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Albion Chambers HEALTH & SAFETY BULLETIN

Attacking the reverse burden

The words "Health and Safety" have, in recent years, become almost a by word for unreasonable state intervention in activities that had previously been regarded as harmless fun. Apocryphal tales abound about sports days cancelled due to a risk of slipping on a damp running track or conker fights being forbidden lest a finger be hurt by an errant embryo nic horse chestnut tree.

These tales, however, demonstrate an undeniable truth, namely that our day-to-day activities are increasingly being affected by, what some regard, as a nanny state.

This state intervention can, and increasingly does, include the prosecution of corporate bodies and individuals to reinforce the need to "prevent death, injury and ill health in Britain's workplaces" [1]. Further, whereas until recently those convicted were punished only financially, there now exists the prospect of being imprisoned for up to two years if convicted of breaching Health and Safety laws [2]. This is a significant factor to bear in mind, as most defendants charged with these offences fail to appreciate that they are potential prison inmates.

It is therefore important to analyse the legal issues involved in every case at an early stage in order to decide if a case is capable of being fought, or whether a timely guilty plea is appropriate. This article examines whether or not it is possible to argue that the prosecution can be prevented from ever getting off the ground.

The first issue to consider is, that, unusually in the criminal law, Health and Safety offences place a burden of proof on the defendant to establish a defence; the "reverse burden of proof" [3].

The duty placed upon any employer under S.3(1) of the Act is that they undertake, so far as is *reasonably practicable*, that persons not in their employment are not exposed to risks to their Health and Safety. Once such a risk is established the burden falls on the defendant to prove "*that it was …not reasonably practicable to satisfy the duty*."

A criminal lawyer unfamiliar with Health and Safety legislation may wonder whether such a provision is compliant with the Human Rights Act 1998. The Court of Appeal has ruled that it is; "those who enter a regulated field, such as the defendant [in this] case, are in the best position to control the harm which may result from their activities and they should therefore be held responsible for it" [4].

This decision, however, pre-dated the change in the law that now allows for imprisonment. As the Court of Appeal regarded as material that in cases where the reverse burden of proof applies, the defendant does not face imprisonment, one could suggest that the reasoning behind the Judgement is now flawed. It may well be therefore, that the first port of call in defending a case is to seek to revisit Davies and argue that the reverse burden is no longer compliant with the defendant's right to a fair trial.

A further variation on this approach to the reverse burden issue is to examine the potential application of the principles of abuse of process. The principle that a court has an inherent power to protect its own process from abuse is now clearly established [5]. Abuse is defined as *"something so unfair and wrong that the Court should not allow a prosecutor to proceed with what is, in all other respects, a regular proceeding"* [6].

In the context of Health and Safety prosecutions at least two areas of abuse are potentially of assistance to the defence.

The first of these is delay. If serious prejudice can be demonstrated such as that which might arise when evidence, in existence at an early stage, is no longer available due to the passage of time, or if a witness who might have been able to rebut the prosecution case has died, then an abuse argument may be advanced. This approach would clearly be based upon the principles set out in Article 6(1) of the European Convention on Human Rights [7].

This type of argument will be familiar to criminal lawyers, but it is possible to argue that the prejudice occasioned is enhanced as, unlike in standard criminal cases, there is a burden upon the defendant to establish a defence. It is not therefore prejudice occasioned by an inability to disprove (or more accurately cast doubt), but rather prejudice caused by an inability to prove (albeit to the civil standard).

A further application of this principle may arise when a defendant suffers from an impairment, such as mental illness. If a defendant is charged with Health and Safety offences but subsequently falls ill, an argument that he is "unfit to be tried" may carry more weight when it is apparent that he is unable to satisfy the burden placed upon him by S.40 because he is unable to give an account of himself in Court.

In both of these examples it is the effect on the defendant's inability to satisfy the burden placed upon him because of factors over which he has no control that arguably renders more potent an abuse of process argument.

Of course if these arguments prove unsuccessful one must turn to more substantive attacks on the prosecution case dealing with issues of proportionality as it applies to reduction of risk [8], reasonable foreseability [9] as well as issues relating to the existence of the risk itself. These arguments are, however, outside the scope of this article and merit separate analysis on a separate occasion.

