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HEALTH AND SAFETY RECEIVES MORE ATTENTION FROM THE APPEAL COURT

On 19th August, the Court of Appeal handed down its long awaited judgement in the Tangerine/Veolia case. Their Lordships' judgement relates to two separate health and safety prosecutions which raised the same key issues on the correct interpretation of the duties imposed by sections 2 and 3 of the Health and Safety at Work etc Act 1974 (HSWA). In *Tangerine,* an employer faced prosecution under section 2 HSWA after a worker sustained injuries after becoming entangled in a large piece of machinery. In *Veolia*, an employer faced prosecution under both sections 2 and 3 HSWA following the death of an agency worker and injury to a worker whilst undertaking a litter collection at the side of a dual carriageway. The workers' pick-up collided with a lorry travelling on the dual carriageway.

What safety issues were before the Court of Appeal?

1. What is the relationship between the term "safety" used in section 2 HSWA and "risk" used in section 3 HSWA?
2. Where there has been an injury, is the prosecution required to prove that the offence caused it?
3. To what extent must the prosecution prove that the risk derives from the defendant's activities?
4. What if anything is the relevance of foreseeability of injury or of an accident which has, in fact, happened?

What did the Court of Appeal decide?

Question 1: risk v safety?
In answer to the first question in this appeal, their Lordships found that the concepts of "ensuring safety" and "exposure to risk" contained in sections 2 and 3 HSWA meant the same thing. Although the sections use different terminology their aims were the same- the avoidance of exposure to risk. This must be correct for if safety is not assured (S2) then there is a relevant risk to safety to employees. If there has been failure to ensure that a non employee has not been exposed to risk, then their safety has not been ensured. So whether you are an employer of a subcontractor on a construction site or the principle contractor responsible for that site, the issue of risk to safety will be the same when determining your responsibility under HSWA.

Question 2: causation?
This issue of whether the prosecution must prove that the offence actually caused the injury sustained is more challenging. Given the sentencing guidance issued to courts provides that breaches that cause death must receive harsher punishments, causation has become a real issue in many health and safety prosecutions across the country.

In response, the Court of Appeal was clear that causation was not a requirement to establish breach of either section 2 or section 3 HSWA. Neither section requires that injury be caused by the defendant's action (or inaction). Rather both sections focus on the absence of risk of injury. It is of course possible to breach sections 2 and 3 without any injury actually occurring– it's the presence of risk that makes out the offence. And conversely, the presence of an injury does not automatically mean that there has been a failure to ensure safety/ prevention of exposure to risk.

So whilst the prosecution need not prove that the injury was caused by the breach in order to prove that an offence has been committed, neither can the prosecution rely on the injury to demonstrate that there must have been a breach of duty by the defendant. The prosecution will have to prove beyond reasonable doubt that there was a failure to ensure safety/ failure to prevent exposure to risk by the defendant. The fact of the injury can be used by the prosecution as evidence of a breach or evidence that the defendant failed to take all reasonably practicable steps to avoid the breach. However the injury is just one piece of evidence to be considered by the jury and the Court

of Appeal was eager to stress that juries should not be distracted into thinking that causation is key to the creation of an offence-which it is not. This is important as in practice over the last a few years prosecutors have in many cases argued that fact of injury means there must have been a failure to ensure safety. The Court of Appeal in this case makes it clear that this is not necessarily so.

Causation remains highly relevant on sentencing. Judges are required to consider the extent of harm caused by the breach when deciding what fine to impose on the convicted defendant. Indeed there are dedicated sentencing guidelines which apply when a safety breach causes death. So whether or not an injury or fatality has been caused by a breach will remain as a key issue between the prosecution and the defence. The Court of Appeal's decision in this case shows their concern that juries understand its limited relevance when deciding whether a breach has in fact occurred.

Question 3: risk derives from the defendant?

