RISKY BUSINESS

Over recent years, there has been a great deal of debate amongst those dealing with health and safety about the types of risk which the law requires employers to take all reasonably practicable steps to control.

On 19 August 2011, the Court of Appeal gave judgment in two cases: R v Tangerine Confectionery Limited and R v Veolia ES (UK) Limited. Whilst the court dismissed both company's appeals, the judgment of Lord Justice Hughes addresses a number of the live questions about risk.

The nature of the duty

It has long been recognised that the duties under Sections 2(1) and 3(1) of the Health and Safety at Work etc Act (HSWA) 1974 are non-delegable. The duties of one person may run concurrently with those of another (see, for example, R v Upper Bay Limited [2010] EWCA Crim 495 (CA)).

They require employers to ensure the health, safety and welfare of employees at work, and to prevent non-employees (a wide class of person including workers, visitors to premises and members of the public) being exposed to risk from their work activities. Neither duty is absolute; however, employers are to take all reasonably practicable steps to minimise or eliminate the risk and, in the context of any enforcement action, be able to prove that they did.

Apart from where the allegation includes welfare of an employee, the decision of that Court of Appeal in Tangerine and Veolia is that the duty towards employees under Section 2(1) of HSWA 1974 requires the same level of response from employers as the duty towards non-employees under Section 3(1).

And that makes sense: in the case of Veolia ES (UK) Limited, Mr Seymour, an employee, worked alongside and did the same litter picking job as Mr Griffiths, an agency worker. It could not be right that Veolia, for whom both carried out essentially the same job, could owe a greater duty to one than the other.

The relevance of an accident

It is often the case that enforcement action is taken by the regulator following an investigation into an accident which resulted in a serious injury or death. These cases were no exception.

Tangerine Confectionery Limited was prosecuted after an employee became trapped in the moving parts of a machine in its sweet factory and died. At trial, it was debated whether the employee had placed himself in a position of danger, and whether it was foreseeable to Tangerine that he would.

The case of Veolia involved Mr Seymour and Mr Griffiths litter picking alongside a dual carriageway. Mr Griffiths was on foot, and Mr Seymour drove Veolia's van along slowly behind him. In order to negotiate a post in the verge, Mr Seymour pulled the van out partially into the nearside lane of the dual carriageway. His van was struck from behind by a lorry. The impact propelled the van forward suddenly, killing Mr Griffiths, and overturning, injuring Mr Seymour. At trial, the company argued that the accident was caused by the poor driving of the van or lorry, not Veolia.

The judgment of the Court of Appeal is very clear that Sections 2 and 3 are concerned with risk rather than the mechanics of any accident. An offence is not necessarily committed simply because there has been an accident at work, nor does there need to have been an accident for an offence to have been committed. Put another way, the judgment recognises that there is a difference between the cause of the risk (which is what the sections are about) and the cause of the accident (which is a side show).

The relevance of an accident, therefore, is simply that it is evidence of the existence of a risk. There may well be other evidence of risk, and it may sometimes be necessary to consider the source of it.

Whether Tangerine's employee put himself in danger, or whether there was driver error which contributed to the collision in the case of Veolia, does not of itself mean that no offence was committed by each company. In each case, the general nature of the risk was attributable to the employer's work activity: the risk of being trapped in moving parts of a sweet making machine, or the risk of being struck by a moving vehicle while working alongside a dual carriageway. It then falls to the employer to show that all reasonably practicable steps were taken to avert the risk.

Foreseeability

The parties' arguments for the appeal were originally concerned with the recent case law on risk: R v Porter [2008] ICR 1259 (CA); R v Chargot Limited and others [2009] 1 WLR 1 (HL); and R v EGS Limited [2009] EWCA Crim 1942 (CA).

However, while the appeals were waiting to be heard, the Supreme Court handed down its judgment in Baker v Quantum Clothing Limited and others [2011] UKSC 17 (SC). That was a civil claim which included an allegation of a breach of Section 29 of the Factories Act (FA) 1961. By a majority, the Supreme Court held that foreseeability did play a part in determining whether or not a place is or was "safe" under Section 29.

The Court of Appeal in Tangerine and Veolia became concerned with of whether that meant that foreseeability also played a part in "safety" in Section 2(1) of HSWA 1974, and "risk" in Section 3(1). The answer is that it does. Lord Justice Hughes put it in this way:

"Whether a material risk exists or does not is, in these cases, a jury question and the foreseeability (or lack of it) of some danger or injury is part of the enquiry."

Lord Justice Hughes goes on to consider reasonable practicability, noting that:

"If a danger is not foreseeable it is difficult to see how it can be practicable, let alone reasonably practicable, for the defendant to take steps to avoid it… What is reasonably practicable no doubt depends upon all the circumstances of the case, including principally the degree of foreseeable risk of injury, the gravity of injury if it occurs, and then implications of suggested methods of avoiding it."

So, foreseeability is a concept which comes into both the materiality of the risk which employers need to guard against, as well as into the reasonably practicable steps needed to control it. In terms of risk, the judgment does not widen the decisions of Lord Hope in Chargot Limited and Lord Justice Dyson (as he then was) in EGS Limited, although it may be that the latter is wider than some may previously have thought! It appears to go no wider, in relation to reasonable practicability, than the court did in R v HTM Limited [2007] 2 All ER 665 (CA). Finally, within the context of a trial, the judgment also leaves all questions of foreseeability to the jury.

Where does the judgment leave us?

The general duties imposed by Sections 2(1) and 3(1) of HSWA 1974 upon employers still need careful consideration. As Lord Justice Hughes says himself in his judgment:

"[The sections] are not limited, in the risks to which they apply, to risks which are obvious. They impose, in effect, a duty on employers to think deliberately about things which are not obvious."

The requirement to conduct assessments of risks, factoring in the hazards of the workplace together with the possibility of injury flowing from them, will continue to inform employers when they come to consider the introduction of measures to control those risks. And it is risks, in a general sense, which employers have to think about.

Employers are not required to do anything about risks (as opposed to accidents) which are wholly unforeseeable. However, if one stands back and thinks about it, how many risks really are?

19 August 2011

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Aug 11