity of the workforce may rise if the company spends money on risk management; firms failing to ensure adequate protection against physical injury may lose their most productive workers and de-motivate those that remain. Workers in unsafe or unpleasant jobs may demand compensating pay, which may affect profit margins.

However, equating accidents to costs may be too simplistic. There comes a point at which any further investment brings little discernible benefit. At the same time, companies which seek to reduce accident rates while keeping an eye on their profit margins may risk damaging their business reputation and employee relations. It also seems that while poor performance can lead to disadvantage, the benefits of good performance often go unnoticed, and cannot easily be measured. Costs may also need to be spread over longer periods than normal business planning cycles to be seen as cost-effective; investment in safety measures may be liable to attack should the financial climate change. Anecdotal evidence also suggests that when there has been a major catastrophe, a company may initially suffer loss of share value, but other factors, such as the ability to recover quickly, may have a positive impact on long-term share values. Perversely, top managers may actually benefit financially from the disaster faced by others.

2. What factors motivate companies to take health and safety seriously?

A research review by the University of Aberdeen for the HSE found that:

Safety, unlike other organisational outcomes is intangible. Good safety performance culminates in non-events that are not self-reinforcing. Thus, in order to develop and sustain employee motivation for safety it is likely that managers will require certain communication and motivational skills, which may differ from those required to fulfill task orientated goals.⁴⁶

⁴⁵ The role of managerial leadership in determining workplace safety outcomes, Prepared by the University of Aberdeen for the Health and Safety Executive, HSE Research Report 044 2003 <http://www.hse.gov.uk/research/rrpdf/rr044.pdf>

⁴⁶ *ibid*

The report found that leadership factors at each level (corporate level – strategic, long-range plans, formulating policy; middle and site manager level – tactical interpretation of policy; supervisory level – day to day, operational matters) interact to influence health and safety outcomes, along with the degree of employee motivation. At the same time, corporate actions are influenced by the agenda of different parties (shareholders, employees, public opinion), each having a different degree and direction of influence on the organisation.

HSE recognises that senior managers have a key influence in driving forward safety culture. They identify poor management, indecisiveness and ignorance of good practices as the primary reasons for health and safety failures within UK organisations.⁴⁷ Tangible commitment at senior (the highest) level, in terms of attitude, policies, priorities, resources and time committed, is crucial to a good culture.⁴⁸ Safety conscious managers are said to move through stages of enlightenment, starting with compliance to stem liability costs, through paternalistic duty to employees and stakeholders, culminating in pride in an organisation sending out the right competitive signals. Leadership style and fostering of trust helps or hinders workers' acceptance of safety goals. Recognition of the complementary role of site and middle managers, and supervisors in imparting the necessary skills and knowledge, and encouraging active participation, is also important.

a. Leadership case study – Legoland

In February 2005, HSE launched a series of case studies to demonstrate the vital role that director leadership has to play in ensuring that risks to health and safety are properly managed.⁴⁹ One of its Case Studies is that of *Legoland*, a company that has a worldwide reputation to maintain, in terms of its toy products and its theme attractions. The company realized that it needed to protect its safety reputation. Its statement states:

“Quality for a LEGOLAND park means safety. Not only safety because it is a company value to look after our employees but because we are about families with children & for this target group, safety is the most important factor.”

The Board also acknowledged it had limited technical health and safety expertise to cope with the increase in legislation, coupled with a realisation that they needed to equip themselves with the necessary tools. Taking advice, the Board sought to bring about a culture change across the organisation. The role the company's leadership played, and how they set about it, is set out in the Case Study document:

VALUE OF LEADERSHIP

⁴⁷ *Revitalising our potential*, Health and Safety Commission 2000.

⁴⁸ *The costs to Britain of workplace accidents and work related ill health in 1995/96*. HSE 1999.

⁴⁹ Director leadership case studies. HSE 2005

<http://www.hse.gov.uk/corporateresponsibility/casestudies/index.htm>

- Successfully led a culture change which supports an open, honest approach which in turn has led to the workforce being extremely loyal
- Actively involved all Directors in the day-to-day running of the park so they are aware of their responsibilities and are highly visible to all employees
- Demystified health and safety for all and made it an integral part of the day to day running of the park
- Improved relationships with external regulators⁵⁰

The Aberdeen review study suggests that it makes sound business sense to manage risk and safety effectively within an embedded internal control system that is intimately linked to the business objectives; integral to, rather than apart from productivity, competitiveness and profitability.

Yet, in practice, managers may try to balance competing safety requirements with other responsibilities, trading them off against other matters. Studies report that pressure to achieve high production targets is implicated in the causes of accidents. Often, managers may encourage the dangerous practices, even when they are contrary to formal company or legislative safety policy.

Researchers from the London School of Economics found that concerns for corporate reputation, followed by fear of corporate criminal liability, penalties and fear of competitive or market effects of criminal convictions, were the main drivers of companies' efforts to manage regulatory risks.⁵¹

This view is supported by The Institute of Directors. In the periodical, *Personnel Today*, Patricia Peter, head of corporate governance at the IOD states that the organisation is "pleased" that the Government has opted not to seek the prosecution of individuals under the proposed legislation.

She believes the threat of bad publicity for companies' accused of corporate killing provides at least one incentive for businesses to take their responsibilities seriously.

"People will know, and other companies will know who those directors involved in making those bad decisions are," Peter said. "I think what a lot of people fail to recognise is that companies, and certainly investors in companies, are increasingly aware of corporate reputation. Investors are looking more and more to companies to show that they are acting responsibly, that they do have proper risk management and risk assessment systems in place, and that these things are being discussed and considered at board level," she said. "Obviously, successful prosecution will also be necessary if the law isn't to fall by the wayside. It's got to

⁵⁰ Legoland Windsor Case Study 2005
<http://www.hse.gov.uk/corporateresponsibility/casestudies/legoland.pdf>

⁵¹ Baldwin R. and Anderson, R. (2002) Rethinking Regulatory Risk, London: Enterprise LSE.

be framed in such a way that it's possible to secure a conviction. Otherwise it will be no more helpful than the existing law."⁵²

The Association of Personal Insurance Lawyers (APIL) suggests that mechanisms such as linking of employers' insurance premiums to health and safety records, and making reporting on health and safety more transparent, might motivate companies to change their procedures and policies to avoid bad publicity and press.⁵³

3. What is the role of the regulator in motivating a safety culture?

The Aberdeen study looked at the role of the regulator (HSE) in regulating, enforcing and motivating organisations to enhance their governance of safety. Research submitted to the Work and Pensions Select Committee for their 2004 report on health and safety showed that, whilst companies identify statutory regulation, rather than voluntary codes, as the most important factor motivating positive health and safety performance,⁵⁴ business reputation appears to be as prime a motivator in improving health and safety as regulatory enforcement powers.

“Corporations and other organisations do not wish to be seen or perceived to be in breach of regulations. Thus, the existence and enforcement of regulations is a key aspect of creating reputational risk”.⁵⁵

The fifth annual *Health and Safety Offences and Penalties report*⁵⁶ examined the reasons why businesses comply with health and safety law. Of the respondents to the survey 90% strongly agreed that health and safety is important for staff morale. 82% felt that they must comply with health and safety regulations to protect their reputations. However, only 45% said they would be more likely to act on the regulator's advice because of its enforcement powers.

The HSE has had to adapt its strategic approach to enforcement and guidance within the context of the changing demands of the workplace, and its own resources. Part of its approach to cultivating a self-regulatory ethos in companies is to shift perceptions from regulatory need to business strategy in order to prove the commercial advantage of improving health and safety performance. The HSC states:

⁵² Corporate killing law: how far will the Government go? Personnel Today 7 December 2004
<http://www.personneltoday.co.uk/Articles/Article.aspx?liArticleID=27077&PrinterFriendly=true>

⁵³ APIL response to HSC consultation on Regulation And Recognition Towards Good Performance In Health And Safety APIL 24/04 December 2004

⁵⁴ See for example, Ashby and Diacon, Motives for occupational risk management in large UK companies, *Safety Science* 221 (1-3) 229-246 1996. • A survey of 127 corporate risk and finance managers selected from 350 of the largest UK companies found that the respondents placed most emphasis on ensuring statutory compliance with health and safety legislation and on avoidance of legal liabilities.

⁵⁵ Wright M., Marsden S., and Antonelli A. (2004) Building an evidence base for the Health and Safety Commission Strategy to 2010 and beyond: A literature review of interventions to improve health and safety compliance, Health and Safety Executive Research Report 196. Suffolk: HSE Books.

⁵⁶ www.hse.gov.uk/enforce/off03-04

“that health and safety leadership in all organisations needs to come from the board of directors or equivalent top level management board. We (HSC) have a key role in providing advice and guidance to directors and senior managers to help them ensure that their organisation is effective in managing health and safety risks.”⁵⁷

Although it can be argued that the HSE’s approach has in large part been responsible for a fall in workplace fatalities and injuries, it may not be possible to directly equate levels of activity on its part, with the degree of company compliance with the law. All this suggests that, while a regulatory approach, backed by enforcement, is necessary to protect employees from excessive risk; other motivating factors may be at play.

4. Is voluntary guidance for directors still the best way forward?

Although the view of most employer organisations was that the 2001 guidance for directors should be voluntary, the HSC made it clear that, if necessary, it would be advising ministers on how the law would need to be changed to make these responsibilities statutory so that directors are clear about what is expected of them in the management of health and safety. Action Point 11 of the HSC’s Revitalising Strategy Document stated that:

“The Health and Safety Commission will develop a code of practice on Directors’ responsibilities for health and safety, in consultation with stakeholders. It is intended that the code of practice will, in particular, stipulate that organisations should appoint an individual Director for health and safety or responsible person of similar status (for example in organisations where there is no board of Directors). The Health and Safety Commission will also advise Ministers on how the law would need to be changed to make these responsibilities statutory so that Directors and responsible persons of similar status are clear about what is expected of them in their management of health and safety. **It is the intention of Ministers, when Parliamentary time allows, to introduce legislation on these responsibilities.**”⁵⁸

The HSC subsequently decided to leave open the option of whether or not it should recommend that directors be placed under a statutory duty to participate in health and safety matters.⁵⁹ At a meeting on 14 October 2003 the Commission decided that there was a lack of consensus for legislation, and no guarantee that the parliamentary time would be found. A legislative approach was only thought to be appropriate once the voluntary

⁵⁷ “HSC/E new strategy: measures to promote: corporate responsibility and accountability for occupational health and safety. Inaugural forum of Cass Business School Risk Management 18 June 2004. Neal Stone, Policy Group HSE.

http://www.cass.city.ac.uk/conferences/hub_summer_forum/conferences/neal_stone.pdf

⁵⁸ Revitalising Health and Safety Strategy Statement June 2000

<http://www.hse.gov.uk/revitalising/strategy.pdf>

⁵⁹ *Health and Safety Bulletin* 324 December 2003 p6

route had failed. The HSE website confirms the view that: “HSC has no evidence that a voluntary approach, based on guidance, would not produce the necessary change in directors’ approach to managing occupational risk.”⁶⁰

HSC considered a variety of evidence on which to base its October 2003 recommendation to adopt the voluntary approach rather than legislation. It reflected on the findings of research commissioned from Greenstreet Berman into the effectiveness of the HSC voluntary code since its introduction.⁶¹ Two thousand companies were telephoned in a 2001/02 baseline survey with a follow up sample survey of companies in 2003,⁶² of the extent to which there is board level direction of health and safety in large private and public sector organisations. It found that in the two years since the introduction of the guidance, there had been some improvement in companies’ awareness of health and safety duties. For instance, HSC found that in the 2003 survey 80% of the companies had heard of the HSC guidance compared to 75% in 2001.

However, one in three organisations was found to be failing to direct safety at boardroom level. Levels of reporting on safety matters were also found to be highly variable. The *Health and Safety Bulletin* summarised the findings of the research thus:

- The board of directors of one third of large firms has not assumed any responsibility for ensuring their companies operate safely.
- Two thirds of company boards have no specifically appointed health and safety director
- Only 40% of boards discuss health and safety either monthly, or have it as a standing item on the board’s agenda
- Only 37% of boards discuss all serious cases of accident and ill health
- Only 48% of boards are notified of serious incidents of non-compliance with health and safety enforcement notices within their companies.⁶³

Other trends revealed by the 2003 research, are summarised by HSE as follows:

Top reasons given for board level direction (2003) are:

- Board level direction is best practice
- Power and control is at board level
- Corporate direction is needed
- New legislation/health and safety law

⁶⁰ HSE Corporate responsibility: frequently asked questions
<http://www.hse.gov.uk/corporateresponsibility/faqs.htm>

⁶¹ *Health and safety responsibilities of company directors and management board members*. HSE RR135
Prepared by Greenstreet Berman for HSE. 2003. <http://www.hse.gov.uk/research/rrpdf/rr135.pdf>

⁶² FTSE350 companies 29
Large companies (250) 243
Large public sector 133
Large voluntary sector 31

⁶³ *Health and Safety Bulletin* 322 October 2003

Top reasons given by respondents for not having board level direction (2003) are:

- Health and safety is an operational matter
- Employer has policy of delegation
- Operations are too diverse to act corporately
- Health and safety not an issue for directors

Significant factors influencing health and safety arrangements in companies:

- Increased importance of H&S
- High risk operations
- HSC guidance
- Concern about occupational health performance
- H&S seen as significant business risk
- Corporate governance requirement
- Fear of prosecution
- Risk of being sued
- Increased H&S regulation
- Directors' fear of prosecution⁶⁴

HSE presented a progress report to the Commission's meeting on 14 October 2003 meeting⁶⁵ in which it acknowledged that "at least one-in-six organisations do not consider board level direction and leadership necessary or desirable and have no plans to change". Some stakeholders felt that new legislation was necessary to assist the prevention of health and safety failures and to aid prosecutions. However, the progress report makes it clear that, "there is a clear lack of consensus on further legislation in the area of directors' responsibilities."

