Regulatory / Health & safety

Proving it in reverse

How has *Chargot* affected future prosecution practice?

By **Tim Horlock QC** & **Matthew Snarr**

IN BRIEF

- An injury to an employee is likely to constitute a prima facie breach of s 2 of HSWA 1974.
- No particulars of defendant's failings are required.
- An injury to an employee may suffice to constitute a prime facie breach of s 3 of the HSWA 1974, but not always.

In *R v Chargot Ltd* [2008] UKHL 73, [2008] All ER (D) 106 (Dec) the House of Lords adjudicated on the burden that the prosecution bears in order to establish a breach of duty under ss 2 and 3 of the Health and Safety at Work (etc) Act 1974 (HSWA 1974). In short, the issue turned on whether the prosecution merely needed to prove that a risk of injury existed or whether the prosecution needed to identify and prove particular acts or omissions which it was alleged gave rise to the breach of duty.

> "Prima facie a breach of s 2(1) arises when an employee is injured while he is at work in the workplace"

Factual background

On 10 January 2003 an employee, Mr Shaun Riley, of Chargot Limited, the first appellant, was fatally injured while driving a dumper truck. The second appellant, Ruttle Contracting Limited, was the principal contractor on site. The third appellant, George Henry Ruttle, was a director of Chargot Limited and the managing director of Ruttle Contracting Limited.

A car park was under construction at a farm in Chorley which required the excavation of a quantity of topsoil. Mr Riley had been asked to replace the driver of the dumper truck who had to leave the site unexpectedly. Mr Riley drove the dumper truck loaded with topsoil and unloaded the soil on two occasions before he met with an accident. While driving down a ramp to deposit a load of soil, the dumper truck tipped over, burying Mr Riley with topsoil. There were no witnesses to the accident. The precise cause of the accident was never established. The truck was fitted with a seatbelt but Mr Riley was not wearing it at the time.

Criminal proceedings were brought against Chargot Limited under s 33(1)(a) of the Health and Safety at Work Act 1974 (HSWA 1974) alleging a breach of HSWA 1974, s 2(1). As the operations had been under the control of Ruttle Contracting Limited it was charged under s 3(1). Mr George Henry Ruttle was charged pursuant to HSWA 1974, s 37 that through his connivance, consent or neglect he had caused Ruttle Contracting Limited to commit a breach of s 3(1).

The appellants were convicted and fined of £75,000, £100,000 and £75,000 respectively, all with costs orders. They were granted leave to appeal against both conviction and sentence to the Court of Appeal. All the appeals were dismissed. The appellants sought to appeal the decision of the Court of Appeal to the House of Lords. Permission was granted in that the appeal gave rise to points of general public importance, ie whether the prosecution is required to identify and prove particular breaches of duties in such prosecutions.

The defence arguments on appeal

On appeal to the Court of Appeal and before the House of Lords the appellants argued that the convictions should be quashed because the prosecution had to prove more than just a risk to health and safety arising from the state of affairs at work. The defence contended that the prosecution had to identify and prove particular acts or omissions consisting of a failure or failures to comply with the duties laid down in HSWA 1974, ss 2, 3. A *Brown* direction (*R v Brown* [1984] 79 Cr App R 115, [2008] All ER (D) 208 (Dec)) would be required directing the jury that unanimity was required on at least one of the specific breaches alleged.

The rationale of the defence argument was drawn from three main sources:

(i) Breach of the duty under ss 2 or 3 must necessarily involved acts or omissions on the part of the duty holder, such acts or omissions must be proved against the duty holder.

(ii) *R v Beckingham* [2006] EWCA Crim 773, had established that a *Brown* direction was required in a health and safety prosecution under HSWA 1974, s 7. The defence relied heavily on the case of *R v Davies* [2003] ICR 586, [2003] All ER (D) 71 (Nov) in which the Court of Appeal had held that the requirement for the prosecution to prove that a duty existed and that the requisite standard had been breached was not a mere formality.

(iii) The prosecution ought to bear the overall onus of proof. The imposition of a legal burden on the defendants was not compatible with the presumption of innocence under Art 6(2) of the European Convention on Human Rights. The reverse burden of proof in s 40 of HSWA 1974 would not be

proportionate to the aim sought to be achieved unless the prosecution supplied detailed particulars of the alleged failings. The increased penalties, including imprisonment, provided for in the Health and Safety (Offences) Act 2008 bolstered this argument. This argument was only developed before the House of Lords.

Photo: © Istockphoto.com

Their lordships' decision

The Lords rejected the defence arguments and upheld the convictions. They held that the nature of the duties imposed by ss 2 and 3 are different to s 7, which was considered in *Beckingham*. First, ss 2 and 3 impose an obligation on employers as opposed to employees. Accordingly it is unsurprising that the law adopts a firmer stance. Second, s 7 imposes a duty to take reasonable case as opposed to the positive obligation to ensure that an individual is not exposed to a risk to their health and safety.

