Directors’ responsibilities for health and safety: the findings of two peer reviews of published research

Prepared by Salford University & Middlesex University Business School for the Health and Safety Executive 2006

RESEARCH REPORT 451
Directors' responsibilities for health and safety - a peer review of three key pieces of published research

Professor Frank B Wright LL.B, LL.M, PhD, FRIPH, FRSA
Maxwell Building
University of Salford
Salford M5 4WT

The report sets out the findings of a peer review of three pieces of published research which were commissioned by the Health and Safety Executive for the Health and Safety Commission as part of its advice to Ministers on the issue of whether new duties should be imposed on directors. The three pieces of research concerned were undertaken by the Centre for Corporate Accountability, the consultancy firm Greenstreet Berman and the Health and Safety Laboratory of the Health and Safety Executive.

The objectives of the commissioned review were to provide assessments of the:

1. thoroughness of the three reports in identifying and surveying relevant published research;
2. their key findings concerning the factors influencing directors to take responsibility for health and safety;
3. the likely impact of any new legal duties placed on directors; and how directors exercise this responsibility and to what effect; and reliability of the evidence base on director responsibility for health and safety and its fit with current HSCE measures to promote greater director responsibility and leadership on health and safety.

For the report prepared by Professor Philip James please refer to page 33.

This report and the work it describes were funded by the Health and Safety Executive (HSE). Its contents, including any opinions and/or conclusions expressed, are those of the author alone and do not necessarily reflect HSE policy.
CONTENTS

EXECUTIVE SUMMARY ........................................................................................................ (iv)

1. INTRODUCTION ........................................................................................................... 1

2. REVIEW FINDINGS ....................................................................................................... 8

2.1. Detailed Analysis of HSE Research Report 135/2003 (Greenstreet Berman) .......... 8


2.3 Greenstreet Berman’s Response ................................................................................ 17

2.4. Detailed Analysis of the HSL Review Undertaken for HSE of Research Reported in Academic and Learned Journals on the Subject of Director Responsibility for and Leadership on Health and Safety ......................................................... 21

2.5 An Assessment of the Key Findings from the above Three Pieces of Research Concerning
(i) The Factors Influencing Directors to Take Responsibility ........................................ 23
(ii) The Likely Impact of Any New Legal Duties Placed on Directors .............................. 25

3. CONCLUSION and an Assessment of the Reliability of the Evidence Base on Director Responsibility for Health and Safety and Its Fit with Current HSC/E Measures to Promote Greater Director Responsibility and Leadership on Health and Safety ................................................................................................................................. 26

4. BIBLIOGRAPHY .......................................................................................................... 28
EXECUTIVE SUMMARY

The report sets out the findings of a peer review of three pieces of published research which were commissioned by the Health and Safety Executive for the Health and Safety Commission as part of its advice to Ministers on the issue of whether new duties should be imposed on directors. The three pieces of research concerned were undertaken by the Centre for Corporate Accountability, the consultancy firm Greenstreet Berman and the Health and Safety Laboratory of the Health and Safety Executive.

The objectives of the commissioned review were to provide assessments of the:

- thoroughness of the three reports in identifying and surveying relevant published research;
- their key findings concerning the factors influencing directors to take responsibility for health and safety; the likely impact of any new legal duties placed on directors; and how directors exercise this responsibility and to what effect; and
- reliability of the evidence base on director responsibility for health and safety and its fit with current HSC/E measures to promote greater director responsibility and leadership on health and safety.

The reviewer found that significant pieces of relevant research had been overlooked or misinterpreted by the Centre for Corporate Accountability, Greenstreet Berman and the Health and Safety Laboratory. These shortcomings were identified and discussed within the body of the Report.

The Health and Safety Commission and the Health and Safety Executive are committed to promoting health and safety management as an integral part of effective business management, achieving higher levels of recognition and respect for health and safety as:

- an integral part of a modern, competitive business and public sector;
- a contribution to social justice and inclusion,

e ncouraging awareness of the importance of greater corporate responsibility for health and safety and promoting good practice for all sizes of organisation in all sectors.

The Health and Safety Commission and the Health and Safety Executive have set in train measures which include challenging directors of all organisations, private, public and voluntary, to provide leadership and direction on health and safety. This entails following Health and Safety Commission guidance; developing tools for use by stakeholders (including business, institutional investors, insurers, employers and trade unions) to further their goal of achieving greater corporate responsibility and developing levers for improving health and safety (CHaSPI and the Health and Safety Performance Indicator for small and medium sized enterprises).
The Health and Safety Commission and the Health and Safety Executive are working to raise the profile of health and safety on the Corporate Social Responsibility Agenda; developing a series of case studies that show the business and social benefits of well managed health and safety and the promotion of public reporting of health and safety targets and performance so that information is made readily accessible to all stakeholders.

This work should therefore continue and be co-ordinated with work across Government. Second, work on the evidence base should be completed with a view to the adoption of an Approved Code of Practice (ACOP) on Director Responsibility. This should be accompanied by a step change in the training and development of Directors in this field in accord with the recommendations of the Higgs Report.
Directors’ Responsibilities for Health and Safety - A Peer Review of Three Key Pieces of Published Research.

Professor Frank B. Wright

Final Report

"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."

Michael Meacher MP

INTRODUCTION

For more than thirty years the Government has pressed for "Directors’ Responsibility for Health and Safety". Since that time the call has been endorsed by responsible international bodies, including the European Union and the Organisation for Economic Co-operation and Development. The failure to adequately address this issue has damaged and is damaging the lives of workpeople and their families. It harms the public exchequer and it reduces the value of shareholder investments.

In 1972 The Robens Committee said:

"We recommend ... that the directors' reports lodged with the Registrar of Companies should be required to include prescribed information, including statistics, about reportable accidents and industrial diseases suffered by the company, employees and about measures taken by the company in this regard. It might be argued against this that a recital of bare statistics can be misleading. This is true, but we cannot imagine that a company would quote such statistics without comment or explanation. It is precisely the preparation of such comments and explanations that would ensure attention to the subject at the highest level within the firm. It will also be argued that this requirement cannot be made to apply to businesses which are not registered companies. Again, this is true, but we do not see this as a good reason for not utilising a ready means of ensuring greater publicity for safety and health over a very large part of industry and commerce. Indeed, we think that many companies would be well content to see such a requirement introduced as a general obligation. Many would take it as a good opportunity to draw attention to the efforts they put into this aspect of their work."

1 Michael Meacher MP [HC Deb. 26 March 1996 c 898]
2 Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward COM (2003) 284 final. 21.5.03. The European Union has an interest because of the damaging impact of recent financial scandals, the growing trend of European companies to operate cross-border in the Internal Market, the continuing integration of European capital markets, the rapid development of new information and communication technologies, and the enlargement of the European Union to 10 new Member States.
3 OECD Principles of Corporate Governance - V1. The Responsibilities of the Board (ISBN 92-64-01597-3)
4 In "Promoting health and safety as a key goal of the Corporate Social Responsibility Agenda: Prepared by Technopolis Ltd and Emerging Markets Economics Ltd for the Health and Safety Executive 2005 Research Report 339 it was said: 'Currently, of the approximately 42 million working days lost through injury and ill health in the UK, 9 million are due to injury and 33 million through ill health.' Of the 33 million lost through ill health, 13 million are estimated to be due to stress.
5 The consequences of poor health and safety standards costs the nation more than £35 Bn. per annum.
6 The Robens Committee (1972) Cmnd. 5034 para 76
The Committee went on…

the fact that not only corporate bodies but also individuals such as directors...are liable to prosecution should be spelt out very clearly.”

This proposal was endorsed by the Government in 1973 in Proposals for a Safety and Health at Work Bill.

“1. Basic obligations on employers and others: 4 (e) where they are directors of registered companies, to provide in reports to shareholders made under the Companies Act 1948 such information about the safety and health of their employees as might be prescribed by statutory instrument under that Act. (The statutory instrument would impose a requirement in brief and general terms; it would probably be desirable to supplement this by more detailed guidance in an approved Code of Practice.)” Authors italics

These provisions became law in Section 79. Health and Safety at Work etc., Act 1974 although they were later repealed in a ‘tidying up’ measure.

Gathering support for “director responsibility” can be found from the European Union in the Green Paper: ‘Promoting a European Framework for Corporate Social Responsibility’ 2001 and in the same year the European Commission described Corporate Social Responsibility as a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with stakeholders on a voluntary basis.

The European Union returned to this theme in 2003. The European Commission then said listed companies should introduce an Annual Corporate Governance Statement covering key elements of their corporate governance structures and practices. The Commission wished to create a European Corporate Governance Forum to help encourage co-ordination and convergence of national codes and of the way they are enforced and monitored.

The Organisation for Economic Co-operation and Development endorsed this view in 2004 where they said:

“Another important board responsibility is to oversee systems designed to ensure that the corporation obeys applicable laws, including tax, competition, labour, environmental, equal opportunity, health and safety laws. In some countries, companies have found it useful to explicitly articulate the responsibilities that the board assumes and those for which management is accountable.

The board is not only accountable to the company and its shareholders but also has a duty to act in their best interests. In addition, boards are expected to take due regard of, and deal fairly with, other stakeholder interests including those of employees, creditors, customers, etc.”

---

2 Ibid at para 264
3 Proposals for a Safety and Health at Work Bill Department of Employment June 1973 (page 12)
4 http://europa.eu.int/commission_employment_social/cor/greenpap.htm
5 Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward COM (2003) 284 final 21.5.03
6 Commission Decision establishing a group of non-governmental experts on corporate governance and company law (2005/380/EC)
7 OECD Principles of Corporate Governance - VI. The Responsibilities of the Board op cit.
suppliers and local communities. Observance of environmental and social standards is relevant in this context. 13

This was a position which had already been embraced by the London Stock Exchange in 2003 following the widely publicized financial scandals at Worldcom, Enron and Tyco in the United States, Barings in the United Kingdom and Parmalat in Italy.

In July 2003 the present Combined Code on Corporate Governance was issued on behalf of the London Stock Exchange. Listed companies are expected to comply with its provisions. In situations where companies are unable to do this a considered explanation must be given to shareholders. Directors should pay due regard to their company's individual circumstances and bear in mind in particular the size and complexity of the company and the nature of the risks and the challenges it faces. The publication includes guidance on how to comply with particular parts of the Code: first, "Internal Control: Guidance for Directors on the Combined Code" published by the Institute of Chartered Accountants and second, "Audit Committees: Combined Code Guidance", produced by the Smith Group under the auspices of the Finance Reporting Council, which relates to the provisions on audit committees and auditors. In both cases, the guidance suggests ways of applying the relevant Code principles and of complying with the relevant Code provisions. Suggestions for good practice from the Higgs report14 are also included.

The Combined Code says that the board's role is to provide entrepreneurial leadership of the company within a framework of prudent and effective controls which enables risk to be assessed and managed. As part of their role as members of a unitary board, non-executive directors should constructively challenge and help develop proposals on strategy. Non-executive directors should scrutinise the performance of management in meeting agreed goals and objectives and monitor the reporting of performance. They should satisfy themselves on the integrity of financial information and that financial control and systems of risk management are robust and defensible.

The board should be supplied in a timely manner with information in a form and of a quality appropriate to enable it to discharge its duties. All directors should receive induction on joining the board and should regularly update and refresh their skills and knowledge. The Higgs Report says 'there should be a step change in training and development provision so that it is suited to the needs of boards.'

When the Combined Code of the Committee on Corporate Governance (the Code) was published, the Institute of Chartered Accountants in England & Wales agreed with the London Stock Exchange that it would provide guidance to assist listed companies to implement the requirements in the Code relating to internal control. Principle D.2 of the Code states that 'The board should maintain a sound system of internal control to safeguard shareholders' investment and company's assets'. Provision D.2.1 states that 'The directors should, at least annually, conduct a review of the effectiveness of the group's system of internal control and should report to shareholders that they have done so. The review should cover all controls, including financial, operational and compliance controls and risk

13 Views which have found resonance in the United States. "Creating an ethical culture means instilling and maintaining a commitment to doing the right thing, this time and every time - so much so that it becomes entwined in the essential DNA of the firm." -William H. Donaldson, Chairman, U.S. Securities and Exchange Commission (Remarks before the Bond Market Association, New York; April 20, 2005)

management.' In the Appendix it says that significant risks, requiring assessment, may for example, include those related to.....health, safety and environmental issues.'\(^5\)

Recently Bills have been proposed in the House of Commons to further address these issues.

In 2003 Ross Cranston QC MP\(^6\) when introducing the Company Directors (Health and Safety) Bill stated:

Directors are responsible for how companies operate. It is directors who set a company's policy on health and safety, and it is they who decide how high health and safety is on the agenda in comparison with other matters. It is they who determine the resources, including management resources, which a company allocates to health and safety. It is they who decide how health and safety is monitored in the company, whether accidents are properly investigated and what preventative action is taken for the future. The British Standards Institution summarises the position thus:

"Ultimately responsibility for occupational health and safety rests with top management."

Whilst more recently The Health and Safety (Directors' Duties) Bill was sponsored by Stephen Hepburn MP\(^7\) The purpose of the Bill was to amend the Health and Safety at Work etc., Act 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 information directors.\(^8\)

The British Courts and the Judiciary have echoed these themes when very serious and tragic circumstances have come before them for review.