Stephen Mooney

1 As per the HSE mission statement
2 HSWA 1974 s.33(2A) and (4)
3 HSWA 1974 s.40
4 Davies v Health and Safety Executive [2002 EWCA Crim 2949
5 Connelly v DPP [1964] AC 1254 (HL)
6 Hui-Chi-Ming v R [1992] 1AC34 (PC)
7 "everyone is entitled to a fair and public hearing within a reasonable time…"
8 Edwards v National Coal Board [1949]1K.B.704
9 R v HTM Ltd [2006] EWCA Crim 1156

Preparing for interview in H & S cases

One of the significant difficulties facing defence practitioners who advise at early stages in Health and Safety cases is uncertainty over what charges their clients may face. Although the Health and Safety at Work Act 1974 is a concise and clear statute, uncertainty is caused by the enormous raft of Regulations. There is hope that the regulatory framework will become easier to navigate in the near future, as a result of two recent analyses of Health and Safety legislation.

Lord Young reflected a common sentiment in his October 2010 report into Health and Safety, observing that *'for businesses trying to make sense of their responsibilities it is almost impossible to understand how it all fits together.'* One of his recommendations was for the existing Regulations to be consolidated, to provide clarity and certainty to businesses - and to legal advisors. The Law Commission's 2010 consultation document about Regulatory Offences is highly critical of the Health and Safety Executive's use of Regulatory Offences, and recommends the restriction of new Regulatory Offences, and the introduction of civil rather than criminal sanctions for some minor Health and Safety offences.

Although radical changes may be afoot, in the meantime those who advise companies and individuals still face a difficult first step of identifying the shape of the case which their client has to meet. This task has become a little easier in recent years because of the increasing cooperation of HSE with defence solicitors. Although different inspectors take different approaches to the amount of information which they disclose before interview, it is generally now accepted that suspects are entitled to know (i) the charges under consideration; (ii) a summary of the facts which have been uncovered in the investigation; and (iii) the likely areas of questioning. Legal advisors are likely to take the view that this material is a pre-requisite to agreeing to be interviewed.

HSE conduct voluntary interviews under caution. This means, of course, that while a decision not to attend interview cannot lead to a formal adverse inference, a failure to answer a question within an interview may lead to an adverse inference. In practice, most companies and individuals feel that they wish to put forward an account at interview, either to challenge the apparent findings of the HSE investigation, or to provide early mitigation.

In order to prepare clients for interview, legal advisors will be assisted by a detailed knowledge of the procedure which HSE follow before deciding whether a prosecution is approved (see www.hse.gov.uk/enforce/enforcementguide/investigation/approving-intro.htm)

With that in mind, where a company is the suspect, the decision as to who should attend as the company's representative can have very significant ramifications. HSE will sometimes allow two company representatives to attend interview, although permit only one to answer (with the second person 'briefing' the first.). A better approach is often to have one person attend the interview and for that person to be briefed in full before the interview (e.g. a NHS area manager, briefed by local security managers, the H&S liaison manager and other personnel involved in an incident). If questions are asked which are outside that area manager's expertise, the manager is entitled to read from a prepared script and make it plain that they do not have any first-hand knowledge of that topic; it is difficult to see that any adverse inference could be drawn from a subsequent failure to answer questions about that topic.

It is often possible to use a HSE interview to introduce documents which will be considered by the 'approval officer' in deciding whether a prosecution should be progressed. It is therefore often advisable to introduce a paginated file of documents at the interview to support points which are made by the interviewee but which are unlikely to otherwise appear in the inspector's report to the approval officer (such as examples of risk assessments in other areas/results of previous HSE inspections/ photographs of updated procedures in action).

Legal representatives' influence on HSE's decision-making can continue after interview. A follow-up letter is often advisable, particularly if there are public-interest aspects of the enforcement code which cannot properly be dealt with by the suspect in interview, but which should be brought to the attention of the approval officer.

In many cases, strategic preparation for interview may well affect the decision as to whether to prosecute at all. It may also pave the way for a plea to Regulatory Offences which reflect the criminality, rather than a plea to a more serious breach of the Health and Safety at Work Act 1974. At present, almost every statutory breach is also a breach of half a dozen Regulations (e.g. an HSWA s2 breach by causing dermatitis in employees may also be a breach of Regulations concerning Control of Hazardous Substances, Regulations concerning risk assessments, and RIDDOR regulations requiring reporting of industrial injury). The advantage which a detailed knowledge of Regulations gives the practitioner is, not least, the ability to identify and negotiate acceptable pleas. It is to be hoped that the consolidated Regulations recommended in the Young Report become a reality, to make the process of advising and negotiating more straightforward for us all.