In the *Veolia* case the issue was raised whether the risk which arose was related to the defendant's activities or from elsewhere. Their Lordships confirmed that both sections 2 and 3 required that the risks must relate to the activities of the defendant. The wording of section 3 is clear that the risk must arise out of the defendant's business activities. And as the obligation imposed by section 2 is relates to ensuring safety of employees whilst "at work" it is clear that this must be the correct interpretation.

So does this mean that employers need only take action against risks arising out of their own business' activities? Not at all. The Court was clear that employers will still be required to take action against certain risks which are not of their making. A risk may arise from the activities of another employer yet action still needs to be taken to protect our own employees from that risk. It is quite conceivable that when running a project, risks may arise from activities of another company that need to be addressed by the principal contractor running the project. For example, where a subcontractor undertakes lifting operations on site, the principal contractor would have to consider the risks posed by those operations on not only its own staff working in the area but also on other subcontractors it has working nearby.

Their lordships decided that there was no need to introduce a new test to determine whether a risk derives from the acts of the defendant. Juries can adequately address the issue when deciding the 2 main questions which they have to consider: (i) exposure to risk and (ii) whether it was reasonably predictable to avoid it.

Question 4: relevance of foreseeability?

Of course, only if a material risk to safety exists does the burden fall to the defendant to prove on the balance of probabilities that it took all reasonably practicable steps to avoid it. It is already an established principle of health and safety law that foreseeability of the risk of danger is a relevant factor when deciding whether all reasonable predicable steps had been taken to avoid an offence. This was decided in R v HTM. In this appeal, the question for the Court of Appeal was whether foreseeability was relevant to establishing if a material risk existed in the first place.

Their Lordships confirmed that foreseeability of danger is relevant to the establishment of risk and not just reasonable practicability. The findings of the Supreme Court in Baker v Quantum on foreseeability (reported in July's edition) applied equally to the interpretation of sections 2 and 3 of HSWA as to the Factories Act at issue in that case. Sections 2 and 3 HSWA aim to prevent exposure to risk of injury. The Court of Appeal concluded that the extent to which injury is foreseeable must be considered when assessing the level of risk to which the employees and non employees have been exposed.

However, their Lordships were clear: the prosecution does not need to prove that the accident which in fact occurred was foreseeable. The court does not need to consider the foreseeability (or

likelihood) of the event occurring in the way in which it did. All that is required is that it was foreseeable that injury could occur from the risk created by the defendant's activities.

How does this affect your business?

But what does this mean for safety officers in the construction industry? When preparing risk assessments, construction employers will need to consider hazards which, whilst not obvious, remain foreseeable. This can be no mean feat particularly without the benefit of hindsight. However, quite rightly, the risks that need to be assessed are only material risks- not those which are trivial or fanciful. This will provide some comfort to those responsible for preparing project risk assessments.

Whilst this case confirmed that the main risks which need to be managed are those arising out of your business' activities, care must be taken to ensure that risks posed by activities of other businesses you are working with are also adequately considered. However, the construction industry perhaps more than others understands the importance of co-ordination and co-operation with other contractors, clients and other duty holders and routinely manages the risks posed by multiple activities being undertaken on a construction site. To this extent, those in the construction industry consider the risks posed by others activities as a matter of course so this element of the judgement provides support for your current approach.

The Tangerine/Veolia judgement is an important case. It provides clarification on a number of key issues which are repeatedly being raised in health and safety prosecutions. The issues of causation and foreseeability in particular are regularly key points at issues between the prosecution and the defence and this judgment has been long awaited by practitioners.

This judgment confirms that the prosecution is not required to prove either that the injury was caused by the defendant's breach or that the way in which the accident occurred was foreseeable. However, this does not mean that the prosecution's role has just become easier. The prosecution cannot rely on the injury to prove of itself that a risk of injury occurred. The prosecution must prove beyond reasonable doubt that a breach of duty occurred. Nor can the prosecution rely on any risk of injury to prove a breach. Only material risks which are foreseeable can be actioned against.

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