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IN THIS ISSUE

The First Word in Enforcement Notices

Sarah Jane Hague. (One of Her Majesty's Inspectors of Health and Safety) v Rotary Yorkshire Limited[2015] EWCA Civ 696.

Introduction

Last June the Court of Appeal handed down judgment in the Rotary Yorkshire case. The judgment was easily missed as it received little publicity. Statutory enforcement notices (prohibition and improvement notices) are commonly encountered by busy health and safety practitioners. Health and Safety Inspectors are well versed in their utility. A large proportion of cases that reach trial in the Crown Court feature a notice with a schedule appended to it. Mindful of the commonplace nature of the notices in many cases it is perhaps unusual that there was until the hearing of this case no Court of Appeal authority on the correct approach that the courts should take with Health and Safety enforcement notices.

The issuing of an enforcement notice

S. 22 HSWA 1974 sets out the power an inspector has to serve a prohibition notice. The ambit of the provision is wide extending to any activity which is under the control of any person, *"to any activities which are being or are likely to be carried on by or under the control of any person, being activities to or in relation to which any of the relevant statutory provisions apply or will, if the activities are so carried on, apply"*. Under s. 22 an inspector may also serve a notice if he believes that an activity involves a risk of serious physical harm.

An inspector may serve a prohibition notice if he is of the opinion that such an activity is being carried on which does, or will, involve a risk of serious injury. There is no appellate authority for the proposition that the risk of harm need not be an immediate risk of harm. However, if one takes the normal meaning of risk to be an exposure to danger then any distinction between the two perhaps disappears to the vanishing point.

Notices as a matter of practical exposition are often drafted extempore. An inspector does not normally wait to return to an office before writing up a notice. The content of a notice is not required to be an exhaustive recitation of all substandard practice extant at the time of a site visit.

Provided that an inspector forms an opinion that there is a risk of serious personal injury, he need not be of the opinion that a contravention of a statutory provision has occurred, or will occur.

The actual terms of a prohibition notice should not include guidance on good practice, or other advice, or other advice that goes beyond the duty imposed by any particular provision in issue. However, inspectors will normally wish to provide assistance to those duty holders that are amenable to receive it.

Appealing the notice in the Employment Tribunal

Appeals against notices issued by an inspector are for historical reasons heard in the Employment Tribunal[1].

S. 24(2) HSWA 1974 provides for the disposals open to an Employment Tribunal upon determining an appeal. The sub section provides as follows:

A person on whom a notice is served may within such period from the date of its service as may be prescribed appeal to an [employment tribunal }[2] ; and on such an appeal the tribunal may either cancel or affirm the notice and, if it affirms it, may do so either in its original form or with such modifications

[1]*For reasons that pre date the 1972 Robens Report dating back to the time when the various Factories Acts governed this area of the law.*
[2]*Words substituted by Employment Rights (Dispute Resolution) Act 1998 c. 8 Pt I s.1(2) (August 1, 1998).*

as the tribunal may in the circumstances think fit."

The extent to which a tribunal may cancel, affirm or modify a notice as it *thinks fit* is unclear on the authorities. There is no authoritative or unifying judgment on the scope of the provision.

Employment Tribunal Appeal; Burden of proof

Notwithstanding that an appeal is a cause instigated by an appellant it is a well established practice for the respondent to present its case first, *Readmans v. Leeds City Council [1992]*[3]. Readmans constitutes one of a triumvirate[4] of pre *Rotary Yorkshire* cases in this area of law that adopted that approach. As Roch J. stated, the burden of proof in appeals against a prohibition notice should be no different from that in criminal proceedings. It follows it is for the HSE to show, on the balance of probabilities, that there was a risk to health and safety. If that can be shown it is then for the duty holder to prove that he had done all that was reasonably practicable. An appeal against a prohibition notice is not an appeal in its true sense; it is in effect a *de novo* hearing more akin to a civil trial.