The Centre for Corporate Accountability (CCA) is sceptical about the thought process behind HSC's recommendation decision to recommend continuation of the voluntary route, and questions the guidance upon which this was based. In written evidence to the Work and Pensions Committee CCA states:

At the [October 2003] meeting the HSC resolved that it should continue with its existing voluntary approach to promoting greater director accountability and responsibility. The CCA is concerned that, in making this decision, the HSC has not acted on the basis of the best available evidence on the most effective means of motivating senior company officers to take responsibility for health and safety – including evidence that the HSE has itself commissioned on this issue. Nor do the HSC appear to have considered how their decision will impact on the issue of accountability and justice.⁶⁶

⁶⁴ ibid footnote 63

⁶⁵ Corporate Responsibility and Accountability for Occupational Health and Safety: A progress report on HSC/E initiatives and measures. <http://www.hse.gov.uk/aboutus/hsc/meetings/2003/141003/c105.pdf>

⁶⁶ CCA Memorandum submitted to the Work and Pensions Committee <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmworpen/456/456we41.htm>

CCA notes that HSE's progress report, presented at the meeting on 14 October 2003 makes reference to a Better Regulation Task Force's (BRTF) policy development document, *'Imaginative Thinking for Better Regulation'*, which led to HSE taking the view, "that a voluntary approach should always be pursued rigorously in the first instance. It is only when this is shown to be inadequate that regulatory routes should be followed."

5.18.... However, none of the recommendations included within the BRTF report contain such guidance. In fact, the Task Force recognises that "regulatory intervention can be necessary" and that "classic regulation can be the best way to regulate".

5.19 What the Task Force does recommend is that departments and regulators should first consider whether alternatives to classic regulation might be more effective than new legislation. This is reflected in the Prime Minister's statement that: "new regulations should only be introduced when other alternatives have first been considered and rejected and where benefits justify costs".

5.20 Neither the Task Force nor the Government, therefore, have advised that a voluntary approach must be "pursued rigorously" until it is shown to be ineffective. Such an approach would potentially be a great waste of time and resources. The guidance only requires that departments consider alternative approaches to classic regulation, presumably in the light of the best available evidence about 'what works'.

CCA contend that neither this report, nor the finding of the Greenstreet Berman study, should have lead HSC to this decision.

In conclusion, the Greenstreet Berman survey does not contradict, and in some senses provides additional evidence for the contention that in the absence of legally binding duties company directors may adopt a superficial and supine approach to the management of health and safety in their companies, even where there is some level of formal board involvement. This survey does not provide any concrete evidence that a voluntary approach would be the most effective means of bringing about behavioural and cultural change. There is, however, ample evidence from both international and domestic studies – including studies that were commissioned by the HSE – to suggest that legislation, backed by credible enforcement, is the single most powerful driver of behavioural change.

Campaigners for this Bill argue that the voluntary approach to directors' duties has indeed failed to provide adequate safety in the workplace. Health and safety practitioners, too, are anxious to see greater prominence given to health and safety issues at board level in order to raise safety levels. A statutory duty is seen as the way to ensure this.

5. How will HSC continue to promote corporate responsibility?

The HSC will continue to monitor the impact of the voluntary guidance:

“Health and safety is a boardroom issue. Good health and safety reflects strong leadership from the top and that is what we want to see. The company whose chairperson or chief executive is the champion of health and safety sends the kind of message which delivers good performance on the ground. We will be monitoring very closely the impact this guidance has on improving corporate responsibility for the control of health and safety risks.”⁶⁷

In May 2002 the HSC⁶⁸ agreed a number of additional actions to push forward HSC/E’s corporate responsibility and accountability strategy. These included developing a health and safety management index.

HSE is in the process of developing CHaSPI - the Corporate Health & Safety Performance Index – a tool for large corporate and public sector organisations (with more than 250 employees). It will be used in part as the basis of revised guidance on health and safety reporting.⁶⁹ A Small and Medium Enterprises (SMEs) version developed by Greenstreet Berman was launched in January 2005.⁷⁰ The Health and Safety Performance Indicator⁷¹ is an internet based tool that allows SMEs to assess their own health and safety performance in comparison with others, and use the information to negotiate with their insurer about their risk premium.

The case studies initiative, outlined above, is a further strand to encourage directors to take health and safety matters seriously. HSE hope that through persuasive evidence based case studies they can demonstrate the social and business benefits of health and safety. HSE will also continue to engage with key stakeholders, including insurers and investors; and sell the ‘business case’ as well as the social and legal case for well managed OHS. Revised HSC/E guidance on directors and reporting is also promised.⁷²

IV Legislating on Directors’ duties

The desire to impose a statutory duty on directors was expressed in March 1996 by Labour Shadow Environment spokesperson Michael Meacher, who stated:

⁶⁷ “HSC/E new strategy: measures to promote: corporate responsibility and accountability for occupational health and safety. Inaugural forum of Cass Business School Risk Management 18 June 2004. Neal Stone, Policy Group HSE.

http://www.cass.city.ac.uk/conferences/hub_summer_forum/conferences/neal_stone.pdf

⁶⁸ see HSC/02/82

⁶⁹ <http://www.hse.gov.uk/research/chaspi.htm>

⁷⁰ HSE Press release E011:05, *HSE announce new tool for SME’s to assess their health and safety performance*, 20 January 2005

⁷¹ <http://www.hspi.info-exchange.com/>

⁷² *ibid* Footnote 63

“I emphasise that responsibility for health and safety must be vested at the highest level of each organisation. Not underlings, but a few well-known white collars, should be prosecuted for gross negligence.”⁷³

1. The Revitalising Health and Safety Strategy

In the thirty years since HSWA has been enacted the number of reported accidents has been significantly reduced and workplace fatalities have fallen by over 70 per cent.⁷⁴ While it is generally agreed that HSWA has been largely successful the Government is aware that the world of work has changed since it was enacted and that more can be done to make the workplace safer. It also faces a challenge to stimulate further falls in accident rates, which had reached a plateau by the mid 1990s. European law, the impact of work related ill health and the management of sickness absence have also been drivers for change.

To this end, the Deputy Prime Minister launched the HSC’s ten year, *Revitalising Health and Safety Strategy*”, published in June 2000.⁷⁵ The Strategy set out the Government’s ten-year plan for better health and safety; new targets to reduce workplace deaths, injuries and illness form its centrepiece.

The minimum targets are:

- to cut deaths and major injury accidents by 10% by 2010;
- to reduce the rate of work related ill-health by 20% by 2010;
- to cut working days lost due to health and safety failure by 30% by 2010; and;
- to achieve half of the improvement by 2004.⁷⁶

The 10-year targets aim to prevent up to 3,000 work-related major injuries and deaths annually. They would also reduce work related ill health by about 80,000 cases and reduce working days lost by about 7.5 million annually. A brief overview of progress against the targets is given in Section B above.

*Securing Health Together*⁷⁷ was published in July 2000, which set out the occupational health agenda. The aim is not only to reduce the extent to which the workplace is harmful to health, but to rehabilitate the sick and disabled back into the workplace.

⁷³ HC Deb 26 March 1996 c 898

⁷⁴ HC Deb 11 October 2004 c15

⁷⁵ DETR Press Notice 402, *Tough New Targets to Cut Workplace Deaths, Injuries and Illness-Prescott*, 7 June 2000

⁷⁶ More detail on the strategy can be found in Library Note SNSC-1701 *Health and Safety-Revitalising Strategy*

⁷⁷ http://www.ohstrategy.net/about_strategy/strategy_foreword.htm

Action Point 11 of the Revitalising Strategy committed the HSC to publish a voluntary code of guidance on directors' duties. At the same time the Government committed itself to the introduction of statutory directors' duties when parliamentary time allowed.

Although the Strategy was widely welcomed by industry and the trade unions, it has not been without its critics. In 2004, the Institute of Employment Rights (IER) produced a detailed critique of the Revitalising Strategy.⁷⁸ The study contends that improvements in standards of health and safety have been reversed in the three years since its introduction. IER cast doubt on the viability of a Strategy based on reliance on voluntary encouragement of employers, and the intensification of the self-regulatory approach and advocates instead, a demanding legal framework backed by rigorous enforcement.

Progress on the Strategy was reviewed in 2003. The Department for Work and Pensions' (DWP) autumn performance report 2003 showed slippage against the targets.⁷⁹ In written evidence to the DWP Committee, HSE wrote: "the conclusion at present must be of limited progress towards targets, based on currently available hard evidence."

Prompted by the recognition that the HSE and local authorities (which are also H&S enforcement agencies) cannot do everything, and that some tasks might best be done by other bodies, or not at all, *A Strategy for workplace health and safety in Great Britain to 2010 and beyond* was published in February 2004.⁸⁰ This lays out a seven point strategy, with the focus on outcomes based on risk assessments, more targeting of resources on a limited number of properly resourced programmes of activity, and more evidence and evaluation as the basis for policies.

2. Company Directors (Health and Safety) Bill [Bill 82 2002-03]

The current Bill is not the first Bill in recent years to address this theme. Ross Cranston MP introduced a Bill under the Ten Minute Rule on 25 March 2003⁸¹ to place on a statutory footing, duties that directors already have in broad terms under the *Health and Safety at Work etc Act 1974* and the *Companies Act 1989*, and under the voluntary code of practice published by HSE in 2001.

Like the present Bill it only applied to company directors but if successful, could have been extended to senior managers in the public sector, Government departments and agencies, and voluntary organisations.

⁷⁸ P James and D Walters, *Health and Safety Revitalised or Reversed?* Institute of Employment Rights Feb 2004.

⁷⁹ DWP Autumn Performance Report 2004 Outstanding targets from Spending Review 2000 Appendix One <http://www.dwp.gov.uk/publications/dwp/2004/autumnreport/outstanding-sr2k/home.asp>

⁸⁰ <http://www.hse.gov.uk/aboutus/hsc/strategy.htm>

⁸¹ HC Deb 25 March 2003 c157-60

Although the Bill received positive support, the Institute of Directors remained concerned that the Bill might lead to directors becoming a scapegoat for the failures of the company as a whole.⁸² The Bill was subsequently dropped.

3. Work and Pensions Committee recommendations

The pressure to legislate has been given further impetus by the recommendations of the Work and Pensions Select Committee, which in 2004 investigated the work of the Health and Safety Commission and Executive.⁸³

The Committee was concerned that the Government had reneged on its commitment to legislate on directors' duties, as promised in the Revitalising Strategy. In evidence to the Committee in May 2004, Minister of State for Work and Pensions, Jane Kennedy made it clear that the Government would no longer consider legislating to introduce statutory directors' duties on health and safety. Instead, they would rely on the voluntary code produced by the HSC.

The Committee felt that there was a need to impose statutory duties on directors.

“The imposition of legally binding duties on directors would increase the likelihood of directors taking ownership of health and safety problems, positively impact on the current levels of preventable work-place death and injury and create more of a level playing field between those directors who take their health and safety responsibilities seriously and those who do not.”

The Committee recommended that:

“The Government reconsiders its decision not to legislate on directors' duties and brings forward proposals for pre-legislative scrutiny in the next session of Parliament.”

The Government response to the report re-stated its position not to legislate:

The Government believes that there is already an appropriate balance of legislative and voluntary responsibilities on directors for occupational health and safety, and has no immediate plans to legislate as recommended. It, along with HSC, will continue to encourage and persuade directors in organisations across all sectors to take their responsibility seriously and to provide leadership on occupational health and safety...HSC has been asked to build on and invigorate the current voluntary measures in place.⁸⁴

⁸² HC Deb 8 April 2003 c9-10WH

⁸³ Work and Pensions Committee fourth report *The work of the Health and Safety Commission and Executive*, HC 456 2003-04

⁸⁴ Work and Pensions Committee Government response to the Committee's fourth report *The work of the Health and Safety Commission and Executive*, HC 1137 2003-04, 27 October 2004

This position was re-stated recently during the Westminster Hall debate on the report:

“Our view is that the legal framework is largely complete. The challenge is to achieve better compliance rather than introduce more legislation.”⁸⁵

Stephen Hepburn urged the Minister to reconsider during the same debate:

I ask the Minister to reconsider her rejection of the Work and Pensions Committee's proposals. I know that legislation will come along, which has been referred to today, but without legally binding responsibilities on directors, that legislation will be as useless as what we have now.

The Government has asked HSC to undertake further evaluations to assess the progress of current legislation and voluntary measures, with a view to reporting by December 2005.

V The Bill

Under the *Health and Safety (Directors' Duties) Bill* directors would have:

- a responsibility to be informed and aware of any health and safety problems;
- a responsibility to rectify any health and safety failure by the company; and
- a responsibility to ensure that their companies had appropriate safety procedures in place to protect their workers and the general public.