Kate Brunner

Consistency versus arbitrariness

A middle path?

In *R v Howe & Son (Engineers) Limited [1999] 2 All ER 249* the Court of Appeal acknowledged that whilst it may be difficult for tribunals who deal rarely with this area of the law to have an instinctive feel for the appropriate level of penalty, nevertheless it was impossible to *"lay down any particular tariff or to say that the fine should bear any specific relationship to the turnover or net profit of the defendant. Each case must be dealt with according to its own particular circumstances"* [p254, paragraph a]. As a result of *Howe*, it has often been considered impermissible to refer to previous authority at sentence.

This approach has resulted in difficulty in advising the client as to the likely outcome of a case and assisting the Court at sentence. The Definitive Guideline on Corporate Manslaughter and Health and Safety Offences Causing Death, sets out the steps in the reasoning the Court must follow at sentence, but is of limited assistance on figures; for health and safety offences causing death we glean that the appropriate fine is unlikely to be under £50,000 and might be over £1m!

Some comfort is to be drawn from recent Court of Appeal authorities however in which, whilst expressly not setting any kind of tariff, reference has been made both to previous cases and statistics as to the levels of fines historically imposed.

In *Chalcroft Construction Limited [2008] EWCA 770*, the Recorder at first instance had found that whilst the case was very serious, it was not in the most serious category of those who sacrifice safety for profit, for which he identified fines at or about £600,000 were the norm. He therefore took a starting point of £400,000. In the Court of Appeal it was accepted by the Appellant that there was no tariff but average fines imposed for various categories of case were presented to the Court. Whilst ultimately these figures were not adopted and the appeal was dismissed, it is noteworthy that the Court did not disapprove of the reliance upon the figures to provide *"some insight into the framework of penalties in this area"* [paragraph 14]. Additionally, in *R v TDG (UK) Limited [2008] EWCA Crim 1963*, the Court said that the very fact that the appeal in Chalcroft was dismissed, when taken in combination with reference by the Court to remarks of the sentencing Recorder, gave "some force" to the submission on the part of the respondent that in *Chalcroft* the Court "appears to accept that £600,000 now represents the sort of figure for a fatality with the added ingredient of safety being sacrificed for profit" [paragraph 20].

Most recently in *Bodycote HP [2010] EWCA Crim 802*, the Court of Appeal was keen to place this part of the Judgment in TDG in context. It was pointed out that the Court had also said that no tariff could be set and reminded itself of *Rowe* and *R v Balfour Beatty Rail Infrastructure Services Limited [2006] EWCA Crim 1586* in which it was said that consistency may not be a primary aim of sentencing. At paragraph 21 of *Bodycote* the Court steered a cautious middle path and said:

"Since there is no tariff, since consistency is not a primary aim in this area of sentencing, the references to earlier cases has the much more limited function of providing only a "broad feel" of the level of fine to ensure that the penalty in the instant case is not arbitrarily fixed".

The fact that the Court of Appeal has allowed the introduction of figures and reference to precedent into argument is a strong ground for arguing that at the Court of first instance the parties can assist the sentencing tribunal with a 'broad feel' from previous cases. Given that the Sentencing Guidelines suggest at paragraph 11 that both prosecution and defence should set out in writing aggravating and mitigating features, an appropriate course may be for parties to suggest a sentencing range within which the case falls, if possible as an agreed position. Unpredictability and inconsistency will remain, but the latest authorities do suggest that the feared arbitrary fine might be a receding problem.

Anna Midgley

Foreseability and risk prevention in HSE Prosecutions

The lot of those defending in Health and Safety Prosecutions is thankless and fraught with difficulty. The application of "reverse burden" immediately places a obligation on the defendant to demonstrate that he did all that was reasonably practicable to minimise or eliminate that risk. In cases where the risk has yet to materialize by way of death or injury there is scope for arguing that all reasonable steps have been taken. The existence of risk to the health and safety of a member of the public, if established, will be enough to demonstrate that an employer has failed to protect the public [1].

There is also no *"identification doctrine"* of the sort found in other areas of law to the effect that a company is guilty only if the board or other *'controlling mind'* is guilty. In the context of Health and Safety enforcement *"subject to the qualification* [reasonable practicability] S.3(1) *created an absolute prohibition"* per Steyn LJ in *R v British Steel plc [1995] 1 WLR 1356.*

The combination of this 'absolute' prohibition, the simple requirement of the existence of risk and the 'reverse burden' can leave a defence practitioner wondering whether it is possible to defend a case brought under S.2 the Health and Safety at Work Act 1974 at all.