The Hon. Mr. Justice Sheen, the Wreck Commissioner under the Merchant Shipping Act 1894 charged with the Conduct of the Formal Investigation into the capsise of the Herald of Free Enterprise said:\(^9\)

"All concerned in management, from the members of the Board of Directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness."

Mr. Desmond Fennell OBE QC, the Inspector charged with the Investigation into the King's Cross Underground Fire of 18th November 1987, said in his 1988 Report.\(^{20}\)

\(^{15}\) In July 2003 the present Combined Code on Corporate Governance was issued on behalf of the London Stock Exchange. The Code applies for reporting years beginning on or after 1 November 2003.

\(^{16}\) Ross Cranston QC MP (Dudley, North (Labour)) Company Directors (Health and Safety) Bill [Bill 82] introduced to the House of Commons: 25th March 2003

\(^{17}\) The Health and Safety (Directors' Duties) Bill (Bill 22 of 2004-05) was sponsored by Stephen Hepburn MP (Jarrow (Labour))

\(^{26}\) [Directors with the responsibility to ensure that the board has the necessary information to comply with the general duty]. The measure would have applied to England, Wales and Scotland. The point was well made by Eric Forth M.P. on behalf of HM Opposition, that any such measures should apply to the public sector. The National Audit Office in A Safer Place to Work: Report by the Comptroller and Auditor General HC 629 Session 2002 - 2003: 30 April 2003 ISBN 0-10- 292143-1 said: In 1999, the Government set targets to reduce the level of sickness absence, incidents of violence and accidents to staff in the NHS, by 20% by 2001 and 30% by 2003. However, the average sickness absence rates remain above target. Moreover, the overall numbers of reported violent and aggressive incidents have increased by 13%. The numbers of reported accidents have also increased.

\(^{19}\) The Hon. Mr. Justice Sheen, the Wreck Commissioner under the Merchant Shipping Act 1894 charged with the Conduct of the Formal Investigation into the capsise of the Herald of Free Enterprise on 6th March 1987, said in his Report of July 1987 (Report of Court No. 8074)

\(^{20}\) Mr. Desmond Fennell OBE QC, The Investigation into the King's Cross Underground Fire of 18th November 1987, HMSO 1988 (Cm 499)
"In my view it is imperative that a holding company charged with ensuring safety of operation should discharge its duty fully. It is not acceptable that it should try to discharge that duty by delegating it to its subsidiary, coupled with maintaining a loose supervision by having on the Board of the main company a director of the subsidiary company.”

Whilst Mr. Anthony Hidden QC, the Inspector charged with the Investigation into the Clapham Junction Railway Accident of 12th December 1988, said in his 1989 Report:21

"17.3...... The best of intentions regarding safe working practices was permitted to go hand in hand with the worst of inaction in ensuring that such practices were put into effect.

17.4 The evidence therefore showed the sincerity of the concern for safety. Sadly, however, it also showed the reality of the failure to carry that concern through into action. It has to be said that a concern for safety which is sincerely held and repeatedly expressed but, nevertheless, is not carried through into action, is as much protection from danger as no concern at all."

These views were endorsed by The Hon. Lord Cullen, Chairman, Piper Alpha Public Inquiry in his 1990 Report: The Public Inquiry into the Piper Alpha Disaster (Cm 1310) "That there were significant flaws in the quality of Occidental's management of safety which affected the circumstances of the events of the disaster."22

Speaking more generally, Mr Justice Jonathan Parker said in Barings (No.5) [1999]23

"Directors have, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors. (ii) Whilst directors are entitled...to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of delegated functions. (iii) No rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty, and the question whether it has been discharged, must depend on the facts of each particular case, including the director's role in the management of the company.”

Careful steps have been taken by the Health and Safety Commission and the Health and Safety Executive to oblige the Boards of companies to take effective measures in this area.

In 1981 the Health and Safety Executive stated24

'It is not enough to declare certain safety goals. People have to be convinced of their importance and that the organisation intends to achieve them. The cue will be taken from the top. Senior management has the influence, power and resources to take initiatives and set standards. This is demonstrated where positive attitudes of directors and senior managers are reflected in a high degree of safety awareness at all levels throughout the undertaking. If management at the highest level demonstrates its interest in and commitment to the provision of satisfactory standards of health, safety and welfare then subordinates are much more likely to know what is expected of them, know that they will be held accountable, and give priority to this subject.'

21 Investigation into the Clapham Junction Railway Accident HMSO 1989 (Cm 820)
22 The Hon. Lord Cullen, Chairman: The Public Inquiry into the Piper Alpha Disaster HMSO 1990 (Cm 1310).
23 Barings (No.5) [1999] 1 BCLC 433 at 489

In Action Point 11 it said:

"The Health and Safety Commission will develop a code of practice on Directors' responsibilities for health and safety, in conjunction 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)."

Action point 11 went on to say,

"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."

This was followed in July 2001 with the publication of Guidance Note INDG 343:

In the accompanying Press Release the Chairman of the Health and Safety Commission, Bill Callaghan, said,

"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."

And in May 2002 the HSC Chair Bill Callaghan said:

What I am looking for "is more information from more companies about their health and safety performance. A transparent account in the annual report will encourage companies to improve their performance and allow company managers to benchmark their progress against others. Reporting on health and safety performance sends a clear signal to workers, investors, customers and other stakeholders that a company takes its responsibilities seriously."

And on 2nd September 2003 Bill Callaghan, Chair, Health and Safety Commission wrote to the Right Hon. Patricia Hewitt, M.P. Secretary of State for Trade and Industry as follows:

"Modernising Company Law White Paper

The Health and Safety Commission (HSC) has considered your Consultation Document 'The Operating and Financial Review Working Group on Materiality' and in particular the key information to be included in the Operating and Financial Review (OFR).

As I stated in my letter of 3 December 2002 we see important benefits in including health and safety as a significant matter to be reported on alongside employment, environmental, social and community matters. It would send a clear signal to all companies that the Government and other key stakeholders see health and safety as a core element of corporate responsibility.

25 HSE Press Release CO19/02-13 May 2002
Good health and safety practice is an indicator of the social responsibility that the Government wishes to promote. And social responsibility, like charity, begins at home. Good health and safety practice is a clear indicator of the respect for people, which lies at the centre of this important new agenda.

With our sponsoring Ministers (then in DETR/DTLR) I challenged the top 350 UK companies in 2001 to report publicly on their health and safety performance from 2002 onwards. We have followed up with visits to discuss reporting and the response has been favourable as it has to other efforts we are making to encourage Boardroom attention to health and safety, such as encouraging directors to take responsibility. We are also encouraging investors to have regard to health and safety performance when making investment decisions.

We recently published some research, which shows that there has been a significant increase in the number of FTSE 100 companies publicly reporting - from 47% in 1995, to 56% in 2000, and now 91% in 2002. The strongest sectors on reporting include: chemicals, construction and building materials, mining, oil and gas, tobacco and water. The research highlighted that there remain a considerable number of top companies who do not report on health and safety and are unlikely to do so while the approach is a voluntary one. These are companies we must reach and a requirement to include health and safety information in the OFT is a way of achieving this objective.

Including health and safety must be seen as going with, not against, the grain. Suppliers, customers, workers, investors, insurers and other stakeholders are increasingly seeking information on health and safety performance as a key business risk. The costs of health and safety failures are significant - not only from catastrophic failures in high hazard plants but the significant drain of resources from 24 million working days lost each year from work related injury and ill health (bad backs, stress, falls, workplace transport incidents).

We would therefore urge you to include health and safety as a specific topic for company reporting to make clear that health and safety is an important element of the Government’s commitment to developing sustainable work and communities.

I am copying my letter to Des Browne, Minister of State, Department of Work and Pensions."
2. REVIEW FINDINGS

2.1 A detailed analysis of HSE Research Report 135/2003 prepared by Greenstreet Berman.

The Report explains that the Health and Safety Commission has issued Guidance (INDG 343, "Directors’ responsibilities for health and safety") on the role of board level directors and their equivalent in the public sector in the direction of occupational health and safety. This Guidance Note advises that organisations should assign directorial responsibility to a Board Director and outlines a range of board level tasks, such as policy formation and performance review.

The Greenstreet Berman Report summarises the results of a 2001/02-baseline survey and a 2003 follow-up of the extent to which there is board level direction of health and safety in large private and public sector organisations. The survey is restricted to organisations with over 250 employees. The survey was designed to:

1. Establish the proportion of large firms that have appointed a board level director for health and safety;

2. Develop a profile of board level health and safety management arrangements;

3. Develop an understanding of the factors influencing the design of board level health and safety arrangements, and;

4. Measure the extent, to which organisations were aware of the HSC guidance for directors, INDG 343.

The survey results were designed to be used for a number of purposes. Firstly, the survey results help answer the question of whether organisations are already directing health and safety at board level. Thus, the survey findings can inform the debate on the extent to which the HSC need to further promote board level direction of health and safety.

Secondly, the baseline survey was completed in the period November 2001 to January 2002. The follow-up second survey was completed in January - March 2003. Therefore, it is possible to gauge the extent to which organisations have increased board level direction of health and safety.

Thirdly, the survey findings can be used to guide the HSC’s strategy in a number of ways, including:

A. Identifying the reasons cited by organisations for providing board level direction of health and safety and the perceived benefits of board level direction - such reasons can be used to further promote the uptake of board level direction, and;

B. Identifying those aspects of board level direction wherein there is scope for improvement.

A large proportion of respondents from both surveys reported that many of the arrangements cited in the HSC Guidance Note were already in place. In particular it was found that the majority of organisations have assigned responsibility for health and safety to a board level director and most boards undertake a wide variety of health and safety tasks. However, only a minority of organisations have specifically appointed a director of health and safety (that is, a director whose primary responsibility interest is in health and safety). There is also variation in the extent, to which organisations achieve each part of the HSC guidance, suggesting issues relating to depth.
Areas appearing to offer scope for improvement:

i) Regularity of board discussions of health and safety;

ii) The scope of performance measures and reports received;

iii) Boards’ response to the reports and performance measures, and

iv) The level of consultation with the workforce.

The follow up survey found an increase in 8% in the direction of health and safety at board level but most of this increase was accounted for by an increase from 60 to 68% for large firms. In 2001 about half of these were appointed as “Director” of health and safety rising to almost 60% in 2003. It was thought that the issued Guidance (INDG 343, “Directors’ responsibilities for health and safety”) on the role of board level directors and their equivalent in the public sector in the direction of occupational health and safety remains an important factor in influencing board arrangements. 75% and 80% of respondents had heard of INDG 343 in the baseline and follow up surveys respectively.

Respondents continued to report that board level direction offered many benefits, including strong leadership, demonstrable commitment and better health and safety management.

Board level direction offered:

- Strong leadership
- Showed commitment, and;
- Helped to improve health, safety and risk management

There was it was felt clearly a need for further HSC/E action.

- In 2001 about 6% of organisations did not currently have board level health and safety representation and had no plans to review the role of directors/boards in health and safety in the next year.

- In 2001 12% of organisations did not have board level health and safety representation and had no plans to increase the role of directors/boards in health and safety.

- The perceived pressure on organisations to proactively manage health and safety seems to have fallen slightly - in 2001 almost 70% agreed or strongly agreed that there were very strong pressures compared with 62% in 2003.

- Public sector organisations are less likely to rate the benefits of board level direction.

- It is believed that the most important prompts relate to HSC/E actions and the general increase in the importance of health and safety.

- Any further promotion of INDG 343 should focus on the CEO/MD and other board members in those organisations without board level health and safety representation;

- In the case of the public sector, particular attention should be paid to the NHS.
As boards do appear to be influenced by awareness of INDG343, further promotion of the guide would appear to be worthwhile.

The report of the Centre for Corporate Accountability addresses two issues:

1. Whether, in trying to change the way in which companies and their senior officers conduct themselves in relation to health and safety, the Government should introduce new legislation; or whether instead it is just as effective for the Government to adopt voluntary codes of conduct, which have no legal basis and no capacity for outside enforcement. 26

2. In relation to the law that currently exists, it considers what techniques regulatory bodies should use to ensure that companies and other employers actually comply with it. It assesses whether compliance is best obtained through, on the one hand inspections and investigations with the threat of the imposition of formal enforcement notices and prosecution, or, on the other hand, through education and other forms of contact with duty holders in which regulators inform them about what they should do and encourage them to take action where necessary, but with no or little threat of actual enforcement.

This Report purports to be concerned to be primarily concerned with Director Responsibility but instead it focuses on the second question. The Centre for Corporate Accountability (CCA) correctly states that there is a substantial body of international and UK research on what motivates employers to improve their occupational safety and health performance, however, its analysis is highly misleading and in a number of instances, wrong.

Legal regulation

- It asserts that all the major reviews of the international literature conclude that the most important driver of management action to improve occupational health and safety performance is legal regulation.

- It reports that this finding is mirrored in the UK research, where the need to comply with the law was the most commonly cited reason for health and safety initiatives amongst all sizes of organisations.

