HENDERSON CHAMBERS

Health, Safety & Environment
May 2019

New Court of Appeal guidance on (i) assessing the likelihood of harm, (ii) considering the resources of linked organisations, and (iii) brevity of skeleton arguments

By Tim Green

In *R v Faltec [2019] EWCA (Crim) 520* the Court of Appeal (Criminal Division) gave important further guidance on the application of the *Health and Safety Offences, Corporate Manslaughter, Food Safety and Hygiene Offences Definitive Guideline* ("the Guideline") and also on the conduct of appeals:

(i) the decision in *R v Squibb Group Ltd* [2019] EWCA Crim 227 applies to the assessment of likelihood of harm, so that scientific evidence will be relevant with the final characterisation of likelihood of harm being left to the sentencing Judge, to the criminal standard, with a wide margin of appreciation;

(ii) the resources of a linked organisation will only be taken into account in exceptional circumstances, where a failure to do so would be misleading; and,

(iii) in any appeal, skeleton arguments of 60 pages are deprecated. Attention is drawn to the limits prescribed by the Criminal Practice Direction, namely; no more than 15 pages long, in font size 12 with 1.5 spacing.

Overview of prosecution

1. This appeal concerned a medium sized company called Faltec Limited. Incorporated in 1989, Faltec traded throughout its life as a manufacturer of car parts for Nissan's European plants. It had supplied other car manufacturers, including Renault, BMW and Honda. In recent years, it had had a turnover of between £33 and £39 million *per annum*. Although Faltec reported a profit in 2015, it has been running at a loss in 2016 and 2017, subsisting largely on loans and share capital supplied by the Holding Company – which itself had a worldwide turnover of between £550 million and £600 million *per annum* and an accounting annual profit of between £10 and £20 million *per annum* in each of the last three years.

2. Faltec appealed against its sentence of £1.6m imposed in May 2018 at Newcastle Crown Court in respect of three counts contrary to sections 2 and 3 of the Health and Safety at Work Act 1974. These counts concerned two distinct courses of criminal conduct. Counts 1 and 2 concerned exposure to legionella bacteria and outbreaks of Legionnaires' disease in and amongst the employees and local population around Faltec's place of business, between 1 October 2014 and 6 June 2015. Count 3 concerned an explosion in a "flocking machine" on 16 October 2015, which caused very serious injuries to an employee.

The Appeal

3. Faltec's appeal amounted to a "root and branch" assault on the sentencing Judge's findings and his application of the Guidelines. The Appellant made submissions challenging the assessment of culpability, harm, weight given to various aggravating and mitigating factors, and the assessment of Faltec's means in respect of both the legionella counts and the count arising from an

industrial accident. However, it was in respect of the sentencing court's treatment of the legionella outbreak that the appellant gained most traction.

4. The Court considered the counts relating to legionella first (counts 1 and 2) and rejected the appellant submission that the case should be categorised as one of low culpability. The Court agreed with the sentencing Judge (and the prosecution) that Faltec's conduct on these counts should be categorised as medium culpability.

Harm

5. However, the appellant was successful in persuading the Court that the sentencing Judge was wrong to find that the likelihood of harm was high. It was agreed between the parties that the type of harm risked in these counts was Level A harm. The Court of Appeal then found that paragraph 44 of the *Squibb* judgement, which dealt with the assessment of likelihood of harm, was of general application, and applied it to Faltec's appeal. As a reminder, paragraph 44 of Squibb is below:

   "*On the issue of harm however, while it was common ground that the seriousness of the harm risked was at Level A, there does not appear to us to have been any proper basis for the judge's conclusion that there was a medium likelihood of such harm arising. The likelihood or otherwise that exposure to asbestos at a particular level for a particular period of time will ultimately cause a fatal disease is not something which is rationally capable of being assessed simply on the basis of supposition, impression or imagination. It is a scientific question which should be answered, if possible, with the assistance of scientific evidence."*

6. The Court of Appeal then went on to consider the scientific evidence available to the sentencing Judge which was that the relevant figure for deaths

in the present case from an exposure to legionella would be 4 in 10,000 and also found that:

"The more difficult question is the characterisation of that figure, i.e., 4 in 10,000, as a high, medium or low likelihood of harm arising. As it seems to us, this question of characterisation is one for the Court, on all the evidence rather than the expert witness. The Court is here engaged in an evaluative exercise and must, in our judgment, be permitted a margin of appreciation" but that "the Court's characterisation ought not to be divorced from the reality of the scientific evidence before it."

7. On this basis, the Court found that the scientific evidence available could only satisfy the Court that the risk of Level A harm was of medium likelihood and accordingly the starting point for the sentence was not harm category 1, as the sentencing Judge had found, but harm category 2. This had the effect of more than halving the starting point for the fine on the legionella counts.