It must be remembered that despite these obvious difficulties S.2 does not create an offence of strict liability and there are issues relating to the likelihood of risk and the requirement for such risk to be minimized which require careful analysis.

The caveat referred to in *R V British Steel (supra)* of reasonable practicability is an area which can offer hope to the defence. To determine what is 'reasonably practicable' requires an assessment in which each risk (both likelihood of an occurrence impacting on health and safety and the severity of the likely result) is weighed against the sacrifice (in money, time or trouble which would be involved in each step which could be taken to avert or minimise that risk. This principle has its roots in *Edwards v National Coal Board [1949] 1KB 704*. Only if there is a gross disproportion between the two such that the risk is insignificant compared to the sacrifice will the step in question not be reasonably practicable. The test of 'gross disproportion' has formed the basis of the approach by the HSE to the issue of risk reduction for many years. If a risk is small, but requires a substantial amount of time or effort to reduce it there is an argument that the step need not be taken, to do so would be 'grossly disproportionate'. If the risk is of a minor injury and the time and expense required to remove the risk is substantial then failure to remove that risk would not necessarily be found as criminal liability under S3. If the risk is of serious injury or death then it would be difficult to argue that the failure to reduce that risk could be excused, however expensive or time-consuming the measure required.

If the issue to be tried involves injury to an individual and the issue of 'gross disproportionality' does not arise a further difficulty lies in the way of the defence.

The purpose of the legislation is to encourage employers to ensure the health of those they employ, or members of the public who are placed at risk by the employer's activities (e.g. train or bus passengers). If injury is caused to an individual in one of those categories then there is a presumption that his safety has not been properly safeguarded. The proof of injury or death is therefore evidence that his health and safety were not in fact ensured [1]. If death or injury has been caused and there is no argument as to whether necessary steps to reduce the risk were grossly disproportionate the defence must explore the way the injury or death were caused and if the concept of 'reasonable foreseability' can offer any assistance.

The concept of reasonable foreseeability is familiar to civil lawyers but is seldom seen in criminal law. To place it into its correct context in the area of Health and Safety law it is helpful to analyse to significant authorities.

R v Gateway Foodmarkets Ltd [1997] 3 All ER 78 analysed the issue of an employer's liability for isolated acts of an employee. A manager at one of the company's stores fell to his death through a trap door in the lift control room. Throughout the preceding year there had been problems with the lift. The manager had been told how to deal with the problem by the lift contractors. A practice developed where he would mend the lift without the need to call out the contractors. He had not been authorised to do this and his employers were unaware of this practice. The day before the fatality the contractors

had attended to service the lift but failed to close the trap door. The next day the familiar problem arose and the manager went to mend the lift. He did not see that the trap door was open and fell to his death. The company argued that the risk to the employee was not caused by an act or admission on the part of the company but rather by the manager who had allowed the irregular system to grow. They should therefore not be held liable for the death. The Court of Appeal disagreed and found that;

"the general considerations referred to in the authorities, including the purpose and object of the legislation make it overwhelmingly clear that S2 (1), like S3 (1), should be interpreted so as to impose liability on the employer whenever the relevant event occurs, namely, a failure to ensure the health, etc. of an employee."

This may be regarded as harsh but is illustrative of the purposive nature of the legislation i.e. to promote safe working practices and environments. The arguments advanced did however raise the issue of what should be the approach to an *unforeseen* act or omission of the part of a junior employee. It was argued, perhaps optimistically, that creating liability for such acts would be 'absurd'. The Court of Appeal dealt with this approach and doubted that there would be occasions where such behaviour could fix an employer with criminal liability;

"The duty under each section is broken if the specified consequences occur, but only if "so far as reasonably practicable" they have not been guarded against. So the company is in breach of duty unless all reasonable precautions have been taken, and thus we would interpret this as meaning "taken by the company or on its behalf"

The court considered what the position should be in the event of 'the rare case' where the employee was on a frolic of his own and there was no failure to take reasonable precautions at any other level. In these circumstances the court accepted that the defence (S.40) would potentially be available but declined to define any narrower test.

Gateway therefore decided that a failure at management level is attributable to the employer but left open the question of whether the employer is liable where the only negligence of failure to take reasonable precautions has taken place at a more junior level.

