

### **Scope of talk**

- Limited to consideration of causation of death in health and safety cases.
- In such cases the alleged offence (e.g. breach of s2 or 3 of HSWA) does not require proof of injury or death.
- Causation in these cases not a central element of the offence, unlike, for example, a prosecution for manslaughter, where death has to be proved by the prosecution.

### So why consider it?

- Not an element of the offence, so why bother considering causation specifically? Reality is a health and safety incident in which death has occurred will:
  - Be more likely to lead to an investigation by the regulatory authorities.
  - Be more likely to lead to a prosecution.
  - Following conviction (if causation of death is admitted or proved) sentence will be higher and possibly substantially higher.
- As to impact on sentence, death is, of course, stated in *Howe* to be an aggravating factor. Whilst death is the one aggravating factor which is independent of the defendant's act or omission, the judicial rationale stated in Howe, that the fine should reflect public disquiet at the loss of life, has been repeated in subsequent cases.
- Significance of death in h&s cases will be substantially increased if the current SAP proposals (or any form of them) or the proposed administrative penalties are implemented or adopted. As to the level of fine in health & safety prosecutions involving a fatality, the SAP proposes a starting point of 2.5% of annual turnover averaged over the 3 years prior to the offence. It recommends that the range of such fines, taking into account aggravating and mitigating features, should be between 1% and 7.5% of the averaged turnover figure. The SAP further proposes to impose a minimum level of fine in all fatality cases to ensure that the harm involved is properly reflected in the sentence.

### So what is the test?

- The test for causation in a Health and Safety at Work Act etc 1974 prosecution is the same as in respect of any criminal case. The question is whether or not the breach of duty contributed significantly to the death, or was a substantial cause of death; substantial meaning more than minimal, slight or trifling<sup>1</sup>. It is no defence that the deceased is also guilty of contributory negligence, if a significant or substantial cause is made out against the accused<sup>2</sup>.

---

<sup>1</sup> R v Cato [1976] 1 All ER 260, 62 Cr App Rep 41, CA; R v Notman [1994] Crim LR 518, CA; R v Kimsey [1996] Crim LR 35, CA.

<sup>2</sup> R v Jones (1870) 11 Cox CC 544; R v Kew and Jackson (1872) 12 Cox CC 355.

### How have these principles been applied in regulatory cases?

- These principles were applied by the Court of Appeal in 2005 in *R v ESB Hotels Limited* a case concerning the Fire Precautions Act 1971 in which a serious fire broke out in a hotel and two elderly guests were killed. An investigation found that three upright beds placed in a corridor had been set alight by an employee of the hotel **(who was subsequently convicted of manslaughter)**.
- The hotel was prosecuted for not keeping fire routes free from obstruction and failure to carry out a proper risk assessment.
- A fine of £400,000 was imposed, and the company appealed. It was contended on the company's behalf that the employee's action, amounting to an act of manslaughter, was unforeseeable and that the fatal consequences did not flow directly from the neglect of duty by the hotel.
- However Mr Justice Beatson, giving the judgment of the Court of Appeal, found that causation was made out on the facts of the case because "*had the beds had not been in the corridor, the employee would not been sent to remove them*" and therefore could not have in a criminal act set fire to them!!

### **Burden and standard of proof**

- As to burden and standard of proof, although there is no decided authority which expressly addresses the issue, we contend that if the prosecution seeks to rely upon death as an aggravating factor it remains for the prosecution to prove beyond reasonable doubt that death was caused by the breach. In reality as long as the death was temporally and spatially close to the index breach, the burden of disproving causation will shift to the defendant.

### **Challenging Causation – take the first opportunity**

- In light of the potentially significant impact on fine, if causation of death is (or might be) alleged by the Prosecution in a health and safety case, it is wise to take steps at an early stage to address the issue.
- The first opportunity is likely to be at the interview under caution stage. The defendant or representative of a defendant company would be well to address the issue of causation in order to attempt to sway the prosecution's view, or, if unsuccessful, to place on early record in admissible form his position with regards to causation. This may well be a matter which can be prepared in advance by way of pre-prepared written statement with the assistance of legal advice.
- Another potentially a significant time is of course at the inquest, which provides a good opportunity for a potential health and safety defendant to call helpful evidence, including expert evidence, as to the way in which the death occurred. It goes without saying that if a jury returns a verdict of unlawful killing, such that it is satisfied the beyond all reasonable doubt, a defendant has a significantly reduced prospect of successfully denying causation in the course of a subsequent health and safety prosecution. Conversely, a finding of misadventure on the part of the deceased as a result of his having embarked on a hazardous course of action might go a long way in persuading the HSE not to pursue causation against the defendant.

### **Challenging Causation – basis of plea**

- If causation of death remains part of the Prosecution's case in the run up to a health and safety prosecution, it will be crucial for the defendant to produce a well argued basis of plea which addresses causation by careful reference to the evidence and to seek to persuade the prosecution in negotiations to abandon causation.
- Expert evidence will very often be helpful at this stage, and can be most helpful in denying a causative link which might otherwise sound plausible. For example, in a case where the central allegation is a failure to introduce alternative measures for the protection of health and safety, was it reasonably practicable to introduce the alternative measures which would have prevented death by the date of the incident?
- If causation remains in issue the final stage for a defendant to consider whether or not to challenge that element is by way of a Newton hearing. In all cases a defendant will have to take into account the practical considerations that requesting a Newton hearing will have, including increased legal costs, potentially greater publicity, the possibility that other matters will be determined in that forum which may be detrimental to the company's position and, of course, the probability that losing the argument will lead to a further aggravation of the sentence.