



UK Environmental, Safety & Health Review

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The Relevance of Foreseeability to Health and Safety Prosecutions

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Through the joined cases of *R v Tangerine Confectionary Ltd* and *R v Veolia ES (UK) Ltd [2011]*, the Court of Appeal took the opportunity to analyse elements of the offences under sections 2 and 3 of the Health and Safety at Work etc Act 1974 (HSWA) and, in particular, to examine the relevance of foreseeability.

The first case involved Tangerine Confectionary Ltd, a sweet manufacturer, which was convicted under section 2 of HSWA after an employee was killed whilst attempting to unblock a sweet-making machine when the machine restarted. In the second case waste and recycling firm, Veolia, was convicted under sections 2 and 3 of HSWA after the death of a contract worker whilst collecting litter at the side of a dual carriageway.

Causation

In delivering the judgment of the Court of Appeal, Lord Justice Hughes revisited the case of *R v Chargot [2008]*. The Court of Appeal was concerned that there was scope for misunderstanding a part of Lord Hope's speech that, *prima facie*, an employer has failed to ensure the health and safety of an employee where that employee has sustained an injury. Lord Justice Hughes explained that an accident is evidence only of the existence of the risk; an offence can be committed without any injury just as injury can occur without there having been an offence.

The Court of Appeal clarified that causation is not an ingredient of either offence, nor are the offences concerned with the mechanics of the accident. Where allegations are made to that effect, Lord Justice Hughes said it is for the

Judge to direct the jury away from the question of what caused the accident and instead to focus on whether or not the offence was committed i.e. was there exposure to risk against which reasonable precautions should have been taken.

Foreseeability

The Court of Appeal was in no doubt that foreseeability was relevant to what would be considered reasonably practicable. The question before the Court was whether it was also relevant to establishing a material risk under these offences.

In considering this issue, the Court of Appeal made reference to the Supreme Court judgment in *Baker v Quantum Clothing Group Ltd and Others [2011]*, a judgment which was handed down prior to the appeals in *Tangerine* and *Veolia*. This case involved a number of claimants who sought personal injury compensation for noise-induced hearing loss whilst working in textile/hosiery factories. The Supreme Court held by a majority of three to two that foreseeability does play a part in assessing risk and that "safety" in this case was a relative standard determined by that which was responsibly thought to be the position at the time of the alleged breach.

The Court of Appeal considered that, despite *Baker* being a civil case and relating to different legislation, it was applicable to the interpretation of sections 2 and 3 of HSWA. Lord Justice Hughes confirmed that foreseeability of risk is relevant to the question of whether a risk to safety exists, a matter which is to be determined by the jury. Sections 2 and 3 do not require foreseeability of the actual accident which occurred, but rather foreseeability of a risk of injury. As such, employers are under a duty to think about risks which are not obvious as well as those which are.

Conclusion

The Court of Appeal upheld the convictions in both *Tangerine* and *Veolia* and in doing so went some way to clarifying the elements of offences under sections 2 and 3 of HSWA. These cases represent a slight softening of approach in favour of defendants by requiring the prosecution to show foreseeability of risk. However, they also highlight the importance of

thorough risk assessments and the need for employers to properly consider all possible risks in the workplace, not just obvious risks.

Transfer of Private Drains and Sewers

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Is there good news for home owners and developers? As from 1 October 2011 virtually all private sewers and lateral drains in England and Wales transferred to the water and sewerage companies (WSC). It is believed that this will mean that around 220,000 kilometres of private sewers and private lateral drains will have now transferred, shifting the liability and financial burden for repair and maintenance away from householders and onto the WSC. As nearly half of all homes in England and Wales are served by a private sewer or drain this is a significant shift, particularly when considering that for every kilometre of private sewer/drain there are an average of nine blockages each year, with average annual sewer/drain repair costs to private sewer owners in the region of £221 million.

The legislation behind the transfer is the Water Industry (Schemes for Adoption of Private Sewers) Regulations 2011 which came into force on 1 July 2011. The Regulations apply to all private sewers and lateral drains (as defined by the Regulations) in England and Wales with the exception of those on land belonging to the Crown (e.g. Ministry of Defence land) or railway undertakers' land.