- It erroneously states that there is growing evidence that wholly voluntary approaches - in the form of voluntary codes of conduct or corporate social responsibility initiatives for example- are largely ineffective in bringing about improved standards of health, safety or environmental performance. Despite the assertion of the Centre for Corporate Accountability 27 there is no evidence that this effort to date will not work. The Right Hon. Jane Kennedy, MP Minister of State, in 2004 in her evidence to the Select Committee on Work and Pensions said:

"directors are giving leadership and direction...the number of companies [where health and safety is directed at board level] had risen from 58 per cent to 66 per cent. We are making progress, the message is being heard by companies. So long as we are making progress, the need to further regulate has diminished. 28

The report of the Centre for Corporate Accountability further wrongly asserts that recent Health and Safety Commission decisions not to address either the current loophole in the law relating to directors' lack of legal safety obligations, or weaknesses in the regulations

26 The reviewer disagrees with the view that Guidance Notes have no legal basis and no capacity for outside enforcement. See the Draft Corporate Manslaughter Bill. HC 2005.
governing workers' rights to participation and consultation are inconsistent with the published research which suggests that new law on these issues could bring about significant improvements in occupational health and safety. An assumption is made that voluntary codes of conduct will not influence the behaviour of directors. To this reviewer's mind, and contrary to the views of the Centre for Corporate Accountability, the Government and other authorities have made strong efforts. A mass of voluntary and legal codes, mark an important first step. They are:

- The regulatory norms of the ILO and the European Union
- The Common Law
- Companies Act 1985
- Section 2, Company Directors Disqualification Act 1986
- Regulation by Licence and Contract
- FSA Listing Rules - including the sanctions of fines and censures for companies and directors.
- The Combined Code on Corporate Governance
- Self Regulatory Schemes, e.g. The IOD Chartered Director Programme
- The 'Fennell' Directors in Railway Companies (A Non - Executive Director with special responsibility for safety to be appointed to the Board and have direct access to the Chair).29
- Recent measures within the Company Law Reform Bill 2005, through its proposed introduction of a Statutory Statement of Directors General Duties
- Strengthening shareholder rights and socially responsible investment
- The Orange Book- Management of Risk – Principles and Concepts HM Treasury
- The General Duties, Health and Safety at Work etc., Act 1974
- Section 37, Health and Safety at Work etc., Act 1974
- HSC's Revitalising Health and Safety (RHS) Strategy Action points 2, 11 and 13
- HSC Guidance: Directors’ Responsibilities for Health and Safety INDG 343
- The promotion of director responsibility for health and safety through Case Studies (www.hse.gov.uk/businessbenefits/)
- Two indices of Health and Safety Performance (CHaSPI and the SME indicator)
- Annual Audit Reports in the context of Safety Case requirements for railways, offshore installations etc.
- Naming and Shaming: HSE Prosecutions Database (www.hse-databases.co.uk/prosecutions/)

They provide a useful platform of guidance indicative of good practice with elements of compulsion and persuasion.30 Despite the assertion of the Centre for Corporate Accountability31 there is no evidence that this effort to date will not work.

These measures when aligned with interventions “involving the creation of “strategic relationships between organisations and groups”, engaging with the most senior managers to enlist their commitment”, and “encouraging those at the top of the supply chain to use their

---

29 Such directors also invariably work in the nuclear, offshore oil and gas, mining and chemicals industries.
30 The UK is one of the countries best placed to gain economic benefit from globalisation. It has a competitive advantage that comes from being open and adaptive to a free-flowing, fast evolving global business culture.
influence” would be entirely appropriate and likely to attract a consensus. This is probably the best approach, especially in an area that has not been regulated in a detailed manner before.

Against this view the Centre for Corporate Accountability cites Gunningham as saying:

“the key to motivating CEOs and senior management to improve safety is to make them liable to personal prosecution and to actually enforce such provisions. Such prosecution is not only a powerful motivator to the CEO concerned, but also has a flow – on effect to senior management in other organisations.”

It is interesting to note that this statement was made six years ago in relation to matters in Australia, a factor to which the reviewer will return later, and referred to management responsibilities and not corporate governance. Moreover, in another work in the same period, Gunningham and Johnstone make the point that:

“prosecutions would primarily be initiated when deterrent methods are required in the face of failure of enforcement methods based on persuasion and voluntary compliance.” (reviewer’s italics)

In further support of the Centre for Corporate Accountability’s view the Report of Brabazon, Tipping et al. was quoted as follows:

“The majority of interviewees perceive that if the number of prosecutions of Directors and Corporate Manslaughter charges increased then this could result in large improvements in health and safety standards as this may enforce the message that directors are responsible for the health and safety of their workforce.” (reviewer’s italics)

Again, it should be noted that this research related to the approach to the management of health and safety in the UK construction sector five years ago and it was hedged with caveats. However, notwithstanding that comment, the quotation is misleading since the interviewees in that study were quoted as having felt

“that health safety should be on the agenda at all board meetings and that little could be said about the impact of corporate manslaughter legislation for it to act as a motivator for change at director level.”

and in accord with the Government’s and the Health and Safety Commission’s current view Brabazon P.A., Tipping et al. concluded:

“the interviewees agree that an effective and proactive safety culture is essential to improve the safety record. The current position within the construction industry is there is [an] insufficient focus on this area due mainly to the short term view commonly taken by the industry.”

35 ibid. at p. 327
37 ibid. at p. 55
38 ibid.
This reviewer finds little support for the view that:

"statutory directors' duties are almost certain to have provided a more effective and efficient 'lever' than the other interventions HSE now intends to pursue and develop."39

Indeed Fisse and Braithwaite argue that it is important to ensure that state resources are not frittered away in the difficult exercise of trying to pin criminal responsibility on individual managers and directors within organisations which have contravened their duties under the OHS statute.40

and as Ayres and Braithwaite point out that

"a strategy based mostly on punishment will undermine the good will of actors when they are motivated by a sense of responsibility. Punishment is expensive, persuasion is cheap. A strategy based mostly on punishment wastes resources on litigation that would be better spent on monitoring and persuasion. A strategy based mostly on punishment fosters an organised business subculture of resistance to regulation wherein methods of legal resistance and counterattack are incorporated into industry socialisation."41

Ayers and Braithwaite have advocated that one should think in terms of a pyramid of regulatory strategies. As Baldwin, Scott and Hood have observed:

"In this model self regulation should be favoured as the initial approach, and where it proves unsuccessful, 'enforced self - regulation', which involves greater state monitoring, should be introduced. Only where these strategies fail should state regulation with discretionary punishment, and finally with mandatory punishment be resorted to."42

However, both the Centre for Corporate Accountability and the reviewer have relied on the views of Australian authorities. Perhaps, however, warnings from Montesquieu, that law is so closely linked to its environment that it could rarely change its habitat, should be heeded and we should not be afraid to rely on our own experience and accumulated knowledge built up over a period of 170 years when reforming our laws.43 Caution should be exercised in drawing comparisons across jurisdictions.44 The Australian regulatory environment of the 1990s is somewhat different to that of the UK today.45 Moreover, the sensitivities surrounding the reform of company law with a view to securing improvements in health and safety are fraught with complex difficulties which require careful analysis and reflection of the national social, cultural, business and political environment.

39 Making Companies Safe: What Works, Centre for Corporate Accountability, London 2004 at p. 28
45 Responsive Regulation for Australia, Braithwaite J. in Business Regulation and Australia's Future, Grabosky P. and Braithwaite J. Canberra: Australian Institute of Criminology, 1993
Much of the paper addresses the second issue, viz: It is asserted by the Centre for Corporate Accountability that: In relation to the law that currently exists, it considers what techniques regulatory bodies should use to ensure that companies and other employers actually comply with it. It assesses whether compliance is best obtained through, on the one hand inspections and investigations with the threat of the imposition of formal enforcement notices and prosecution, or, on the other hand, through education and other forms of contact with duty holders in which regulators inform them about what they should do and encourage them to take action where necessary, but with no or little threat of actual enforcement.

Although this area is not central to the principal discussion on Director Responsibility it should be noted that Inspectors of the Health and Safety Executive are not policemen and have a quite different role. It is to use their best endeavours to raise health and safety standards. Their policies and practices have been developed gradually over 170 years and conform to the British national style. A subtle and sophisticated range of techniques have been developed. Although the main task for the majority of inspectors has been the inspection of workplaces, inspectors at various levels have assisted in framing and revising legislation; undertaking investigations, surveys and research; participating in the preparation of advisory literature; liaising with manufacturers of plant and equipment, sitting on various kinds of technical committees; delivering lectures and participating in conferences at home and overseas. Typically, only a very small proportion of offences discovered by inspectors have lead to prosecution. Prosecution has typically been regarded as a tool of last resort. Such action must be focused on the curbing of wilful, flagrant or reckless behaviour which has resulted or is likely to result in serious injury.

Wilson has noted that one of the advantages of the UK regulatory system lies in the quality of relationships between Inspectors and the inspected.

Whilst Greenberg found little correlation between the number of inspections, the number of prosecutions, the size of fines and the number of accidents.

The approach is best seen in the following quotation from the Annual Report of HM Chief Inspector of Factories 1968:

"The enforcement and advisory work of the Inspectorate is not done with a starry - eyed and theoretical approach. The Inspector is fully aware that there may be three sides to a problem – the management’s and the worker’s as well as his own. The management has to run a successful business in a competitive world and must constantly experiment with new processes and materials. The worker must be allowed to behave as a human being may reasonably be expected to behave, and not as an automaton. The Inspector has to continue the job that the Inspectorate has been doing for over 130 years, that of enforcing the standards laid down by the law, many of which are not in absolute and precise terms, but hedged about by such phrases as ‘reasonably practicable’ and adequate and suitable’. In these circumstances the Inspector’s training in the uniform application of the law and his wide experience are important. More than this, he co-operates with the most forward looking managements and trade and union associations in achieving standards which will become the legislation of tomorrow."

---

49 See also, Inspector Howell’s report for the last quarter of 1836 in which it was said that “frequent visiting was equally efficacious as convictions in producing obedience to the law” (Parl. Papers, 1837, XXXI, 107).
Moreover, policy makers and legislators must proceed with caution for as the CBI has noted: "The case for further legislation as a motivator for higher standards of health and safety...has not been, nor is it likely to be made."\(^{50}\)

It is significant that the European Commission has defined corporate social responsibility (CSR) as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis."\(^{51}\) (reviewer's italics)


2.3 Greenstreet Berman’s Response

Points of agreement

First, it is possible to highlight a number of areas of agreement between the Centre for Corporate Accountability and the Health and Safety Commission’s strategy and the report of the Centre for Corporate Accountability expresses a view that:

(i) Enforcement is important, along with education and the business case;
(ii) Higher fines are needed;

Directors and safety/employee representatives play an important role in health and safety, and that their involvement in health and safety should be developed;

There is a need to improve the provision of occupational health services.

Points of agreement lost in the detail

Also, because the report of the Centre for Corporate Accountability focuses on the argument for enforcement and therefore highlights the limitations of incentives and education, their view about the importance of education and incentives is "lost" in their report. This is illustrated by the following statements in the Centre for Corporate Accountability’s report:

"This does not mean that campaigns and educational activities are not important...while it may be important to explore more effective methods for communicating with organisations, and especially SMEs...") (p65)

"If these arguments (that there is a business case for health and safety) could be shown to be persuasive, then - assuming that you could make them widely known, which as we have seen above is not altogether easy- they could prove to be an effective motivating factor for change without the need for inspectors to enforce the law." (p69)

Care must be taken in interpreting the report of the Centre for Corporate Accountability as an argument against education and incentives per se. Rather, they argue, in the detail of the report, that education and incentives may "only be effective if they occur in the context of consistent and frequent inspections backed by enforcement activity" (p65). Thus, the summary of main findings in the Centre for Corporate Accountability’s report may not fully reflect the more detailed sections of their report.

It is also reasonable to note that much of the evidence cited by Centre for Corporate Accountability was also cited by the Greenstreet Berman "Evidence Base", such as that the activity of regulators is fundamental to the creation of reputational risk, and that the interpretation of this evidence is common to the two reports.

Differences in the representation of the Health and Safety Commission’s strategy

The Centre for Corporate Accountability’s report does not convey the Health and Safety Commission’s strategy in the same way that the Health and Safety Commission expresses its own strategy in the 2004 strategy document. For example:

Whilst the Health and Safety Commission suggests that the introduction of new regulations should not be the automatic response to a new issue or changing circumstance, there is no mention of revoking regulations or moving away from current regulations and their enforcement.
Whilst the Health and Safety Commission wish to assure "a goal setting system of regulation", the Centre for Corporate Accountability argues against a "wholly voluntary approach" which is not apparent in the Health and Safety Commission's strategy;

The Centre for Corporate Accountability often presents enforcement and education as mutually exclusive alternatives (e.g. part three is titled "Securing compliance without formal enforcement", for example), and suggests that alternative strategies represent a shift, whilst the Health and Safety Commission's strategy and supporting evidence is cited in support of a flexible and complementary mix of advice and enforcement that mirrors the principles of the Robens Committee in 1972;

The Health and Safety Commission's strategy also argues for a new law on corporate killing and the removal of crown immunity, which is not covered by the report of the Centre for Corporate Accountability.

Because of this, the report of the Centre for Corporate Accountability does argue against certain positions that it is difficult to identify in the Health and Safety Commission's strategy as stated in the 2004 document.