The Bill has four clauses and one schedule. It seeks to amend the *Health and Safety at Work Act 1974* and the *Companies Act 1985* in order to do the following:

- Place a general duty on all company directors to “take all *reasonable* steps to ensure that the company acts in accordance with the obligations imposed on it by applicable law relating to health and safety.”
- Impose a duty on all companies, other than those that are defined as small or medium under the *Companies Act 1985*, to “appoint one of its directors as the health and safety information director” and to put that person’s name in their Annual return
- Require the nominated health and safety information director to “take all reasonable steps” to comply with the statutory duties set out in the Bill. These are outlined in detail below

⁸⁵ HC Deb 20 January 2005 c354WH

- Put legal obligations on the board to ensure that there are “adequate arrangements” to provide the nominated health and safety information director with the information necessary to carry out his or her duties and to take into account the information provided by that nominated director.

1. Nominated health & safety information directors

The nominated health and safety information director need not be the Chief Executive, but the chosen director must be clearly identified in the company’s annual report. There is no obligation to publish safety information in the annual report, although the HSE guidance suggests the minimum information that should appear in a report.⁸⁶ Such action may also fulfill the duties to review the social and environmental impact of a company’s business, as recommended in the company law review, *Modernising Company Law* (Cm 553). Willingness to publish information on the company’s safety record demonstrates a commitment to the issue.

Under Clause 1 of the Bill the nominated health and safety information director (relevant only for large companies) is required to take all reasonable steps to comply with the duties laid out in the Bill. These duties are concerned with ensuring that the board of directors has all the appropriate information that will allow them to carry out their duties to take “reasonable steps” to ensure that their company is complying with health and safety law.

The specific duties are:

- (a) To inform the other directors not less than four times a year of:
- How the company’s activities are affecting the health and safety of its employees and other persons not in the company’s employment
 - The adequacy of the measures taken by the company to ensure it complies with any law relating to health and safety and any further measures that may be necessary for this purpose

⁸⁶ Evaluation on Occupational Health and safety reporting performance undertaken for HSC/E in 2003 revealed :

- 91 of FTSE100 companies publicly report cf to 47 in 1995 and 56 in 2000
- Over 78% of all organisations surveyed (business and public) report publicly on OHS performance
- Public bodies lag way behind top businesses on reporting
- Quality of reporting still to needs to improve

- (b) To inform other directors promptly of:
- Any significant health and safety failure by the company and the steps that have been taken, or will be necessary, to rectify it
 - Details of any deaths, injuries or other incidents that the company has a duty to report under law
 - Details of any notice served on the company or on one of its employees under relevant statutory provisions
 - Details of any proceedings brought against the company for an offence relating to health and safety or for any offence arising out of a death.
- (c) To inform the board of the health and safety implications of its decisions

Representative bodies, such as the Institute of Directors (IoD),⁸⁷ are keen to avoid a blame culture. In their response to HSC's initial consultation on directors' duties⁸⁸ IOD felt that company boards as a whole should take responsibility for health and safety standards and performance, otherwise there might be a risk of dilution were there to be a specific named health and safety director. While there needs to be clarity about who has the legal responsibility for health and safety, IOD thought named directors might be made a scapegoat, making it very hard to recruit somebody to a position as sole guardian of safety matters. In many small and medium-sized firms, it may even be too costly to recruit a specific person at board level.

The Bill avoids these criticisms and meets some of the concerns as expressed by the IOD. Unlike the voluntary guidance, it does not require a named 'health and safety director' who is delegated by the Board to deal with safety issues. In the Bill, all directors have the same general safety duty. The Bill does require the appointment of a 'Health and Safety Information director' but he is not responsible for carrying out health and safety responsibilities on behalf of the board. He only has to provide the board with the information so that the directors can all carry out their safety duties. Small and medium sized companies are not required to appoint a specific information director.

2. General duty on all directors

Under Clause 2 of the Bill there is a general duty on all company directors to take all reasonable steps to ensure that the company acts in accordance with the requirements of

⁸⁷ <http://www.iod.com/is-bin/INTERSHOP.enfinity/eCS/Store/en/-/GBP/IOD-Start>

⁸⁸ Consultation Document - Health and safety responsibilities of Directors – Responses HSC
<http://www.hse.gov.uk/consult/condocs/cd167responses.htm>

health and safety legislation. This is the key duty that campaigners say, is currently absent in law and is currently met by voluntary codes.

a. *Test of reasonableness and adequacy*

The Bill does not prescribe the “reasonable steps” required or what are “adequate arrangements”. Instead, the Bill gives the Health and Safety Commission the power to draft an Approved Code of Practice that would set out the details of those terms.

No penalties are set out in this Bill. Measures to increase penalties for health and safety offences have been addressed previously, by the *Health and Safety (Offences) Bill 2003-04*, a Private Members’ Bill that failed to reach the statute book. The Government has promised to bring forward legislation to increase the penalties when parliamentary time allows.

b. *What impact would the Bill have on SMEs?*

The Bill would place a general duty on all company directors to “take all reasonable steps to ensure that the company acts in accordance with the obligations imposed on it by applicable law relating to health and safety.” But those that are defined as small or medium under the *Companies Act 1985* will not have to appoint one of their directors as the health and safety director and to put that person’s name in their Annual Return.

VI Views on the Bill

1. Conservative Party

Comments submitted for this paper by the Opposition frontbench spokesperson for health and safety, Tim Boswell, indicate a preference for promulgating and communicating best practice on health and safety rather than further law or regulation.

We on these Benches are interested in any proposals which actually can be shown to make a significant contribution to improving health and safety at work. The House will know that the obligation to address these issues has fallen on all employers for many years. Good safety and good working practices should be the mutual responsibility of all those engaged in industry, and the expectation should be that as experience and technology develop and a new generation of machines comes along, we should generally be able to show a better record than that of the past. In fact, this has generally been the case and British industry has one of the best safety records among members of the European Union. In no sense is that an argument for complacency.

The particular legislation seeks to amend the Companies Act to impose duties on directors of companies. They will of course by definition be either executive, and so covered by existing legislation, or non-executive, in which case their responsibilities for the supervision of the company are more general. While perhaps it would be possible to conceive of circumstances in which a non-

executive director's negligence could have contributed to a failure in safety, I would be surprised if this were the norm, and it falls to the proposers of the Bill to make the case. We must seek to avoid a culture where the response to something going wrong is automatically simply to press the "blame" button without examining the underlying causes.

This matter is also relevant to the public sector. While by definition those leading for example Government Departments are not subject to the Companies Act, they too would have general responsibilities for the supervision of their operations. It is not clear why a duty should be imposed on private sector directors but not extended to their counterparts in the public sector. This is all the more the case when the evidence shows that the performance of, for example, the National Health Service is one of the most disappointing in the whole field of health and safety.

At all events, I would strongly advise against over reliance on this measure in terms of either prevention of individual excellence or of any welcome improvement in collective attitudes to safety matters.

2. Liberal Democrats

To date no comments on the Bill have been supplied by the Liberal Democrats.

3. Simon Jones Memorial Campaign

Simon Jones was a 24-year-old student, employed by Euromin on a casual basis through an employment agency at a Shoreham dockyard. On 24th April 1998, his first day at work, he was killed when the jaws of a grab closed around his head, almost decapitating him. The crane driver was unable to see Simon in the hold and a co-worker responsible for directing the crane driver was unable to speak English. Although the company was fined £50,000 for health and safety offences, Euromin and its general manager, James Martell, were acquitted of manslaughter charges in November 2001.

The family and friends of Simon Jones are campaigning to bring about a change in the law on the enforcement of statutory health and safety duties.⁸⁹ Simon's mother, Anne Jones speaks for the Simon Jones Memorial Campaign.

"The Campaign would be very supportive of any private member's bill which seeks to impose legally binding duties on directors to ensure their company is complying with health and safety law". It matters not whether this is part of the reform of the law of manslaughter or an amendment to health and safety law so that decision makers instead of the non-decision making company are targeted, or indeed, if it is an amendment to company law. The absence of such duties is

⁸⁹ David Bergman, "Holding directors to account", *Guardian*, 4 December 2001, p18

likely to be a principal reason why so many companies fail to comply with health and safety law.

A director's career would end if he exposed the financial welfare of a company to a situation which could cripple it or bring about its total collapse. It is our view that the workers and members of the public should attract similar stringent control. Both the interests of justice and the future safety of the workforce demand that the focus of legislation should be on the behaviour of directors and senior management. Without this safeguard the safety culture of the work place is unlikely to improve, workers will continue to die needlessly and bereaved families will still be denied justice.⁹⁰

The Work and Pensions Committee in its report identified casual, agency and migrant workers as vulnerable groups who should be afforded extra protection under health and safety law. It urged the HSE to carry out more checks on companies employing these workers to afford them due care and protection. Employment advice is becoming increasingly available to EU migrant workers recruited through agencies into the agricultural and service sectors, to inform them of their rights.

4. Centre for Corporate Accountability

The Centre for Corporate Accountability is a charity concerned with promoting worker and public safety. It considers that the introduction of statutory obligations will have a significant positive impact on health and safety. CCA Director David Bergman says that the proposed Bill "does not impose any onerous burdens on directors, and responsible company directors will already be doing what the bill proposes – that is to take all reasonable steps to ensure their company is complying with health and safety law. What is remarkable is that this obligation is not already upon company directors at present."⁹¹

5. Confederation of British Industry

In comments submitted for this paper, the CBI states; "Directors' duties, along with duties of managers and employees, are all included in the Health and Safety at Work etc. Act 1974, and we do not see the need for any further legislation."

In written evidence to the Work and Pensions Committee, the Centre for Corporate Accountability comments on the CBI's stance in more detail:

In a note considered by the Health and Safety Commission at their 14 October [2003] meeting, the CBI stated that it is opposed to legislation specifying directors' responsibilities for health and safety for the following reasons. The CBI

⁹⁰ Directors' Duties Briefing Pack, T&G / UCATT December 2004

⁹¹ T & G Supporting Statements

<http://www.tgwu.org.uk/Templates/Campaign.asp?Action=Display&NodeID=91395>

is of the opinion that:

- The appointment, allocation of functions, responsibilities and structures for directors should be the prerogative of the organisation and its board so that it can be tailored to the needs of the organisation.
- Health and safety is a shared responsibility inappropriate to allocation to an individual director. It should not be used as a focus for blame for management failures of the organisation.
- If legislation and enforcement action is to be strengthened, guidance should be directed at all those individuals and groups who can have an impact and responsibilities for health and safety at the workplace. In addition to employers, and directors, this should include employees, the self-employed, suppliers of goods for use at work, owners/occupiers of premises, members of the public etc.⁹²

6. Construction Confederation

In comments submitted for this paper, the Construction Confederation considers the Bill has some merit:

“as its principal effect would be to reinforce the corporate accountability of larger companies. As an employers organisation we have voiced concerns about proposals that have sought to isolate individual directors and make them wholly accountable for health and safety failures. This Bill does not appear to seek to do this, but merely obligates board directors to ensure that they are presented with the salient facts they need to take ownership of health and safety management. In this regard, it works against the unwanted tendency of irresponsible employers who 'distance' themselves from health and safety decision making to avoid liability. Earlier proposals to target individuals would have had the effect of increasing this practice. Our members who would fall within the scope of the Bill would almost all consider health and safety issues at board level as a matter of routine.”

VII Health and Safety enforcement and penalties

A. How is health and safety at work currently enforced?

Health and safety regulations are part of the law and the provisions are mandatory, breach being an offence. However, for the purpose of giving practical guidance, the Health and Safety Commission (HSC) also issues Approved Codes of Practice covering and explaining the Regulations.

⁹² Reported in CCA evidence to the DWP Select Committee on the Role of the HSC/E
<http://www.corporateaccountability.org/dl/HSE/selcom/ccaavid04.doc>

The role of enforcer of safety and health legislation falls to the Inspectorate of the HSE and to environmental health officers in local authorities. Inspectors have wide powers to enter workplaces, to inspect them and take samples and to require premises to be sealed off. If necessary they can obtain the help of the police. They are able to issue enforcement notices of improvement, requiring matters to be put right within a specified time, or prohibition notices of further activity where circumstances are thought to be particularly dangerous. They also have powers to seize articles or substances. Employers have the right of appeal against these. HSE's Enforcement Policy was updated in January 2002.

In cases of serious breaches of the law⁹³ or where a death has taken place, inspectors may take employers or site owners to court, where fines of £5,000 up to £20,000 pounds may be imposed for cases heard in magistrates' courts (summary trials without a jury), or unlimited fines and imprisonment for cases heard in the Crown Court.⁹⁴ There is pressure for cases involving workplace fatalities or major injuries to be heard in Crown Courts, where increased penalties and sentencing powers are available, on indictment. The Court of Appeal has advised Magistrates to exercise caution in accepting jurisdiction in health and safety cases when death or serious injury has occurred.

HSE research concludes that between 70-85% of workplace deaths are preventable, yet, according to a CCA / Unison report, only about 30% result in a prosecution for a health and safety offence.⁹⁵ The HSE's 'name and shame' enforcement database⁹⁶ was launched in October 2000. It gives details of all successful prosecutions carried out by HSE and names the convicted defendants. In October 2001 the database was expanded to include all improvement and enforcement notices served by the HSE.

