HENDERSON CHAMBERS

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Court of Appeal considers the relevance of expert evidence to the issue of "harm" under the Sentencing Guidelines applicable to Health & Safety Offences

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In *R v Squibb Group Limited* [2019] EWCA Crim 227 the Court of Appeal (Leggatt LJ, Cutts J and HHJ Wall QC) considered the issue of 'harm' under the Definitive Guideline for Health and Safety Offences ('Sentencing Guidelines'). The decision has the potential to encourage reliance on expert evidence at the sentencing stage in health and safety prosecutions, leading to more complex, costly and lengthy hearings.

Overview of prosecution

1. The prosecution arose from the Defendant's involvement as a demolition contractor in a project to refurbish a school in South London. The project was managed on behalf of the local authority by NPS Ltd. The main contractor was Balfour Beatty Regional Construction Services Ltd.

2. The school had been built at a time when asbestos was routinely used in construction. Those involved in the refurbishment were subject to duties under the Control of Asbestos Regulations 2006 to manage the risk of exposure to asbestos. NPS Ltd had therefore commissioned an asbestos survey which identified asbestos in various places in the school building.

Steps were taken to remove this asbestos safely and the project went ahead.

3. Squibb was engaged to perform demolition services. Part of this work was carried out in April 2012. Squibb returned to site to complete the job on 23 July 2012. The following day, one of Squibb's employees discovered a large clump of asbestos. All work immediately ceased. A new asbestos survey was carried out by a different surveyor which confirmed the widespread presence of asbestos. In particular, it demonstrated that the parts of the building which had already been demolished had contained asbestos.

4. NPS London Ltd, Balfour Beatty and Squibb were all charged with health and safety offences. NPS London Ltd and Balfour Beatty pleaded guilty. Squibb maintained its innocence and was tried at Southwark Crown Court before HH Judge Beddoe and a jury in July 2017.

5. The company was charged with two offences under the *Health and Safety at Work etc Act 1974*. On count 1, Squibb was charged with an offence of failing to comply with its duty under s.2(1) of the Act "*to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all [its] employees*." Count 2 charged it with an offence under s.3(1) of failing to conduct its undertaking "*in such a way as to ensure, so far as is reasonably practicable, that persons not in [its] employment who may be affected thereby are not thereby exposed to risks to their health or safety*."

Outcome at trial

6. The jury found Squibb guilty on count 1 in respect of ensuring the safety of its employees, but acquitted Squibb on Count 2 as to persons not in its employment.

7. On sentencing, the Judge followed the Definitive Guideline for Health and Safety Offences issued by the sentencing Council.

8. He found culpability to be "high" as Squibb had no system to ensure that, where an asbestos survey has been carried out, the survey report was obtained, read and acted upon.

9. The seriousness of harm was agreed at level A because exposure to asbestos can potentially lead to a person who has inhaled asbestos fibres contracting a fatal disease.

10. As to the likelihood of the harm occurring, the Judge assessed that to be "medium". The overall harm category was therefore "2".

11. Given that the company was a medium sized organisation, the Judge took the starting point as being £450,000.

12. With some reduction for mitigation, Squibb was fined £400,000.

The Appeal

13. Squibb appealed against both its conviction and sentence.

14. On conviction Squibb argued that:

    (i) the verdicts which the jury returned on the two counts were inconsistent with each other, such as to make the conviction on Count 1 unsafe;

    (ii) the jury should have been directed that it was not open to them to return different verdicts on the two counts; and

    (iii) the judge should have directed the jury to consider the work done by Squibb in April and in July separately.

15. All three grounds were rejected:

    (i) As to the first two grounds, it was confirmed that although an appeal court can interfere with the verdict of a jury if it has returned inconsistent verdicts, the test of inconsistency is a high one. The appeal court must be persuaded that the jury has returned verdicts which cannot stand together. In this case, it had been open to the jury to find that the risk to Squibbs' employees was greater than to non-employees; that the steps that it should have taken to protect employees were therefore more onerous; and that it failed in that regard. These grounds of appeal were therefore rejected.