The conventional procedure adopted on appeal to the Employment Tribunal

The standard approach by the tribunal is to ask two tests in the following order: Firstly, did the inspector genuinely hold the view held in the notice, and, secondly, if so did the activities complained of involve a breach of a statutory provision or a risk of serious personal injury. The first test was ruled upon in *Railtrack and Smallwood [2001]*[5] and *Chillcott and Thermal Transfer Limited [2009]*[6].

The first test, the *Foremans* test; did the inspector genuinely hold the opinion?

Under a S. 22 appeal the burden of proof is on the inspector, on the balance of probabilities, to show that he held the view that there was a serious risk to the health and safety of others.

The inspector, in issuing the notice must be acting on reasonable grounds. This test was first adopted in the unreported Employment Tribunal case of *Foremans Relocatable Building Systems v Fuller*[7]. The same general approach was closely followed and amplified in the case of *Railtrack and Smallwood [2001]*[8].

In *Railtrack* Sullivan J. stated that the court`s ruling ought not to be considered as endorsing the Foremans test. The judge plainly had some difficulty in reconciling the greater ambit of S. 22 HSWA1974, namely the power to amend, with a strict application of the Foremans test. As a caveat to following the general Foremans approach the judge indicated that the tribunal must have regard to an inspector's experience.

In *Chilcott* the *ratio decidendi was* in identical terms to that in *Railtrack*; the court once again ruled that the first step to be taken by the tribunal was to ascertain the inspector's opinion having regard to the inspector's experience. Charles J. further stated that the tribunal had power nevertheless to form an independent view based on the facts of each case. The case provides authority for the *de novo* nature of such appeals and the courts' statutory power to affirm and modify on appeal.

The second test; did the activities complained of involve a breach of a statutory provision or a risk of serious personal injury?

In *Chilcott* Charles J. emphasised that the focus of any appeal was on the activity being carried out at the time that the notice was issued and whether as a matter of fact the activities subject to the appeal gave rise to a breach of a statutory provision or a risk to health and safety.

It is one of those great peculiarities of this area of practice, antithetically, that a case can be listed in the employment tribunal as well as the Crown Court. Two parallel courses with different rules of evidence, different rules of procedure and different standards of proof.

[3]*Readmans v. Leeds City Council [1992] COD 419.*
[4]*Those being Readmans, Railtrack v. Smallwood [2001] ICR 714 and Chilcott v Thermal Transfer Limited [2009] EWHC 2086.*
[5]*Railtrack v. Smallwood [2001] ICR 714.*
[6]*Chilcott v Thermal Transfer Limited [2009] EWHC 2086.*
[7]*ET-3200213/99/S*
[8]*An Administrative Court Decision following the Ladbrook Grove Railway disaster.*

Appealing an Employment Tribunal determination

Appeals from an Tmployment Tribunal are heard in the Administrative Court as of right pursuant to CPR Part 52.19(1). This same route of appeal is taken whether the appeal relates to prohibition or improvement notices issued under the HSWA 1974. Appellants may appeal to the High Court if they are *"dissatisfied in point of law with the decision of the tribunal."* The statutory foundation for the jurisdiction of the High Court is section 11 of the Tribunals and Inquiries Act 1992. Appeals to the High Court are determined by a High Court Judge sitting alone. However, as shall become clear, a puisne judge under s.11 is restrained from considering the facts of the case, or more accurately restrained from considering the facts of an appeal except to the extent required to do so to determine the legal test[9]. In other words it is not open to a judge sitting in the Administrative Court to make fresh findings off fact or to substitute his findings of fact for those already established.

In keeping with the general practice of the Administrative Court, a judge may hand down judgment on a case and then make any order that would have been open to the Employment Tribunal to make in order to determine the case. If the case warrants it the judge may modify, amend or cancel a notice and immediately deal with costs and costs below. However, for practical purposes cases are sometimes remitted back to the Employment Tribunal.

Appeals from the Administrative Court to the Court of Appeal.