"Private sewers" under the Regulations include the whole or part of the foul, combined or surface water sewers which connect to the public sewer system, provided that these serve more than one property. This can include sewers beneath highways or private land. "Private lateral drains" are private drains which connect to the public sewer system but the

section of pipe within the curtilage of a property will not transfer unless that pipe drains more than one property.

It should be noted that the 1 October 2011 transfer date is for sewers and lateral drains already connected to the public sewerage system as at 1 July 2011. For those which were connected between 1 July 2011 and 1 October 2011 transfer will take place six months later i.e. 1 April 2012.

Privately owned pumping stations will also transfer to the WSC but have a delayed transfer date of no later than 1 October 2016.

Two months notice of the transfers had to be given by the WSC to the owners of private sewers and lateral drains – unless such owners could not be traced. As often owners could not be traced, notices could be sent by the WSC to their customers and published in the *London Gazette* and in local or regional newspapers. Notices served on owners in relation to sewers and lateral drains also covered pumping stations, notwithstanding their later transfer.

Owners or anyone affected by the proposed transfer (for example neighbouring owners) wishing to prevent the transfer must appeal to the Water Services Regulation Authority (OFWAT) on the prescribed form. If there are no appeals, the WSC can adopt.

Appeals against transfers must be made within two months of the notice of transfer being made. As this is a tight timescale owners need to react quickly once they receive the notice to transfer. The only grounds for appeal are that the WSC is not under a duty to adopt the sewer/pipe in question or that the adoption would cause the applicant "serious detriment". Guidance produced by OFWAT sets out the basis for deciding appeals.

As most home owners are likely to welcome the transfer, it may be difficult to imagine who might wish to appeal. Appeals against a transfer are therefore anticipated to be largely from landowners who have put in place complex provisions relating to sewerage and drainage, the effect of which would be superseded by the statutory regime. Other examples may be

where the transfer could impact on future development, for example if easements have been negotiated allowing sewers to be relocated on redevelopment (lift and shift) and it would be detrimental for the sewer to be adopted if the rights to relocate with them be lost.

It is worth noting that drains serving premises within a single "curtilage" are not included in the transfer. Examples of these would be drainage systems serving airports, caravan parks and some industrial/commercial sites. Other drains which will not transfer are surface water sewers which do not connect to the public system and private drainage networks e.g. shared sewers leading to a septic tank/cesspool.

Sewers currently under Section 104 adoption agreements are under special provisions, which vary depending on when the Section 104 agreement was entered into and whether the sewer was connected to the public system. Generally however any sewers subject to a Section 104 Agreement as at 1 July 2011 which are connected to a public sewer will have transferred by 1 October.

Going forward the real impacts of the transfer are yet to be felt. The transfer has removed much of the previous uncertainty and financial burden of repair and maintenance from householders, but of course the cost of repair and maintenance falling on the WSC will be levied over time by increasing the sewage element of bills imposed on customers. In addition, the ramifications of adopting so many previously privately owned sewers (many of which have been built over) and the viability of successfully establishing the appeals process are still unknown.

HSE Cost Recovery Scheme

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As part of the government's plans to reform health and safety regulation in the UK, the Health and Safety Executive (HSE)

has consulted on proposals to implement a pre-approved policy to extend the range of activities for which it is able to recover its costs.

The proposals would put the HSE under a legal duty to recover costs, known as a **fee for intervention**, where it has issued a formal written requirement to rectify a material breach of health and safety law by a duty holder, for instance a letter or enforcement notice. Under the proposals, there would be no fee for intervention where the breach is non-material or merely technical. Nor would there be any fee for compliant duty holders. Duty holders include both employers and self-employed persons who have duties under the Health and Safety at Work etc Act 1974 or other relevant statutory provisions.

There is no intention by the HSE to replace any existing intervention cost recovery scheme. As a result, top tier sites under COMAH, offshore oil or gas installations, licensed nuclear installations and certain pipeline activities are excluded.

The current proposals only apply to the HSE and would see costs recovered from the start of the investigation through to its conclusion at a proposed hourly rate of £133 for all HSE staff. It is anticipated that these recoverable costs will also include any follow-up interventions such as site visits or telephone calls, and any relevant associated office based work.

The estimated average recoverable cost of an inspection that results in a letter is approximately £750, and increases to £1,500 where it results in an enforcement notice. Where non-HSE professionals or persons from the Health and Safety Laboratory offer support, the actual costs incurred for this shall be payable by the duty holder. Costs for serious incident investigations will run into many thousands of pounds.

