

Occidental Chemical Corporation

PVC Products

Robert D. Luss

Group Counsel

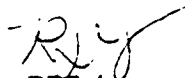
September 25, 1986

TO: Vinyl Institute Legal Committee

FROM: R. D. Luss

RE: Criminal Responsibility for Employment
Fatalities

As we discussed at our last meeting, attached is a copy of a speech prepared by Bruce Harrison concerning criminal capability for employment fatalities. I found the article interesting and informative. Please feel free to disseminate the article in your organization.


RDL/rm

Attachment

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R. D. L.
SEP 11 1986

September 9, 1986

Robert D. Luss, Esq.
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Pottstown, Pa. 19464

Dear Bob:

I am enclosing a copy of my formal presentation to the New Jersey Occupational Safety Conference entitled "New Risk for the Safety Professional: The Emerging Doctrine of Criminal Culpability for Employment Fatalities". My research suggests, and I believe my paper does as well, that the likelihood of any criminal initiatives following the death of Mr. Brogan is small.

If you wish to discuss either the Brogan matter or my presentation with me, please feel free to call.

Best regards.

Very truly yours,

CAPEHART & SCATCHARD, P.A.

Bruce L. Harrison

BLH:bh
Enclosure

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NEW RISK FOR THE SAFETY PROFESSIONAL:

THE EMERGING DOCTRINE OF CRIMINAL
CULPABILITY FOR EMPLOYMENT FATALITIES

By Bruce L. Harrison^{1/}

When I graduated from law school in 1972, I went to work for the Occupational Safety and Health Review Commission, the quasi-judicial body which interprets the Occupational Safety and Health Act of 1970. I learned, shortly after starting, that the Act had what at the time was a most unusual provision. Specifically, §17(e) of the Act provides, in part, that:

any employer who willfully violates any standard ... or any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than \$10,000 or by imprisonment for not more than six months, or by both ...

29 U.S.C. §666(e). This provision was rather novel because it incorporated into federal legislation the concept that corporations and their officials could commit a criminal offense for failing to heed safety standards and further, that the consequence of such behavior could be imprisonment, something usually reserved to a very different group of people than corporate managers.

1/ The writer wishes to acknowledge the able assistance of William Houser who provided needed research and insight.

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My research for this presentation demonstrates that in part, the historical antecedents for §17(e) are quite remote in time. Illustrative, as long ago as 1917, the New Jersey Supreme Court held that a company, in this case a railroad, could be indicted for manslaughter. State v. Lehigh Valley RR Co., 90 N.J.L. 372 (1917). There, the indictment followed a bystander's death when railcars overloaded with dynamite exploded.

However, prior to the passage of the Williams-Steiger Act in 1970, no other state court had followed the lead of New Jersey in permitting companies to be indicted. Further, since the OSHA Act permits criminal sanctions against individuals, as well as their employers, one can see that §17(e) was rather revolutionary for its time.

What was rather revolutionary in 1970 cannot be so classified in 1986. Illustrative, in the federal legislative context, the failure to give required notice to the National Response Center of a hazardous substance spill can yield precisely the same criminal penalty as in OSHA §17(e). See 42 U.S.C. §9603.

More pertinent for our purposes, however, is the application in state courts of traditional theories of criminal law.

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Parenthetically, applying traditional common law theories in novel contexts has become very much in vogue in recent years. For example, traditional theories of tort and contract law have limited, perhaps substantially, an employer's once unfettered right to discharge an employee-at-will.

In an academic sense, at least, it is interesting to see the variety of different circumstances raising the general issue of corporate and/or managerial criminal culpability. Some of these cases strike very close to home, at least geographically. Illustrative, in a case presenting somewhat similar issues as in the 1917 railroad case, Six Flags/Great Adventure and two corporate executives were indicted by a New Jersey grand jury for "aggravated manslaughter" in 1984 after a tragic fire in a park amusement killed eight youths. Last week, trial commenced in Los Angeles in the so-called "Twilight zone case" where a film director and several production crew members are charged with manslaughter in the death of actor Vic Morrow and two youths. People v. Landis. In Texas, a nursing home and five employees were recently charged with murder by neglect in the death of an elderly patient. State v. Autumn Hills Convalescent Home. And late last year, Ciba-Geigy Corp. and four corporate officials were indicted on numerous charges

including fraud, theft by deception, conspiracy, tampering with public records, unlawful release of hazardous waste and the like. The Ciba-Geigy case includes a 35 count, 71 page indictment generally dealing with allegedly unlawful disposal of chemical wastes and attendant conspiracies to deceive and defraud government agencies.