An application for permission to appeal from a decision of the High Court which was itself an appeal is a second appeal and must be made to the Court of Appeal. An application to make a second appeal must identify the grounds of the appeal, the important point of principle or practice or compelling reasons which are said to justify the grant of permission to appeal. The *Bowman Report* recommended that one level of appeal should be the norm. This principle reflects the need for certainty, reasonable expense and proportionality. The report considered that when there had already been an appeal to some courts below the Court of Appeal, further appeal should only be allowed in special circumstances. This recommendation was placed on a statutory footing in S. 55(1) of the Access to Justice Act 1999, which provides:

> *"where an appeal is made to a county court or the High Court in relation to any matter, and on hearing the appeal the court makes a decision in relation to that matter, no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that –*
>
> *a. the appeal would raise an important point of principle or practice, or*
>
> *b. There are some other compelling reason for the Court of Appeal to hear it."*

This provision is substantially repeated in C.P.R. r.52.13.

The important question as to what constitutes an important point of principle or practice was addressed in *Uphill v. BRB (Residuary) Ltd (2005)*[10] where it was said that appeals addressing the meaning and scope of either principle or practice would only arise where they had not been determined by a higher court.

The second criterion for granting permission for a second appeal under both the Act and the CPR is that there is some other compelling reason for the Court of Appeal to hear the appeal. This point was also addressed by Dyson L.J. when giving the judgment of the court in *Uphill v. BRB (Residuary) Ltd (2005)* at paragraph 24 where the judge elucidated the meaning of the phrase:

> *"(1) A Good starting point will almost always be a consideration of the prospects of success. It is unlikely that the court will find that there is a compelling reason to give permission for a second appeal unless it formed the view that the prospects of success are very high…..*
>
> *(2) … the fact that the prospects of success are very high will not necessarily be sufficient to provide a compelling reason for giving permission to appeal. An examination of all the circumstances of the case may lead the court to conclude that, despite the existence of very good prospects of success, there is no compelling reason for giving permission to appeal…*
>
> *(3) there may be circumstances where there is a compelling reason to grant permission to appeal*

[9] *A situation which is on a par the vast majority of judicial review cases.*
[10] *Uphill v. BRB (Residuary) Ltd (2005) EWCA 60at [18]*

even where the prospects of success are not very high. The court may be satisfied that there are good grounds for believing that the hearing was tainted by some procedural irregularity so as to render the first appeal and unfair.…"

Notwithstanding the guidance given in *Uphill* the authority has not been allowed to ossify into rule. The Court of Appeal have demonstrated over time that the court's interpretation of r.52.13, is dependent to some extent on the provenance of the proposed appeal, so much was said in *Cramp v Hastings BC* [2005][11]. Also in *Esure Insurance Ltd v Direct Line Insurance Plc.* [2008][12] the complexity of the case and the real prospect of showing that the judge had incorrectly exercised his appellate function were held to constitute *"compelling reasons"* for permitting the second appeal[13]. It was essentially this basis upon which the HSE sought to appeal the Administrative Court`s decision in the *Rotary Yorkshire* case.

The Rotary Yorkshire Case

The appellant inspector appealed against the decision of the Administrative Court[14] quashing a prohibition notice that she had served on the respondent construction company under the S. 22 HSWA. Inspectors had attended a large construction site where the company was responsible for installing mechanical and electrical plant. They had entered a high-voltage room and found exposed conductors, contact with or proximity to which, if they were live, could have caused death or serious injury. They served a prohibition notice on the company on the basis that it had allowed access to the room, and that although the conductors appeared to be dead, it was not clear whether they were. The next day a test was conducted by an authorised person. The conductors were proved to be dead, and to have been so the day before. The prohibition was lifted. The company argued that the prohibition was premature and the inspectors should have awaited the outcome of the test and ensured safety in the meantime by a direction under s.20(2)(e) to lock the room concerned. The company appealed to an employment tribunal under s.24(2) of the 1974 Act. The tribunal dismissed the appeal but modified the notice from saying that the conductors *"can be energised and made live"* to *"are exposed and cannot be proved dead"*. The company appealed to the Administrative Court, which quashed the notice, finding that the service of the notice had not been the only means of dealing with the situation, that a prohibition notice should only be issued if clearly needed because its existence on the register against a company could produce a disadvantage, and that the inspectors could have directed under s.20(2)(e) that the relevant area remained undisturbed while testing took place.