The Association of Personal Insurance Lawyers (APIL) suggests that the technique of 'naming and shaming' companies that breach workplace health and safety should be more widely used, in parallel with a policy of 'naming and praising' companies which succeed in having world class health and safety.⁹⁷

1. Crown immunity

Current health and safety law has no jurisdiction over Crown bodies. Action Point 15 of the Revitalising Strategy Document states that:

⁹³ Circumstances where prosecution is likely, as set out in HSC's Enforcement Policy Statement.

⁹⁴ Ian James and David Preece, *Jordan's Health and Safety management*. Jordans. 2000 pp1-3

⁹⁵ *Safety Lottery: How the Level of Enforcement of Health and Safety Depends on Where you Work* Centre for Corporate Accountability / Unison 2003

<http://www.corporateaccountability.org/dl/LocAuth/safetylottery.pdf>

⁹⁶ www.hse-databases.co.uk/prosecutions

⁹⁷ APIL response to HSC consultation on Regulation And Recognition Towards Good Performance In Health And Safety APIL 24/04 December 2004

The Government will seek a legislative opportunity, when Parliamentary time allows, removing Crown immunity from statutory health and safety enforcement. Until immunity is removed, the relevant Minister will be advised whenever Crown censures are made.

Although crown immunity applies to a Crown body, there is no clear definition of what is a Crown body. Property owned by the Crown is not subject to legislation unless an Act specifically says so. The enabling statute of an organisation will often state whether or not a particular organisation should be treated as acting on behalf of the Crown.

Where legislation does not clarify whether or not the public sector organisation is or is not an agent of the Crown, reference is made to a Home Office document, cited on the CCA website,⁹⁸ which states that:

"The question of whether an organisation can claim crown immunity depends upon the degree of control which the Crown through its ministers, can exercise over in the performance of its duties. The fact that a Minister of the Crown appoints the members of such a body, is entitled to require them to give him information and is entitled to give them direction of a general nature does not make the corporation his agent. The inference that a corporation acts on behalf of the Crown will be more readily drawn where its functions are not commercial but are connected with matters, such as the defence of the realm, which are essentially the province of Government.

There is no doubt that Government Departments are Crown bodies. The prison service - since it is also a department within the Home Office - is also a crown body. Police forces are however not crown bodies.

The Houses of Parliament do not have Crown Immunity but enjoy parliamentary privilege. However, the House of Commons Commission has agreed that the HSWA and subordinate legislation apply by analogy. Crown immunity does not apply to the Scottish Parliament, the Welsh Assembly or the Greater London Assembly.

The application of health and safety law to Crown bodies is set out in a note issued by the Cabinet office in June 2001.⁹⁹ Crown bodies must comply with the general duties under HSWA and relevant statutory provisions, but they are currently excluded under Section 48(1) of the HSWA from the provisions for statutory enforcement, including prosecution and penalties. In 2001, The Royal Mint could not be prosecuted for health and safety offences over the death of John Wynne, aged 50, who was killed when a six-tonne furnace fell on him at the Royal Mint in Llantrisant, South Wales, as it is a Crown body.

⁹⁸ <http://www.corporateaccountability.org/rb/gb/CrownBodies.htm>

⁹⁹ Information Note for Personnel Managers, PIN 45 Procedures for enforcing health and safety requirements in Crown Bodies, Cabinet Office, June 2001.

HSE is the relevant enforcement authority for Crown bodies, and may issue non-statutory Crown Enforcement Improvement and Prohibition Notices. They may also censure the Crown body in circumstances when a prosecution would otherwise have been brought.

A 'Crown Censure' is the formal recording of a decision by the HSE that, but for Crown immunity, the evidence of a Crown body's failure to comply with health and safety law would have been sufficient to provide a realistic prospect of conviction in the courts (in line with the Code of Crown Prosecutions). Details of crown censures are recorded in the HSE annual report and on the HSE website.

A Crown censure differs from a trial, as it is chaired not by a judge, but a senior HSE inspector, no witnesses are called and the public is not allowed to attend. The CCA comments on Crown censure:¹⁰⁰

The aim of the hearing is to "seek acknowledgment of the problem and to obtain an undertaking to improve standards of health and safety."

Under Section 48(2) of the HSWA, individual Ministers and crown servants may be prosecuted for health and safety offences, and if convicted, fined or for certain offences, sent to prison.

It has been government policy recently to gradually reduce Crown immunity by removing it when new legislation is enacted. For example, Section 60 of the *NHS and Community Care Act 1990* states that from 1 April 1991, with limited exceptions, "no health service body shall be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown", thereby removing hospitals from crown immunity.

Although the Government has promised to legislate further in this area, it is not clear whether or not Crown Bodies will be actually prosecuted for health and safety offences. HSC has offered the *Food Safety Act 1990* as a possible model. This provides for statutory improvement and prohibition notices against Crown bodies and, in lieu of prosecution, the power to seek a High Court (or, in Scotland, Court of Session) declaration of non-compliance.

CCA cites a number of reasons why it should be possible to prosecute Crown bodies for corporate killing

Homicide offences are the most serious crimes in the criminal law. No organisation should be able to escape prosecution if they commit such a serious offence;

¹⁰⁰ <http://www.corporateaccountability.org/rb/gb/CrownBodies.htm>

Crown bodies are no less likely to create risks and cause deaths than any other organisation;

It sends out the wrong signal - suggesting that Government is above its own laws;

Whether or not a particular organisation has or does not have Crown status is often an arbitrary one, dependent on whether or not it was written into the originating statute. So whilst the Civil Aviation Authority could be prosecuted for corporate killing (since it is not a crown body) the Department of Transport could not (as it is);

It is difficult to justify why local government bodies - which do not have Crown status - would be able to be prosecuted for corporate killing, but central government bodies would not;

Individual ministers and civil servants do not have immunity from prosecution for homicide offences, so why should their organisation; and

A House of Lords case has indicated that technically there is no legal obstacle to the prosecution of government departments for criminal offences, and that such prosecutions are required to 'vindicate the requirements of justice.'

CCA questions why an alternative suggested by the Government has not found favour.

17. Didn't the Government suggest an alternative to prosecution? What's wrong with that?

Yes. It suggested that where there was evidence that Crown bodies had 'committed' the offence of corporate killing, they should be brought before the High Court, which could make a 'declaration of non-compliance with statutory requirement'. This would require the Crown body to take immediate action to 'rectify the shortcoming identified'. This would be a civil law declaration and no fine or other penalty would be imposed.

There is no reason why a Crown body should not be prosecuted, like any other organisation, if there is sufficient evidence to do so. This is also the view of the Health and Safety Commission, which considers that Crown bodies should be able to prosecute not only for corporate killing but also health and safety offences.¹⁰¹

No date for legislation has yet been set.

¹⁰¹ Why we need a new corporate killing law, Centre for Corporate Accountability briefing for the TUC http://www.tuc.org.uk/h_and_s/tuc-6363-f0.cfm#_ftnref11

2. HSE resources

Health and Safety accident investigation and enforcement requires sufficient staff time and money; resources that the HSE has indicated are in short supply. Consequently the *HSE Strategy to 2010* has taken a more pragmatic approach; routine inspections will now be based on categories of risks, with lower risk premises visited less often. There will be more emphasis on guidance and advice rather than routine site visits. Local authorities and other regulatory agencies are expected to take their share of responsibility for investigation, enforcement and advisory services.

Yet, as noted, research and evidence presented to the Work and Pensions Committee suggests that inspection, backed by enforcement, as opposed to arms length advice and guidance, is the tried and trusted way of motivating employers to comply with statutory requirements. For employers already doing a good job the more passive role of the HSE supporting the control of risks may be adequate, but the Committee remained strongly convinced that a more proactive response was needed. Consequently the Committee recommended that the numbers of HSE Field inspectors should be doubled, at an estimated annual cost of £48 million after seven years.

The Committee's call for more resources and a doubling in numbers of Field Operations Division is backed by the trade union, Prospect, which represents many health and safety inspectors. In evidence to the Committee, Prospect compared the HSE's existing annual costs of £260 million with an estimated £2 billion paid out in compensation and industrial injuries benefit.¹⁰² The HSE itself estimates that taking into account lost production, increased labour costs and costs to the NHS, ill health and injuries at work cost the UK £31 billion per year.¹⁰³ Prospect expressed disappointment that the Government's response appears to allow HSE resources to be diverted away from inspection into other areas.¹⁰⁴

The Committee's Chairman, Archy Kirkwood, addressing a debate on the report in Westminster Hall expressed caution that the wider call for a lighter-touch regulatory burden on businesses, as advocated by the Hampton review¹⁰⁵ should not be used as a smokescreen for further radical changes to HSE's direction.¹⁰⁶

¹⁰² 65% through court claims and 35% through industrial injuries.

¹⁰³ Interim update of the "Costs to Britain of Workplace Accidents and Work-Related Ill Health" HSE 2004 <http://www.hse.gov.uk/statistics/pdf/costs.pdf>

¹⁰⁴ Prospect critique on the Government's response to fourth report of the Work and Pensions Select Committee, session 2003-4 (HC456) http://www.prospect.org.uk/dl/3274_1275730767.doc/as/GOVRESPONSE.doc?prs=d2333cdd3996b991dcfc7992e90968bf

¹⁰⁵ Hampton Review of regulatory inspection and enforcement http://www.hm-treasury.gov.uk/pre_budget_report/prebud_pbr04/assoc_docs/prebud_pbr04_hampton.cfm

¹⁰⁶ HC Deb 20 January 2005 c316WH

The Government response to the Committee's report affirmed that it does not wish HSE to move away from enforcement; the challenge, it says, lies in finding the right mix of activities to optimise "desirable outcomes from the resources used." The outcome of a consultation exercise¹⁰⁷ promises to shed more light on the matter, but inspection, investigation and enforcement would remain a key to the intervention strategy. In financial terms the Government would "recognise HSE as a frontline service and will ensure that it has the resources to carry out its duties effectively."

However, Work Minister, Jane Kennedy, later told the Westminster Hall debate that, although HSE as a front line service should be protected, it could not be exempted from developing more efficient and effective ways of working; "There is no evidence that simply doubling the number of inspectors will achieve significant improvements."¹⁰⁸

B. Prosecutions and penalties

The following section presents an overview of the number of cases prosecuted by the HSE and penalties imposed by the courts. Evidence shows that the courts are not afraid to impose larger fines; the record fine to date for a single offence under section 3 of HSWA is £1.5 million (plus £680,000 costs) handed down to Great Western Trains following the Southall rail crash.¹⁰⁹ Fines over £100,000 are not uncommon.

1. Totals

Figure 20 below displays the total number of cases prosecuted by the HSE and the number of duty holders convicted.¹¹⁰ The total number of cases prosecuted had increased by 4.0% compared with 1997/98, while the number of duty holders convicted had increased by 2.3% over this period. As a proportion of number of cases prosecuted, the number of duty holders convicted has fallen from 91.3% in 1997/98 to 89.8%. Figure 21 below shows the average fine per duty holder convicted.

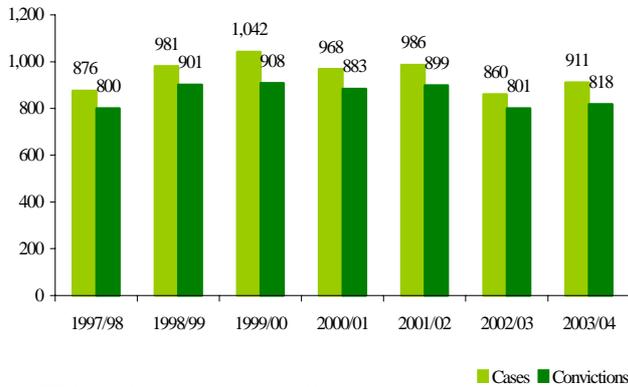
¹⁰⁷ Consultation Document - Regulation and recognition - towards good performance in health and safety HSE 2004 <http://www.hse.gov.uk/consult/condocs/cd-interventions.htm>

¹⁰⁸ HC Deb 20 January 2005 c316WH

¹⁰⁹ *Tolley's Health and Safety at Work Handbook 2004* Sixteenth edition Lexis Nexis 2004.

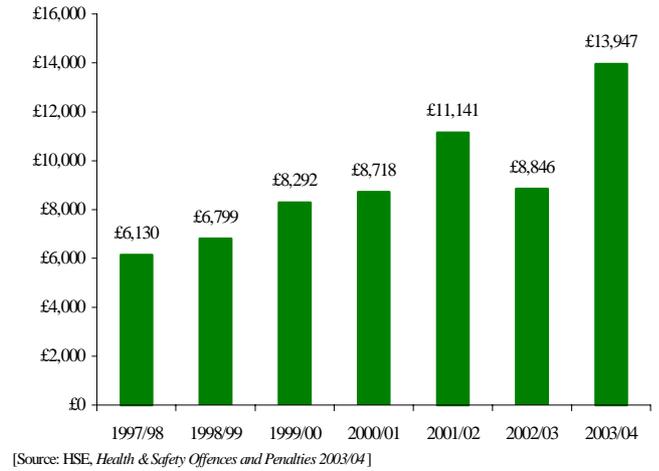
¹¹⁰ Data used to produce figures 20-23 are taken from the HSE's *Health and Safety Offences and Penalties 2003/04* publication. See: <http://www.hse.gov.uk/enforce/off03-04/off03-04.pdf> .