None of these cases deal with state criminal charges being leveled at corporate managers as the result of the death of an employee. The most important such case arose in Chicago in 1983 when Film Recovery Systems, Inc. and five corporate managers were indicted for murder, manslaughter and criminally reckless conduct. See, Corporations Can Kill Too, After Film Recovery, Are Individuals Accountable for Corporate Crimes, 19 Loyola of Los Angeles Law Review 1411 (1986). The facts of this case should be examined.

Film Recovery Systems reclaimed silver from used photographic film using a process known as cyanide-leaching. This process involved the dipping of film chips into large vats filled with a solution of sodium cyanide and water. Doing the dipping were low paid, hourly employees, most of whom were illegal hispanic or Polish aliens who could not speak English.

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The raw sodium cyanide was received by Film Recovery in bags with labels warning of all the hazards presented by the handling, use or exposure to sodium cyanide. Among other things, the warning label stated that contact with acid or weak alkalies, such as water, causes emission of poisonous gas. This fact notwithstanding, the company did not place hooded vents over the vats. Insurance inspectors warned the company of potential safety risk yet only particulate respirators were made available to the employee. When in the work area, a non-employee first-aid inspector was nearly overcome by fumes and experienced nausea and a burning sensation in the eyes, nose and throat. Notwithstanding these facts, the company took no steps to minimize the cyanide risk.

The decedent was a Polish immigrant who had complained of nausea and headaches after working at the vats. Through an interpreter, Mr. Golab asked for a transfer because of his symptoms. The company did not accommodate him and some days later, he was overcome by fumes and died.

Not only were the criminal charges against the company sustained, the individual defendants were likewise found guilty. Each was sentenced to twenty-five years in prison for his role in "the murder". These convictions are currently on appeal.

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It is well to pause and ask what has been the practical significance of sixteen years experience under §17(e) and the many state court cases, most significantly the Film Recovery decision. The answer, I believe, is a radical increase in local governmental attention and concern for workplace fatalities. Many cities/counties, such as Chicago (Cook County) and Los Angeles (Los Angeles County) have special units in the District Attorneys' offices whose role is to investigate and prosecute in the event of workplace fatalities. In New Jersey, an "Environmental Prosecutions Section" has been established in Trenton to investigate and, in some cases, seek indictments for perceived ecological or workplace crimes. It was this section which sought and obtained the indictments against Ciba-Geigy and its manager. It is, likewise, this section which is prosecuting Aero Plating, Inc. of Woodbury, New Jersey, and its plant manager for second degree manslaughter in the 1985 death of a sewer plant employee who was overcome by chemical fumes.

Before speaking about Aero Plating, it is appropriate not only to note that public and governmental concern for workplace fatalities has heightened considerably in the past few years but to address briefly the cause for this increased concern.

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This is a subject recently treated, and I believe competently so, in BNA's Labor Relations Reporter, 121 LRR at p. 280. BNA opines, correctly I believe, that state and local governmental agencies are far more susceptible to pressure than is the federal government. Illustrative, while organized labor may have little clout in Washington, D.C., the opposite is the case in the greater Philadelphia area as evidenced by the activist group PHILIPOSH.

Turning to the Aero Plating matter, to the extent the facts are publicly known, they are quite simple. However, the significance of the case cannot be overstated because this is the first case where New Jersey has indicted a corporation and a corporate official for homicide or injury to persons.

According to the one count indictment which names both the company and plant manager as defendants, Aero, on September 4, 1985, had an accidental spill of 1-1-1 Trichloroethane into the sewer system of Woodbury City. The indictment also alleges that, in violation of the company's sewer use permit, Aero and its plant manager failed to notify the Gloucester County Utilities Authority of the accidental spill. On September 5, 1985, employees of the City of Woodbury entered a pump station to perform regularly scheduled cleaning work. Because of the

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spill, lethal fumes were present. Two employees were overcome, one of whom died.