As part of the proposals, the HSE is considering a two tier internal dispute resolution procedure whereby any queries or disputes from duty holders will be dealt with in the first instance by a Principal Inspector and, where the dispute cannot be resolved, it will then be passed to an HSE senior manager. Where a dispute is not upheld, the HSE proposes to recover the costs of handling the dispute at the rate of £133

per hour, leaving the duty holder liable for the full enforcement costs as well as the cost of dealing with the dispute and there being no cost to the HSE. Where a challenge is successful, the costs would either be offset against any outstanding HSE invoice or refunded.

The consultation period expired on 14 October and we wait with anticipation to see how and when these proposals will be implemented by the HSE on the back of the responses received. What is clear is that, as the government has pre-approved the essence of the chargeback scheme, these proposals will be implemented in some form or other and companies in receipt of enforcement letters or notices will feel the full force and financial impact of these proposals. It is, therefore, increasingly important for companies to fully understand and implement health and safety measures into their business, and to carry out full and continuous risk assessments on all aspects of their activities.

Government Review of Waste Policy in England 2011: A Missed Opportunity?

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The much awaited Government Review of Waste Policy in England 2011 was published on 14 June 2011 by the Department for Environment and Rural Affairs (DEFRA), along with a number of connected documents.

The review's main aim is to progress England into a "zero-waste" economy and many with interests in this sector were eagerly anticipating how the government aimed to achieve this and by when. Unfortunately, the review has been generally viewed as disappointing. It has been criticised for merely restating current government and European Union targets, and not creating any specific new commitments.

Key Actions

The actions set out in the review include:

- Strengthening enforcement and penalties for waste offences, and considering the use of civil sanctions, but also the use of voluntary rather than new regulatory approaches in some cases.
- Abolishing the Landfill Allowance Trading Scheme (LATS).
- Considering landfill bans on wood waste, metals, textiles and biodegradable waste, and the long term aim of zero food waste to landfill.
- Developing a waste prevention programme by 2013.
- Simplifying producer responsibility programmes (packaging, batteries, electrical equipment and vehicles) and considering voluntary schemes for other sectors with high embedded carbon such as paper, hospitality, construction.
- Consulting on increased recycling targets for packaging up to 2017.

One proposal which has attracted most attention is to allow the restoration of weekly bin collections for "smelly waste". This is to assist local councils to "meet households' reasonable expectations for weekly collections". This is quite a turnaround in policy terms and is likely to increase cost burdens on councils who are already dealing with government cuts. This proposal may require long-term waste contracts to be renegotiated. It also contradicts recent survey evidence suggesting that councils with the highest recycling rates are almost all those who operate fortnightly non-recyclable rubbish collections.

Also in relation to household waste, a number of local authority powers regarding entry and inspection of household waste and surveillance on households will be removed.

Key Omissions

As mentioned earlier, the review did not introduce any significant new proposals and did not take the opportunity to increase England's recycling targets. Instead, the current target to recycle 50 percent of waste by 2020 has been maintained, even though Scotland and Wales have separately recently pledged to recycle 70 percent by 2025.

Another significant omission is any further clarity on the definition of waste, an issue which has been the source of concern and some confusion. The whole waste policy debate is coloured by the lack of clarity surrounding what is and is not waste, and when things can cease to be waste (so called "end of waste"). Whilst recent developments on the back of the revised EU Waste Framework Directive have moved things forward somewhat, there is still room for improvement. The review provided an obvious forum for the Government to set out its ideas and proposals on this issue, but it failed to do so.

Could It Have Done More?

The review has been heavily criticised by environmental and other campaign groups and also by trade and sector associations, for recycling existing policies rather than coming up with something new. The opposition party described it as "a missed opportunity which will leave England with the weakest recycling targets in the UK".

The review was also a chance to address a number of commercial and regulatory barriers which are present in the waste sector, including the fundamental definition of waste, but it has shied away from these difficult issues as well.

Although the review shows that England is on track to achieve its EU prescribed waste targets, this was an opportunity to provide more far reaching targets and proposals to promote England as a leader in waste reduction and management, and to drive innovation and development in this sector.

Barr and Others v Biffa Waste Services Limited: Permits and Common Law Nuisance

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In April 2011, the case of *Barr and others v Biffa Waste Services Ltd* [2011] EWHC 1003 saw the Technology and Construction Court (TCC) hand down a decision which could impact on the number of private actions for nuisance brought against companies who are subject to detailed regulatory regimes and environmental permits.