This question was addressed ten years later in the significant authority of *R v HTM Ltd. [2006] EWCA Crim1156*. This case came before the Court of Appeal by way of an appeal under S.35(1) of the Criminal Appeal and Investigations Act 1996 as an appeal against a ruling made by a trial judge.

The defendant company faced an indictment alleging an offence under S.2(1) of the HSWA 1974. Two employees of the company were working on parts of the A66 Road. They were working close to power lines and had been warned of the risks of moving equipment near the lines. Specific instructions had been issued to lower a tower before being moved under the lines. The employees did not follow instructions and did not lower the tower. The tower made contact with the electricity lines and both men were killed.

At trial the company sought to introduce evidence of the lack of foreseeability of such an event. The trial judge ruled such evidence was admissible as being relevant to the issue of whether or not the defendant had done all that was reasonably practicable. The Prosecution appealed against this ruling.

The court took this opportunity to review the authorities and considered the approach of Lord Goff in *Austin Rover Group Ltd. v HM Inspector of Factories [1990]1 A.C*. At paragraph 22 of the transcript in HTM the court said this:

"In our view, Lord Goff's analysis of what is the right approach, is the one which, on the authorities, correctly identifies the correct approach to the jury question posed by the relevant phrase. It is to be noted that he expresses the relevance of foreseeability in a closely confined way. Foreseeabtility is merely a tool with which to assess the likelihood of a risk eventuating. It is not a means of permitting a defendant to bring concepts of fault appropriate to civil proceedings into the equation by the back door; still less does it mean that the phrase 'reasonably foreseeable' in itself provides an answer to the jury question. But it seems to us that a defendant to a charge under section 3 or 4, in asking the jury whether it has established that it has done all that is reasonably practicable, cannot be prevented from adducing evidence as the to the likelihood of the incidence of the relevant risk eventuating in support if its case that it had taken all reasonable means to eliminate it"

The import of this ruling is that a defendant seeks to quantify the level of risk alleged by arguing that it was so unusual or unexpected that steps could not have been taken to prevent it occurring. It is important to appreciate that this argument does not seek to say that there is no criminal liability because the risk was not reasonably foreseeable. It simply provides a tool to assess whether or not it was reasonably practicable to guard against the risk. If an event is so unusual that it cannot be foreseen until it occurs then it cannot be guarded against. This view was endorsed by *Dyson LJ in R v EGS Ltd EWCA Crim 1942 para 27;*

"In any event it is strictly inapt to speak of a risk being foreseeable. A risk is a present potential danger the existence of which may or may not be appreciated; see per Steyn LJ in R v Board of Trustees of the Science Museum [1993] 1 WLTR 1171. 1177F, approved in Chargot at [20]. If the risk eventuates and an accident occurs, then a question may arise in the context of a S.40 defence as to whether the accident was foreseeable or unforeseeable: see R v HTM. Ltd [2006] EWCA Crim 1156. But it is not relevant to the issue of whether the prosecution has proved the existence of a material ris. It may be that the Judge used the word "foreseeable" inaccurately and the he used it interchangeably with "would have been appreciated"

A review of these authorities offers insight into not only the rationale behind Health and Safety Legislation, but also the way in which the courts have sought to implement Parliament's intentions. The aim has always been to promote the safety of those affected by an employer's activities.

There has been recognition by the courts that however laudable the intentions, there will be situations where it is simply unjust to attribute criminal liability for an act which could not have been guarded against. The application of the principle in *HTM* will, by definition, be rare, but it does at least acknowledge the realities of human existence. If everything could be foreseen and everybody did everything up to the point of gross disproportion to prevent those foreseeable risks eventuating there would be no need for prosecutions. Life is not however that easy to regulate. There will always be the unforeseen and tragedies will occur. In those circumstances individuals and families will suffer, but prosecution to punish the fact that we cannot all be Nostradamus adds nothing. The use of the concept of reasonable foreseeability in the way it is envisaged in *HTM* and *EGS* gives the defence a method by which it is possible to defend an individual or company who is being prosecuted in circumstances where, in reality no criminal responsibility lies. It may be a principle that is applied infrequently but it is important that defence practitioners are alive to its existence to guard against the risk of a conviction, not for a criminal act, but rather for an inability to see into the future.

1 As per the HSE mission statement
2 HSWA 1974 s.33(2A) and (4)

Stephen Mooney