Figure 20: Total Number Of Cases Prosecuted By HSE's Field Operations Directorate, and Number of Duty Holders Convicted



[Source: HSE, Health & Safety Offences and Penalties 2003/04]

Figure 21: Average fines per duty holder convicted



[Source: HSE, Health & Safety Offences and Penalties 2003/04]

Figure 22 displays the total number of offences investigated by the HSE leading to a conviction, and the average penalty per conviction since 1990/91. Over the period displayed the total number of offences leading to convictions has fallen by 34.5%. Related data may be found in table A8 in the statistical appendix to this paper.

Figure 22: Total offences investigated by HSE leading to conviction, and average fine per offence prosecuted, Great Britain



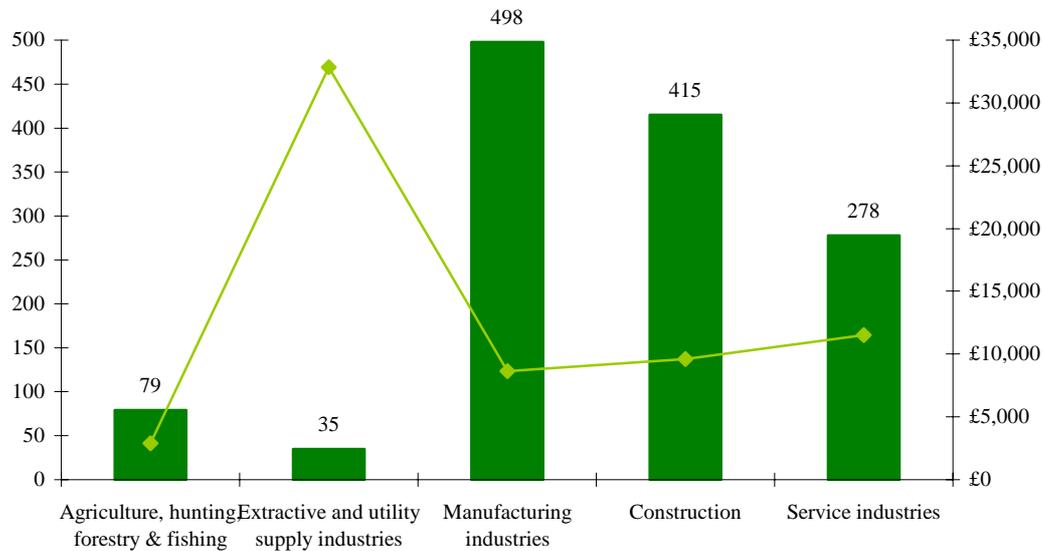
[Source: HSE, Health & Safety Offences and Penalties 2003/04]

■ Convictions ◆ Ave. penalty (£)

2. By main sector

Figure 23 displays the number of convictions following HSE investigated offences and the average penalty per conviction in 2003/04. Table 2 displays these data since 1996/97.

Figure 23: Number of convictions following HSE investigated offences, and average penalty (£) per conviction, 2003/04



[Source: HSE, *Health & Safety Offences and Penalties 2003/04*]

■ Convictions ◆ Ave. penalty (£)

Table 4: Offences prosecuted leading to conviction, and average fine per conviction

	Agriculture, hunting, forestry & fishing		Extractive and utility supply industries		Manufacturing industries		Construction		Service industries	
	Convictions	Average penalty	Convictions	Average penalty	Convictions	Average penalty	Convictions	Average penalty	Convictions	Average penalty
1996/97	87	£1,101	37	£1,780	477	£7,372	385	£3,934	209	£5,305
1997/98	69	£1,316	26	£19,192	438	£5,760	544	£3,123	207	£5,872
1998/99	102	£1,391	34	£8,916	551	£4,077	565	£5,516	260	£5,932
1999/00	107	£3,751	65	£10,644	606	£7,373	542	£4,296	296	£10,579
2000/01	71	£2,090	23	£14,589	572	£6,158	530	£4,692	294	£9,468
2001/02	115	£1,997	36	£26,444	615	£8,611	442	£7,450	314	£8,795
2002/03	68	£1,606	28	£13,721	522	£5,020	434	£5,745	221	£10,330
2003/04	79	£2,899	35	£32,851	498	£8,634	415	£9,601	278	£11,516

Note: Standard Industry Classification (SIC92)

Source: HSE, *Health & Safety Offences and Penalties 2003/04*

There is a feeling that reliance upon fines as a form of penalty is no deterrent to negligent and reckless companies because they are derisory in terms of company profits and the loss and suffering caused to families. The Government has signalled its intention to increase the fines and penalties available under the law, when parliamentary time allows.

3. Compensation levels for claims for negligence following health and safety breaches

Data compiled by the HSE from four major trade unions¹¹¹ for the research report *Analysis of compensation claims related to health and safety issues*¹¹² provides a range of data on compensation claims resulting from health and safety breaches. Notably, the data shows that the smallest amount of damages paid for negligence following health and safety breaches was £75 and the largest amount of damages paid was £250,000. The average cost of the main types of claims was:

- Slips, trips and falls - £4,222
- Manual handling - £4,325
- Exposure to noise £1,782.

Additional summary data¹¹³ compiled for the research report from the Transport and General Workers Union showed that “the cost for cases to be settled ranged from £1 to £1,333,462 for injury at work claims and £1 to £500,000 for industrial disease claims.”¹¹⁴

VIII Corporate manslaughter and corporate killing

A. The current law on homicide

English law has two general homicide offences: murder and manslaughter. Murder requires proof of intention to kill or inflict serious harm. Mitigating circumstances, such as provocation, enable the offence to be reduced to voluntary manslaughter. If someone does not intend to kill, but a death results for which they are blameworthy, then the offence is involuntary manslaughter. There are two categories of involuntary manslaughter; manslaughter by an unlawful and dangerous act, and manslaughter by gross negligence. The law on involuntary manslaughter covers many different types of wrongful behaviour, which can make it difficult for judges to decide on the appropriate penalty, and for the public to understand why a particular penalty was imposed.

The police can investigate serious criminal offences (other than health and safety offences) such as manslaughter but it is for the Crown Prosecution Service (CPS) to decide whether such a case will proceed. In order to determine whether an act constitutes the offence of gross negligence manslaughter, the Crown must establish that:

- There was a duty of care owed by the accused to the deceased.

¹¹¹ Raw data on 488 claims between 1992 and 2001 were compiled from ASLEF, FDA, MU and NGSU.

¹¹² HSE, *Analysis of compensation claims related to health and safety issues*, Research Report 70, 2003: <http://www.hse.gov.uk/research/rpdf/rr070.pdf>

¹¹³ TGWU data compiled between 1988 and 2001.

¹¹⁴ HSE, *Op. cit.*, p70.

- There was a breach of the duty of care by the accused.
- Death of the deceased was caused by breach of the duty of care by the accused.
- The breach of the duty of care by the accused was as great as to be characterised as gross negligence and therefore a crime.

More information on the prosecution of manslaughter is available from the CPS website: www.cps.gov.uk

1. Work related deaths

If there has been a death in the workplace, charges of manslaughter (or culpable homicide as it is known in Scotland) on the grounds of gross negligence may be brought. It will be for the CPS (or in Scotland, the Crown Office) to decide whether there is sufficient evidence to bring a prosecution and whether a prosecution is needed in the public interest. Since the introduction of the protocol of liaison on work-related deaths, the police are increasingly involved, amongst others, in the investigation and if there is no manslaughter prosecution, may hold information that can be used to pursue a prosecution for health and safety breaches. Health and safety offences are usually prosecuted by HSE, the local authority or other enforcing authority in accordance with current enforcement policy. The CPS may also prosecute health and safety offences, but usually does so only when prosecuting other serious criminal offences, such as manslaughter, arising out of the same circumstances.¹¹⁵ The arrangements for liaison between the police, CPS and HSE are set out in '*Work-related deaths: A protocol for liaison*'.¹¹⁶

2. Prosecuting organisations

In some cases a company may be prosecuted as well as its individual directors or managers. Only incorporated bodies, such as companies and local authorities can be guilty of a criminal offence. Unincorporated organisations such as schools, clubs and police forces cannot be prosecuted however negligent or reckless their conduct.

The test for ascertaining whether directors, managers or other similar persons are liable under regulatory legislation is whether the offence has been committed with the consent or connivance of, or is attributable to neglect on the part of, such a person (s37(1) of HSWA).

At one time it was thought that a company could not commit a criminal offence, as it had no body to do the act (*actus reus*) or blameworthy mind (*mens rea*) to think with. It is now established that a company can 'act' through the actions of its controlling directors or managers.

¹¹⁵ See CPS website: http://www.cps.gov.uk/legal/section5/chapter_b.html

¹¹⁶ <http://www.hse.gov.uk/pubns/misc491.pdf>

The CPS suggest that it is ‘difficult to envisage circumstances in which a company could be convicted of “voluntary manslaughter” (where all the elements of murder are present but the crime is reduced to manslaughter by means of a special defence) or involuntary manslaughter by means of an unlawful act.’ Corporate manslaughter will, therefore, normally be considered in the context of involuntary manslaughter by means of gross negligence.¹¹⁷ A company can only be convicted of corporate manslaughter if the prosecution can show that an individual, who is considered to be a ‘directing or controlling mind’ of the company, is guilty of the charge. This is sometimes known as the “principle of identification”. That principle developed in the law of England relating to the criminal liability of corporate bodies now appears also to be part of the law of Scotland.¹¹⁸

The requirement to find the ‘directing or controlling mind’, to justify prosecution under the general law, means that it is difficult to secure a manslaughter conviction involving a large company where lines of responsibility are diffuse and delegated to lower level managers. There have been few successful prosecutions because liability is difficult to establish, especially in large organisations where it can be impossible to pinpoint the ‘directing mind’. Those that have been successful were in small companies with basic management structures where an individual could be identified as the ‘directing mind’.

3. Prosecutions for corporate manslaughter

According to the Centre for Corporate Accountability, there have to date been only seven successful convictions of companies for corporate manslaughter, all of them brought against small companies with one director who could be identified as the controlling mind of the company.¹¹⁹ A summary of the corporate manslaughter convictions is given in Appendix B.

Following the Southall train crash of September 1997, in which 7 people died and many others were injured, Great Western Trains was prosecuted for manslaughter. The trial judge ruled that it was a condition precedent to a conviction for manslaughter by gross negligence for a guilty mind to be proved and that where a non-human defendant was prosecuted it could only be convicted via the guilty mind of a human being with whom it might be identified. Verdicts of not guilty were accordingly entered on those counts. The judge said that it was virtually impossible to bring a successful prosecution against a large corporation particularly where, as there, the allegation is essentially based on a system failure.¹²⁰ The company pleaded guilty to an offence of failing to conduct an undertaking

¹¹⁷ http://www.cps.gov.uk/legal/section5/chapter_b.html

¹¹⁸ *Transco v HM Advocate*, 3 June 2003,
<http://www.scotcourts.gov.uk/index1.asp?path=%2Fjusticiary%2Fjusticiary.htm>

¹¹⁹ <http://www.corporateaccountability.org/manlaughter/cases/convictions.htm>

¹²⁰ see *TRANSCO PLC Appellant; against HER MAJESTY'S ADVOCATE Respondent*

in such a way as to ensure that members of the public were not exposed to risks to their health, and was fined £1.5 million. The CPS appealed explaining in a press statement:

The CPS decided to prosecute GWT for manslaughter because it believed the law allowed a prosecution without naming a director, based on a previous judgement by the House of Lords. The judge disagreed. However, he made it clear that to have named a director would have made no difference in this case. If The CPS had prosecuted the director responsible for safety at GWT the prosecution would still have failed. This is because no director was personally responsible for ordering the running of the train which crashed. David Calvert-Smith, Director of Public Prosecutions, said: “We need to get the law clarified.”...

Richard Lissack QC, the prosecuting Counsel, told the Central Criminal Court that criminal law had failed to keep pace with the changing face of corporate life in the last part of the 20th century.

“If a company is large, with responsibility for safety assumed by no-one and avoided by everyone, it may conduct its undertaking as negligently as it wishes, knowing that, unless the prosecution can prove beyond doubt that a directing mind of the company personally authorised, procured or directed the specific wrong, that neither that individual nor the company could ever be convicted of manslaughter, with all that a conviction for that offence conveys,” said Mr Lissack.

In making his ruling, the Judge, Mr Justice Scott-Baker, said there were many people who believed the present state of law was unsatisfactory and that the present obstacle to prosecuting large corporations for manslaughter should be removed.¹²¹

The Court of Appeal upheld the judge’s ruling, rejecting the argument that where there is a series of management failures, each in itself venial or at least falling short of gross negligence, they may be added together, i.e. aggregated and that if they accumulatively amount to gross negligence the company is liable and may be convicted.

Following the Ladbroke Grove accident in 1999 in which 31 people were killed the CPS stated

We were first consulted by the BTP¹²² on 7 October 1999. From then on they submitted evidence to us on a regular basis until 14 April 2000.

Having received all this evidence, we reviewed it to see whether it was sufficient to support proceedings against any individual or company for either an offence of manslaughter, or an offence of endangering the safety of railway users (contrary to section 34 of the Offences Against The Person Act 1861).

