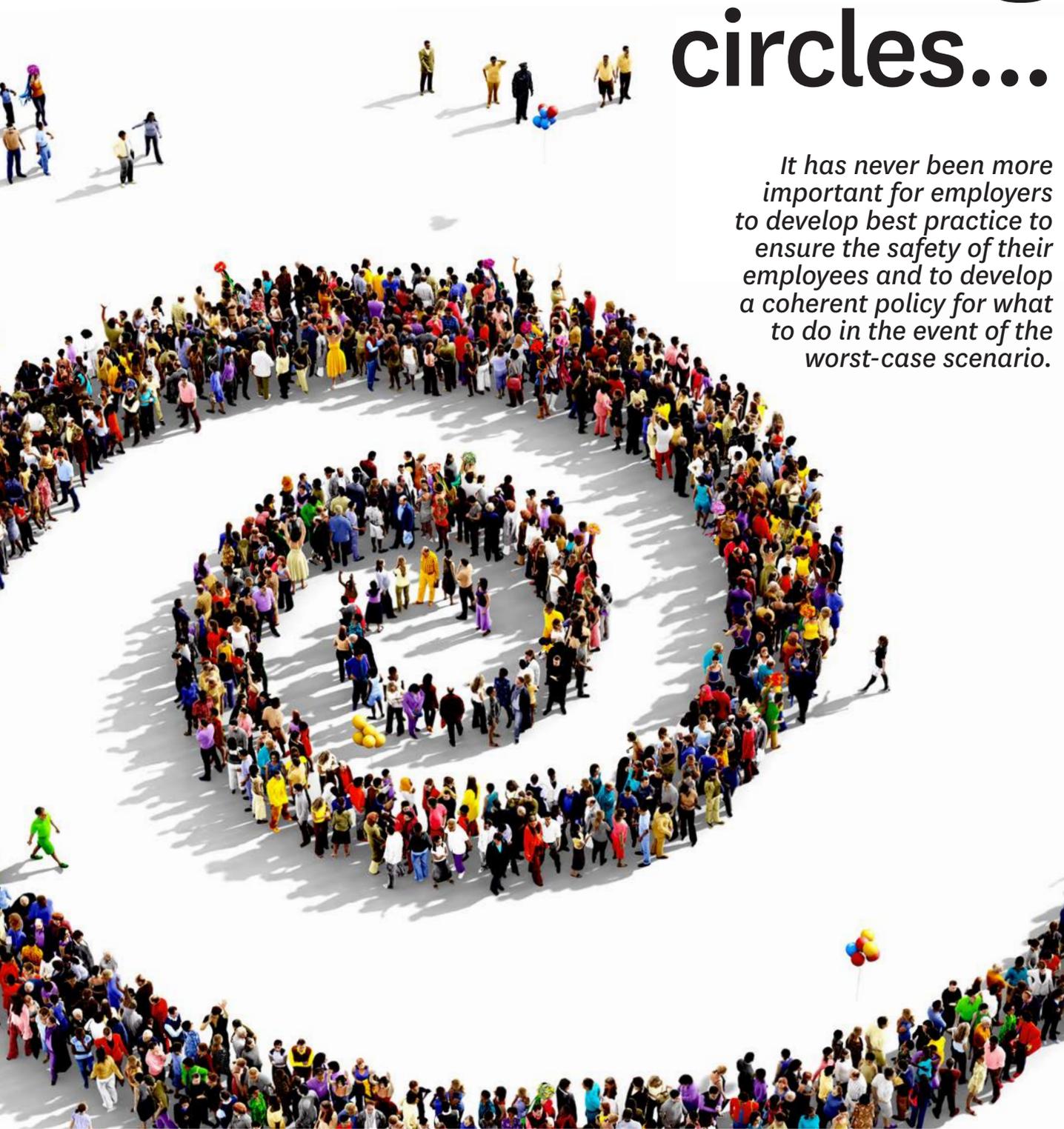


# Ever increasing circles...

*It has never been more important for employers to develop best practice to ensure the safety of their employees and to develop a coherent policy for what to do in the event of the worst-case scenario.*



BY:

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**T**HE NOOSE HAS BEEN STEADILY TIGHTENING around the proverbial corporate neck as awareness increasingly grows relating to the responsibility of employers towards the safety of their employees. There have now been over 30 prosecutions under the Corporate Manslaughter and Corporate Homicide Act 2007 and the fines imposed have been high, often over GBP500,000<sup>1</sup>. Employers face potential civil and criminal liability and being liable for substantial damages or, heavily fined. In the case of Directors, they can be disqualified for up to 15 years and/or imprisoned<sup>2</sup>. This liability exposure increases when it comes to companies conducting their operations across the globe. The same applies to Health and Safety Offences, with more individual Directors and individuals being sent to prison.

