

# Section 3

## Trustees and Directors & Officers Liability



**Section 3 Trustees and Directors & Officers Liability****People who run and control organisations have responsibilities recognised by the law. This generally applies to whatever position they hold whether it be that of trustee, director or officer.**

As Lord Denning, one of our most eminent Law Lords of recent years explained by likening an organisation to the human body. He imagined the employees to be represented by the hands and feet which could only undertake tasks as directed by the brain.

The Directors, however, he felt were equivalent to the brain which controls and directs all the functions and capability of the body, and consequently those limbs and actions of the employees.

Whilst Lord Denning was actually referring to Directors a similar situation applies to Trustees who are defined in the Charities Acts, “as those people having general control and management of the administration of the charity”.

In the Charity Sector there is often a lack of appreciation that it is the actual responsibility with regard to any control a person undertakes in his or her role that dictates, in the eyes of the law, as to whether that person is a trustee and not the actual title of that person.

Charities are run by Trustees, who are entrusted with the money donated for charitable purposes and have, accordingly, the highest duty in the eyes of the Law. They are ultimately personally responsible to run the charities effectively and efficiently.

The Charity Commission, who are the regulatory authority in England and Wales, have stated that Trustees should use the same degree of care as a prudent man of business.

Trustees are personally liable for a breach of trust or duty for any loss suffered by the charity or beneficiaries virtually without limitation. Examples from where these may arise are:

- Misapplication of funds
- Misapplied distribution of charity property
- Borrowing funds
- Investment matters
- Failure to safeguard the charities assets physical or otherwise
- Failure to keep within the Charity Commission’s requirements

Accordingly many trustees are very concerned that in these litigious times that they may suffer substantial financial loss despite their undertaking their onerous duties out of charitable instinct and without remuneration.

An example of where trustees of charities have been criticised or held responsible by the Charity Commission is when:

- Matters have been left without suitable supervision and caused the charity to lose substantial funds were e.g. a senior employee who behaved imprudently was not monitored properly
- Money has been spent on inappropriate advertising e.g. political or misdirected
- Money has been invested in risky projects e.g. property development
- Control has been lost e.g. insufficient meetings and minutes of meetings

However, the Charity Commissioners have historically treated trustees, who have made honest mistakes, fairly gently. In fact, under the Trustee Act 1925 the Law “may” allow a trustee, who has made an honest mistake, to be “indemnified” from charitable funds.

Most charities are Unincorporated Associations i.e. not incorporated under the Companies Acts. Many charities are, in fact, incorporated to obtain the protection afforded under these Acts, but some do not realise that the “protection” can, in certain circumstances, be overridden by the requirements of the Charities and Trust Acts.

It is generally considered that the main advantage of incorporation is that when a director or officer of an incorporated organisation signs or agrees a contract he or she cannot be held personally liable for any failure on the part of the organisation to satisfy the terms of such contract. The opposite applies to trustees of unincorporated associations.

Directors and officers may be held responsible for any act that is negligent, outside their authority or in breach of duty or trust. The Companies Act contains the main legislative requirements. The definition of a director is vague and unless precluded by the articles of association or disqualified in law, anyone can be a director. A director does not need to be a natural person and a company can be a director of another.

The definition of an officer is also vague and, in line with Lord Denning’s analogy, ordinary employees are not generally officers, but directors and company secretaries are. Managers can be but would probably need to be involved in tasks that involved the company as a whole. Salaried professional advisers and auditors may be officers.

Trustees and directors must not let personal interests prejudice the interests of the charity, trust or company.

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Directors and officers have three main types of duty:

- Fiduciary – a director must act in good faith and in the best interests of the company
- Skill and care – the directors must carry out their duties with reasonable degree
- Statutory – there are over 80 indictable offences in the Companies Act such as non-disclosure of certain information

In respect of a company the following can bring an action:

- Shareholders
- DTI
- The Official Receiver
- The Company Liquidator
- Regulatory Bodies
- Creditors
- EEC Authorities

There is also a growing movement for the rights and interests of various stakeholders to be acknowledged e.g.:

- Employees
- Clients
- Sponsors
- Health & Safety Executive

Directors may be indemnified by suitable clauses in the Articles of Association and in his or her contract. However, Section 310 of the Companies Act, restricts the instances in which these clauses can be effective, e.g. successful defence of a civil action.

Many charities form trading or subsidiary companies for a number of reasons e.g.:

- To legitimately raise funds by means which the Charity Commission would interpret as being not strictly within their mission statement or objectives
- To protect the charity from risks inherent in projects or joint ventures
- Legal protection within the Companies Act

The Charity Commission is particularly concerned that the assets or the funds of the charity should not be at risk through the activities of a trading company e.g. a loan should only be made in exceptional circumstances and with the permission of the Charity Commission. A number of charities have had extreme problems from trying to bolster a trading company.

There is a growing intent on the part of our legislators to include within civil Acts of Parliament aspects which embrace “criminal” offences for a breach of statutory duty.

The result is that fines or imprisonment can be imposed on directors or officers. Examples can be found in:

- The Health & Safety at Work Act 1974
- The Insolvency Act 1986
- The Companies Act 1985

**Trustees Indemnity Insurance**

The Charity Commission of England and Wales now agree that it is possible for charities to arrange insurance to indemnify their trustees. The cover typically may include:

- Damages and legal expenses arising from any “wrongful act”
- Dishonesty which is not recoverable from the trustee
- Loss of documents
- Any actions against fellow trustees
- Libel and slander (other than printers’ errors or omissions)

However, it must be stressed that such cover is subject to Charity Commission approval and dependent on such charity’s articles of memorandum.

Another onerous position for those willing to take it on is that of a trustee of a pension fund, who owe a fiduciary duty to the members of that fund. Specialist advice should be sought if required.

**Useful information**

The following organisations specialise in providing guidance for charities and charity trustees:

- **The National Council for Voluntary Organisations (NCVO)**  
Address: Regent’s Wharf, 8 All Saints Street, London N1 9RL  
Tel: 020 7713 6161
- **The Directory of Social Change for England & Wales**  
Address: 24 Stephenson Way, London, NW1 2DP  
Tel: 020 7209 4949
- **The Charity Commission, Publications Dept**  
Address: St Alban’s House, 57-60 Haymarket, London, SW1Y 4QX  
Tel: 020 7210 4556
- **The Dept. of Trade and Industry**  
Address: 1 Victoria Street, London, SW1P 3AG  
Tel: 020 7270 3000

For Scotland:

- **Scottish Charities Office**  
Crown Office, 25 Chambers Street, Edinburgh EH1 1LA  
Tel: 0131 226 2626

For Northern Ireland:

- **Charities Branch Voluntary Activity Unit, Dept. of Health & Safety**  
Castle Buildings, Stormont, Belfast BT4 3RA  
Tel: 01232 5220780

Please remember these notes are purely a guide and for more specific legal advice or information refer to solicitors or other organisations or consultants, such as those listed above, or who are experienced in the requirements of the charity sector or company governance.

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