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LATEST COURT OF APPEAL DECISION UNDERLINES THE IMPORTANCE OF OBTAINING EXPERT EVIDENCE ON THE 'LIKELIHOOD OF HARM' WHEN RESPONDING TO A HEALTH AND SAFETY PROSECUTION

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If your organisation or employees are prosecuted for a health and safety breach, your main focus will be whether to defend the prosecution or plead guilty. You may need to call an expert witness to show that everything reasonably practicable had been done, which is the test of your innocence. But the recent Court of Appeal decision in R -v- Squibb Group Ltd underlines the importance of thinking ahead and additionally obtaining expert evidence on the 'likelihood of harm', in this case cutting the eventual fine by more than half.

What was the factual background?

Squibb was engaged as demolition sub-contractor on a refurbishment project at a school in Waltham Forest in North London in 2012. An asbestos survey had been provided for the principal contractor, Balfour Beatty Regional Construction Services Ltd, but they wrongly reassured Squibb that there wasn't an asbestos problem in the relevant part of the school where Squibb was working. Squibb did not themselves properly review the survey, which was in any event ambiguous.

By the time one of Squibb's employees discovered a large clump of asbestos above a suspended ceiling, it became apparent that they had been demolishing parts of the building that contained widespread asbestos – and without the proper precautions.

Crown Court proceedings – July 2017

Balfour Beatty and the project management company pleaded guilty to health and safety offences. Squibb considered they had done everything reasonably practicable in relying upon the reassurance from Balfour Beatty and took the case to trial - unsuccessfully. The jury decided Squibb were guilty of an offence under section 2 of the Health and Safety at Work Act 1974, having not done everything reasonably practicable to avoid exposing their employees to asbestos.

The Crown Court judge then followed the sentencing guideline that had been introduced in 2016. He needed to decide upon a variety of sentencing factors in order to follow the tables in the sentencing guideline and allocate the correct fine. He decided there was 'high culpability' and that there had been a risk of death from asbestos related cancer ('Level A' seriousness of harm risked).

The defence team put forward a report from an expert witness that the risk of anyone dying from this asbestos exposure was less than 1 in 1,000. The judge nonetheless allocated the likelihood of harm

as being 'Medium' and when allowing for other factors, including the medium sized turnover of Squibb (£46million), he fined Squibb £400,000.

Court of Appeal – February 2019

Squibb appealed on a number of grounds and the Court of Appeal were reluctant to disagree with the Crown Court Judge's findings - except on one point. The Court of Appeal did not see how a risk of death that was assessed by Squibb's expert as being less than 1 in 1,000 could have been determined to be 'Medium', so they changed that factor to 'Low'. Working through the sentencing tables, this single step alteration to a single sentencing factor led to the Court of Appeal reducing the fine from £400,000 to £190,000. If Squibb's turnover had been a fraction larger, in the category over £50million, then following the same reasoning this single factor would have changed the fine from £1million to £500,000.

Why is this type of expert evidence rarely used?

Lawyers defending health and safety cases know that each of the factors in the sentencing guideline can have a dramatic effect upon the fine. Yet they do not very often submit expert evidence on the 'likelihood of harm' or the 'seriousness of harm risked', even when it could be helpful. There are various reasons for this:

- The main focus in a trial is whether everything reasonably practicable was done, and this often requires evidence from an expert witness, who will not necessarily also have expertise on the likelihood of harm. For example, the expert giving an opinion on whether more should have been done to plan a lifting operation will not be an expert on the probability of someone being killed by a particular load falling from a particular height.

- Probability and statistics do not feature in lawyers' training, with the effect that most lawyers are more comfortable to let the judge 'stick a finger in the air' and determine that a risk is 'Low', 'Medium' or 'High' than to trawl through relevant statistics and deal with complex expert calculations on probabilities.

- This expert evidence will only be considered if you lose at trial or plead guilty – so it could prove to be unnecessary.

Conclusion

The message from this Court of Appeal case is clear. A good health and safety defence lawyer needs to engage with the probabilities and statistics that underlie 'likelihood of harm' and 'seriousness of harm risked' and in appropriate cases instruct a suitable expert witness on these issues. The extra work will often yield a dividend if the jury decides to convict; but will also be fruitful in the process of negotiating a suitable basis for a guilty plea (or in the hearing before a judge if the basis of plea cannot be agreed with the prosecution).

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