The case was brought as a class action by local residents who sought damages in nuisance against Biffa Waste Services Limited (Biffa), a large waste disposal company, for odour pollution originating from pre-treated waste on Biffa's nearby landfill site.

Biffa sought to rely on two defences, arguing that it would be unfair and unrealistic if, having complied with onerous legislation and various permit obligations, Biffa could still be liable in nuisance as if neither the legislation nor the permit had existed. Principally, Biffa relied on relevant legislation and the terms of the permit as granted by the Environment Agency (EA) to contend that it could not be liable in nuisance (the defence of statutory authority). In the alternative, Biffa argued that any liability in nuisance would only arise where the nuisance arose from negligence on Biffa's part. This latter defence arises from the concept of the "reasonable user of land", reflecting the need for "give and take" within a community so that not all activities will constitute a nuisance.

The court's assessment of this case went back to an analysis of basic principles as there was no previous authority which would determine whether Biffa could be liable in nuisance for the inevitable consequences of their activities as permitted by the EA in the absence of any allegation of negligence and after having complied with its obligations under both law and permit.

In delivering his very lengthy judgment, Coulson J considered in detail the clash between two potentially irreconcilable principles: the claimants' common law rights in nuisance for which it should not be possible to exclude through legislation; and the potential for injustice in finding Biffa liable in nuisance despite compliance with all of its obligations.

In upholding Biffa's alternative defence, Coulson J dismissed the class action and held that, in the absence of an allegation of negligence, compliance with a permit will be a defence in claims of nuisance for the inevitable consequences of activities permitted under the permit. He considered that the law should be flexible and that, in an already heavily regulated sector, it is not for the common law to impose an additional set of standards different to those imposed by the legislation.

This case was the first in which the courts were asked to consider the interplay between permits and legislation and the law of nuisance, and has proved to be very important for defining the scope of common law nuisance. The principle laid down by Coulson J opens up the possibility for companies operating under environmental permits to rely on compliance with their permit obligations as a defence to nuisance claims by local communities in the absence of any allegations of negligence.

The claimants have been granted permission to appeal the case to the Court of Appeal, and the hearing is scheduled to take place towards the end of January 2012.

Is It Getting Easier to Appeal Enforcement Notices?

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Historically, it has been very difficult to appeal an enforcement notice, with a local authority or Health and Safety Executive inspector having only to show that his opinion was genuine and based on reasonable grounds. However, following a string

of case law culminating in *Chilcott*, it is now much easier to appeal enforcement notices and anyone in receipt of such a notice should give serious consideration to the possibility of a challenge.

The Health and Safety at Work etc Act 1974 (HSWA) is the principal health and safety legislation in the UK. Section 21 enables an inspector to serve an improvement notice where he is of the opinion that a person is: (i) contravening one or more of the relevant statutory provisions; or (ii) has contravened one or more of those provisions in circumstances that make it likely that the contravention will continue or be repeated. An improvement notice requires positive action to remedy the situation by a specified date.

If an inspector regards the situation as more serious and is of the opinion that those activities either involve or will involve a risk of serious personal injury, they may serve a prohibition notice under section 22 of HSWA prohibiting that activity until certain remedial steps are taken.

If an enforcement notice is left unchallenged, possible consequences may include: an escalation in fine in any subsequent prosecutions; negative publicity and damage to reputation as all notices are registered on the Health and Safety Executive's website; and notices may have to be declared when tendering for contracts or applying to be an approved supplier. Companies may also have to report notices to their insurer affecting their annual premiums. It therefore warrants consideration as to whether a challenge to the enforcement notice can be brought.

In order to challenge an enforcement notice, the appeal should be lodged with the Employment Tribunal within 21 days (unless not reasonably practicable to do so). An appeal has the effect of automatically suspending an improvement notice. It does not automatically suspend a prohibition notice. The Employment Tribunal may then affirm the notice in its current form, amend or cancel the notice.

Historically, it was rare that an appeal against an enforcement notice would succeed. An inspector had to show only that the notice emanated from a genuine opinion based on reasonable

grounds (known as the Foremans test) and, as costs were not normally awarded, this was a costly exercise with little chance of success.