¹²¹ CPS Press Release 125/99 *Southall rail crash - CPS to appeal* 2 July 1999

¹²² British Transport Police

On 8 May 2000, we announced that there was insufficient evidence to provide a realistic prospect of convicting any person or any company for either offence. Criminal proceedings were therefore not instituted...¹²³

There followed a public inquiry in which Lord Cullen was authorised by the Attorney General to give an undertaking in respect of any person who provided evidence to the Inquiry. The effect of the undertaking was that no evidence given to the Inquiry, whether orally or by written statement, nor any written statement made preparatory to giving evidence, nor any document produced to the Inquiry, could be used against the person giving the evidence or producing the documents in any criminal proceedings. After the conclusion of the public inquiry, the CPS explained their position:

The circumstances of the railway collision were subjected to minute and critical examination in Lord Cullen's Inquiry. We have now decided that, even if the BTP were to reproduce the evidence given to Lord Cullen on the issues identified above, that evidence, whether alone or added to that which the BTP obtained before or during the Inquiry, would not be enough to bring proceedings against any person or company for an offence of manslaughter. We have therefore advised the BTP that, in our view, any further investigation by them would not support criminal proceedings for manslaughter...

There is no doubt, in our view, that the evidence in this case clearly reveals a history of corporate failings. However, given the principles of law which we must apply, we concluded in May 2000 that the evidence was not sufficient to enable us to prosecute any person or company for manslaughter by gross negligence and there is now no basis upon which a further investigation by BTP could be justified.¹²⁴

Although the case was reopened after protests from the bereaved families, the CPS said there were no grounds for action against the company's senior managers for gross negligence.¹²⁵

In January 2005, *The Sunday Times* reported that Network Rail and Jarvis were facing prosecution due to the large scale of safety failures discovered by the HSE in the wake of the Potter's Bar derailment. However, the report commented that:

Both companies are likely to escape prosecution by the CPS for corporate manslaughter because of the difficulty in finding evidence linking specific individuals to the faulty points that caused the crash.¹²⁶

¹²³ CPS Press Release 132/01 *Ladbroke Grove railway accident* 24 October 2001

¹²⁴ *ibid*

¹²⁵ "First prosecution scheduled from Paddington crash" *The Independent*, 2 October 2003

¹²⁶ "Rail crash report damns lax Jarvis safety regime", *The Sunday Times*, 9 January 2005

Several prosecutions of corporations for work related deaths are pending.¹²⁷ A trial arising from the Hatfield train crash in 2000, in which four passengers were killed, began at the Old Bailey in January 2005. It is expected to last for up to a year. The company Balfour Beatty Rail Maintenance Inc, and five managers (from Balfour Beatty and Network Rail Ltd, which replaced Railtrack) have been charged with manslaughter.

The Old Bailey heard that the track was in such a poor state on 17 October 2000 that the rail broke into 300 pieces as the 12.10 King's Cross to Leeds express passed over it at 115mph. Mr Lissack said the main focus of the prosecution on the manslaughter charge would be on the defendants' individual involvement in the four and a half months before 17 October.

He said the five men had realised there were a large number of defects which should have been repaired. "The only proper way of dealing with the extremely serious situation was to follow the book of rules of what to do when you have defects. But these defendants chose to go outside the rules."...

He said all those charged with manslaughter were complicit in that arrangement. "They knew of it and approved of it and got away with operating a system of crisis management which was far outside the codified approach of doing it by the book."¹²⁸

In September 2004, the judge had allowed applications by Railtrack and three of its executives for the dismissal of manslaughter charges against them on the grounds that the evidence would not be sufficient for a jury properly to convict.

Barrow in Furness Council appears to be the first local authority to be charged with corporate manslaughter, following the deaths of seven people in 2002.¹²⁹ They died from Legionnaire's disease, whose source was the air conditioning system at a council-owned arts complex. The manslaughter trial of the council and its design services manager began on 8 February 2005 at Preston Crown Court and is expected to last 10 weeks.¹³⁰

Mr Webster [prosecuting] said Beckingham, the head of Barrow's design services group, bore the principal responsibility for the outbreak. "Until she was instrumental in its cancellation, there had been a contract which ensured that the necessary tests were carried out. She negotiated, after a gap of months, when this system was not covered by any maintenance contract at all, the new contract which did not provide for any water treatment regime. She was warned by service engineers as to the serious dangers brewing up. She failed to take any effective action and the tragedy unfolded." The council was guilty of manslaughter because she was "so far up the chain of command".¹³¹

¹²⁷ <http://www.corporateaccountability.org/manslaughter/cases/ongoing.htm>

¹²⁸ "Hatfield rail fault known for 21 months", 1 February 2005, *The Independent*

¹²⁹ Local authorities have been recognised as corporate bodies since the 19th century.

¹³⁰ "Architect 'caused seven legion deaths'", 9 February 2005, *Daily Telegraph*

¹³¹ "Council architect denies legion deaths", *Daily Telegraph*, 9 February 2005

Although they are still rare, there has been an increase in successful prosecutions of individual directors or managers responsible for workplace deaths. By January 2004, thirteen cases, involving eighteen deaths, had been prosecuted. A total of eleven directors have been convicted on manslaughter charges. A further five business owners or sole traders have been convicted, resulting in four imprisonments and one suspended sentence. All of these cases are outlined on the Centre for Corporate Accountability's website.

Other recent breaches of health and safety law on the railways which have caused derailments have attracted fines. Jarvis Facilities Ltd was fined £400,000 and paid over £28,000 in costs over an incident at Rotherham in 2002. Network Rail Infrastructure Ltd and AMEC Rail Limited were fined £70,000 in total over a derailment at Sutton in Surrey. The law also governs narrow gauge and heritage railways; Wicksteed Park Ltd was fined and paid costs for a derailment in 2003. The company had a history of derailments and poor maintenance practice. In all the cases, no deaths occurred but the events could have been foreseen and company rules were ignored.¹³²

B. Proposals for a new offence of corporate manslaughter

Proposals for a special regime applying to corporate liability for manslaughter go back more than a decade. In 1994 the Law Commission published provisional proposals, and a further consultation paper was published by the Home Office in 2000.¹³³ Public opinion, trade unions and lobby groups have all brought pressure to bear on the Government and the HSE for a change in the law on corporate accountability. Further information can be found in Library Note SNHA-1638. The Centre for Corporate Accountability has campaigned for the last three years to make it easier for companies to be convicted for deaths in the workplace, under a new charge of corporate killing. Background information on the CCA campaign can be found in Library Note SNSC-2135.¹³⁴

1. When is legislation expected?

The Labour Party manifesto of 16 May 2001 said that law reform was necessary to make provisions against corporate manslaughter. In the Queens' Speech, on 23 November 2004, the Government announced proposals for a Draft Corporate Manslaughter Bill. No draft Bill has yet been published. Earlier in November 2004 Paul Goggins had said:

The Government are currently developing proposals for reforming the law on corporate manslaughter and intend to publish a draft Bill this autumn.¹³⁵

¹³² RoSPA, *Occupational Safety & Health Bulletin*, September 2004, pp506

¹³³ see Library Standard Note SN/HA/1638

¹³⁴ SN-SC-02135 Health and Safety law – CCA Campaign

¹³⁵ HC Deb 15 Nov 2004 c1095W

2. What would the new law cover?

There has been considerable speculation about what the draft Bill will contain, and the likely effect of the new legislation. Questions which have arisen are:

- Whether it should be possible for individual directors, as well as companies, to be liable to conviction of a new offence
- Whether it should be possible for undertakings which are not incorporated bodies to be liable
- Whether there would be Crown immunity (so that civil servants could not face prosecution)
- Whether companies could be prosecuted in respect of deaths which take place abroad
- How would the new test of liability be framed
- Whether the increased risk of criminal liability would discourage people from taking up directorships

3. What will be the test for corporate killing?

A change in the law on corporate manslaughter would change the present test under common law for company liability, namely the identification test. In 1994 the Law Commission recommended that, rather than identifying the ‘controlling, or directing mind’, which is a prerequisite for bringing a corporate body to account for manslaughter through gross negligence, a new corporate offence of killing by gross negligence should be committed only when the defendant’s conduct in causing death *falls far below what could be reasonably be expected*. The risks need not be obvious or the defendant capable of appreciating the risk for a case to be answerable.¹³⁶ The requirement would be for a death to have been caused by company failure to organise and manage its activities appropriately.

The Law Commission made a firm recommendation that it should not be possible for an individual to be caught by the new offence in any way, with express provision in the law to that end. Two other new offences of reckless killing and killing by gross carelessness should apply to individuals; the latter to be adapted to a third offence in the special cases of companies, but not to extend to individuals even as secondary parties.

The Government’s consultation document¹³⁷ was broadly in line with the Law Commission’s recommendations, but in this respect, indicated that it held the contrary view; that any individuals who could be shown to have had some influence in or responsibility for a management failure falling far below what could reasonably be

¹³⁶ *Criminal Law: Involuntary Manslaughter: Law Commission Consultation Paper 135*

¹³⁷ *Reforming the law on involuntary manslaughter: the Government’s proposals*: Home Office May 2000

expected of the company - that is, if there was sufficient causal link between the individual and the death – then they could be convicted for their part in a corporate killing. They could also be disqualified from acting in a management role.

The question lies at the heart of the arguments over new draft legislation; opponents see the change as a vehicle for vengeance, which might diminish the intention of the changes, namely to bring about an overall improvement in safety culture. There is also the difficulty of a jury being able to decide what constitutes a management failure, and what level of conduct falls “far below what one would reasonably expect”?

C. Major transport incidents – pressure for action

Most of the major incidents where the deaths of members of the public have led to calls for a strengthening of the law on corporate manslaughter have been transport related. For example, 47 people died when a British Midland flight crashed near Kegworth in January 1989, 192 died when the Herald of Free Enterprise capsized at Zeebrugge Port, Belgium on October 1987¹³⁸ and 51 died when the Marchioness riverboat sank in the River Thames in August 1989.¹³⁹ However, most of the major transport incidents of the past twenty-five years have been on the railways.

Since 1980 there have been many minor and several major accidents on the railway. Some of the major ones were:

- *6 November 2004 Reading* - 7 people died when a train carrying 300 passengers hit a car on a level crossing
- *7 July 2003 Pershore* - 3 people in a minibus died when a First Great Western train collided with it on a level crossing
- *10 May 2002 Potters Bar* – 7 people died and 40 were injured when coaches of a West Anglia Great Northern train from King’s Cross to King’s Lynn left the tracks immediately to the south of Potters Bar station.

¹³⁸ In September 1990, P&O (European) Ferries and two directors were acquitted of the manslaughter of 192 people who died when the ferry, the Herald of Free Enterprise, sank off the coast of Zeebrugge in May 1987 after it had left port with its bow doors open. Yet, a 1987 Department of Transport inquiry into the tragedy had concluded that it would not have happened if senior P&O (European) Ferries managers had installed indicator lights so that the ship’s master would have known whether or not the bow doors were open. The inquiry stated that the board of directors had not appreciated “their responsibility for the safe management of the ships” and that “the directors did not have any proper comprehension of what their duties were.”

¹³⁹ For more information on the Marchioness disaster, see Library Note SN/BT/769: <http://hcl1.hclibrary.parliament.uk/notes/bts/snbt-00769.pdf>

- *28 February 2001 Selby* – 13 people died and 75 were injured when a GNER passenger train hit a land rover on the track and then collided with a laden coal train at Little Heck, near Selby.
- *17 October 2000 Hatfield* – 4 people were killed and 34 were injured when a GNER train travelling from King's Cross to Leeds was derailed just north of Hatfield.
- *5 October 1999 Ladbroke Grove* – 31 people were killed and 227 injured when a high speed passenger train collided with a turbo diesel multiple unit train travelling in the opposite direction.
- *19 September 1997 Southall* - 7 people died and about 150 were injured when an intercity train from South Wales ran into a freight train.
- *8 August 1996 Watford* - one passenger was killed and 69 injured when a passenger train collided with an empty train at a junction.
- *15 August 1994 Cowden, Kent* – 5 were killed and 12 injured in a head on collision on a single line.
- *27 September 1991 Newton, Scotland* – 4 were killed and 22 injured in a head on collision on a single lead junction where two lines came down to one leading up to a junction
- *8 January 1991 Cannon Street* - 2 commuters died and 542 were injured when a train ran into buffers at Cannon Street station.
- *March 1989 Purley* – 5 died and 90 were hurt when two trains collided.
- *December 1988 Clapham Junction* – 35 people were killed and 113 hurt when two commuter trains collided and a third train ploughed into wreckage.
- *July 1986 Lockington* – 9 were killed and 11 hurt at when a train collided with a van on a level crossing.
- *July 1984 Falkirk* – 13 were killed, and 44 hurt in a derailment

More information can be found in Library Notes SNBT-3114 on rail accidents and SNBT-605 on rail safety.

