

Technical Notes

Health and Safety

These technical notes are prepared for insurers, solicitors and other non technical readers as an outline of the basic principles and facts on topics which are frequently the subject of disputes. They are for initial guidance and to aid understanding of the topics and should not be relied upon without reference to Capita Symonds Health and Safety.

Introduction

The increasingly higher profile of health and safety is inextricably linked to a greater focus on litigation, both criminal and civil. A consequence is that the arguments have become increasingly complex.

The key issues set out in these Notes reflect the experience of Martin Barnard, Capita Symonds' Director of Health and Safety, who is one of the leading health and safety experts. That experience has included such landmark cases as:-

- i) R-v-Porter - Court of Appeal case which established the concept of 'fanciful risk';
- ii) R-v-HTM - Court of Appeal case which allows foreseeability to be part of a Defence;
- iii) R-v-Beckingham - Successful Defence of seven counts of manslaughter in the UK's largest outbreak of Legionnaires Disease;
- iv) R-v-Metropolitan Police Commissioners - Successful Defence of Lord Condon and Sir John Stevens in respect of risks to police officers at work

Health and Safety Legislation

Most people are familiar with the Health & Safety at Work Act 1974 being the prime legislation in Great Britain, with complementary Regulations made under the Act e.g. the Management of Health & Safety at Work Regulations 1999. There is similar legislation in Northern Ireland, the Isle of Man and the Channel Islands.

Health & Safety at Work Act 1974

The Act sets out the duties of employers, self-employed and persons in control of premises, generally within the framework of ensuring 'so far as is reasonably practicable' that persons are not put at risk. That principle is the cornerstone of modern health and safety legislation and is a balance between risk and sacrifice. The sacrifice, whether in time, trouble, money, effort or a combination, must be grossly disproportionate to the risk before one can say that it is not reasonably practicable to make that sacrifice.

Much confusion and uncertainty sits around the application of the Act in practice. In reality, the wording of the Act allows a wide breadth of allegations to be made, any one of which, if proved, would be sufficient to bring about a conviction.

Health and Safety Regulations

Regulations made under the Act put legal flesh on the skeleton of 'so far as is reasonably practicable'. Such Regulations are usually hazard or industry focussed e.g. the Electricity at Work Regulations.

Approved Codes of Practice and HSE Guidance

Such documents are usually regarded as providing authoritative guidance on acceptable practice. They provide the technical detail to establish what has to be done in order to comply with the law i.e. to do what is reasonably practicable.

Personal and Corporate Manslaughter

Few non-legal people understand the key ingredients of gross negligence manslaughter in the 'at work' circumstance. By virtue of their familiarity with the breadth of allegations which can be made under the Act, they fail to recognise the sharp focus on manslaughter issues such as:-

- i) Duty of care;
- ii) Causation;
- iii) Failing so far below acceptable practice as to be gross.

The Corporate Manslaughter Act of 2007 (Corporate Homicide in Scotland) has significantly changed the face of corporate responsibility for health and safety. Prior to the new law, the only successful convictions for corporation manslaughter were against small companies. Larger organisations were protected by layers of management separating the '*directing mind and will*' from individuals close enough to the action as to be guilty of personal manslaughter.

Under the Act, organisations can be guilty of corporate manslaughter if its Senior Managers grossly failed in their management of health and safety. Whilst remaining subjective, what once protected large organisations i.e. its layers of management, is now potentially its vulnerability.

Criminal and Civil Law

Again, whilst laying claim to an understanding of both, many confuse the fundamental ingredients of each e.g. seeking to promote contributory negligence issues in a criminal law case. Having said that, there is much in common in respect of health and safety which can be pursued as part of a case strategy, be it for criminal or civil.

10 issues worthy of inclusion in a health and safety case strategy

Whilst detailed consideration is beyond the scope of this Note, our top 10 issues are worthy of note in conclusion:-

1. Fact or Fiction?

Many cases have the potential to be fundamentally flawed due to 'assumed' facts not being proven. Over time, some convince themselves that the facts are there when they are not.

2. Understanding acceptable practice

In considering any guidance documents, it is appropriate to have two specific concepts in mind, namely:

- i) **Acceptable practice:** in compliance with legal requirements (on basis that non-compliance with the law is unacceptable), and
- ii) **Best practice:** of the highest standard, often in excess of legal requirements (on basis that no published guidance advocates any better practice).

We should consider 'acceptable' and 'best' practice to sit at either end of a spectrum. Anything in between becomes a matter of conjecture and is vulnerable to individual opinion. It is to the credit of many individuals or organisations that they aspire to meet the often high standards set in a 'best' practice document. They do so however in the knowledge that they are attempting to operate at a level considerably above what they need to do to comply with the law.

It would be wrong to say that any failure to maintain the 'best' practice level should be seen as a failure to comply with the law, provided that the actions taken remain at or above 'acceptable' practice. However well intended, to do so would act as a major deterrent to organisations and/or individuals aiming to achieve standards above what the law requires in case they fail.

3. Breaking the chain of causation

Whether in civil or criminal, particularly manslaughter, the ability to break the chain of causation is paramount. The chance to do so is often linked with it being 'Fact or Fiction?' as above.

4. Causation – playing a game of skittles

In any negotiation on the basis of plea settlement, there is invariably focus on moving any criticism away from the consequence, particularly a death. The breadth of allegation which can be made under the HSW Act means that a basis of plea is finally reached which is a considerable distance away from where it started i.e. a paperwork 'technical' offence rather than causative of a death. The consequence is a considerably lower penalty.

5. Suitable and sufficient risk assessment

It is somewhat naïve to only have regard to a single or few bits of paper entitled 'risk assessment'. In practice, risks are invariably assessed on an ongoing 'dynamic' basis. This can include discussions, observations and judgements made. Such elements are often not recorded in any formal way.

6. Competence and resource

Where proceedings involve other parties, e.g. contractors, competence and resource become key issues. Questions such as "you only engage competent contractors, don't you?" usually bring wry smiles. The failure to show that a contractor you have engaged is one of the greatest vulnerabilities in any legal argument. The reverse is also true i.e. the ability to show the contractor is competent will invariably strengthen the legal position.

7. Monitoring - v - supervision

It is common for Prosecutors to hold a position that organisations have a duty to 'supervise' the work of contractors. It is for the employer to 'supervise' his employees. Indeed that is the very essence of Section 2 of the HSW Act. In contrast, Section 3 of the Act makes no reference to supervision. An organisation therefore has a duty to 'monitor' the work of a contractor, rather than to 'supervise'.

8. Foreseeability

The judgement in the HTM case is hugely significant in allowing there to be a defence which reflects on the foreseeability of the actions of individuals. Whilst attractive, it should not be misconstrued as meaning there is a simple defence along the lines of "*he did something he shouldn't have*". Properly marshalled, foreseeability can make a significant impact on a case.

9. Fanciful risk

Similarly the judgement in the Porter case will have considerable impact for cases at the everyday end of the health and safety spectrum. In essence, before applying the reasonably practicable principle, there is first a need to consider if the risk is fanciful i.e. to do with everyday life. (In the Porter case, it was a child playing on concrete steps in a school playground). If not, there is no need to apply the rigours of the Act.

10. Litigation risk or Litigation lottery

Risk means 'chance of disaster or loss'. A basic starting point is to say that most 'chances' can be eliminated or reduced to an acceptable level. In the legal context unless such risks are reduced to that acceptable level, the whole process becomes a litigation lottery rather than a litigation risk. The legal teams who manage the litigation risk they are exposed to by good management of the key issues will invariably win the day.