

Health & Safety Scotland

Case Law Update

Malcolm Gunnyeon
12 September 2018

Topics to be covered today

- Appeals against Prohibition and Improvement Notices
- Challenges to Legal Privilege
- The approach to sentencing since *Scottish Power plc v. HMA*

Appeals against Prohibition & Improvement Notices

- Appeal to the Employment Tribunal in terms of Section 24 of the 1974 Act
- What evidence can the Tribunal take into account?
- What about evidence that only becomes available afterwards?
- Is expert evidence admissible? What if that wasn't available to the Inspector at the time?

Appeals against Prohibition & Improvement Notices

- *HM Inspector of Health & Safety v. Chevron North Sea Limited*
- Decision of the UK Supreme Court in 2018
- The role of the Tribunal is to determine, as a matter of fact, if a risk existed at the time of the Notice
- It is about fact, not opinion

Appeals against Prohibition & Improvement Notices

"...when it comes to an appeal, the focus shifts. The appeal is not against the inspector's opinion but against the notice itself...no good reason for confining the tribunal's consideration to the material that was, or should have been, available to the inspector. It must...be entitled to have regard to other evidence which assists in ascertaining what the risk in fact was..."

Appeals against Prohibition & Improvement Notices

"...[if the evidence] shows that there was no risk at the material time, then, notwithstanding that the inspector was fully justified in serving the notice, it will be modified or cancelled as the situation requires..."

Legal Privilege

Two main types

Legal Advice Privilege

- Applies to communications between a **qualified lawyer** and their client. This includes in-house lawyers
- Applies to all communications, not just those in relation to litigation

Litigation Privilege

- Applies to communications/documents prepared when you reasonably anticipate you will be involved in litigation
- Not just communications with lawyers – it can protect communications with third parties too
- Litigation must at least be “in contemplation”

Legal Privilege

Serious Fraud Office v. Eurasian Natural Resources Corporation Limited

- Initial decision of the High Court in England - overturned in part by the Court of Appeal on 5 September 2018
- The appeal confirmed that notes of a lawyer's investigation into the facts of an incident **are** privileged
- Reasonable contemplation of an investigation **is** reasonable contemplation of litigation/prosecution
- Documents prepared to avoid or settle a prosecution **are** just as protected as documents prepared to defend it
- The appeal confirmed that lawyer's working notes **are** privileged even if they do not contain notes of advice given/to be given
- Fact finding (as opposed to giving advice on the facts) **is** privileged - and that includes investigations by people such as forensic accountants

Sentencing in Health & Safety since Scottish Power

- In Scottish Power case the Court of Appeal confirmed that Scottish judges should refer to the 2016 English Sentencing Guidelines as a "cross check"
- The guidelines will be of limited relevance in Summary Proceedings where the £20,000 maximum fine remains
- No further reported decisions on the process to be applied, but many fines imposed since the case

Health & Safety Sentencing Guidelines

The new regime

- Companies categorised by turnover from Micro (Less than £2million) to Large (£50million plus)
- Level of Culpability + Seriousness of Harm = Offence Category
- The Judge is given a range of fines to use as a starting point
- For Large companies that range is £3,000 to £10million
- The fine is increased for aggravating factors and reduced for mitigating factors
- “It should not be cheaper to offend than to take the appropriate precautions”

Recent Health and Safety Fines

Date	Company	Details	Fine
February 2016	Conoco Phillips	Offshore gas releases (no injuries)	£3 million
September 2016	Merlin Attractions	Rollercoaster crash (4 serious injuries)	£5 million
October 2016	Foodles Production	Injury to Harrison Ford on Star Wars set	£1.6 million
February 2017	Wilko	Serious crush injury to employee	£2.2million
February 2018	Martin Baker Aircraft	Death of Red Arrows pilot due to ejector seat	£1.1 million
February 2018	Tata Steel	Employee killed in crane collision	£1.4million

Any Questions?

Contact us



Malcolm Gunnyeon

Partner

Dispute Resolution

Direct Line - 01224 356140

Email - malcolm.gunnyeon@dentons.com