But statistics show that members of the public are fatally injured on the railways on an almost daily basis. 135 fatalities of members of the public alone were reported to the HSE

Railways division and local authorities in the six months from 1 April to 30 September 2004.¹⁴⁰

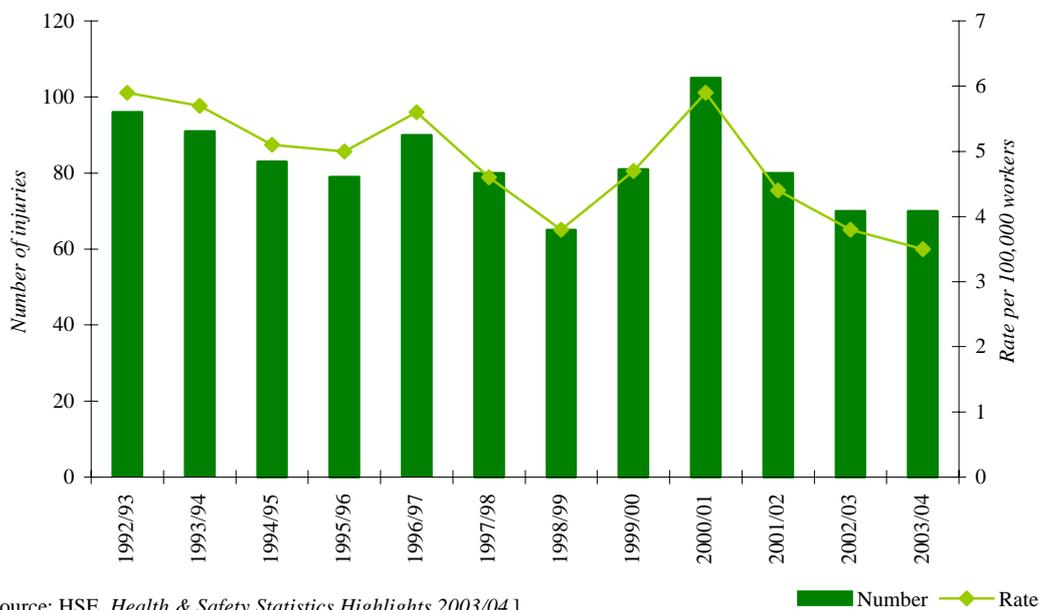
¹⁴⁰ Fatalities reported to HSE and local authorities 1 April 2004- 30 September 2004, HSE
<http://www.hse.gov.uk/statistics/causinj/6mthftls.pdf>

Appendix A Construction industry – current (2003/04) and past trends

In 2003/04 70 workers in the construction industry were killed in work related accidents in Great Britain (the same level as 2002/03). Of these, 51 were to employees (56 in 2002/03) and 19 to self-employed workers (14 in 2002/03). Notably in 2003/04 29.8% of all fatalities to workers were in the construction industry, however, in March 2004 workers in the construction industry only accounted for 7.0% of all workforce jobs

The following graphs display recent injury trends in the construction industry. Related data may be found in tables A4 to A7 in the statistical appendix to this paper. Figure 12 displays the number and rate of fatal injuries to construction workers.

Figure 12: Number and rate of fatal injuries to construction workers

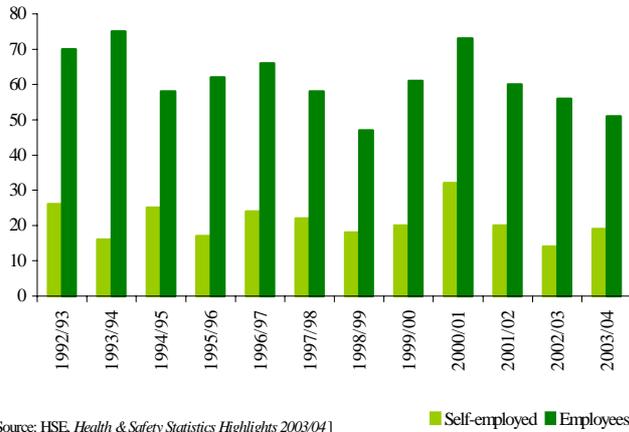


[Source: HSE, *Health & Safety Statistics Highlights 2003/04*]

Compared with 1992/93 both the number and rate of fatal injuries have fallen in 2003/04. Notably, the number of injuries has fallen by 27.1% from 96 in 1992/93 to 70 in 2003/04.

Figures 13 and 14 show the number and rate of fatal injuries to workers in the construction industry split by those who are employees and those who are self-employed.

Figure 13: Number of fatal injuries to workers in the construction industry



[Source: HSE, Health & Safety Statistics Highlights 2003/04]

Figure 14: Rate of fatal injuries to workers in the construction industry

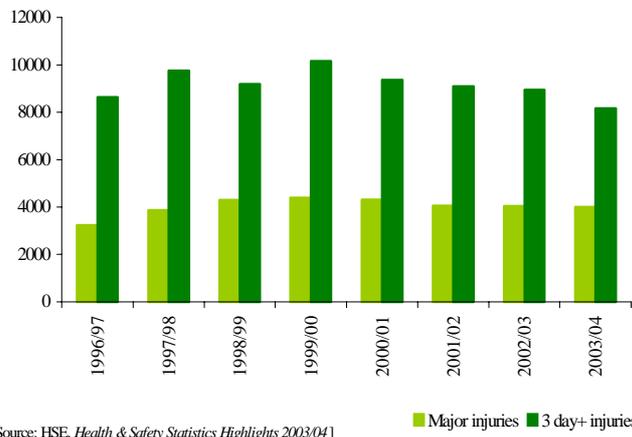


[Source: HSE, Health & Safety Statistics Highlights 2003/04]

Compared with 1992/93, in 2003/04 the number of fatal injuries had fallen for employees and self-employed by 27.1% and 26.9% respectively.

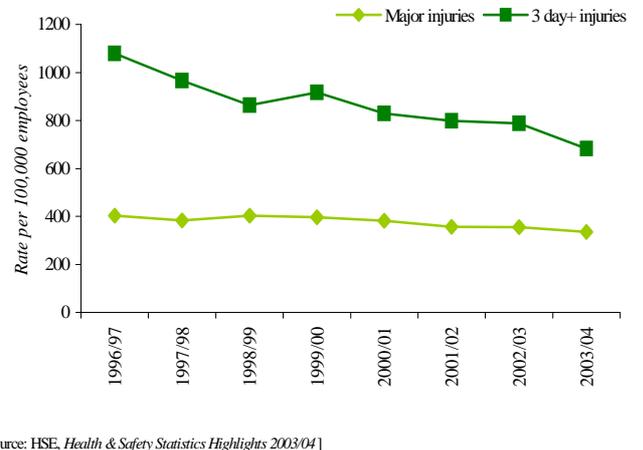
Figures 15 and 16 below show the number and rate of non-fatal injuries to employees in the construction industry since 1996/97.

Figure 15: Number of non-fatal injuries to employees in the construction industry



[Source: HSE, Health & Safety Statistics Highlights 2003/04]

Figure 16: Rate of non-fatal injuries to employees in the construction industry

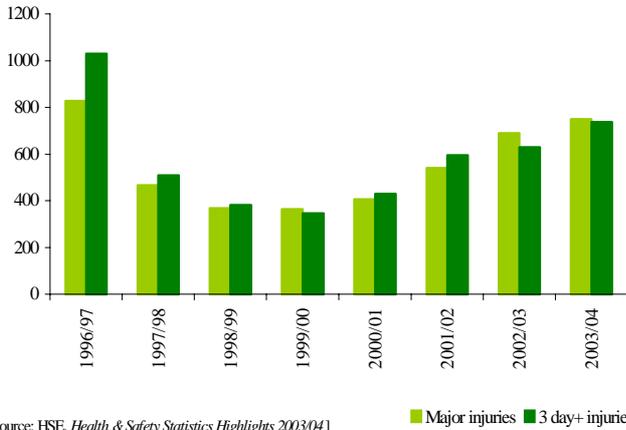


[Source: HSE, Health & Safety Statistics Highlights 2003/04]

There were 4001 major injuries to employees in the construction industry in 2003/04; this was up 24.0% on 1996/97. In contrast the number of three day plus injuries in 2003/04 was 8162. This was 5.5% lower than in 1996/97.

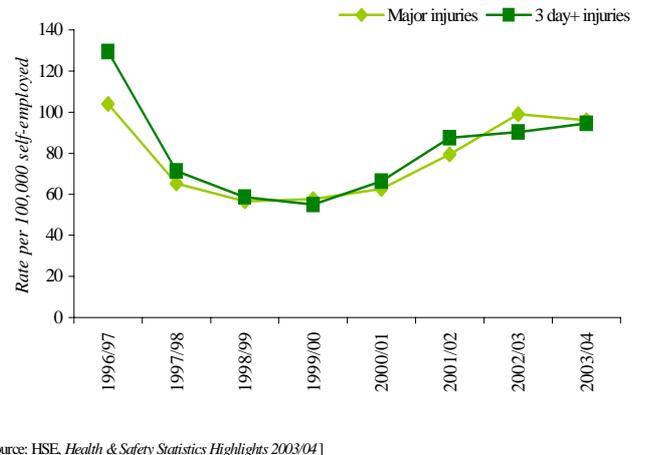
Figures 17 and 18 below show the number and rate of non-fatal injuries to self-employed workers in the construction industry since 1996/97.

Figure 17: Number of non-fatal injuries to self-employed in the construction industry



[Source: HSE, Health & Safety Statistics Highlights 2003/04]

Figure 18: Rate of non-fatal injuries to self-employed in the construction industry

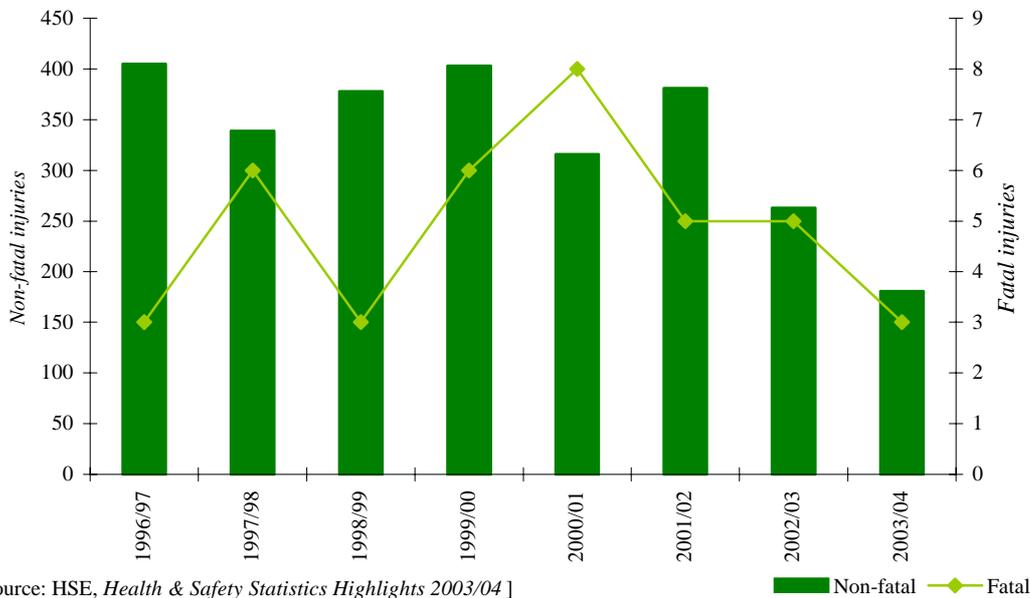


[Source: HSE, Health & Safety Statistics Highlights 2003/04]

There were 9.4% fewer major injuries, and 28.4% fewer three day plus injuries to self-employed workers in 2003/04 than in 1996/97.

Figure 19 below displays the number of injuries to members of the public related to the construction industry.

Figure 19: Number of injuries to members of the public in the construction industry



[Source: HSE, Health & Safety Statistics Highlights 2003/04]

There were 3 fatal injuries to members of the public related to the construction industry in 2003/04. This was the same number as in 1996/97. In contrast, non-fatal injuries were 55.3% lower in 2003/04 (181) compared with 1996/97 (405).

Appendix B Summary of successful convictions for Corporate Manslaughter

R v. Kite and OLL Ltd ¹⁴¹

OLL Ltd arranged various outdoor activity holidays for groups of school children at Lyme Regis. It was a very small company, having only four employees, with only one director, Mr Peter Kite. In 1993 a group of school children got into difficulties during a canoeing trip that resulted in the deaths of four of them. It was clear that OLL had given very little consideration to health and safety generally, and no procedures were in place to assess risks to young children. The weather conditions had also not been considered in any detail.

The company, OLL, and the managing director, Mr Kite, were indicted for manslaughter. The grounds were that they had not considered health and safety issues adequately. It was found that there was a wilful disregard of safety and OLL was fined £60,000. Mr Kite was sentenced to three years imprisonment, which was reduced to two years on appeal.

The simplicity of the management structure made the establishment of liability straightforward because Mr Kite was the only director and he could be identified as the 'directing mind' with personal knowledge of the inadequate safety systems and the consequent risks.

R v. Jackson Transport (OSIT) Ltd

Although Jackson Transport (OSIT) Ltd was a larger company than OLL Ltd with a workforce of about sixty people, the managing director, Mr Alan Jackson, was involved in all the company's decisions.

In 1996 a 21-year-old employee was cleaning residue from a road tanker when he was sprayed in the face with a toxic chemical that led to his death. The supervision and training had been grossly inadequate, and for such a hazardous task the supply of protective equipment was almost non-existent.

The company was convicted of manslaughter and a range of offences under the *Health and Safety at Work etc Act 1974*. It was fined £22,000 including £15,000 in respect of the manslaughter charge. Mr Jackson was fined £1,500 and imprisoned for a year.