The inspector submitted that the judge had exceeded his jurisdiction on an appeal brought under s.11and sch.1[16] .Tribunals and Inquiries Act 1992, which was limited to matters of law, by substituting his own view on the merits; further that he had been wrong to judge the enforcement decision with hindsight; and that he had erred in holding that the use of the power granted by s.20(2)(e) could be an acceptable alternative to a prohibition notice where the inspectors had

[11]*Cramp v Hastings BC [2005] EWCA Civ 1005 at [64].*
[12]*Esure Insurance Ltd v Direct Line Insurance Plc. [2008] EWCA Civ. 842.*
[13]*As to which see Arden L.J. at [65].*
[14]*RotaryYorkshire Ltd v Hague (Health and Safety Inspector) [2014] EWHC 2126 (Admin.*

concluded that there was a risk of serious personal injury. A second appeal argument was that the judge ought not to have taken into account that registration of a prohibition notice against a company could be a commercial disadvantage to it.

In allowing the appeal the court held that as there was no Court of Appeal authority on the scope of an appeal under s.11 of the 1992 Act, or of an appeal against a prohibition notice under s.24(2) of the 1974 Act and that the approach should be the same as it would be on any statutory appeal on a point of law. An appellant had to show that the Employment Tribunal had made a material error of law; a misconstruction of a relevant statutory provision, a finding of fact not rationally supportable on the evidence, or a procedural error that had led to unfairness. The judge had not found an error of law in the tribunal's decision. The essence of his conclusion was that the tribunal should have decided that the situation could have been dealt with by less draconian means. That was a view of the factual merits. Alternatively, if it could be said that the judge rejected the Tribunal's view that the power under s.20(2)(e) was to effect a temporary measure to preserve the state of premises while an investigation was carried out under s.20(2)(d), then that decision was erroneous. Section 20(2)(e) was clearly an ancillary power. Therefore, it did not take effect where an inspector had already concluded that within s.22(2) there was a risk of serious personal injury, which was the position in the instant situation. Unlike s.11, s.24(2) of the 1974 Act conferred a right of appeal on the facts and not just the law. In deciding what facts the tribunal had to consider, the decision in *Chilcott v Thermal Transfer Ltd [2009] EWHC 2086* (Admin)was correct: the question for an inspector was whether there was a risk of serious personal injury, on the facts known to him at the time of the decision. He was concerned with the prevention of injury at that time. The tribunal should only be concerned with whether the facts known, or which ought to have been known, justified the inspector's action, *Chilcott* approved[15]. Section 24 was not to be construed so that it might appear to call into question the propriety of a notice which it might well have been the inspector's duty to issue at the time[16]. Any commercial disadvantage to a company caused by the registration of a prohibition notice was irrelevant[17].

Conclusions

The judge had erred in substituting his own view on the merits of a health and safety inspector's decision to serve a prohibition notice on a company where it was unclear whether exposed electrical conductors on a construction site were live. The judge had exceeded his jurisdiction on an appeal brought under the Tribunals and Inquiries Act 1992 s.11 and sch.1 para.16, which was limited to matters of law only. The approach in such an appeal should be the same as it would be on any statutory appeal on a point of law.

Most importantly in terms of the practical effect on a client if issues are to be raised as to the facts of a case or the framing of a notice issued in a case, the proper - and arguably on this case - only forum to take issue in will be the Employment Tribunal. It is too late to challenge or criticise the contents of a notice when the case is being prosecuted if no attempt was ever made to appeal or modify the notice in the Employment Tribunal.

For public policy reasons whether a company is commercially disadvantaged or not is not a proper consideration on appeal of a notice, in either the Employment Tribunal, Administrative Court or the Court of Appeal.

From a practical perspective operating companies and contractors should ensure that they have a clear policy as to where they will allow site visitors access before any visitors, inspectors included, are granted access to a site or a part of a site. Had such a procedure been in place in this case, and had that policy been in force, it is unlikely the notice would ever have been served.