Thirdly, and most importantly, their lordship's reasoning derived from an analysis of the nature of the duties in ss 2 and 3. The duties are expressed as being general and are results based; if the result is not achieved the duty has been breached. As soon as an individual is exposed to a risk of injury the employer has failed to achieve the stipulated result. All the prosecution need to establish is that the result described in the provisions of ss 2 and 3 was not achieved. Once that is done a prima facie case is established, the onus then passes to the defence to make good the defence of reasonably practicability.

In practice the judgment of the Lords reaffirms the status quo as propounded in *R v Board of Trustees of the Science Museum* [1993] 1 WLR 1171 and *R v Associated Octel Co Ltd* [1994] 4 All ER 1051*, 1063a*, where, in the latter case, the allegation was that there had been a contravention of s 3(1), Lord Justice Stuart-Smith said: "If there is a risk of injury to the health and safety of the persons not employed by the employer, whether to the contractor's men or members of the public, and, a fortiori, if there is actual injury as a result of the conduct of that operation there is prima facie liability, subject to the defence of reasonable practicability."

The prosecution will often need to prove little more than the fact of an accident. Consequently, it follows that it is not for the prosecution to set out in detail how it was reasonably practicable to avoid the risk. The imposition of a legal burden on the defendant was proportionate as per *Davies*, and was compatible with Art 6(2). Lord Justice Latham had stated in the Court of Appeal at para 26: "That it was a real risk, as opposed to a purely hypothetical one, was established by the fact that there was the accident. That was in our view sufficient to justify the requirement that the first and second appellants should have the burden of proving that they had done all that was reasonably practicable to protect against that risk."

The ratio of *Chargot* is encapsulated in Lord Hope's judgment at para 30 in which he reaffirms the ratio of Court of Appeal's decision: "Prima facie a breach of s 2(1) arises where an employee is injured while he is at work in the workplace."

Unresolved Issues

Materiality of risk

Lord Hope said that the risks which are to be guarded against under ss 2 and 3 of HSWA 1974 are not those which are trivial or fanciful but risks that are material. He said at para 27: "It is directed a situations where there is a material risk to health and safety, which any reasonable person would appreciate and take steps to guard against."

This may tend to suggest that a defendant cannot be convicted of a failure to ensure the health and safety of his employee if the risk was not foreseeable. Although Lord Hope did not use the word foreseeable his comment may be taken to introduce the concept of foreseeability into the question of risk.

Lord Hope referred to the Court of Appeal authority of *R v Porter* [2008] EWCA Crim 1271, [2008] All ER (D) 249 (May) in which the court declined to paraphrase the statutory concept of risk applicable to HSWA 1974 but did hold that the prosecution must to prove a real (as opposed to fanciful or hypothetical) risk. This approach, combined with the observations of Lord Hope, appears to import the concept of reasonable foreseeability into HSWA 1974 which would be a new weapon available to the defence.

The formulation of this test is crucial. It remains to be seen whether the criminal courts incorporate a civil law approach to the concept of risk. In the Scottish case of *Adamson v Procurator Fiscal*, Lanark, 31 October 2000, Lord Carloway, delivering judgment in the High Court of Justiciary, said: "It is sufficient for the proof of the existence of risk that a possibility of danger is created."

Such an approach would probably place the level of risk needed to establish breach at a lower level that than suggested by Lord Hope.

Revisiting foreseeability

HSWA 1974, ss 2 and 3 make no actual reference to risks which are foreseeable. In *R v HTM* [2006] EWCA Crim 1156, [2007] 2 All ER 665 the Court of Appeal held that the concept of foreseeability was more relevant to a determination of the issue of reasonable practicability (as opposed to whether an employee had been exposed to a risk at all).

In *Dugmore v Swansea NHS Trust* [2003] 1 All ER 333 the Court of Appeal considered the meaning of reasonably practicability in the context of reg 7(1) of the Control of Substances Hazardous to Health Regulations 1988 (SI 1988/1657) and 1994 (SI 1994/3246) (the regulations). Lord Justice Hale stated: "Nowhere is there any reference to the reasonable foreseeability of the risk. Nor is the duty dependent upon what a risk assessment would have revealed."

The references to reasonable practicability in HSWA 1974 ss 2, 3 and

Directions, burdens and waiver: at a glance

- An injury to an employee is likely to constitute a prima facie breach of HSWA 1974, s 2. No particulars of defendant's failings are required.
- An injury to an employee may suffice to constitute a prime facie breach of HSWA 1974, s 3 but not always.
- A *Brown* direction to the jury will not be required where the prosecution has established a prima facie breach of HSWA 1974, ss 2 and 3.
- The prosecution must establish the risk was "material" even if an injury occurred.
- If the risk is fanciful or hypothetical it is unlikely to be material.
- It is possible to waive an entitlement to the guarantee of the right to a fair trial under Art 6.