8. Pausing to assess the correct category for sentence, the Court of Appeal reminded itself that the passage in step 2, which requires the sentencing court to consider whether or not to move up a harm category to reflect either (i) the risk posed to more than one worker or member of the public and/or (ii) that actual harm arose from the said risk, is permissive only. There is no obligation on the sentencing court to move up a category, even if both factors are present. The court only moves up a category, or within a category, if it considers this justified by the facts of the particular case. In this case, the Court of Appeal was content with leaving the case in harm category 2.

9. Faltec then submitted that the decision of this Court in *R (Health and Safety Executive) v ATE Truck and Trailer Sales Ltd* [2018] EWCA Crim 752; [2018] 2 Cr App R (S) 29, [paragraph 58], meant that the Court could not have regard to health and safety failings outside the period of the indictment. This was

relevant because of Faltec's previous convictions and evidence of previous warnings given about safety.

10. The Court of Appeal held that in *ATE*, [see paragraph 57], the argument about the offending period was especially important in the light of the basis of plea and the different methods of work adopted in that case. Moreover, it is settled law that a sentence cannot reflect offences of which a defendant has not been convicted: *R v Kidd* [1998] 1 WLR 604.

11. Having said that, the Court of Appeal found nothing in either *ATE* or *Kidd*, or any other relevant principle, that prevents a Court considering previous convictions by way of antecedents as an aggravating factor – provided that they are relevant and that double counting is avoided. Indeed, the Guidelines treat previous convictions as a specific aggravating factor consistent with the CJA 2003.

12. With the need to avoid double counting the antecedents firmly in mind, the Court of Appeal treated the previous warnings regarding safety as going to the assessment of culpability only [paragraph 80].

Linked organisations

13. The Court of Appeal went on to consider the relevance of the resources of Faltec's holding company and came to this conclusion at paragraph 89:

"*the question should be approached with a degree of caution; ordinarily, it is only the resources of the offender which are to be taken into account; the fact that companies are members of the same group or have a subsidiary – parent relationship, will not of itself satisfy the test; it is only in exceptional cases that the resources of a linked organisation fall to be considered.*"

14. On the facts of the appeal, the Court then found that this was an exceptional case and that the resources of the Holding Company should be considered because:

"*as in Tata Steel, to ignore the Holding Company's resources would be wrong and would produce a misleading and unrealistic picture of Faltec's resources [paragraph 90].*

15. The Court heard an extensive argument regarding the level of fine imposed for count 3 (arising from an accident to a worker using a "flocking machine") but rejected those submissions, leaving in place the fine of £800,000 for that count.

16. Thus, the appeal succeeded to the extent that the total fine was then reduced from £1.6m to £1.18m, reflecting the successful appeal on the characterisation of the likelihood of harm which brought the harm category down from harm category 1, to harm category 2.

Skeleton arguments

17. A very important postscript for practitioners came in the final two paragraphs of the Judgement which were not concerned with the facts of the appeal at all. The Court deprecated the 60-page skeleton argument provided by the appellant and drew attention to the *Criminal Practice Direction ("CPD")*, at *CPD X11 D.17 (Archbold,* Appendix B-693ce). The *CPD* provides that, subject to any overriding judicial directions, skeleton arguments must not normally exceed 15 pages, together with ancillary directions as to font sizes (12 points) and line spacing (1.5) as well as other matters regarding the presentation of written advocacy. The Court noted that there was no enforcement mechanism for this Direction but indicated it would draw this lacuna to the

Criminal Procedure Rules Committee and favour the Criminal Appeal Office, rejecting any skeleton argument in excess of 15 pages.

Comment

18. This decision is important to practitioners for a variety of reasons.

19. Firstly, the Court of Appeal made clear that it is for the prosecution to satisfy the sentencing Judge as to the likelihood of harm arising in a particular case to the criminal standard of proof and that assessment will often involve the Judge considering scientific evidence. The Court also made it clear that the sentencing Judge can expect a significant margin of appreciation in making this assessment before the Court of Appeal will intervene.

20. It follows from this that *Squibb* and *Faltec* both highlight the need for defendants and their representatives to consider at an early stage, not only the evidence needed to support a trial; but in the event of conviction, the necessary evidence to ground submissions regarding likelihood of harm.

21. The Judgement also emphasised that whether or not to elevate the offending company from one harm category to another because of either (i) the risk to other workers and member of the public and/or (ii) actual harm was caused, is a matter in the discretion of the sentencing court. The court should consider these matters but is not obliged to adjust the harm category unless it thinks this is justified on the facts of a particular case. This should come as a relief to some defendants.

22. The decision confirmed that it is not appropriate to take the resources of such a linked organisation into account at Step 3 of the Guidelines when determining the size of the organisation unless exceptional circumstances apply.

23. Finally, practitioners must remember the Criminal Practice Direction enjoins brevity with skeleton arguments generally limited to 15 pages in the Court of Appeal. Resident Judges are likely to take note and demand the same in Crown Courts across England. Practically speaking, this may be for what *Faltec* is most remembered. Advocates have been warned; long-winded written advocacy will not be tolerated!

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8 May 2019