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[15]R. (on the application of Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court [2011] EWCA Civ 31, [2011] 3 All E.R. 579, Railtrack Plc v Smallwood [2001] EWHC Admin 78, [2001] I.C.R. 714and MWH UK Ltd v Wise (Inspector of Health and Safety) [2014] EWHC 427 (Admin), [2014] A.C.D. 96were all considered.

[16]See [21-29, 31-32, 34] of judgment.

[17]See [36-37] of the judgment

Risk Not Want Not

On the 13th October the Court of Appeal dismissed the appeal of C T Aviation in the case of R. *(on the application of Health and Safety Executive) v C -T Aviation Solutions Ltd* [2015] EWCA Crim 1620. C T Aviation solutions had been convicted of one offence under Section 3(1) of the Health and Safety at Work Act 1974 Act (Count 4) and Regulation 11(3) of the Construction (Design and Management) Regulations 2007 (Count 5).

A co-defendant, London Luton Airport Company Operations Limited, 'LLAOL', was convicted of (i) failing to discharge their duty under Section 3(1) of the 1974 Act contrary to Section 33(1) (a) of the 1974 Act (Count 1) and (ii) contravening regulation 3(1)(b) of the Management of Health and Safety at Work Regulations 1999 (The 1999 Regulations provide that every employer shall make a suitable and sufficient assessment of the risks to the health and safety of persons not in its employment arising out of or in connection with the conduct by him of his undertaking, for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions and by Part II of the Fire Precautions (Workplace) Regulations 1997) (Count 2) and (iii) between 30 September 2009 and 25 May 2010 contravening a requirement imposed by an improvement notice served under section 21 of the 1974 Act contrary to section 33(1)(g) of the 1974 Act.

On 18 October 2013, the appellant was fined £70,000 and ordered to pay £30,000 costs on Count 4. No separate penalty was imposed on Count 5. LLAOL was fined a total of £75,000 and ordered to pay £197,595 costs.

The company specialised in traffic management designs for UK airports. It had produced designs for the airport in respect of changes in pedestrian and vehicular arrangements following the terrorist attack at Glasgow Airport in 2007. An elderly lady had died after being hit by a lorry when she was crossing an access road. The prosecution alleged that the appellant had delivered a demonstrably unsafe system. It considered the crossing point to have been constructed in such a way that there was a material risk that people on the crossing could not be seen by lorries, which used it regularly, and that there were simple features which could have been incorporated into the design to reduce or eliminate that risk. The lorry driver was acquitted of causing death by careless driving. He gave evidence for the prosecution to the effect that the victim had crossed in the lorry's "blind spot". The company was convicted of failing to discharge its duty under the HSWA 1974 S. 3(1) and contravening the Construction (Design and Management) Regulations 2007 reg.11(3) , the offences being contrary to s.33(1)(a) and (c) of the Act respectively. The issue was whether the judge had erred in refusing the company's submission of no case to answer, made on the basis that there was insufficient evidence of material risk. The judge considered the issue to be a matter for the jury.

The company argued, relying on *R. v Porter (James Godfrey) [2008] EWCA Crim 1271, [2008]*

I.C.R. 1259, that a pedestrian crossing the road and colliding with a vehicle was an "incidence of everyday life that [was] tolerated by society". It argued that, in the absence of evidence that ordinary risk was increased for a particular reason, that could not be a material risk for the purposes of the legislation. The court took a particularly dim view of that submission.