Points not addressed by the Centre for Corporate Accountability

As the Centre for Corporate Accountability's report does not address or consider the same range of aims and issues as the Health and Safety Commission's strategy, it does not review or consider the entire evidence base, specifically:

* The need to improve access to occupational health support;

* The need to cater for the special needs and specific health and safety problems associated with Small and Medium sized Enterprises (SMEs), and;

* The case for closer working between the Health and Safety Executive and local authorities.

In addition, the Centre for Corporate Accountability's report:

1. Does not accord the same importance to the distinction between SMEs and larger organisations and hence does not consider the relative virtues of interventions (education and enforcement for example) for different sizes of organisations to the same extent as the Health and Safety Commission;

2. Takes little account of the SME specific issues and supporting evidence addressed by the Health and Safety Commission's strategy, and hence does not clearly review the evidence for (say) working with small firms' intermediaries in the context of the specific needs of SMEs.

Points of debate

The points of debate revolve around:

* The role to be played by enforcement, advice and incentives, and the balance required between these;

- The case for more regulations, versus whether the commonly agreed aim of greater director and worker involvement can be achieved without new regulations.
In response to these points it is Greenstreet Berman’s opinion that the report of the Centre for Corporate Accountability:

- Has not fully considered the possibility that the role played by "alternative" strategies has changed over the past 10 or so years, or that the role of these alternative strategies could change. For example, whilst they cite evidence that the promotion of the business case has had a limited effect, although this is debatable, the report of the Centre for Corporate Accountability has not mapped out the change in the reported increased importance of insurance since the 1990s. Also, evidence that (say) shareholder pressure has not been a driver for health and safety, can also be interpreted as indicating that (1) there is scope for shareholder pressure to have a greater role and (2) steps should be taken to generate shareholder pressure instead of citing this as a reason to downgrade this option;

- Makes no mention of the evidence against enforcement or evidence that suggests enforcement has its limits, whilst it does cite evidence against "alternative" interventions and incentives;

- Often equates inspection with enforcement, and does not fully consider the extent to which inspection involves the provision of advice and information to employers;

- Does not consider alternative explanations for why inspections with enforcement are associated with measurable outcomes whilst inspections without enforcement are not;

- Cites evidence about the relative strengths and weaknesses of alternative interventions (but not enforcement), such as reputational risk, tending to present them as binary arguments "for or against" each intervention rather than trying to map out where each intervention may be of value and what mix of interventions may be best in different contexts;

- Does not fully acknowledge the lack of evidence for the effectiveness of mandation specifically of positive legal directors’ duties or worker consultation;

- Has not given due weight to the frequency and consistency of employers’ request for more advice and support, particularly from SMEs;

- Focuses on how to secure compliance whilst the HSC strategy and supporting evidence was discussed in the wider context of how to improve workplace health and safety.

Are there any new studies since the end of 2003 that have significant findings?

Greenstreet Berman is of the view that there have been some studies completed since 2003 that have significant findings. In that firm’s opinion studies completed since 2003 provide further support for a flexible strategy that adopts a responsive regulatory approach to organisations according to their a priori health and safety performance and commitment. They also provide an explanation for why inspections with enforcement have measurable outcomes, whilst inspections without enforcement may not - namely that inspectors target enforcement on poor performers who have scope for improvement, whilst limiting their action to advice in the case of better workplaces.
A KPMG review (Key Management Motivators in Occupational Health and Safety, KPMG, 2001) reaches similar conclusions to Greenstreet Berman’s 1998 study. The KPMG follow up work contests Gunningham’s assertion that financial incentives are not significant.

2.4 A detailed analysis of the Health and Safety Laboratory’s review undertaken for the Health and Safety Executive of research reported in academic and learned journals on the subject of director responsibility for and leadership on health and safety.

This report presents a review of the literature on directors’ responsibilities for health and safety. The Health and Safety Laboratory (HSL) carried out the work for the Cross-Cutting Interventions Division of the Health and Safety Executive (HSE). The report was drawn up to help build the evidence base in the area of directors’ responsibilities for health and safety, to assist the Health and Safety Commission (HSC) when advising ministers on proposed legislation that places further responsibilities on directors regarding health and safety.

Method

A search of literature databases was conducted. However, only a small number of empirically based or peer-reviewed papers were found; HSL are of the view that the majority of literature in this area is either opinion based or takes the form of commissioned reports of the Health and Safety Executive.

This is an area where law reform is being considered and yet the extensive relevant literature in the fields of EC law, criminal law, business law, labour law, company law, administrative law, criminology and legal practice were ignored. In addition, important reports generated by Government and the Financial Institutions, to which the reviewer has referred, were not considered. The analysis is the poorer because of these omissions.

Main Findings

HSL believe that under current UK legislation directors do not have to undertake proactive health and safety management in their organisation, although directors may be held culpable if they fail to react to a known unsafe situation. The reviewer disagrees with this view. HSL confirms that there have only been a small number of successful prosecutions of directors for health and safety offences to date.

Hand Safety Commission guidance recommends that directors lead safety from the top of an organisation arguing that it is essential both for effective health and safety management and an effective safety culture. Surveys of directors indicate that most directors recognise this responsibility. However, a recent survey of UK directors revealed that in 26% of the companies surveyed health and safety is not led at director level (Greenstreet Berman, HSE Research Report 135/2003).

HSL believe that there are many motivators for directors to engage with health and safety:

- Compliance with legislation is recognised as the key motivator.
- Fear of loss of reputation is closely related to compliance with legislation, as fear of prosecution and the bad publicity it would bring is recognised by directors as being detrimental to business success.
- There are also more direct financial considerations for many companies; effective health and safety management is perceived as being good for business, with benefits ranging from increased profit and turnover, to increased staff morale and retention.
- For many smaller businesses health and safety management is also a necessary part of winning contracts when larger companies specify the health and safety standards they expect from their suppliers.
Moral responsibility for protecting workers is another reason cited for director leadership of health and safety. This is particularly the case in small and medium sized businesses where directors are more likely to know their workforce and interact with them more frequently than in large organisations.

HSL believe that the introduction of proposed legislation on directors’ duties for health and safety could have the beneficial effect of improving health and safety management and reducing accidents, injury and ill health rates due to increased director involvement. But it may be unpopular with organisations and their directors in particular.

Because of the publicity currently surrounding corporate manslaughter legislation, directors may be wary of further legislation requiring them to take responsibility for health and safety. Any new legislation may also be difficult to enforce since the assessment of proactive measures taken by boards to promote health and safety is potentially problematic.

HSL Recommendations

➢ There is a widely held acceptance of the potential effectiveness of Director Leadership schemes for bringing about improvements in occupational health and safety and many large UK companies are now taking director leadership of safety seriously. However, not all companies are aware of the Health and Safety Commission’s publication ‘Directors’ responsibilities for health and safety’. The Health and Safety Executive should therefore continue to publicise this leaflet, the case studies on director leadership and other relevant publications.

➢ There is limited empirical evidence regarding director leadership of health and safety, specifically in relation to small and medium sized enterprises, the public sector and non-unionised workplaces. There is scope for further research to provide more detailed evidence.

➢ The available literature suggests that directors may lack the specific competence (knowledge and skills) required to lead effectively on health and safety, and that rectifying this may improve organisations’ health and safety performance. The issue of training for directors merits further attention.

➢ Before any legislation to give directors responsibilities for health and safety is introduced, full consideration should be given to its impact on organisations. Particular attention should be paid to small and medium sized businesses to ensure there is not a disproportionate burden on them.

➢ Consideration should also be given to how to enforce any new legislation, and how its success will be measured.
2.5 (i) An assessment of the key findings from the above three key pieces of research concerning the factors influencing directors to take responsibility.

(a) The report of the Centre for Corporate Accountability aimed to provide a comprehensive review of the evidence on the relative effectiveness of the use of law to obtain improvements in health and safety standards and also the various regulatory techniques and approaches to ensure that companies comply with existing health and safety law. It questions whether statutory duties on directors should be introduced but it also addresses cognate issues such as whether further rights should be afforded to workers to participate in decision making and explores the utility of the Health and Safety Commission and the Health and Safety Executive in their education and enforcement role. The report also examines the strategic partnerships and relationships of the Health and Safety Commission and the Health and Safety Executive.

This Report purports to be concerned to be primarily concerned with Director Responsibility but instead it focuses on a further question, that is in relation to the present law, what techniques regulatory bodies should use to ensure that companies and other employers comply with it. The report of the Centre for Corporate Accountability assesses:

"whether compliance is best obtained through, on the one hand inspections and investigations with the threat of the imposition of formal enforcement notices and prosecution, or, on the other hand, through education and other forms of contact with duty holders in which regulators inform them about what they should do and encourage them to take action where necessary, but with no or little threat of actual enforcement."

The reviewer would make three comments. More evidence should have been provided on the subject of director responsibility; second, quite properly the enforcing authorities achieve their objectives by a combination of enforcement, education and other forms of contact and more recognition should have been given to this, and finally greater rigour should have been provided in the execution of this study.

(b) The main findings from the Greenstreet Berman survey of respondents revealed that 66% in 2003 reported that health and safety management was directed at board level compared to 58% in 2001; 70% of leading companies and 55% of public bodies surveyed in 2003 reported that health and safety management was directed at board level representing little change since 2001; 69% of large firms reported that health and safety management was directed at board level, an increase on the figure of 59% in 2001 whilst 82% of respondents in 2003 reported that they had a board level person responsible for health and safety management.

The principal reasons given for choosing board level direction in the 2003 survey was that this is best practice; it is a recognition that power and control is located at board level, that corporate direction is needed and that this is the best way of meeting new legislative responsibilities.

For those respondents whose firms had chosen not to direct health and safety management at board level they reasoned that health and safety management was an operational matter; that their firm had a policy of delegation; that the operations were too diverse for a corporate response and that health and safety management was perceived not to be an issue for directors.

Factors which were significant in influencing the design of board level arrangements were the perceived increased importance of health and safety management; high risk operations in that
company; Health and Safety Commission Guidance and concerns centering on occupational
health performance.

In a paper submitted to the Health and Safety Commission in September 2003 Neal Stone
recognized some improvements but recognized that there had been little impact in some areas.
He said:

"It is clear from the evidence provided by the research undertaken on behalf of HSC/E and
from the views of stakeholders that there are clear signs of a growing number of boards of
large and medium sized organizations providing the leadership and direction that HM
Government and HSC/E consider essential if we are to achieve our health and safety targets.
HSC's strategy has played an important part in producing these improvements.

There remains, however, a need to reach out and persuade and influence a considerable
number of organizations, at least one in six, who do not consider board level direction and
leadership necessary or desirable and have no plans to make the required changes. It is clear
also from the research that the level of real Board involvement in some cases is fairly
superficial - health and safety may be on some board agendas direction and leadership is
lacking.

It is regrettable that the research was not forward looking and nor did it focus on the full
range of corporate activity in Britain in the public and private sectors. Large firms, protective
of their reputation, present a particular challenge as do the smaller micro - businesses but
both of these find themselves, for different reasons, to be relatively straightforward targets for
the enforcement agencies. But the UK has 2.2 million companies, many of which are not
micro businesses nor are they large. Currently the public sector in the United Kingdom
provides employment for 5.846 million workers, which as a proportion of total employment is
20.4 per cent. The Greenstreet Berman study was unrepresentative of a number of key
groupings, including the latter. Two of Britain's largest employers, the Ministry of Defence
and the NHS, also received scant attention.

(c) The third report, that of the Health and Safety Laboratory of the Health and Safety
Executive, aims to provide

"a comprehensive review of UK and international literature on director leadership of
occupational health and safety, specifically focusing on factors influencing leadership
behaviour and the perceived benefits such an approach brings in terms of improvements in
occupational health and safety performance."

Its aim was to assist the Health and Safety Executive in

"reviewing its position with regard to regulating directors duties for health and safety,
specifically, when considering whether to introduce additional legislation for directors' 
responsibilities."

Again the study lacked the necessary rigour, moreover, this is an area where law reform is
being considered and yet the extensive relevant literature in the fields of EC law; criminal
law; business law; labour law; company law; administrative law; criminology and legal
practice were ignored. In addition, important reports generated by Government and the
Financial Institutions, to which the reviewer has referred, were not considered. The analysis is
the poorer because of these omissions.
2.5 (ii) The likely impact of any new legal duties placed on directors.

The codification of directors’ duties in this field is important, timely and desirable. It can make a useful and necessary contribution to corporate governance. If handled sensitively it could make a valuable contribution to UK health and safety. This would be particularly the case for small and medium sized companies where other forms of intervention have not met with success.

Section 16 of the Health and Safety at Work etc., Act 1974 provides for the issue and approval of codes of practice. The issue of an Approved Code of Practice together with an enhanced Guidance Note preceded by a short set of regulations would seem an ideal way forward.

The Guidance Note should further develop advice given in Successful Health and Safety Management but applied to Director Responsibility. It would describe the differing obligations of large, medium and small businesses, the complex and more straightforward and the more or less risky. Care should be taken not to place too great a burden on small and medium sized enterprises. Note would be taken of special areas of responsibility, for example, the railways, hazardous chemicals, nuclear installations and construction.33

The Approved Code of Practice will provide further practical guidance in relation to the requirements of sections 2-7, or the new regulations on directors’ responsibility. By virtue of section 17, a failure on the part of any person to observe any provision of an approved code of practice does not of itself render that person liable to civil or criminal proceedings.