Challenging an enforcement notice has, however, become easier as a result of an evolving line of cases. In the case of *Railtrack v Smallwood [2001]*, Sullivan J notes his provisional view that “a tribunal hearing an appeal under section 24 was not limited to reviewing the genuineness and/or the reasonableness of the Inspector’s opinions. It was required to form its own view, paying due regard to the Inspector’s expertise”. However, as the appeal was dismissed in this case it was not necessary to determine the correctness of the Foremans test.

Then came the case of *Chilcott [2009]*. In this case, a health and safety inspector chose by chance to visit a site in Swindon on the same day that one of the subcontractor’s supervisors had fallen through a hole in a platform, breaking both his ankles. The inspector decided to investigate and straight away issued a prohibition notice. On appeal, it was determined that it is the role of an employment tribunal to assess the risks and circumstances at the time when the notice was issued and to decide if, having regard to all these circumstances, it would have issued the notice at that time. Accordingly, the tribunal was able to take into account information the inspector ignored or failed to appreciate. Even though this case involved prohibition notices, the principle also applies to appeals against improvement notices.

This introduction of reasonableness and objectivity serves to make it easier to challenge such notices, as illustrated in the later cases of *Vinci v Lambert* and *Vinci v Caboche*, both of which saw prohibition notices cancelled.

These cases give renewed power to organisations in receipt of onerous enforcement notices to appeal them in the Employment Tribunal. Proper consideration should be given to the content of the notice, whether there was a breach of health and safety or a risk of serious personal injury, and whether the notice was disproportionate. If, on reasonable assessment, there are grounds to challenge the notice, serious thought

should be given to mounting an appeal as the possible future consequences to the organisation of not doing so could prove very costly.

First Conviction Under the UK Bribery Act

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The law on bribery in the UK was substantially reformed by the enactment of the Bribery Act 2010 (the Act), which came into force on 1 July 2011.

This Act supersedes previous common law and statutory offences and provides a new comprehensive and concise system of offences relating to bribery. It contains (i) the active offence of bribing, i.e. offering, promising or giving of a financial or non-financial advantage; and (ii) the passive offence of being bribed, i.e. requesting, agreeing to receive or accepting a financial or non-financial advantage. The Act further contains the specific offence of bribing a foreign public official and, most significantly, introduces a new corporate offence of failing to prevent bribery.

In recent months, Munir Yakub Patel, a court clerk at Redbridge Magistrates’ Court, has become the first person to be convicted and sentenced under the Act. He appeared at Southwark Crown Court charged with requesting and receiving a bribe intending to improperly perform his functions under Section 2 of the Act after he accepted £500 in exchange for not entering details of a speeding charge onto the court system, thereby influencing the course of criminal proceedings. He was arrested after his acceptance of £500 was filmed by *The Sun*.

On pleading guilty in October, Mr Patel became the first person to be convicted under the Act and faced a maximum sentence of 10 years imprisonment and/or an unlimited fine. He had also been charged with the offences of misconduct in a

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public office and perverting the course of justice which can carry a maximum penalty of life imprisonment.

Mr Patel was sentenced on 18 November. Judge Alistair McCreath considered that, over a period of more than a year, Mr Patel had been driven by greed to seek payments from traffic offenders through which he is understood to have made a personal gain of at least £20,000. He was sentenced to three years for the bribery offence and six years for misconduct in a public office. The sentences are to run concurrently.

Such lengthy imprisonments may appear disproportionate to the relative gain made by Mr Patel, however it is likely that the severity of sentence reflects Mr Patel's position of responsibility as a public servant, as any such position of authority will usually attract a higher penalty. Regardless of any profit which may or may not have been made, the offence committed by Mr Patel was viewed by the court as being very serious. To use the words of Gaon Hart, Senior Crown Advocate for the CPS Special Crime and Counter Terrorism Division, "[Mr Patel's] conduct brought into disrepute the criminal justice system as he sought to undermine the very laws which he was employed to uphold".

As this case did not involve a corporate body, there was no explanation or examination of what may constitute **carrying on a business** in the UK or who an **associated person** might be for the purposes of the corporate offences under the Act. Likewise, the case gives no indications as to the levels of penalty which may be imposed on a corporate defendant. It does, however, indicate that the courts are willing to impose tough sentences, including imprisonment, on those engaged in bribery.

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Environmental, Safety & Health

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