The court in *Porter* was not purporting to depart from the statutory test or to put a gloss on it, and it was the statutory test which had to be applied. The facts in *Porter* were very different from the instant case. In the instant case, the airport was situated on private land and its road, parking and pedestrian system had recently been remodelled or redesigned by the company. Pedestrians were either the airport's "guests" or employees as part of its undertaking, as was vehicular traffic, for which roads and parking were provided. Pedestrians and vehicles were brought together on the land for the purposes of the airport's undertaking; the material risk created being "pedestrian and vehicular conflict". The combination of an overly wide gap in the crossing guard rail, together with the absence of "give way"marks, had led to a situation where pedestrians trailing suitcases could enter the crossing and a lorry could be positioned where it could not see them. That was ample evidence of material risk, *Porter and R. v Chargot Ltd (t/a Contract Services)* [2008] UKHL 73, [2009] 1 W.L.R. 1 applied. It was open to the defence to contend that the possibility of pedestrians crossing the road and colliding with vehicles was an incidence of everyday life tolerated by society, and that the crossing in question was no different to many others. However, the issue was whether that crossing, in that location, designed with the particular features it had, and did not have, had exposed pedestrians to a material risk to their health and safety. There was considerable force in the prosecution's argument that if the fact that similar risks to those prosecuted existed in everyday life outside an employer's undertaking was a complete answer to a prosecution under s.3, that would impermissibly rewrite the statutory test. The argument that the reliance on comparators, where standards of safety might be lower than those under consideration in a particular case, could lead to a "race to the bottom" also had force. There were points to be made for the company on all aspects of the prosecution's evidence, which was recognised by the judge. The prosecution's experts did not even agree on various matters. However, those matters had been for the jury to consider when resolving what was, on the facts, quintessentially a question for the jury.

Minded that the concept of risk is central to health and safety law enforcement and that the term invariably appears on most health and safety prosecution indictments in all but the most straight forward cases, it is perhaps surprising that there is so little by way of authority on what constitutes risk at law. The paradigm definition was coined by *Steyn LJ in R v Board of Trustees of the Science Museum* [1993] 1 WLR 117 namely that risk connotes its ordinary meaning in English of a situation involving an exposure to danger. *Porter*, a surprisingly short judgment, does not set down any principle of law and made no attempt to provide any guidance as to how the courts should approach risk as a legal concept. The Court of Appeal in C T Aviation Solutions Ltd. has not sought to clarify the position any further. Other than perhaps opening the door to the suggestion that what constitutes risk in a school is different from what constitutes risk at an airport. Which, of itself, is a factual distinction and not a matter of legal principal nor does provide guidance to practitioners in advising on risk.

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The First Prosecution of an NHS Trust for Corporate Manslaughter Collapses

On 28 January 2016 a jury in the Inner London Crown Court was directed to acquit both Maidstone and Tunbridge Wells NHS Trust and Dr Errol Cornish (EC). This followed successful applications by both defendants for a ruling that there was no case to answer.

DAC Beachcroft represented the Trust after it was charged with an offence under the Corporate Manslaughter and Corporate Homicide Act 2007 (the Act). EC was charged with gross negligence manslaughter. Both charges followed the death of Frances Cappuccini on 9 October 2012. A second anaesthetist, Dr Nadeem Azeez (NA) would have been charged alongside EC, but for his return to Pakistan.

Background

Mrs Cappuccini suffered a cardiac arrest due to complications which followed a successful caesarean section. She was initially under the care of NA who undertook prolonged efforts to ventilate Mrs Cappuccini after she failed to re-awaken from an anaesthetic. He was then assisted by EC, a locum consultant anaesthetist, before two further consultants took over. Neither NA nor EC were involved in her care in the 2 ½ hours prior to Mrs Cappuccini's death.

The case against the Trust was based on alleged breaches of duty in relation to the following issues:

- The interview and appointment process for NA and EC, based on the CPS's expert evidence that neither doctor had sufficient qualifications or experience to be appointed to the roles they were performing on 9 October 2012;
- The appraisal and general supervision of the doctors; again based on one expert's opinion that the Trust's appraisals of NA were somehow deficient; and
- The supervision of NA on 9 October 2012.

This argument relied almost exclusively on the fact that there was no named consultant for supervision noted in Mrs Cappuccini's medical notes.

The CPS's case relied heavily on the opinions of a Professor of Anaesthesia who had been involved in the case from the start and had advised the Police during interviews under caution. His evidence was undermined during effective cross examination by counsel for the Trust, John Cooper QC.