Attached to this write-up is a copy of the indictment and fact sheet for the Aero Plating case. Note should be taken that the indictment is predicated on the alleged violation of N.J.S.A. 2C:11-4 (second degree manslaughter). Conviction on this indictment allows for a 5-10 year prison sentence as well as \$100,000 fine.

The statute involved simply reads:

B. Criminal homicide constitutes manslaughter when:

(1) it is committed recklessly.

Manslaughter, as noted, is a crime of the second degree. Aggravated manslaughter, where "the actor recklessly causes death under circumstances manifesting extreme indifference to human life", and which was charged in the Great Adventure case, is a crime of the first degree. Conviction of a first degree crime carries with it a presumption of incarceration for fifteen years, though twenty years imprisonment may be imposed.

Since it appears that manslaughter or aggravated manslaughter are the New Jersey state charges most likely to be leveled against individual defendants arising out of workplace

fatalities, it is appropriate to briefly examine the elements of the two offenses. At the risk of oversimplification, there are two elements to the first degree offense (aggravated manslaughter) and one element to the second degree offense (manslaughter). To establish the first degree offense, the prosecutor must establish both reckless conduct causing death and circumstances manifesting extreme indifference to human life.

The Courts tell us that the circumstances manifesting extreme indifference to human life which permit elevation of a manslaughter charge to aggravated manslaughter are objective and do not depend on the defendant's state of mind. State v. Curtis, 195 N.J. Super. 354 (App. Div. 1984). Rather, the degree of recklessness must be determined from all surrounding circumstances and the ultimate question is whether the homicide was committed under circumstances involving a possibility of death, in which case it is manslaughter, or a probability of death, in which case presented is the crime of aggravated manslaughter. Id. In short, the offenses are distinguished by the degree of risk inherent in employer behavior.

As indicated, an element of both aggravated manslaughter and manslaughter is "reckless" conduct by the defendant. The term reckless is defined by statute as follows:

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A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

N.J.S.A. 2C:2-2b(3). The key elements in this definition are "conscious disregard" and "gross deviation" from normal standards of conduct. Since the prosecutor has the burden of proving all elements of the indictment beyond a reasonable doubt, one might think that safety professionals can rest easy, secure that they are insulated from potential criminal liability.

But such a sense of security would be folly. In the first place, ignorance is not bliss and I am sure the individual defendants in the Film Recovery, Aero Plating and Ciba-Geigy cases, among others, never imagined they someday would be tried as murderers, conspirators, thieves or the like. In the second place, there is at least a theoretical risk under the criminal section (17(e)) of OSHA, about which we will speak momentarily. Finally, a sense of security is unwise because the standard of

proof for manslaughter, while demanding, is certainly not unattainable in a workplace fatality case.

While Aero Plating is the first case of its kind in New Jersey, cases in similar contexts demonstrate the correctness of my last point. In State v. Winter, 96 N.J. 640 (1984), for example, the defendant was a registered nurse. She was charged with aggravated manslaughter when she transfused incompatible blood into a patient, thereby causing a fatal reaction. The nurse did not help her cause by attempting to conceal her error by failing to inform the victim's doctor of her mistake and by secreting and disposing of the remainder of the blood when her error became manifest. She was convicted of manslaughter, the "lesser included offense".

In an older case, an architect was indicted and convicted for manslaughter when a building he had designed collapsed causing death. State v. Ireland, 126 N.J.L. 444 (1941) appeal dismissed 127 N.J.L. 558 (1941). The theory of liability in this case was that the architect designed the building negligently and in violation of existing building codes.^{2/}

2/ Since negligence alone is not "recklessness", one must doubt whether the set of facts in Ireland would, under current statutes, give rise to conviction for manslaughter.

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I referred earlier to the risk of OSHA criminal sanction as "theoretical" and the choice of words was deliberate. Our research discloses only one reported decision where criminal sanctions were sought for violation of §17(e). U.S. v. Dye Construction., 510 F.2d 78 (10th Cir. 1975). The facts in Dye Construction are as follows. Employees were excavating to lay pipe. They dug a trench 9-12 feet deep with the width at the bottom being only 38-40 inches. The walls from bottom to the five foot level were shear and afterward, they widened to a width of 7½ feet at the top. The decision to slope or shore the trench was delegated to a non-managerial backhoe operator. The supervisors who delegated were aware of OSHA trench regulations. Tragically, the unshored and largely unsloped trench collapsed, killing a worker.