    (ii) The third ground was rejected on the facts.

16. On sentence, Squibb challenged the trial Judge's decisions on both "high culpability" and "medium likelihood" of harm.

17. As to culpability, it was argued that the Judge had failed to take any proper account of the fact that, by virtue of the acquittal on count 2, the jury was satisfied that Squibb had done all it reasonably could to protect the health of non-employees; that it had taken steps to protect its employees by training them on asbestos management; that it reasonably relied on the main contractor's asbestos survey; and that, despite not reading that survey, it did have its own risk assessments and method statements.

18. These grounds were rejected. The Court was not persuaded that it ought to disturb the finding on culpability which it considered was justified given that:

    (i) No challenge was or could be made to the Judge's finding that Squibb failed to have a proper system in place to obtain, review and act upon any relevant asbestos report before carrying out

demolition works in a building which was known, or was likely, to contain asbestos.

(ii) Squibb was an organisation that specialised in this type of work and could routinely expect to encounter the risks created by the presence of asbestos. The Judge was entitled to find that its failings reflected a lax approach on the part of its senior managers towards their responsibilities which subsisted over a significant period of time.

(iii) Accordingly, the conclusion that Squibb had fallen far short of the appropriate standard and that there had been a failure within the organisation which was both serious and systemic to address a material risk to the health of its employees, was entirely justified.

19. As to the likelihood of harm, the sentencing Judge had been provided with a report from an independent expert which sought to estimate the risk to Squibb's employees (and others) of contracting an asbestos-related disease as a result of their likely level of exposure.

20. These estimates were based on statistical data derived from published studies. The expert estimated that if 100,000 people were exposed to asbestos to a similar extent to Squibb's employees, about 90 deaths would result. Comparing this to the risks posed by other causes such as smoking, road traffic accidents and workplace accidents, the likelihood of one of Squibb's employees dying as a result of the breach of duty was, the Court accepted, "extremely small".

21. The Appeal Court acknowledged that such estimates were necessarily "very rough" - not least because long-term risks of this nature are inherently difficult to assess and quantify, the relevant scientific knowledge

is far from perfect and any estimate must be subject to a wide margin of error. However, as Leggatt LJ stated, *"that is not a reason to reject or disregard whatever scientific evidence is available. The rational approach for a court to adopt in these circumstances is to rely on the best evidence that it has."*[1]

22. The Court also noted that the prosecution had not adduced any expert evidence either to put forward any alternative estimate of risk or to criticise the methodology or assumptions used by Squibb's expert.

23. In those circumstances the Appeal Court found that the Judge was wrong to assess the likelihood of harm as medium and held that "*the only reasonable conclusion on the available evidence was that the likelihood of harm arising from the offence was low*."[2]

24. The overall impact on sentence was to bring the offence into harm category 3 with a starting point of £210,000. With mitigation the Court settled on a fine of £190,000, just under half the level of the fine imposed by the trial Judge.

Comment

25. This decision may well have important implications for how defendants and the HSE (and other prosecuting authorities) choose to conduct sentencing hearings in the future.

26. The significance that the Court placed on the expert evidence – despite its acknowledged limitations – in the exercise of determining the correct harm category increases the likelihood that parties will seek to rely on expert evidence for sentencing purposes in appropriate cases. Given the influential

[1] Paragraph 46
[2] Paragraph 47

role that the "likelihood of harm" plays in setting the level of fine under the sentencing guidelines, this decision may encourage both prosecutors and defendants to obtain such evidence.

27. If such statistical evidence becomes commonplace in health and safety prosecutions, then it is likely that the cost, complexity and length of such hearings will increase - particularly if such evidence is controversial and has to be heard at a Newton hearing. And such evidence may play an increasingly central role – as it did in ***Squibb*** – in determining the appropriate harm category, with significant impact on the overall fine received.

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