The Ruling

In a detailed ruling following 7 days of prosecution evidence Mr Justice Coulson comprehensively dismantled the cases against both defendants, describing the case against EC as being *"as far removed from a gross negligence manslaughter case as it is possible to be"*. He also referred to elements of the prosecution expert's evidence against the Trust as *"perverse"* and found *"there was no evidence that* [the Trust's alleged failure to carry out effective appraisals]… *was a systemic failure of management or organisation of activities."*

Coulson J also found that the none of the allegations against the Trust amounted to breaches which could be characterised as 'gross' pursuant to the Act, and further that *"There was no evidence that any of the alleged breaches against the Trust, even if they were gross, caused or contributed to the death of Mrs Cappuccini."*

The Commencement Argument

At a preliminary hearing in October 2015, the Trust applied to exclude evidence in relation to NA's appointment on the basis that it could not form part of any alleged offence as it predated the coming into force of the Act in April 2008. Coulson J ruled that whilst evidence relating to Dr A's appointment could be referred to as part of the background to the case, it could not form part of any alleged breach of duty on the date of the incident on

9 October 2012. Whilst this point was clearly explained to the jury at the start of the trial, it is perhaps fortunate that they were never called upon to undertake the difficult exercise of trying to exclude this evidence from their consideration of the allegations of breach of duty against the Trust.

Senior Management

Section 1(3) of the Act states that:

"An organisation is guilty of an offence … only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach …"

The Trust made an early application for better particulars from the CPS on the basis that the Case Summary contained no definition of senior management or an explanation of how the Trust's senior management was alleged to have organised its activities in a way that amounted to causative breach of duty. The CPS relied on the argument that its allegations of breach of duty were self-evidently matters of corporate governance which could only have been attributable to the senior management of the Trust.

Whilst Coulson allowed the Trust's application, he ruled in October 2015([2015] EWHC 2967 (QB)) that the CPS need only identify the lowest tier of Trust employees which formed part of its senior management. In his ruling Coulson J disagreed with the Trust's submission that the CPS had still failed to demonstrate a link between the Trust's alleged breaches of duty and its senior management. Ultimately, this issue was eclipsed by the Crown's failure to provide evidence that could be put to a jury on the issues of breach of duty, grossness and causation.

This case involved the largest corporate manslaughter defendant to date and it had been widely hoped that we would glean some useful guidance on what "senior management" means for large organisations in corporate manslaughter cases and what type of evidence would be required in relation to S1(3) of the Act. However, the weakness of the prosecution's case on all other elements of the offence meant that the senior management point was never explored by a jury, and the Judge felt he did not need to go beyond his October 2015 ruling on the issue.

The case now leaves us with the worrying prospect that the CPS might repeat their approach (and the Judge's ruling) in other cases, having concluded that all they need do is identify a tier of management, without particularising in any detail the way in which senior management played a role in the organisation's alleged breach of duty. If that tactic is a dopted it will represent a complete shift away from the identification principle and arguably a departure from what many practitioners considered was the effect of section 1(3) of the Act.

This leaves large organisations vulnerable to the somewhat circular argument that activities which have the potential to cause a death, must by definition be matters of such weight that they could only have been managed or organised by senior management. It will remain vital for other large organisations facing a corporate manslaughter charge to be able to adduce evidence that will demonstrate

the extent of senior managements involvement in the alleged breach and to distinguish it from a specific event, where the judgement of an individual has been a key factor in the alleged breach.

Parasitic Offences

The CPS took the view that the case against the Trust could only succeed if the jury found that there was sufficient evidence to convict NA or EC of gross negligence manslaughter. It was never clear why the CPS limited their case in this way and Coulson J indicated his view that those conclusions if found by the jury *"…would not necessarily establish the required causation against the Trust"* and further that *"The case against [EC] and the theoretical case against [NA], exists wholly independently of the case against the Trust… it is perfectly possible to see ways in which, on other facts, the Trust could have been liable under the 2007 Act whilst [EC] and [NA] were not guilty of gross negligence manslaughter."*

What can we learn from this case?