Likely important to a finding of guilt with regard to the corporation, which was the only defendant in Dye Construction, was the fact that 10 or 11 days before the fatality, the company had been written up for trench violations in the same area by the State of Colorado. Further, the Circuit Court found the jury was within its rights to disregard the testimony of the foreman and job superintendent who had inspected the trench beforehand and concluded that the material involved was hard rock as opposed to unstable soil.

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The Court also rejected the company position that to establish willfullness under §17(e), the government must prove an evil motive. Essentially, the Court took the position that the facts demonstrated a knowing violation of the pertinent regulations, notwithstanding employer protestations to the contrary, and that such knowing violation is all the government must establish for a guilty finding.

It is important to note the existence of a divergence of opinion between the Tenth Circuit and the Third Circuit, which encompasses Pennsylvania and New Jersey, regarding the definition of willfullness. I am happy to report that the Third Circuit requires more demanding proof. The Third Circuit treatment of this issue appears in Frank Irely v. OSHA, 519 F.2d 1200 (3rd Cir. 1975) affirmed on other grounds, 430 U.S. 442 (1977). The Frank Irely Court took note of the fact that employer knowledge of a violation is a constituent element of a "serious violation" where only a \$1,000 fine may be imposed. They thus concluded, correctly I believe, that the legislature intended more demanding proof to establish a willful violation where the potential sanction is much greater.

Thus, the Third Circuit held that willfulness connotes "defiance or such reckless disregard of consequences as to be

equivalent to a knowing, conscious and deliberate flaunting of the Act". 519 F.2d at p. 1207. "Willful" concluded the Court, "means more than merely voluntary action or omission - it involves an element of obstinate refusal to comply." 3/ Id.

It would appear that the test for willfulness under OSHA §17(e) is at least as demanding as the test for manslaughter in New Jersey. In fact, the Frank Irey test may be closer to the aggravated manslaughter standard. In any event, the extreme infrequency of criminal prosecutions under OSHA suggest that safety professionals should be much more concerned about state initiatives rather than federal.

Of course, for the purpose of this presentation, the bottom line concern for safety professionals is how to avoid being placed in the position of being a criminal defendant. My view is that avoidance, at least of being a convicted defendant, is a fairly simple matter. Dick Hofman was kind enough to send me an article from Safety Professional (September, 1985) entitled "Worker injuries - Applications of criminal liability", authored by George A. Peters, a much published authority on

3/ There is a split among the Circuit Courts on the correct definition of "willful" under §17(e). At some time in the future, an air clearing opinion by the Supreme Court is likely.

worker safety. In this article, a copy of which is attached, Mr. Peters offers many helpful, and I believe, insightful, suggestions on both what not to do and what to do. Rather than repeat his suggestions, I want to add my thoughts and encourage a serious reading of the Peters' article.

Firstly, my observation, as a non-technically trained individual, is that safety is a very common-sense oriented discipline. One might possess multiple degrees in engineering and natural sciences and be a miserable safety professional if not likewise possessed of commonsense and sensitivity. This point being made, I would counsel never to ignore your instincts: believe in them and follow-up on your hunches. If your instincts, your commonsense, tell you that a condition is unsafe, then investigation will often prove your instincts to be reliable.

Secondly, cases pertinent to this presentation seem to follow a pattern and that pattern is the failure to act as opposed to acting in an incompetent manner. The law does not expect you to be supermen and women. Rather, it expects reasonable prudence and concern. Consistently, employers have placed themselves at risk for ignoring obvious danger signals. If you see danger signals, let your instincts be your guide.

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Thirdly, I don't wish to appear to be naive about the nature of your position. A safety professional is like an offensive lineman in football. A lineman's number is called only when he is caught holding, clipping, tripping or going off-side. For better or worse, you like the offensive lineman, have cast your lot with a group of professionals who perform best when largely unnoticed.

Fourthly, I strongly urge that you maintain your professional integrity regardless of any countervailing pressure. Maintenance of professional integrity is your personal first line of defense against criminal liability. If you make recommendations which are not heeded, and the condition which gave rise to your recommendation also gives rise to a workplace fatality, at least you should be insulated from liability. In the second place, most if not all of you, report to non-safety professionals who rely upon your expertise. You owe it to your boss, in whatever position he/she may stand, to provide accurate assessments. To do otherwise could put your boss at risk of criminal sanction.