Once these provisions have been put in place Board Directors should be trained in their roles. Accredited training may be carried out by private sector providers with the support of the Confederation of British Industry, the Institution of Directors, the Health and Safety Commission and the Health and Safety Executive.

These measures should have equal application in both the public and private sectors.

33 Mr. Desmond Fennell OBE QC, the Inspector charged with the Investigation into the King’s Cross Underground Fire of 18th November 1987, said in his 1988 Report: Investigation into Kings Cross Underground Fire (Cm 499)

".....London Underground accepted my suggestion that it should have on its Board a non –executive director whose specific responsibility would be safety. The appointment will be subject to the approval of the Board of London Regional Transport. That director should, in my view, be a person with relevant experience who, after independent outside advice, could lay down safety standards and establish performance targets against which the safety standards in the company could be judged. As a non-executive director of London Underground, he will be best placed to report independently to the Board of London Regional Transport on safety matters, and should have direct access to the Chairman of London Regional Transport.”
3. CONCLUSION and an assessment of the reliability of the evidence base on director responsibility for health and safety and its fit with current HSE/E measures to promote greater director responsibility and leadership on health and safety.

The report sets out the findings of a peer review of three pieces of published research which was commissioned by the Health and Safety Executive for the Health and Safety Commission as part of its advice to Ministers on the issue of whether new duties should be imposed on directors. The three pieces of research concerned had been undertaken by the Centre for Corporate Accountability, the consultancy firm Greenstreet Berman and the Health and Safety Laboratory of the Health and Safety Executive.

The objectives of the commissioned review were to provide assessments of the:

- thoroughness of the three reports in identifying and surveying relevant published research;
- their key findings concerning the factors influencing directors to take responsibility for health and safety; the likely impact of any new legal duties placed on directors; and how directors exercise this responsibility and to what extent;
- reliability of the evidence base on director responsibility for health and safety and its fit with current HSE/E measures to promote greater director responsibility and leadership on health and safety.

Significant pieces of relevant research have been overlooked or misinterpreted by the Centre for Corporate Accountability, Greenstreet Berman and the Health and Safety Laboratory. These shortcomings have been identified and discussed within the body of the Report.

Three million businesses in Britain employ fewer than 10 employees. More evidence might have been provided of ongoing work in relation to the directors of these businesses, the vast raft of businesses that are classified in the middle ground, between this group and the FTSE 350, as well as to corporations in the public and voluntary sectors. Whilst good work is being carried out in relation to the FTSE 350 this effort needs to intensified and extended more widely.

The Health and Safety Commission and the Health and Safety Executive are committed to promoting health and safety management as an integral part of effective business management, achieving higher levels of recognition and respect for health and safety as:

- an integral part of a modern, competitive business and public sector;
- a contribution to social justice and inclusion;

encouraging awareness of the importance of greater corporate responsibility for health and safety and promoting good practice for all sizes of organisation in all sectors.

The Health and Safety Commission and the Health and Safety Executive have set in train measures which include challenging directors of all organisations, private, public and voluntary, to provide leadership and direction on health and safety. This entails following Health and Safety Commission guidance; developing tools for use by stakeholders (including business, institutional investors, insurers, employers and trade unions) to further their goal of achieving greater corporate responsibility and developing levers for improving health and safety (CHAStPI and the Health and Safety Performance Indicator for small and medium sized enterprises).
The Health and Safety Commission and the Health and Safety Executive are working to raise the profile of health and safety on the Corporate Social Responsibility Agenda; developing a series of case studies that show the business and social benefits of well managed health and safety and the promotion of public reporting of health and safety targets and performance so that information is made readily accessible to all stakeholders.

This work should continue and be co-ordinated with work across Government. Second, work on the evidence base should be completed with a view to the adoption of an Approved Code of Practice (ACOP) on Director Responsibility. This should be accompanied by a step change in the training and development of Directors in this field in accord with the recommendations of the Higgs Report.
Bibliography

Ayres I and Braithwaite J. Responsive Regulation, Transcending the Deregulation Debate, Oxford University Press, Oxford 1992


Barings (No.5) [1999] 1 BCLC 433 at 489


Braithwaite J Responsive Regulation for Australia, in Business regulation and Australia’s future. Grabosky P. and Braithwaite J. Canberra: Australian Institute of Criminology, 1993


Committee on Safety and Health at Work Crnd. 5034 HMSO. London 1972.

Companies Act 1985

Companies Act 1985 (Operating and Financial Review and Directors’ Report etc.) Regulations 2005

Company Directors Disqualification Act 1986

Company Directors (Health and Safety) Bill [Bill 82] introduced to the House of Commons: 25th March 2003

Company Law Reform Bill 2005


28


Draft Corporate Manslaughter Bill. HC 2005


Financial Services Authority, Listing Rules. 2005


Hansard HC Deb. 26 March 1996 c 898

Hawkins K., Compliance Strategy, Prosecution Policy and Aunt Sally, British Journal of Criminology, 1990, 30 (4), 444-466


Health and Safety at Work etc., Act 1974

Health and Safety Executive, Prosecutions Database (www.hse-databases.co.uk/prosecutions/)

Health and Safety Executive ‘Regulation, Enforcement, Inspection and What We Will Do’ Paper to the HSE Board October 2003: annex 2 p.5


Mr. Anthony Hidden QC Investigation into the Clapham Junction Railway Accident HMSO 1989 (Cm 820)

Mr. Desmond Fennell OBE QC, The Investigation into the King’s Cross Underground Fire of 18th November 1987, HMSO 1988 (Cm 499)

Montesquieu, De l’esprit des lois (1758)


Parliamentary Papers, 1837, XXXI, 107

Promoting a European Framework for Corporate Social Responsibility’ 2001


Proposals for a Safety and Health at Work Bill Department of Employment June 1973


The Health and Safety (Directors’ Duties) Bill (Bill 22 of 2004-05)

The Hon. Lord Cullen, Chairman: The Public Inquiry into the Piper Alpha Disaster HMSO 1990 (Cm 1310).


The Promotion of Director Responsibility for Health and Safety through Case Studies (www.hse.gov.uk/businessbenefits/)


Directors' responsibilities for health and safety - the findings of a peer review of published research

Professor Philip James
Middlesex University Business School
The Burroughs
Hendon
London NW4 4BT

This report details the outcomes of a peer review of three pieces of published research which was commissioned by the Health and Safety Executive as part of its preparation of advice to Ministers on the issue of whether new statutory health and safety duties should be imposed on directors. On the basis of the evidence reviewed, it is concluded that the attitudes and behaviour of directors do exert an important influence over their organisation’s health and safety management and performance and that, while directors already consider themselves to face considerable legal, commercial and societal pressure to take responsibility for health and safety and to avoid the occurrence of damaging incidents, their commitment to the issue is often problematic and frequently seen to be so by other managers. It is further concluded that the evidence available provides a strong, but not conclusive, basis for arguing that the imposition of ‘positive’ health and safety duties on directors would serve to usefully supplement the liability that they currently face under section 37 of the Health and Safety at Work Act.

This report and the work it describes were funded by the Health and Safety Executive (HSE). Its contents, including any opinions and/or conclusions expressed, are those of the author alone and do not necessarily reflect HSE policy.
## CONTENTS

### EXECUTIVE SUMMARY

1. INTRODUCTION ........................................................................................................... 39
   1.1 INTRODUCTION ....................................................................................................... 39
   1.2 TERMS OF REFERENCE AND THE REPORTS INVOLVED .............................. 40
   1.3 NATURE OF THE THREE REPORTS ................................................................. 40
   1.4 METHODS............................................................................................................... 41

2. REVIEW FINDINGS ...................................................................................................... 43
   2.1 INTRODUCTION ....................................................................................................... 43
   2.2 THE SIGNIFICANCE OF DIRECTORS’ ATTITUDES & BEHAVIOUR .................... 43
       2.2.1 Summary ........................................................................................................... 44
   2.3 DIRECTORS’ PRIORITISATION OF HEALTH AND SAFETY ......................... 44
       2.3.1 Director responsibility and involvement ...................................................... 44
       2.3.2 Directors’ commitment to health and safety ................................................. 45
       2.3.3 Summary ........................................................................................................... 48
   2.4 THE LAW AS A MOTIVATOR OF DIRECTOR ACTION ....................................... 48
       2.4.1 Role of general health and safety law ......................................................... 49
       2.4.2 Role of individual personal liabilities .......................................................... 49
       2.4.3 Summary ........................................................................................................... 50
   2.5 VALUE OF IMPOSING STATUTORY DUTIES ON DIRECTORS .................... 51
       2.5.2 CCA view ....................................................................................................... 51
       2.5.3 Greenstreet Berman view ............................................................................ 51
       2.5.4 HSL view ........................................................................................................... 51
       2.5.5 Discussion ........................................................................................................... 52

3. CONCLUSION ................................................................................................................. 54

4. REFERENCES ............................................................................................................... 56
EXECUTIVE SUMMARY

The report details the findings of a peer review of three key pieces of published research which was commissioned by the Health and Safety Executive as part of its preparation of advice to Ministers on the issue of whether new statutory health and safety duties should be imposed on directors. The three pieces of research concerned had been undertaken by the Centre for Corporate Accountability, the consultancy firm Greenstreet Berman and the Executive’s Health and Safety Laboratory (HSL).

In summary, the objectives of the commissioned review were to provide assessments of the:

- thoroughness of the three reports in identifying and surveying relevant published research;
- their key findings concerning the factors influencing directors to take responsibility for health and safety; the likely impact of any new legal duties placed on directors; and how directors exercise this responsibility and to what effect; and
- reliability of the evidence base on director responsibility for health and safety and its fit with current HSC/E measures to promote greater director responsibility and leadership on health and safety.

In order to explore these issues it was decided to examine the relevant material in the three reports in relation to four broad, and to some extent, inter-related, themes. First, the degree to which directors’ attitudes and behaviour influence organisational health and safety management and performance. Secondly, what prioritisation directors currently appear to accord to the issue of health and safety at work. Thirdly, to what extent the law acts as a motivator of director behaviour in this area. Fourthly, the views expressed in the three reports as to the desirability of imposing explicit statutory health and safety duties on directors and their ‘fit’ with the research evidence reviewed in relation to those themes previously mentioned.

At a general level, it was found that not all of the three reports addressed the first of the above themes. It was further found that the depth of coverage of particular themes varied to some degree between them and that the sources of relevant evidence they utilised also sometimes differed. Nevertheless, in combination, the three reports were, in general, found to provide, with two notable exceptions, a good overview of the relevant research evidence, when considered alongside the present author’s own further analysis, and, on an individual level, to report the research findings they utilised accurately. The exceptions referred to concerned the failure of the three reports, taken together, to provide thorough reviews of the evidence relating to (a) the influence that directors exert over health and safety management and performance and (b) the role of individual personal liabilities in motivating director actions in the area of health and safety at work.

More specifically, the evidence provided in the three reports was found to indicate that directors do exert an important influence over their organisation’s health and safety management and performance. It was also found to suggest that while directors appear to consider that they already face considerable legal, commercial and societal pressures to take responsibility for health and safety and to avoid the occurrence of damaging incidents, in practice, their commitment to the issue is often problematic and frequently seen to be so by other managers.

Statutory health and safety requirements, including those giving rise to individual, personal, legal liabilities, serve, the evidence further suggests, as one of the most important drivers of director actions in respect of health and safety. However, there would seem scope to explore in more detail the evidence that sheds light on the issue of whether the introduction of ‘positive’ health and safety duties on directors would act to improve their motivation in this...
regard. Nevertheless, on balance, the evidence provided in the three reports is seen to provide a strong, but not conclusive, basis for arguing that the imposition of such duties would serve to usefully supplement the liability that directors currently face under section 37 of the Health and Safety at Work Act.
1. INTRODUCTION

1.1 INTRODUCTION

At present, British health and safety law does not impose any explicit duties on company directors in respect of how they manage health and safety that can give rise to criminal liability. Directors can, however, accrue such liability under section 37(1) of the Health and Safety at Work Act where an offence committed by a corporate body is found to have been committed with their ‘consent or connivance’ or to have stemmed from their ‘neglect’. Furthermore, if so convicted, the potential exists for them to be disqualified from holding such office under the Company Directors Disqualification Act 1986.

An Action Point contained in the ‘revitalising health and safety strategy statement’ produced jointly by the, then, Department for the Environment, Transport and the Regions (DETR) and the Health and Safety Commission in June 2000, suggested that this lack of explicit directors duties would, in due course, be addressed (DETR/HSC, 2000). Thus, in Action Point 11 of the statement, it was 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 will, in particular, stipulate that organisations should appoint an individual Director for health and safety or a 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’

In the light of this Action Point, in June 2001, the HSC published guidance on the health and safety responsibilities of directors’ responsibilities. Later, in October 2003, however, it decided not to go further by drafting legislation to impose statutory duties and, in January 2004, went on to advise the Minister, in accordance with this decision, that legislation was not, in its view, now needed.

This decision to eschew the imposition of such duties was accepted by the government, but generated much criticism in other quarters. In particular, in a report on the work of the HSC and the HSE, the House of Commons Work and Pensions Select 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’. In response to this recommendation, the Government announced that it would ask the HSC to re-consider the issue and provide further advice to Ministers by the end of 2005.