As in the OLL case it was comparatively easy to identify the 'directing mind' as Mr Jackson, the managing director, was responsible for health and safety.

¹⁴¹ Winchester Crown Court, 8 December 1994, unreported

After the cases against OLL and Jackson's it became obvious that it was much easier to gain a successful prosecution against a small company that was likely to have a simple management structure in which it was possible to easily identify the 'directing mind'. Indeed, both companies had only one director who was convicted. This is in direct contrast to the Herald of Free Enterprise case and several others following disasters on the railways in which the prosecution for manslaughter failed because it was not possible to identify the 'directing mind'.

R. v Brian Dean

Brian Dean was the former owner of a Staffordshire demolition firm. Michael Redgate and his son, Carl, were sent to demolish a kiln without proper instruction. The two workers were killed when the kiln collapsed and buried them. Mr Dean was found responsible for the deaths and was jailed for 18 months. Trade unions leaders welcomed the sentence, and said that it should act as a 'wake-up' call to industry.

In October 2002 the Court of Appeal quashed the two manslaughter convictions, replacing them with a conviction under HSWA. Mr Dean was released without further financial penalty after serving five months in prison. According to the *Health and Safety Bulletin*, the Court of Appeal found that the trial judge's directions on causation and gross negligence were sufficiently inadequate to make the verdict unsafe.¹⁴² The case has implications about the extent to which an employer needs to make an explicit warning of risks, in addition to explaining a system of work, to workers.

R. v English Brothers

In August 2001, English Brothers LTD, a Wisbech based construction company, pleaded guilty to the manslaughter of Bill Larkman, a gang foreman, who died in June 1999 when he fell through a fragile roof to his death. The prosecution had earlier accepted a plea of 'not guilty' from Melvyn Hubbard, a director of the company. The Court heard that in 1997, inspectors from the HSE had seen Bill Larkman working at another English Brothers site without using the correct safety equipment, and had spoken to the company about its safety failings. However nothing was done to improve the situation. The company was fined £25,000 but no director was convicted.

R. v. Dennis Clothier and Sons

In October 2002, the company, Dennis Clothier and Sons, and one of its directors, Julian Clothier were found guilty of the manslaughter of Stephen Hayfield who died in

¹⁴² Court of Appeal quashes kiln killing convictions, *Health and Safety Bulletin* 315 January/ February 2003 p23

November 2000 when he was hit by a 20-tonne trailer which was owned by the company. The court heard the trailer became detached from a tractor because it was dangerously loaded and the hitch mechanism connecting the trailer to the tractor was "badly worn". Mr Clothier was responsible for the maintenance on the company's vehicles, and the court heard that he should have noticed the defect which was "obvious to the naked eye." A failsafe system was not connected at the time of the crash. He was sentenced to do 240 hours Community Service.

R v Horner

John Horner, the director of a small family firm, Teglgard Hardwood UK Ltd, received a fifteen months prison sentence, suspended for two years, at Hull Crown Court after he pleaded guilty to the manslaughter of an employee. The company, which also pleaded guilty to manslaughter, was fined £25,000 after the death of nineteen-year-old Christopher Longrigg in April 2000. He had been employed as a labourer and was crushed to death after stacks of timber toppled over on to him in the company's yard. On investigation, the HSE and police found that other stacks were unsafe, and there was anecdotal evidence of previous collapses. There was no evidence of a health and safety policy (required in all firms employing five or more people), risk assessment or any training.¹⁴³

R. v Mark

Alan Mark, the managing director of Plymouth-based Nationwide Heating Services, was jailed for 12 months on August 24 at Exeter Crown Court after a jury convicted him of the manslaughter of 21-year-old Ben Pinkham. Ben suffered 90% burns following an explosion at Princess Yachts International on 3 February 2003. Nationwide Heating was likewise convicted of the offence, although no separate penalty was imposed. Alan Mark lost his appeal to have the verdict overturned at the Court of Appeal in October 2004.

R v Spree

Melvyn Spree, a director of Keymark Services, Northamptonshire, was imprisoned for seven years after one of his lorry drivers fell asleep at the wheel killing three motorists. Spree, and his co-defendant and fellow director, Lorraine March, conspired to encourage and enable drivers to work dangerously long hours through fraudulent record keeping and tachograph tampering. Spree was identified by the judge as the 'dominant personality' of Keymark and the 'driving force of the fraud'. March was imprisoned for sixteen months, and the company fined £50,000 after pleading guilty to corporate manslaughter.

¹⁴³ Director faces jail as campaigners press Government on corporate killing offence, *Health and Safety Bulletin*, April 2003 317 p3

Statistical appendix

Table A1: Number and rate of fatal injuries to workers

	Employees		Self-employed		All workers	
	Number	Rate ^(a)	Number	Rate ^(b)	Number	Rate ^(c)
1992/93	276	1.3	63	2.0	339	1.4
1993/94	245	1.2	51	1.6	296	1.2
1994/95	191	0.9	81	2.5	272	1.1
1995/96	209	1.0	49	1.5	258	1.0
1996/97	207	0.9	80	2.3	287	1.1
1997/98	212	0.9	62	1.8	274	1.0
1998/99	188	0.8	65	1.9	253	0.9
1999/00	162	0.7	58	1.7	220	0.8
2000/01	213	0.9	79	2.4	292	1.0
2001/02	206	0.8	45	1.3	251	0.9
2002/03	183	0.7	44	1.3	227	0.8
2003/04	168	0.7	67	1.8	235	0.8

Notes: (a) per 100,000 employees.

(b) per 100,000 self-employed.

(c) per 100,000 workers.

Source: HSE, *Health & Safety Statistics Highlights 2003/04*

Table A2: Number and rate of major injuries to workers

	Employees		Self-employed		All workers	
	Number	Rate ^(a)	Number	Rate ^(b)	Number	Rate ^(c)
1996/97	27,964	127.5	1,356	38.4	29,320	115.1
1997/98	29,187	127.6	815	23.3	30,002	113.8
1998/99	28,368	121.7	685	20.3	29,053	108.8
1999/00	28,652	116.6	663	19.7	29,315	104.9
2000/01	27,524	110.2	630	19.2	28,154	99.6
2001/02	28,011	110.9	929	27.8	28,940	101.2
2002/03	28,113	111.1	1,079	32.3	29,192	101.9
2003/04	30,666	120.7	1,275	34.0	31,941	109.6

Notes: (a) per 100,000 employees.

(b) per 100,000 self-employed.

(c) per 100,000 workers.

Source: HSE, *Health & Safety Statistics Highlights 2003/04*

Table A3: Number and rate of over three day injuries to workers

	Employees		Self-employed		All workers	
	Number	Rate ^(a)	Number	Rate ^(b)	Number	Rate ^(c)
1996/97	127,286	580.1	2,282	64.6	129,568	508.7
1997/98	134,789	589.2	984	28.1	135,773	514.8
1998/99	132,295	567.3	849	25.2	133,144	498.8
1999/00	135,381	550.9	732	21.8	136,113	487.3
2000/01	134,105	536.9	715	21.8	134,820	477.1
2001/02	129,655	513.5	917	27.5	130,572	456.7
2002/03	128,184	506.5	951	28.4	129,135	450.7
2003/04	129,143	508.4	1,104	29.4	130,247	446.8

Notes: (a) per 100,000 employees.

(b) per 100,000 self-employed.

(c) per 100,000 workers.

Source: HSE, *Health & Safety Statistics Highlights 2003/04*

Table A4: Number and rate of fatal injuries to workers in the construction industry

	Employees		Self-employed		All workers	
	Number	Rate ^(a)	Number	Rate ^(b)	Number	Rate ^(c)
1992/93	70	7.8	26	3.6	96	5.9
1993/94	75	8.9	16	2.1	91	5.7
1994/95	58	6.9	25	3.2	83	5.1
1995/96	62	7.7	17	2.2	79	5.0
1996/97	66	8.2	24	3.0	90	5.6
1997/98	58	5.7	22	3.1	80	4.6
1998/99	47	4.4	18	2.8	65	3.8
1999/00	61	5.5	20	3.2	81	4.7
2000/01	73	6.5	32	5.0	105	5.9
2001/02	60	5.3	20	3.0	80	4.4
2002/03	56	4.9	14	2.0	70	3.8
2003/04	51	4.3	19	2.4	70	3.5

Notes: (a) per 100,000 employees.

(b) per 100,000 self-employed.

(c) per 100,000 workers.

Source: HSE, *Health & Safety Statistics Highlights 2003/04*

Table A5: Non-fatal injuries to employees in the construction industry

	Major injuries		3 day+ injuries	
	Number	Rate ^(a)	Number	Rate ^(a)
1996/97	3,227	403.0	8,637	1,078.6
1997/98	3,860	382.3	9,756	966.3
1998/99	4,289	402.7	9,195	863.4
1999/00	4,386	395.9	10,159	917.0
2000/01	4,303	380.9	9,367	829.2
2001/02	4,055	356.1	9,100	799.1
2002/03	4,031	354.9	8,949	788.0
2003/04	4,001	335.1	8,162	683.6

Notes: (a) per 100,000 employees.

Source: HSE, *Health & Safety Statistics Highlights 2003/04*

Table A6: Non-fatal injuries to self-employed in the construction industry

	Major injuries		3 day+ injuries	
	Number	Rate ^(a)	Number	Rate ^(a)
1996/97	827	104.0	1,029	129.4
1997/98	466	65.4	509	71.4
1998/99	367	56.5	381	58.7
1999/00	363	57.7	345	54.9
2000/01	405	62.7	429	66.4
2001/02	540	79.5	595	87.6
2002/03	690	99.1	629	90.4
2003/04	749	96.1	737	94.6

Notes: (a) per 100,000 self-employed.

Source: HSE, *Health & Safety Statistics Highlights 2003/04*

Table A7: Injuries to members of the public

	Construction industry		All industries	
	Non-fatal	Fatal	Non-fatal	Fatal
1996/97	405	3	35,694	367
1997/98	339	6	28,613	393
1998/99	378	3	23,800	369
1999/00	403	6	25,059	436
2000/01	316	8	20,836	444
2001/02	381	5	14,834	393
2002/03	263	5	12,793	396
2003/04	181	3	13,575	371

Notes: (a) per 100,000 employees.

(b) per 100,000 self-employed.

(c) per 100,000 workers.

Source: HSE, *Health & Safety Statistics Highlights 2003/04*

Table A8: Offences prosecuted leading to conviction, and average fine per conviction

	Convictions	Average Penalty (£)
1990/91	1,991	903
1991/92	2,126	1,181
1992/93	1,865	1,390
1993/94	1,507	3,103
1994/95	1,499	2,873
1995/96	1,451	2,572
1996/97	1,195	5,274
1997/98	1,284	4,694
1998/99	1,512	4,861
1999/00	1,616	6,820
2000/01	1,490	6,226
2001/02	1,522	8,234
2002/03	1,273	6,251
2003/04	1,305	9,858

Note: Standard Industry Classification (SIC92)

Source: HSE, *Health & Safety Offences and Penalties 2003/04*

Table A9: Road accident casualties by severity

	Fatal	Serious	Slight	Total
1993	3,814	45,020	257,301	306,135
1994	3,650	46,540	265,169	315,359
1995	3,621	45,533	261,533	310,687
1996	3,598	44,499	272,481	320,578
1997	3,599	42,984	281,220	327,803
1998	3,421	40,834	280,957	325,212
1999	3,423	39,122	277,765	320,310
2000	3,409	38,155	278,719	320,283
2001	3,450	37,110	272,749	313,309
2002	3,431	35,976	263,198	302,605
2003	3,508	33,707	253,392	290,607

Source: DfT, *Road Casualties in Great Britain Main Results 2003*

Table A10: Number of fatal accidents at work: All industries

	1994	1995	1996	1997	1998	1999	2000	2001	2002	% change 1993-2002
Belgium	138	142	117	112	120	113	115	120	103	-25.4
Denmark	75	86	75	82	82	69	68	52	57	-24.0
Germany	1,542	1,487	1,377	1,273	1,155	1,152	1,018	981	947	-38.6
Greece	83	91	77	74	78	103	57	50	70	-15.7
Spain	1,133	1,088	783	840	832	782	803	739	805	-28.9
France	928	848	900	912	912	876	851	852	803	-13.5
Ireland	50	77	27	47	47	59	30	54	53	6.0
Italy	1,325	1,267	1,128	1,229	1,300	1,234	1,202	1,067	967	-27.0
Luxembourg	10	14	30	26	13	7	15	12	10	0.0
Netherlands	..	110	110	109	109	99	103	83	91	..
Austria	272	412	252	243	239	236	236	222	218	-19.9
Portugal	296	232	261	228	228	236	354	346	..	..
Finland	52	43	44	52	61	44	47	55b	48	-7.7
Sweden	235	90	87	89	56	52	58	56	60	-74.5
United Kingdom	260	242	281	263	244	213	280	233	212	-18.5
Norway	..	..	..	29	43	30	48	46	38	..
EU (15 countries)	6,423	6,229	5,549	5,579	5,476	5,275	5,237	4,922	4,790	-25.4
Euro-zone	5,770	5,720	5,029	5,145	5,094	4,941	4,831	4,581	4,461	-22.7

Note: .. Not available

Source: Eurostat, *Eurostat Statistics in Focus - Theme 3 - Accidents at Work in the EU*