Coulson J's ruling emphasises the height of the threshold required to support allegations of grossness and causation in corporate manslaughter and gross negligence manslaughter cases, particularly in a clinical setting. It also makes clear that the prosecution need to properly support with evidence all of its allegations of breach of duty, rather than simply coalescing them into a general allegation that they demonstrate a failure to manage or organise a defendant's activities.

Whilst the case did not provide further useful guidance on the senior management issue, and it may result in less effort by the CPS to particularise that element of the offence in future cases, further legal argument on that issue is by no means ruled out.

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What lies between the lines of the new health & safety sentencing guidelines?

The new sentencing guidelines for health & safety offences are in force from 1 February 2016. They were intended to increase the level of fines, particularly for larger organisations. However, unintended consequences of the way punishments are now calculated mean that Judges will be forced to hand out very much greater fines than expected and send many more directors, managers and junior employees to jail for breaching health & safety laws.

THE 4 INFLATIONS

Close inspection of the new health & safety sentencing guidelines shows that 4 inflationary factors are going to increase radically the level of fines, yet only 1 of these factors was intended. Similarly, the threshold for imprisonment will be reached very much more easily than before. Let's look briefly at the 4 inflationary factors:

1st Inflation

The sentencing guidelines introduce a structured approach that the Court must follow. This involves plugging 'culpability', 'likelihood' and 'harm' factors into a series of tables to reach recommended starting point fines, as well as ranges of fines above and below the starting points. Similarly for imprisonment of individuals, the tables stipulate ranges of prison sentences above and below various starting points.

These tables were calculated by reviewing past sentences and then, particularly for larger companies, increasing the levels of fines. This 1st inflation was intended. It was designed to accommodate the Court of Appeal's repeated view that health & safety fines have generally been too low and need to be increased sufficiently to send a message to directors and shareholders. Indeed, the Court of Appeal envisages fines exceeding £100million for the worst health & safety breaches by the largest companies.

The Court of Appeal has not recommended massive increases across the board. Yet this will be the effect of the next 3 inflations.

2nd Inflation

The sentencing guidelines switch from a mainly outcome based approach (what was the seriousness of the injury) to a risk based approach (how serious was the harm that was risked). There are justifiable reasons for this switch but its inflationary effect on sentences was not factored into the calculations. How does this 2nd inflation work?

Suppose an object falls from a crane and crushes someone's toes. Traditionally, that would be prosecuted and sentenced very much more leniently than if the same object had hit someone's head and caused a fatality. Under the new risk based approach, the toe injuryis seen as having involved a high risk of death or disability and is plugged into the computation at the level calculated for a fatality.

The majority of non-fatal incidents could have been more serious, so these will be inflated up to the level of fine corresponding to that more serious injury.

3rd Inflation

If the offence exposed not just one but a number of people to the risk of harm, the Court is directed to ramp the punishment up to the next level. I struggle to think of any of my clients' cases where the breach only exposed one person to a risk of harm. For example, if other people could have been hit by the object falling from the crane, this 3rd inflation will apply.

4th Inflation

Finally, if there was actual harm (unless more minor than could be expected), the Court is also directed to ramp the punishment up to the next level. Since most prosecutions arise after someone has been injured, this 4th inflation will almost always apply.

In summary, the combined effect of these last 3 unintended inflations will mean that criminal sentences will tend to converge at the higher end of a scale that has already been substantially increased by the 1st intended inflation. The Court is given some discretion but not enough to depart materially from the stipulated calculations.

Working through an example, it is going to be difficult for an individual convicted offender to escape a jail sentence if he or she was aware of a risk of being in breach, nobody suffered an injury but several people were exposed to a 'medium' likelihood of death or disability.The unintended inflations direct the judge to impose a prison sentence for this crime that would previously be punished with a small fine. This is a very significant reduction in the threshold for imprisonment for health & safety offences.

As we follow the new sentencing in action over the coming months, I fear there will be some perverse and shocking results. Perhaps the shock will not lie in a headline grabbing big fine for the first unfortunate large turnover company. Instead, it may come when an individual is handed a prison sentence, having not done much wrong other than being at the wrong end of these unintended inflations.

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