As part of the process of gathering together evidence on which this advice could be based, the HSE commissioned the present author, and another academic, to each conduct individual ‘peer reviews’ of that provided in three published research reports. This paper is essentially concerned with detailing the conclusions of the review undertaken by the present author.

The remainder of the paper is divided into eight sections. The first two of these briefly outline the study’s terms of reference and the nature and scope of the three reports involved. The third, then, details the methodology utilised to undertake the review, while the next four go on to detail the review’s main findings through a consideration of four, somewhat inter-related, issues: the impact that director attitudes and behaviour have on organisational health and
safety management and performance; the priority that directors accord health and safety issues; the extent to which the law acts to motivate director actions in respect of health and safety; and the potential role that new legal requirements could play in improving the attitudes and behaviour of directors in respect of health and safety. Finally, the key points emerging from the analysis provided are briefly summarised in a final concluding section.

1.2 TERMS OF REFERENCE AND THE REPORTS INVOLVED

The three reports required to be peer reviewed had been produced by three different organisations and, in two cases, funded by the HSE. Chronologically, the first of these, and the one not funded by the HSE, was produced by the Centre for Corporate Accountability (CCA) in 2004, the second by the consultancy firm Greenstreet Berman in early 2005 and the third by the HSE’s Health and Safety Laboratory (HSL), in mid-2005.

In summary, the objectives of the commissioned reviews were specified by the HSE as being the provision of assessments of the:

- thoroughness of the three reports in identifying and surveying relevant published research;
- their key findings concerning the factors influencing directors to take responsibility for health and safety; the likely impact of any new legal duties placed on directors; and how directors exercise this responsibility and to what effect; and
- reliability of the evidence base on director responsibility for health and safety and its fit with current HSC/E measures to promote greater director responsibility and leadership on health and safety.

1.3 NATURE OF THE THREE REPORTS

All three of the reports take the form of literature reviews. They were found, however, to differ markedly in terms of their overall scope and the particular objectives that had informed their preparation.

The CCA report was intended to provide a comprehensive review of ‘what the evidence tells us about the relative effectiveness of (a) the use of the “law” to obtain improvements in health and safety and (b) various regulatory techniques and approaches that exist to ensure companies comply with existing health and safety law’. As a result, while it does use the evidence obtained to address the question of whether statutory duties on directors should be introduced, its focus is much wider than this. For example, it also pays attention to the question of whether the law should be changed to extend workers’ rights to participation and consultation, and explores the utility of various techniques that could, and are, used by the HSE to secure legal ‘compliance without enforcement’, including ‘education and information provision activities’, ‘strategic partnerships and relationships with key organisations’, ‘business case’ arguments, and ‘earned autonomy’.

The Greenstreet Berman report was commissioned by the HSE to provide an ‘opinion on that produced by the CCA and, in doing so, to address the following questions:

- are there any new studies since the end of 2003 that have significant findings?
- Has the evidence regarding employers’ acceptance of the business case/motivation provided by insurance changed since the 1990’s?
- Is there a case for a balanced advisory/enforcement strategy?
- Does the CCA report provide a balanced review of the evidence for and against advisory/enforcement strategy?
• Are there alternative interpretations of research findings and their implications for the strategy [for Workplace Health and Safety in Great Britain to 2010 and Beyond]?
• What is the latest view of the contribution of self-regulation within a regulatory framework?
• Is the CCA report clear and does it use all relevant research validly and in the correct context and has it chosen and used an appropriate body of evidence?

In large part, therefore, in providing a response to the CCA report, the Greenstreet Berman covers the same range of issues. However, in also reviewing the CCA report against the HSC’s Strategy for Workplace Health and Safety to 2010 and Beyond, it addresses a number of additional issues, including the need to improve access to occupational health support, cater for the special needs and the specific health and safety problems of small and medium sized enterprises, and the case for closer working between HSE and local authorities. At the same time, while drawing on new research evidence produced subsequent to the preparation of the CCA report, it does not explicitly reference as many sources of evidence. Instead, it draws heavily on the conclusions of an earlier extensive literature review that Greenstreet Berman undertook for the HSE which was intended to provide an ‘evidence base’ that HSC could draw on to develop its previously mentioned strategy (Wright et al., 2004).

The third report, that produced by the HSL, is far more narrowly focused than the other two in being only concerned to provide a ‘comprehensive review of UK and international literature on director leadership of occupational health and safety, specifically focusing on factors influencing leadership behaviour and the perceived benefits such an approach brings in terms of improvements to occupational health and safety performance’. Its overall, originating, purpose was also correspondingly narrower in being limited to assisting the HSE in ‘in reviewing its position with regard to regulating directors duties for health and safety, specifically, when considering whether to introduce additional legislation for directors’ responsibilities’.

1.4 METHODS

The review’s terms of reference, as detailed above, meant that certain of the issues explored in the CCA and Greenstreet Berman reports fell outside its scope. As to the material in the three reports that did fall within the review’s scope, an initial read of them enabled four themes, or lines of analysis, to be identified. These were:

• The relationship between directors’ attitudes and behaviour and health and safety management and performance;
• The prioritisation of health and safety issues by directors;
• The extent to which the law acts to motivate director actions in respect of health and safety;
• The potential role that new legal requirements could play in improving the attitudes and behaviour of directors in respect of health and safety.

With regard to each of these issues, four strands of analysis were conducted in order to enable the key objectives of the review, as specified in its Terms of Reference, to be fulfilled. These were:

• An examination of the evidence put forward in each of the reports in respect of them;
• A comparison of this evidence to identify (a) significant differences in the sources used and (b) significant variations in how they had been interpreted;
• Where such differences were identified, the inspection of the original source materials in order to verify the validity of the analyses of them;
• The more general inspection of original source materials on which particular reliance was being placed¹;
• The checking of databases to identify any other significant sources of evidence that had not been utilised in the three reports under review.

¹ The source materials so inspected during the review are identified in the references listed at the end of this report by an asterisk.
2. REVIEW FINDINGS

2.1 INTRODUCTION

In what follows, separate sections are devoted to each of the four lines of analysis identified in the previous chapter, namely the degree to which directors’ attitudes and behaviour influence organizational health and safety management and performance, the prioritisation that directors currently accord to the issue of health and safety at work, the extent to which the law acts to motivate director behaviour in this area, and the views expressed in the three reports as to the desirability of imposing explicit statutory health and safety duties on directors and their ‘fit’ with the research evidence reviewed in relation to those themes previously mentioned. In the case of the first three of them, the evidence provided in the reports is initially examined and a short summary of the key points emerging from these examinations then provided. In the case of the fourth, the conclusions reached in the three reports concerning the potential value of imposing new statutory health and safety duties are initially briefly summarised and these subsequently discussed in relation to the evidence reviewed in the three previous sections.

2.2 THE SIGNIFICANCE OF DIRECTORS’ ATTITUDES AND BEHAVIOUR

Both the HSL and CCA reports explore research evidence relating to the link between directors’ attitudes and behaviour, on the one hand, and standards of health and safety management and performance, on the other.

On the basis of its review of the relevant evidence, the HSL report concludes that directors and senior managers can significantly influence the safety culture of an organisation and suggests that there is some evidence to show that a high level of commitment to safety on their part can have a positive impact on performance. It must, however, be said that little detail is, for the most part, provided on the relevant findings obtained from the studies cited to support these conclusions and it would seem that a number of those referred to relate to the way in which ‘commitment by top management to involving the workforce’ is a key aspect of an effective health and safety culture. However, it is noted that a study by Cox and Flin (1998) found that the main influence on employees’ safety commitment was how workers perceived ‘management concern for safety’ and further observed that one of the other quoted studies suggests that senior managers/directors can exert a significant influence over the attitudes and behaviour of line managers, notably in shaping how they deal ‘with safety versus productivity’ (O’Dea and Flin, 2003) and that this view is supported by another one undertaken by Rundmo and Hale (2003) \(^2\). In addition, references are made to a study by Sawacha et al (1999) which found that the attitude of senior management towards safety was a significant factor in influencing accident records on construction sites, and to a meta-analysis of the organisational and workplace factors which influence injury rates undertaken by Shannon et al (1997) which concluded that ‘senior management taking an active part in health and safety was consistently linked with lower injury rates’.

The view that directors’ attitudes and behaviour can exert a critical influence over health and safety is managed within organisations receives further support in the limited, and virtually completely different, literature on the issue utilised in the CCA report. For example, in this,

\(^2\) It should, however, be noted that the empirical research reported in this last cited study does not directly address this issue. It does, though, make reference to a number of other studies, Cohen, (1975), Cohen et al, (1975), Smith et al (1978) and Simonds and Shafai (1997), which are argued to show ‘management commitment and involvement in accident prevention and safety promotion to be important for the safety status as well as risk behaviour and the number of accidents and near misses’ (Rundmo and Hale, 2003: 559).
reference is made to case study evidence from an HSE funded study of noise-induced hearing loss showing that, in most of the organisations visited, company performance on hearing conservation directly matched the attitudes of senior management on the topic (Thompson-MIT, 1993). In addition, attention is drawn to a survey of senior staff in 50 major UK companies in which 60% of respondents mentioned lack of leadership at board level as one of the four top impediments to good risk management (Baldwin and Anderson, 2002), and to a construction industry study in which most interviewees considered that workers adapt their attitudes towards health and safety to those of site managers and felt that these last attitudes were, in turn, shaped by those of senior management (Brazabon et al, 2000: 56).

The plausibility of the conclusions reached in the HSL and CCA reports concerning the importance of directors’ attitudes and behaviour are, it should be noted, further reinforced if attention is paid to a literature review produced by Gunningham (1999) on ‘CEO and supervisor drivers’ which is referred to in both of them. For in this review not only is reference made to a number of additional studies by Braithwaite (1985), Ferry (1990), Grimaldi and Simonds (1989), Hammer (1985) and Peterson (1975) which, it is argued, suggest that ‘continuous and genuine management support is the key to a safe and healthy working environment’, but mention is made to a study by Gallagher (1997) that, it is suggested, more specifically, supports the view that ‘leadership by senior management, and by the CEO in particular, is critically important to OHS outcomes’ (Gunningham, 1999:11).

2.2.1 Summary

The CCA and HSL reports both reference studies which are seen to demonstrate that the attitudes and behaviour of directors exert a fundamental influence over either standards of health and safety management or levels of health and safety performance. Both of the reports, however, draw on a limited range of literature. At the same time, on the basis of the preceding analysis, it would seem reasonable to conclude that their overall conclusions regarding the significance of directors’ attitudes and behaviour are supportable by reference to the existing evidence\(^3\). There would, however, seem scope to provide a more in-depth review of this evidence.

2.3 DIRECTORS’ PRIORITISATION OF HEALTH AND SAFETY

In combination the reports make reference to and discuss a number of studies that shed light on this issue. However, the foci of these studies vary. Consequently, in the name of coherence and clarity, their relevant findings and the discussions provided on them in the three reports are explored in this section via a consideration of two broad and somewhat inter-related issues: the extent to which directors take responsibility for and get involved in, health and safety; and the degree to which directors demonstrate a commitment to the issue.

2.3.1 Director responsibility and involvement

In exploring this issue, all three of the reports draw on an HSE funded study by Wright \textit{et al} (2003). This study reports the results of two telephone surveys, a 2001/02 baseline survey and a 2003 follow-up one, which were both carried out with the overall aim of assessing the

\(^3\) The relevance of senior managers and directors attitudes and behaviour to health and safety performance is also indicated in a more narrow way in the Greenstreet Berman report’s discussion on page 16 of a survey of HSE and LA inspectors that the same organisation had undertaken for the HSE. Thus, in this, it is noted that whether enforcement action leads to improvements beyond the specific action referred to is ‘particularly related to the extent that the notice or prosecution raises the interest of senior management’.
extent to which there is board level direction of health and safety in large private and public sector organisations.

In its coverage of the Wright et al study, the HSL report notes that the findings obtained indicate that in 2003 26 per cent of the surveyed organisations delegated responsibilities for health and safety to below board level and that the percentage doing so had fallen from 38 per cent in 2001/02, a finding which it observes suggests that directors are now increasingly choosing to direct health and safety at board level. The CCA report also acknowledges this apparent rise in board level direction. However, it goes on to question its significance in terms of indicating a growth of director responsibility for health and safety on the grounds that board level involvement appeared to often be superficial and that the reported rise in board level direction had occurred alongside a reduction, sometimes by 10 per cent, in board level engagement with some health and safety tasks. It further and more generally, notes, a little misleadingly, that around a third of the surveyed organisations reported that their boards had assumed no responsibility for health and safety and casts doubt on the validity of the study’s findings because of its reliance on non-validated self-report responses.4

For their part, the authors of the Greenstreet Berman report do not take issue with the accuracy with which the findings of this study are reported in the CCA report and hence do not challenge the points raised in it concerning the superficial nature of much board level involvement in health and safety5 and the reduction that had occurred in board engagement with some types of health and safety tasks. On the issue of the validity of the self-report nature of the data obtained, however, the Greenstreet Berman authors argue that the probing nature of the telephone interviews would have required wholesale fabrication on the part of respondents to misrepresent their health and safety actions and also point out that the study did involve a number of face-to-face case studies. The import of this last observation is, though, left unclear, while the validity of the comment concerning ‘misrepresentation’ must be queried given that the copy of the questionnaire contained in the Wright et al report indicates that telephone interviewees were not routinely prompted. That said, insofar as the CCA’s methodological concern relates to the potential for the reported rise in board level responsibility for health and safety to be spurious and hence misleading, it should be noted that the authors of the report themselves observe that the ‘follow-up survey ‘does not report a major improvement or changes in directors’/board level health and safety arrangements’ (Wright et al, 2003:17)

2.3.2 Directors’ commitment to health and safety

All three of the reports make references to studies which, with varying degrees of directness, shed light on the extent to which directors’ are motivated to address the issue of health and safety.