40 can therefore be read as excluding any consideration of reasonable foreseeability. While the Court of Appeal agreed with *Dugmore* in *HTM,* they held it was confined to reg 7 of the regulations.

In *HTM* the court relied heavily on the judgment of Lord Goff in *Austin Rover Group Ltd v HM Inspector of Factories* [1990] 1 AC 619 at p 626H: "The degree of likelihood is an important element in the equation. It follows that the effect is to bring into play forseeability in the sense of likelihood of the incidence of the relevant risk, and that the likelihood of such risk eventuating has to be weighed against the means, including cost, necessary to eliminate it."

The court approved Lord Goff's analysis: "It is to be noted that he expresses the relevance of foreseeability in a closely confined way. Forseeability is merely a tool with which to assess the likelihood of a risk eventuating. It is not a means of permitting a defendant to bring concepts of fault appropriate to civil proceedings into the equation by the back door; still less does it mean that the phrase "reasonably foreseeable" in itself provides the answer to the jury question."

In *HTM* the court failed to distinguish between the likelihood of any incidence or the relevant risk eventuating and, on the other hand, a person's ability to be aware of that likelihood. It stated at para 22: "…a Defendant…cannot be prevented from adducing evidence as to the likelihood of the incidence of the relevant risk eventuating in support of its case that it had taken all reasonable means to eliminate it."

The Crown in *Chargot* invited the Lords to rule on whether the risk ought to be viewed objectively or subjectively but their lordships declined to determine this issue; the debate therefore continues.

Waiver of Art 6

The Crown in *Chargot* argued that the defendants had waived their rights to argue that their Art 6 right to a fair trial had been infringed. In certain circumstances, an individual may unequivocally waive his convention rights. Such a wavier must be must be voluntary, informed, unequivocal and must not run counter to some important public interest, see *Pfeiffer and Plankl v Austria* [1992] 13 EHRR 692.

The defendants were all represented by counsel throughout the trial. No request had been made for particulars of the offence during the trial. It was contended that the defendants had waived their right to argue the point that the prosecution's presentation of the case infringed their Art 6 right to a fair trial.

Their lordships did not rule on the merits of this argument. However, it would be prudent for defence representatives to ensure that they raise any concerns or objections as to the presentation of the prosecution case during the course of trial. If the issue is raised afterwards, on appeal, the court may take the view that the defendant has waived his right to argue the point.

Future prosecution practice

A *Brown* direction is not required in prosecutions under HSWA 1974, ss 2 and 3, see para 44 of Lord Brown's judgment. Therefore it is doubtful whether the prosecution needs to include specific counts for specific failures of duty. There remain cases where the prosecution will have to present particularised allegations of failures. It is the nature of the duty which defines the ingredients which the prosecution needs to prove. In qualified duties where certain measures are stipulated, see s 48(1) of the Mines and Quarries Act 1954 and reg 11 of the Provision and Use of Work Equipment Regulations 1998, particularised allegations of the failings will be required.

Lord Hope referred to HSWA 1974 ss 4 and 6, para 21 as contrasting examples of duties where more particular measures must be taken. In these cases the prosecution will need to identify the respects it is alleged there were breaches. In ss 2 and 3 prosecutions where no injury has occurred particularity may be required as to the breach of duty alleged. Where the risk to which the employee or person was exposed did not materialise the particular risk may need to be identified. Lord Hope did raise the issue at para 22 that there may be some cases where the assertion of an injury is insufficient to demonstrate that there was a risk. Cases will need to be looked at on an individual basis. Prosecutions under s 3(1) may require the identification and proof of the respects in which the injured person was liable to be affected by the conduct of his undertaking.

The overall test of how much detail is required from the prosecution in either the statement of offence or the particulars provided is one of fair notice, see para 24 of *Chargot*. If a defendant is in difficulty framing his defence because insufficient notice is given it is open to ask for further particulars. While fairness may require the giving of notice of such allegations they are not the ingredients of the offence in ss 2(1) and 3(1), they do not need to be proved.

Too much confusion?

In conclusion, the judgment in *Chargot* makes it more straightforward for the prosecution to establish a prima facie breach of duty under ss 2 and 3 of HSWA 1974. Consequently, it is the authors' view that enforcement of workplace health and safety breaches is now probably more straightforward under ss 2 and 3 of HSWA 1974.

The unresolved issues in *Chargot* present defendants with new potential arguments. In particular, an ability to argue that the risk alleged was not a material risk, an argument that can be presented before the case is opened, at the conclusion of the prosecution case, at the conclusion of the evidence and, if all else fails, in submissions to jury. NLJ

Tim Horlock QC appeared for the Crown in *R v Chargot*. Both he & **Matthew Snarr** are practising barristers at 9 St John Street, Manchester