In conclusion, it is my belief that criminal charges, especially state, are likely to be filed more often than in the past against safety professionals. Practicing law teaches that

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elements of our society naturally assume that unfortunate consequences are always the result of breaches of legal duty. Thus, the key is to define the duty owed by the safety professional. I suggest that, at least currently, the duty owed by the safety professional is not unduly demanding. He/she must maintain and update skills; attentiveness must not be lost; documentation must be thorough; commonsense must be followed; and intellectual courage and integrity never abandoned.

For putting to one side the legal "mumbo jumbo" which attaches to the subject at hand, the qualities above mentioned are the touchstone to avoidance of potential criminal sanction. You, ladies and gentlemen, are professionals and acting as such should insulate you from possible liability.

CAPEHART & SCATCHARD, P. A.

About the authors and Capehart & Scatchard, P.A.

Bruce Harrison graduated from Westminster College (Pennsylvania) (BA degree) in 1969 and Vanderbilt University School of Law (JD degree) in 1972. After graduation, he worked with the Occupational Safety and Health Review Commission until May, 1975. While with OSHA, Mr. Harrison pursued course work for a masters degree in labor law. Course work was completed in the spring of 1975. Mr. Harrison joined Capehart and Scatchard on June 1, 1975, and authored his masters' thesis while working with the firm. The topic for the thesis was OSHA intrusion into labor/management affairs. An LLM degree was awarded by George Washington University School of Law in February, 1976.

William Houser received his BA and JD from George Washington. He completed his law degree in the spring of 1986. He started with the firm in August, 1986, and is awaiting bar exam results.

Capehart & Scatchard, P.A. is a mid-sized general practice law firm located in Moorestown, New Jersey. The firm has six somewhat overlapping sections including litigation, labor and environmental, lending and recovery, estate planning and administration, real estate and business.

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Periodically, the firm publishes a newsletter and a copy of the most recent newsletter is attached. On request, the firm will be pleased to add employers or individuals to its mailing list. Additionally, a firm brochure is available which more fully describes the firm and its members.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CRIMINAL

STATE OF NEW JERSEY) STATE GRAND JURY NUMBER SGC 153
v.) INDICTMENT
JOHN PERSIC)
AND)
AERO PLATING, INC.,)
a New Jersey Corporation)

The Grand Jurors of and for the State of New Jersey
upon their oaths, present that:

COUNT ONE

(Manslaughter - Second Degree)

JOHN PERSIC

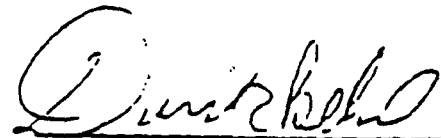
AND

AERO PLATING, INC.,
A New Jersey Corporation

between on or about September 4, 1985 and on or about September 5, 1985, at the Borough of Woodbury Heights and at the City of Woodbury, all in the County of Gloucester, did recklessly and unlawfully cause the death of David A. Lavery, the said JOHN PERSIC and AERO PLATING, INC., having a duty to give notice to the Gloucester County Utilities Authority in the event of the accidental discharge of waste into a public sewer beyond the discharge limitations of the "Industrial Sewer User Permit" issued to the said AERO PLATING, INC., the said JOHN PERSIC and AERO PLATING, INC. did recklessly and unlawfully fail to notify the Gloucester County Utilities Authority that a substance not in accordance with the discharge limitations of the aforesaid

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"Industrial Sewer User Permit," namely 1-1-1 Trichloroethane, had discharged into the sewer system of the City of Woodbury, in conscious disregard of a substantial and unjustifiable risk from such failure to notify, such discharge of 1-1-1 Trichloroethane causing the death of David A. Lavery, a municipal employee of the City of Woodbury, contrary to the provisions of N.J.S.A. 20:11-2 and N.J.S.A. 20:11-4, and against the peace of this State, the government and dignity of the same.



DONALD R. BELSOLE
ASSISTANT ATTORNEY GENERAL
AND DIRECTOR, DIVISION OF
CRIMINAL JUSTICE

A TRUE BILL:

131 Nancy J. Pulaski
Foreman

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