---

4 In a similar vein, the HSL report notes that this study’s findings may have been influenced by ‘response bias’ stemming from the desire of respondents to give the impression that safety is competently managed in order to avoid increased levels of regulation.
5 The ‘tasks’ investigated in the study were help formulate health and safety policy, help set health and safety targets, check that board decisions reflect health and safety intentions, report health and safety performance to the board, help board understand how health and safety is managed in the organisation, ensure board considers health and safety problems and takes action, liaise with regulators, engage the board in health and safety decisions, advise board on health and safety matters and ensure board allocates sufficient resources to health and safety. In relation to the point made in the CCA report concerning the superficiality of board involvement, it should be noted that in the case of all these tasks the number of respondents who reported that the extent of involvement was ‘A lot’ in 2003 was either below or just over 10 per cent.
6 It should be noted that the Greenstreet Berman authors would be well placed to challenge any inaccurate reportage of the findings given that the study in question was undertaken by their organisation and both of them were co-authors of the final report of the study.
The HSL and CCA reports both draw on the analysis provided by Smallman and John (2001) of a ‘Captains of Industry Survey’ undertaken by MORI (2000) and eight qualitative interviews that they conducted with directors. The HSL report notes that the findings reported by Smallman and John from these two studies suggest that directors do view ‘safety as being an integral part of their management plans and a significant performance determinant’. It also, in common with the CCA report, observes that the interview findings obtained suggest that although the interviewed directors believed that a poor health and safety record could potentially impact on corporate reputation and profits, they did not, in contrast, believe that an excellent safety record enhances a company’s reputation.

The HSL report also draws directly on the MORI survey’s findings concerning directors’ views of the impact that safety culture has on an organisation. In doing so, it notes that that 90 per cent of respondents believed that a poor safety culture adversely affects employee morale, 80 per cent that it contributed to a loss of corporate reputation, and 80 per cent that it led to increased insurance costs. It also points out that adverse outcomes were also cited in respect of productivity and efficiency, customer satisfaction and sales/profit.

The implication of the above findings that directors do, in the context of the current legal framework for health and safety at work, have incentives to take action in respect of health and safety is, in turn, reinforced by the authors of the Greenstreet Berman report who, in discussing the issue of ‘Mandating directors’ duties, make the following observations.

- A number of studies report that directors perceive that the ‘risk’ posed to the organisation by (infringement of) existing regulations and/or another form of serious incident, already provides sufficient reason to direct health and safety;
- They similarly report that the general increase in societal concern for health and safety and the associated increase in reputational risk provide grounds to direct health and safety;
- Current HSE commissioned work by Greenstreet Berman Ltd (Shaw et al, in press) reinforces the notion that boards are already motivated by “corporate risk” posed by getting health and safety wrong to see it as a ‘corporate’ issue that requires directors’ attention.

Unfortunately, the lack of references to the studies being drawn on to support the observations made in the first two of the above bulleted statements and the yet to be published nature of that used to support the third, means it was not possible to check the validity of these conclusions. It would, however, seem likely that one of the studies being referred to is that by Wright et al (2005) concerned with evaluating how best to secure compliance with the law. Thus, as part of this study, Wright and his colleagues undertook a survey of employers and found that 71 per cent of the 1,746 respondents agreed or strongly agreed that ‘The director(s) think that health and safety is a critical business success factor’ and that 83 per cent similarly felt that ‘The director(s) think that health and safety is a big risk for the business if we get it wrong’ (Wright et al, 2005: 46).

Insofar as the above studies do suggest that directors have incentives to protect the health and safety of workers, and others, they do not, however, provide any indication of the ‘adequacy’

---

7 It should, however, be noted that the response rate to this survey was relatively low, at 12.5 per cent. and that, since around 26 per cent of respondents were from organisation employing 50 or fewer employees, it would seem likely that a reasonably significant minority of them were, in fact, owner/managers who were being asked to comment effectively on their own attitudes, thereby raising the possibility that they had an incentive to show themselves in a positive light. It must also be said that there would seem to be some tension between the above bulleted observations and the finding reported from the earlier mentioned study of directors’ responsibility for health and safety that in 2003 around a third of the surveyed (large) organisations boards of directors took no direct responsibility for the issue. This is particularly so given that there must inevitably be doubts as to whether this position could have meaningfully changed in a period of just two years.
of these incentives and the actions that flow from them. A number of other studies cited in the three reports do, though, give some insight into these issues and, in doing so, cast a degree of doubt concerning them.

This is true, for example, of the earlier mentioned study by Wright et al which found that where directors do take direct responsibility for health and safety, their involvement is often ‘superficial’. It is also true of the earlier mentioned study referred to in the CCA report which found that 60 per cent of respondents mentioned lack of leadership at board level as being one of the four top impediments to good risk management (Baldwin and Anderson, 2002) and another quoted one which found, in the context of an investigation of the links between health and safety management, on the one hand, and total quality management, on the other, ‘no evidence of real enthusiasm for H & S management coming from and through executive and senior management’ (Osborne and Zairi, 1997: 14).

Furthermore, the doubts raised by these last studies concerning the commitment of directors to health and safety would seem to be reinforced by the reference made in the HSL report to findings from a study by Pearson (1991), cited in Jeffcote et al (2005). Thus, this is noted to have found that almost a third of health and safety managers believed that health and safety was rarely or never a priority of senior management and that just under a quarter were unhappy with the support they received from senior executives. It is further noted to have found evidence of a marked disjunction between how senior executives and safety managers perceived the way in which health and safety was managed, with it being observed, for example, that while the 85% of senior executives claimed that they, or another director, always attended safety meetings, only 59% of the managers agreed.\(^8\)

Some of the findings obtained in an Australian study by KPMG (2002) which is cited in the HSL and Greenstreet Berman reports would, in turn, seem to add some weight to these last findings. Thus, this not only found, somewhat similarly to Wright et al (2003) in the case of Britain, that there remained ‘a rump of about 20 per cent of CEOs who are not recognising their responsibility for safety’, but that among small firms a ‘gap existed between theory and practice’ (KPMG, 2001: 9)\(^9\). In particular, in relation to this last point, the report observed that over a third of CEOs in small firms in medium to high hazard industries were found to be relying on informal approaches to managing safety, a finding alluded to in the HSL report.

It should also, more generally, be pointed out, in passing, that these findings concerning small companies can be seen to echo the substantial body of evidence drawn from studies concerned with environmental protection, occupational health and safety, and food safety which shows that the proprietors of such firms frequently possess a low knowledge of relevant legal provisions and a lack of motivation to take relevant action (see, e.g. Yapp and Fairman, 2004). Indeed, one recent HSE funded study of legal compliance among 39 hairdressers undertaken by these same researchers found that while legal compliance within them was often poor, reaching a high of 61 per cent in the case of electrical safety and a low of 19.5 per cent in the case of risk assessment, all of those interviewed considered their organisations to be legally compliant (Fairman and Yapp, 2005)\(^10\).

---

8 In this context, it should be further noted that the Hidden inquiry into the Clapham Junction disaster found that the safety failings it identified as contributing to the accident existed in an organisation, British Rail, whose Board had a policy of ‘absolute safety’. See Department of Transport (1989).

9 The KPMG study included conducting qualitative interviews with a range of stakeholders, a quantitative telephone survey of 1000 CEOs and supervisors and the collection of a number of forms of secondary evidence.

10 In relation to this point, the HSL report notes that the findings from an audit programme in a UK water utility company found that managers had only a limited understanding of their legal and corporate responsibilities for health and safety and, in doing so, suggests that this problem of limited knowledge may also be a problem in larger organisations. See Fuller (1999)
2.3.3 Summary

In exploring current director/board level responsibility for health and safety in Britain, each of the three reports draw on the same HSE study and no points of tension emerge between them with regard to the actual reporting of this study's findings. The CCA report does, however, question the validity of the study's findings on the grounds that they are based on non-validated self-report responses, while Greenstreet Berman challenges, but not convincingly, this potential methodological problem. There would, however, seem common ground between the authors of the CCA and the Greenstreet Berman reports that the study’s findings suggest that a significant minority of large organisations do not direct health and safety at board level and that where they do so, the degree of board level involvement in the area is often rather superficial. It would also seem that the authors of these reports are in broad agreement that the period 2001-2003 did not see any dramatic change in directors’/board level health and safety arrangements in such organisations.

Each of the reports reviewed refer to evidence which suggests that, in the context of the current legal framework for health and safety, organisations face a number of business and societal pressures to protect worker health and safety. However, while the Greenstreet Berman report sees these pressures as being sufficient to motivate boards of directors to ‘direct’ health and safety, the CCA one argues that they are insufficient to motivate them to adequately provide such protection. On balance, given the evidence reviewed above, the first of these viewpoints would seem open to debate. Meanwhile, the second would seem to be consistent with the research findings discussed in the preceding paragraph and those referred to earlier concerning a frequent lack of director level commitment in the area of health and safety, including among small business proprietors, and the common presence within small firms of a ‘theory-practice’ gap.

2.4 THE LAW AS A MOTIVATOR OF DIRECTOR ACTION

Significant proportions of the three reports are given over to a consideration of the research evidence available as to the factors that motivate employing organisations to comply with the law. A good deal of discussion is, for example, provided on the relative effectiveness of inspections, enforcement action, financial incentives and educational campaigns in generating such compliance. These discussions are, however, not considered here. Instead, attention is focussed more narrowly on what insights the three reports provide in terms of the role that the law plays in motivating directors. This is for two main reasons. The first is that the policy context within which this review is located is one that is more narrowly concerned with the potential utility of imposing explicit statutory duties on directors. The second, and more general one, is that, given the evidence considered earlier about director/board level responsibility for health and safety, it is unclear how far it is safe to assume that, in the case of larger organisations, the motivational bases for ‘organisational’ and director actions are the same.

The three reports, in fact, all cite studies that provide an indication of the extent to which the law acts to motivate directors to accord attention to health and safety. These studies effectively consider this motivational role of the law in two ways. First, through the provision of insights on the degree to which health and safety law in general serves as a motivator. Secondly, via the shedding of light on the role that individual personal liabilities on the part of directors serve to influence their behaviour.
2.4.1 Role of general health and safety law

With regard to this issue, the HSL report makes reference to the work of O’Dea and Flin (2003) which highlights that legislation does motivate director level staff to take action on health and safety issues. It also, in common with the CCA one, refers to a postal survey of risk and finance managers undertaken by Ashby and Diacon (1996) to examine what motivates large UK companies to take measures to reduce risks of occupational injury to their employees. In both cases the reports note that the study’s findings suggest, at least in 1993, when it was conducted, that compliance with the law and the avoidance of legal liabilities constituted the most significant sources of motivation.

The HSL report, along with the Greenstreet Berman one, also makes reference to the already mentioned Australian studies produced by Gunningham (1999) and KPMG. Both note that the Gunningham study concludes that regulation is the most important CEO driver and that the KPMG study found regulation and its enforcement, to be the second most important one, with the Greenstreet Berman additionally detailing the four most important such motivators identified in this second study as being, in order of importance:

- A sense of moral responsibility;
- Regulation and its enforcement;
- Commercial incentives, such as greater productivity and lower workers’ compensation premiums, and
- Measurement and benchmarking of health and safety performance.

In relation to such findings as those of Gunningham and KMPG, the Greenstreet Berman report goes on to observe that there is a ‘close association between the self-rated role of factors such as enforcement, the cost of accidents, reputational risk etc – such that organisations tend to be motivated (or not) by each of these drivers’ (Wright and Marsden, 2005: 9). In a similar vein, the HSL report notes that another recent study involving one of the same authors concluded that reputation risk and regulation compliance may be intertwined (Wright et al, 2005) and the CCA one effectively makes the same point in noting that the previously mentioned study by Baldwin and Anderson (2002) found that, among the 50 senior staff from large UK companies interviewed, the main motivators of efforts to manage regulatory risks were concerns for corporate reputation, followed by fear of criminal convictions and fear of the competitive or market effects of criminal convictions.