### Risk scenarios in a global setting

In *Dusek & Ors v StormHarbour Securities LLP* (2015), the employee, a Mr Dusek, was employed as managing director, by StormHarbour Securities LLP, a financial services firm specialising in capital markets, he came from a financial background.

Whilst in Peru in 2012, working on a project for the financing of a proposed hydroelectric complex in the foothills of the Andes, Mr Dusek died in a helicopter accident on the way back from a site survey.

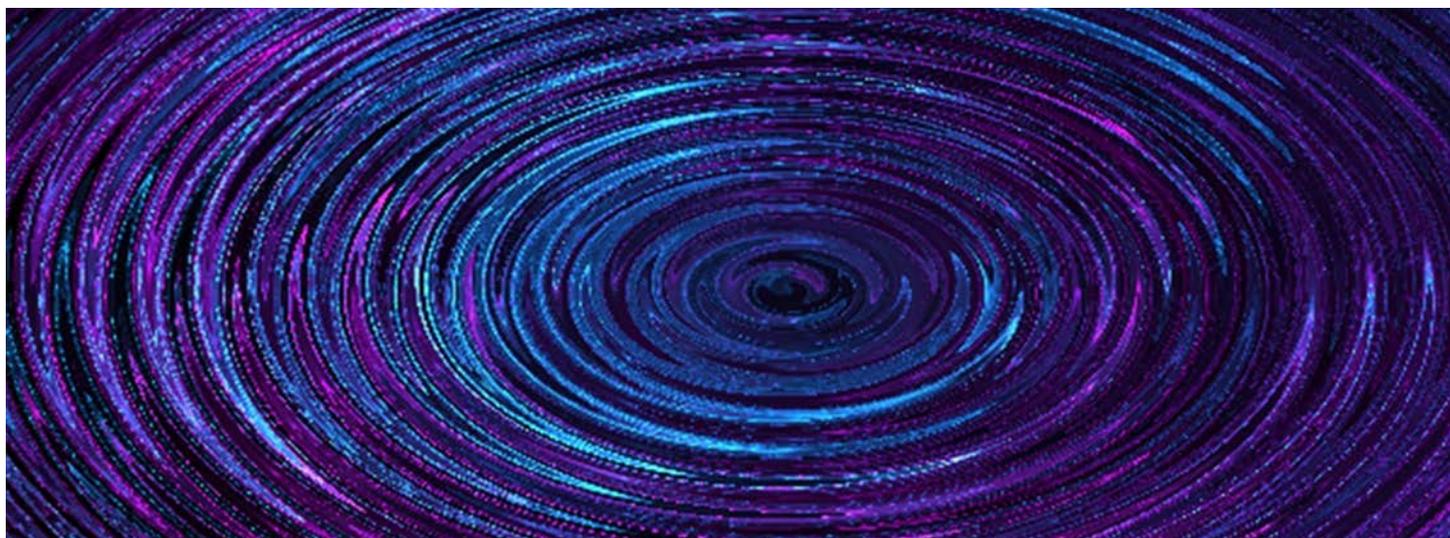
The helicopter crashed into a mountainside having exceeded the permitted height it could fly to - the unforgiving terrain, night conditions and bad weather all being contributing factors.



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The Court of Appeal upheld the High Court's decision to hold StormHarbour liable to pay his estate damages even though Mr Dusek was a highly intelligent, senior employee with a high degree of autonomy, and even though the trip had not been organised by the employer. StormHarbour's duty to take reasonable care for Mr Dusek's safety was held to be non-delegable, and that included the employer's duty to carry out a careful assessment of the risk in relation to the helicopter flight that Mr Dusek was planning to take. The helicopter company had previously had near misses, and the pilot lacked certain qualifications.

