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Insurance POST

Claims

Legal Update: D&O liability, data protection and the avoiding of bogles

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- The Information Commissioner supports extending liability so directors are personally accountable
- From May 2018, fines for data breaches will be much higher
- The GDPR extends direct liability to outsourcing

Scots worldwide are preparing to celebrate the works of poet Robert Burns. Two lines from his famous poem Tam o'Shanter will be spoken at many events: "Gathering her brows like gathering storm, nursing her wrath to keep it warm".

Buffeted by data breaches, hacks or ransomware, and with the regulator or affected individuals increasingly willing to make the consequences for business financial, directors and managers may empathise with Tam's imagined vision of his wife's reaction to his late return.

At the **House of Commons Public Bill Committee on the *Digital Economy Bill*** in October 2016, the new Information Commissioner Elizabeth Denham said she would support extending liability and accountability to directors so that they were personally accountable for nuisance phone calls rather than companies. "Companies go out of business and, as in a game of whack-a-mole, appear somewhere else," she said.

Denham also said she would consider placing the Information Commissioner's **Data Sharing Code of Practice** and its **direct marketing guidance** on a statutory footing. Breaches of those codes would then carry a penalty. The present maximum fine for breaching the *Data Protection Act* is £500,000. After May 2018, the European Union's ***General Data Protection Regulation*** will raise the maximum fine to the higher of €20m or 4% of a company's global turnover.

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Sea change regulation

The **GDPR** represents a sea change. 'Privacy by design' calls for "the inclusion of data protection from the onset of the designing of systems". Previously contractors were exempt as mere data processors but the new regulation extends direct liability to outsourcing. This has profound implications for businesses. More due diligence will be required. Contract negotiations may become more tortuous. Tenders may become more onerous. The cost of negotiating contracts will rise.

One can foresee regular battles of warranties: no one will want their business on the hook for a nine-figure fine. **Cyber insurance** may become

the norm. Inadequate or no insurance may result in shareholder claims against boards. Following the **Playstation hack** when 77 million users' records were compromised, Sony's insurers sought a court declaration that the commercial general liability and excess policies issued to Sony excluded "defending and potentially indemnifying Sony from class action lawsuits, possible government investigations and other miscellaneous claims". The case settled out of court.

Importance of data security

Thus, it is essential that data management, information security and associated risk issues are kept within the ownership of boards and under review, using external experts in security to assist them. Boards must ensure staff are aware of the risks and adequately trained. In two recent large fines imposed on a telecoms provider and an insurer, the Information Commissioner commented negatively upon organisations she deemed to have had resources they could have spent on data security but whose board apparently chose not to.

Directors have a duty to exercise reasonable skill and care. To say data security and risk was left to the IT manager is unlikely to satisfy the performance of that duty. Directors will be rightly concerned that the UK may be moving towards personal liability for corporate breaches of the *DPA*. The previous Information Commissioner is also on record as favouring prison sentences where directors had deliberately flouted the *DPA*.

Directors might, therefore, consider adopting the approach of Tam o' Shanter on his journey home through that gathering storm: "Glowering round with prudent cares, lest bogles catch him unawares".