2.4.2 Role of individual personal liabilities

As regards the motivational role of individual legal liabilities, the Greenstreet Berman report does not cite studies which provide evidence on this issue, although it does make the observation that it is ‘hard to find evidence of whether (or how well) mandation of Directors’ Duties would work, and exactly what requirements would work best, without actually trying it out or reviewing examples of such regulation overseas’ (Wright and Marsden, 2005)

For its part, the CCA report draws attention to another of Gunningham’s conclusions, namely that ‘the key to motivating CEOs and senior management to improve safety is to make them liable to personal prosecution and to actually enforce such provisions’. It would appear, however, that the validity of this statement, which is also alluded to in the HSL report, was not checked through the carrying out of a review of the various studies that Gunningham cites in support of it, namely those by KPMG (1996), Hopkins (1995), Purvis (1996), Braithwaite and Makkai (1991), Reiner and Chatten Brown (1989), Hammit and Reuter (1998), Cohen
(1988) and the Australian Industry Commission (1995). The CCA report does, though, rightly note that Brazabon et al (2000: 66), in their study of health and safety in the British construction industry, concluded that ‘the majority of interviewees perceived that if the number of prosecutions of Directors and Corporate Manslaughter charges increased this could result in large improvements in health and safety standards as this may enforce the message that directors are responsible for the health and safety of their workforce’

No direct mention is, however, made in any of the reports to the discussion provided in the KPMG report concerning how the imposition of personal legal liabilities on directors can act to influence them to accord health and safety a higher priority. As a result, attention is not drawn to its finding that ‘many CEOs cited their personal legal responsibility as a factor motivating them to attend to safety’, despite the fact that under, then, current Australian legal frameworks senior officers were rarely prosecuted, in part because of the difficulties of bringing such prosecutions, nor to the fact that CEOs in small firms were found to be slightly more likely to cite such liability as being a motivating factor (KPMG, 2001: 70).

At the same time, it would seem, although this merits checking, that during the period of the KPMG research the personal legal responsibility of CEOs which existed in most, if not all, Australian jurisdictions, consisted of the type of ‘negative’ liability which currently exists under section 37 of the Health and Safety at Work Act. The above findings do not, then, necessarily point to the value of the imposing of ‘positive’ duties on directors. This uncertainty, it is suggested, consequently reinforces the point already, indirectly, alluded to concerning the desirability of examining the sources of evidence quoted by Gunningham in relation to the motivational role played by such personal legal liability. It remains the case, of course, that the Brazabon et al findings quoted above would, nevertheless, seem to suggest that steps to increase the number of prosecutions of directors and, by implication, make such prosecutions easier could act to encourage directors to accord a greater priority to the issue of health and safety at work. Indeed, this suggestion would seem to receive a good deal of reinforcement from the fact that the study by Wright et al concerned with evaluating how best to achieve compliance with the law found that 49 per cent of the ‘employer’ respondents considered that ‘personal fines for directors’ constituted the ‘best way’ of improving the enforcement of health and safety laws and that this option for improving enforcement was favoured by a greater percentage of those responding than a range of alternative ones mentioned in the questionnaire they completed (Wright et al, 2005: A106)\textsuperscript{11}.

\subsection*{2.4.3 Summary}

Existing evidence suggests that legal regulations and their enforcement constitute a key, and perhaps the most important, driver of director actions in respect of health and safety at work and that this motivational force is intimately connected to a number of others, such as corporate reputation, competitive damage and a sense of moral responsibility to protect workers from injury and ill health. It also suggests that the creation of individual personal liabilities on the part of directors can particularly serve to motivate them to improve health and safety. This evidence, however, has not been considered in detail in any of the three reports, with the result that they do not consider how far they verify the argument’s validity and, as a result, the extent to which the introduction of ‘positive’ health and safety duties on directors would act to encourage directors to accord a higher priority to worker protection remains unclear. At the same time, it would seem that many managers do believe that making directors more vulnerable to prosecution and financial penalties would yield positive benefits.

\textsuperscript{11} These other options included simpler regulations, more frequent inspections, more advisory visits, bigger fines, a law making it easier to secure Corporate Manslaughter convictions, ‘more consistent, pragmatic and fairer enforcement’ and giving trade unions the power to serve ‘provisional improvement notices’.
2.5 The value of imposing statutory duties on directors

The three reports reach rather different conclusions on this issue in the light of the evidence they have reviewed. These different viewpoints are briefly summarised in this section and then discussed in relation to the preceding analysis of the present author.

2.5.2 CCA view

The author of the CCA report strongly criticises the present legal framework for health and safety on the grounds that it does not impose any positive legal obligations on company directors and consequently renders them largely immune from prosecution. As a result, it is seen to adversely affect the motivation of directors in relation to occupational health and safety issues and to potentially provide them with an incentive to ‘manage’ the (limited) risk of prosecution they face by delegating safety responsibilities down the management chain, thereby insulating themselves from knowledge of safety problems in their companies.

In the CCA’s author’s view the current evidence on board level ‘leadership and direction’ does not indicate that these problems can be resolved by a voluntary approach aimed at increasing such leadership. Given this, and the evidence which strongly suggests that the attitudes and behaviour of directors exert a crucial influence over health and safety performance, and that the current levels of director commitment to the issue is frequently poor, there is consequently a need for the imposition and enforcement of legally binding duties; a proposal which it is argued is congruent with international and domestic research evidence.

2.5.3 Greenstreet Berman view

As to some degree already indicated earlier, the Greenstreet Berman report does not come out clearly in favour or against the imposition of statutory duties on directors. It does, however, argue that the current evidence suggests that directors already have sufficient incentives to direct health and safety. It also makes the point that the precise nature of any regulation, as well as its implementation, are likely to be important and that its authors are unaware of any evidence on the effectiveness of specific (positive) health and safety duties on directors.

2.5.4 HSL view

The HSL report also does not come out clearly in support of the imposition of new statutory duties. It does, however, take the view that the introduction of such legislation would raise the profile of health and safety at board level and, in doing so, that it could be expected to ‘benefit health and safety management in most organisations’. That said, it further concludes that it is ‘difficult to draw firm conclusions when there is very limited evidence’ in the area and that any such legislation could be difficult to enforce, and also argues that there is a ‘widely held acceptance of the potential effectiveness of Director Leadership schemes for bringing about improvements in OHS’. Ultimately, the report recommends (a) that the HSE should continue to publicise its current guidance on directors’ responsibilities, case studies on director leadership and other relevant publications, (b) that current weaknesses in the empirical evidence regarding director leadership of health and safety in small and medium sized companies, the public sector and non-unionised workplaces be addressed, (c) that before any legislation to give directors responsibilities for health and safety is introduced, its potential impact on organisations, particularly small and medium sized ones, should be fully
considered, (d) that consideration be given to how any new legislation would be enforced and its success evaluated and (e) that the issue of training for directors be given further attention.

2.5.5 Discussion

As the HSL and Greenstreet Berman reports note, and the earlier parts of this one have highlighted, it is difficult to reach a firm, evidence based, conclusion as to whether the introduction of positive statutory duties for directors, as advocated in the CCA one, would yield benefits in terms of improved health and safety management and performance. The evidence reviewed in this report does, however, lend a good deal of weight to the view that directors exert an important influence over health and safety standards, although the evidence on this issue could have been explored in more detail, and suggest that in a significant minority of large organisations directors currently take no direct responsibility for health and safety and that, where they do, the extent of their involvement is often very limited. The reviewed evidence further suggests that while a substantial proportion of directors, in the context of the current legal framework for health and safety at work, perceive themselves as facing a number of pressures requiring them to pay attention to the issue of health and safety at work and to take direct responsibility for the issue, the priority that they in reality accord to the issue, and the degree of commitment they exhibit towards it, would frequently seem to be problematic. Furthermore, it would appear that this is the case among both large organisations and small and medium sized ones.

The current situation regarding director leadership in respect of occupational health and safety would consequently seem to be in need of significant improvement. To date, as noted in the introduction to this report, the HSC has favoured a voluntary approach to addressing this situation. Given what has already been said about the existing evidence base, it cannot be firmly said that this approach is a wrong one. However, the apparently slow progress that has so far been achieved via the adoption of this approach, as highlighted in the report of Wright et al (2003), and effectively acknowledge by the authors themselves, indicates that the HSC is right to be re-considering whether it is the correct one, notwithstanding the observations made in the HSL report about its potential value.

Indeed, on the basis of the evidence reviewed earlier in this report, there would seem reasonably good, evidence based, grounds for trying the ‘the legislative route’, as suggested in the CCA report. Thus, this evidence does indicate that statutory requirements are a major, and perhaps the main, driver of director behaviour with regard to the issue of health and safety at work. It also indicates that directors are influenced by potential personal legal liabilities, even when the likelihood of their being penalised is low – a point which further suggests that the presence of such liabilities can have a positive impact notwithstanding the existence of a low probability of their actually being imposed and suggests that many managers believe that beneficial consequences would flow from making directors more vulnerable to prosecution and the imposition of fines.

The fact, nevertheless, remains that no direct evidence is provided in any of the three reports which sheds light on the likely motivational impact on directors of imposing ‘positive’ health and safety duties on them, as opposed to the type of ‘negative’ liability currently provided under section 37 of the Health and Safety at Work Act. There would consequently seem scope

---

12 The HSL report’s recommendation concerning the need for more research on director leadership in smaller enterprises seems somewhat surprising given, as noted earlier in this report, what is known about the health and safety attitudes and knowledge of their proprietors. In a similar vein, in relation to the same point made in respect of public sector organisations, it should not be forgotten that the baseline and follow-up surveys conducted by Wright et al included 108 and 133 large public sector employers respectively.

13 This is not to say that the authors of the HSL and Greenstreet Berman reports are wrong to observe that, should it be decided to impose ‘positive’ legal duties on directors, careful thought would need to be given to how they are to be enforced.
for looking more closely at the research evidence on this issue and, more generally, exploring, as the HSE is currently doing and the Greenstreet Berman report suggests, the experiences of other countries that have made use of such duties.

While such additional evidence would undoubtedly be helpful, in the present author's view, it may still not prove possible to reach unchallengeable, evidence based, conclusions as to whether the present voluntary approach to encouraging greater director leadership of health and safety should be supplemented by the imposing of 'positive’ statutory duties on directors. Consequently, as the Greenstreet Berman report observes, albeit in the context of the evaluation of proposed regulatory interventions more generally, it is likely that an element of judgement will ultimately have to be utilised in order to reach a decision on this issue.
3. CONCLUSION

This report was commissioned by the HSE in order to provide a critical review of three pieces of research undertaken respectively by CCA, Greenstreet Berman, and HSL as part of its preparation of advice to ministers on the issue of whether new statutory health and safety duties should be imposed on directors. In broad terms, the review was intended to review the thoroughness of the three reports in identifying and surveying relevant published research; identify their key findings concerning the factors influencing directors to take responsibility for health and safety; the likely impact of any new legal duties placed on directors, and how directors exercise this responsibility and to what effect; and assess the evidence base on director responsibility for health and safety and its fit with current HSC/E measures to promote greater director responsibility and leadership on health and safety.

In order to explore these issues it was decided to examine the relevant material in the three reports in relation to four broad, and to some extent, inter-related, themes. First, the degree to which directors’ attitudes and behaviour influence organisational health and safety management and performance. Secondly, the prioritisation that directors currently appear to accord to the issue of health and safety at work. Thirdly, the influence that law exerts over director behaviour in this area. Fourthly, the views expressed in the three reports as to the desirability of imposing explicit statutory health and safety duties on directors and their ‘fit’ with the research evidence reviewed in relation to those themes previously mentioned.

At a general level, it was found that not all of the three reports addressed the first of these themes. It was further found that the depth of coverage of particular themes varied to some degree between them and that the sources of relevant evidence they utilised also sometimes differed. Nevertheless, in combination, the three reports were, in general, found to provide, with two notable exceptions, a good overview of the relevant research evidence, when considered alongside the present author’s own further analysis, and, on an individual level, to report the research findings they utilised accurately. The exceptions referred to concerned the failure of the three reports, taken together, to provide thorough reviews of the evidence relating to (a) the influence that directors exert over health and safety management and performance and (b) the role of individual personal liabilities in motivating director actions in the area of health and safety at work.

As regards the main conclusions that emerged in respect of the four identified themes, these in summary were

- the attitudes and behaviour of directors do appear to exert an important influence over their organisation’s health and safety management and performance, although the evidence relating to this could be explored in greater depth;
- in a significant minority of large organisations directors take no direct responsibility for health and safety and, in those where they do, their involvement is often of a very limited nature;
- directors would appear to consider that they already face considerable legal, commercial and societal pressures to take responsibility for health and safety and to avoid the occurrence of damaging incidents;
- it, nevertheless, seems that in practice the commitment of directors to health and safety is often problematic and frequently seen to be so by other managers;
- health and safety regulations and their enforcement constitute one of the most important drivers of director actions in respect of health and safety, if not the most important;
- individual personal liabilities also appear, against this background, to provide an important source of motivation, even when the likelihood of them being imposed is low;
there is, though, scope to explore in more detail how far the evidence on this last issue sheds light on how far the introduction of ‘positive’ health and safety duties on directors would act to improve their motivation in this regard;

the evidence reviewed in the three reports does not therefore conclusively indicate that duties of this type would act to improve health and safety management and performance, although it does indicate clearly that many managers believe that the making of directors more vulnerable to prosecutions and fines would have beneficial consequences;

the available evidence, however, also does not demonstrate that the current voluntary approach to encouraging director leadership of health and safety has, so far, had a significant impact;

on balance, the research evidence consequently provides a strong, but not conclusive, basis for arguing that the imposition of ‘positive’ health and safety duties on directors would serve to usefully supplement the liability that they currently face under section 37 of the Health and Safety Act;

it is, however, possible that, as with other possible types of regulatory initiative, it will, ultimately, prove impossible on the basis of research evidence to conclusively, as opposed to (very) plausibly, demonstrate that duties of this type will act to significantly improve current health and safety management and performance.
4. REFERENCES


* Denotes publications examined as part of this review by the present author