In an uncannily similar case, *Cassley & Ors v (i) GMP Securities Europe LLP (ii) Sundance Resources Ltd* (2015),



<sup>1</sup> Ten years of the Corporate Manslaughter Act

<sup>2</sup> Gross negligence manslaughter



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Mr Cassley, a financier, had in the course of his employment taken a flight chartered by a mining company from Cameroon to the Republic of Congo, at the invitation of the charterer's board of directors, to inspect a mining site on behalf of his employer.

The plane crashed due to pilot error and everyone on board, including Mr Cassley, died. Following Dusek, the High Court agreed that the employer had a non-delegable duty to take reasonable care to see that he was reasonably safe when travelling in the course of his employment, and had taken no steps to discharge that duty. There were various enquiries it should have made of the charterer about the carrier, the route and the insurance position for example.

Despite that though, the employer was found not liable as the court found that had the employer made the requisite enquiries, it would have concluded that the flight was safe.

Employers should not just be concerned about potential flight carrier crashes while their employees are abroad. There are many potential hazards. War zones, the Ebola pandemic, the ash cloud in 2010; malaria; dengue are just a few examples. These risks are constantly changing.

Exposure to liability may even extend beyond the company's immediate employees. Attempts have been made to fix parent companies with liability for their foreign subsidiary companies' actions. In *Ogale Community v Royal Dutch Shell & Ors* (2018), the claimants sought unsuccessfully to hold the parent

companies responsible for environmental damage caused by Nigerian subsidiaries of the England based parent. Despite the outcome, the case demonstrates that, depending on the circumstances, it is possible for liability to "flow up" from the subsidiary to the parent.

### Legal consequences for the employer

The scenarios above and many others have the potential to cause harm to employees posted or travelling abroad. This can lead to both civil and criminal proceedings against the employer. On the civil front, the bar for asserting that the employer owes a duty is not impossible to cross, and the case law clearly shows that the courts regard that duty to be non-delegable. ISO45001 is also just about to be introduced.

Whether a criminal prosecution for corporate manslaughter or individual gross negligence manslaughter, or health and safety offences is as easy to bring, is debatable, but private prosecutions are on the rise. To lower the risk of civil and/or criminal proceedings, prevention is of course the best policy and we suggest *inter alia* the following precautionary steps:

#### Make a list of the risks posed to all employees travelling abroad

**Ask probing questions in relation to the risks** in order to assess the appropriate level of risk to decide whether the employee should go at all. Further whether he/she should partake in certain activities. This should be much more than just a "tick box" exercise. In *Dusek*, the Court held that his employer should have enquired about the details of the flight operator, the helicopter, the route and as to how Acres had satisfied itself as to the safety of the proposed flight. This would have led to further enquiries, including an audit of the flight operator.

**Obtain tailored insurance** to cover any damage resulting from foreign travel and ensure that the insurer is informed of all relevant circumstances of the proposed trip. These risks will remain dynamic.

**Explain the risks to the employee** of the foreign travel and ensure that he/she is not under pressure to accept the assignment, and is fully aware of all the issues.

**Provide training** to the employee on political, security and travel risks, local laws and

customs of importance and emergency procedures, including contact information for 24-hour assistance in the event of an emergency. This may also entail enhanced training including kidnapping risk.

**Continue to monitor updates** to travel advice and ensure these are promptly and regularly communicated to the individuals who are travelling.

**Ensure that employees are vaccinated** against and aware of guidance surrounding the avoidance of diseases.

**Provide assistance** when abroad (for example, regarding evacuation or seeking medical assistance if unwell). Consider attaching a tracking device to the employee so that he/she can be found more easily in the event of a disaster occurring.

**Develop a crisis management plan** in the event that an employee comes to harm.

## THE REPUTATIONAL FALL-OUT FOR COMPANIES FROM AN INCIDENT OCCURRING BECAUSE OF FAILING TO TAKE PREVENTATIVE MEASURES, CANNOT BE UNDERESTIMATED.

### Food for thought...?

It has never been more important for employers to develop best practices to ensure the safety of their employees and to develop a coherent policy for what to do in the event of the worst-case scenario. Apart from the obvious and necessary importance of protecting their employees, the reputational fall-out for companies from an incident occurring because of failing to take preventative measures, cannot be underestimated. Once negative press has spread, the damage is done and almost impossible to salvage the reputation even with the most skilled of public relations advice.

In conclusion, the time has never been more appropriate for employing firms and companies to behave responsibly and take immediate and preventative action to ensure that their employees are to the best of their ability fully protected at all times. ■

