Compass Chambers



Barney Ross KC

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Overview

- Risk-based offences
- Why does causation matter?
- Legal test & case law
- Impact on Sentencing
- Evidential & Tactical considerations



Offences under HSWA 1974: the legal principles

- Overarching duties of employer under Health & Safety at Work etc Act 1974, sections 2 & 3.
- Offences are concerned with the creation of a risk of harm [subject to reasonable practicability defence].
- No requirement to prove that the offences in fact **caused any actual harm.**

[R v Chargot (2009) 1 WLR 1]

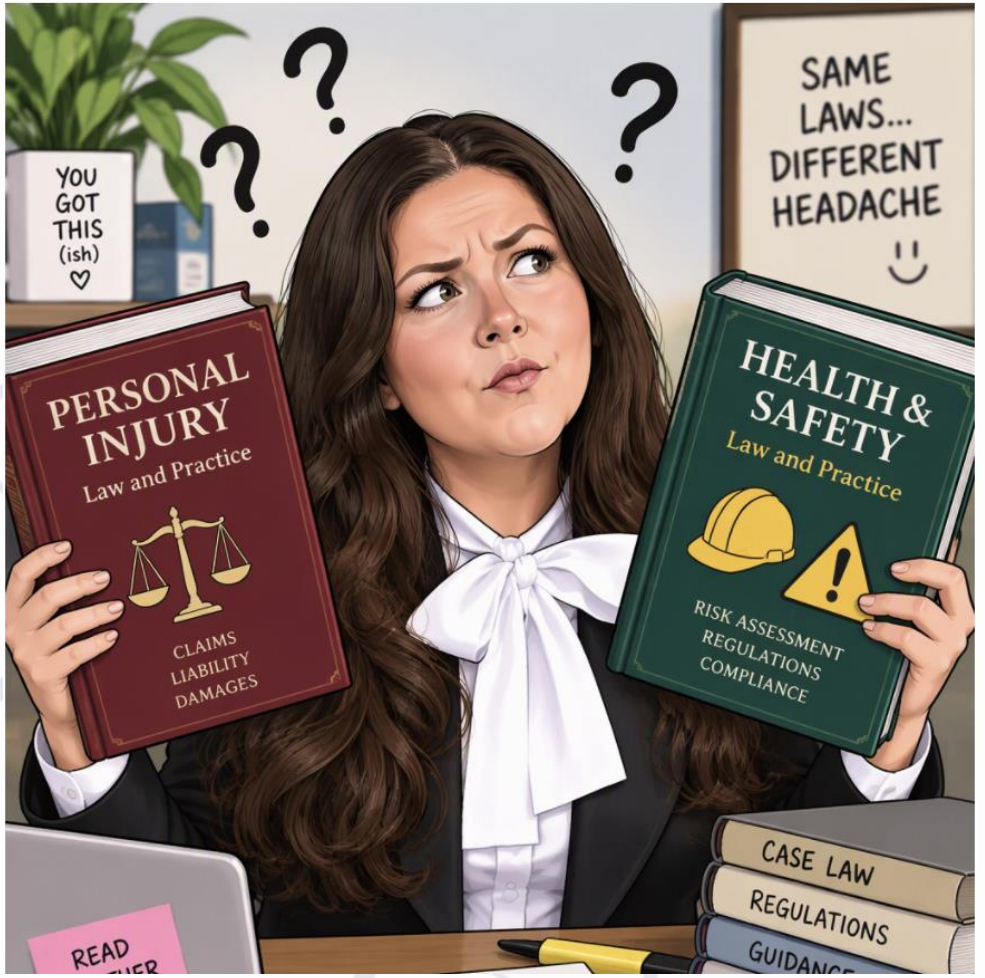
- Health and Safety offences are generally **risk-based offences**, as opposed to result-based offences. [CF: corporate homicide]

- Unlike a **civil personal injury reparation claim,** where proving a causal link between negligence and the injury is [usually] essential for success, Health and Safety prosecutions, in theory, focus on the **creation of risk** as opposed to whether that risk manifested in injury.

The Fundamental Difference

In a personal injury action, the court asks:
Did the defender's breach of duty cause the pursuer's injury?

By contrast, in a health and safety prosecution, the question is often:
Did the accused create or permit a risk to health and safety?
The offence may be complete even if nobody is injured.



Offences under HSWA 1974: the practical reality

- In practice, prosecutions in Scotland usually [though by no means always] follow upon harmful events resulting in injury or death.

- Health and Safety Executive much more likely to investigate when an accident causing serious injury or a fatality occurs.

- Such events therefore the catalyst for a prosecution and a justification for criminal charges to be brought in the public interest.



The "Causative breach" in Scotland

- In practice indictments in Scotland tend to libel the offence as a "causative breach":

*"….did fail to conduct your undertaking…to ensure, so far as reasonably practicable that persons not in your employment who may have been affected thereby were not exposed to risks to their health or safety in that you did fail to….**and in consequence thereof….[XXX] ……was severely injured and he died…**"*

- Albeit that strictly speaking this is not an ingredient of the offence, the Crown will invariably include this in the charge rather than just the narrative – for obvious and understandable reasons.
- Establishing cause of injury or death will be a matter of great importance to injured persons; their families; and the accused organisation and its directors or management.

The Tension: Why does causation matter?

For conviction – not required, albeit it can assist the Crown in proving that a breach has been committed

This creates a tension:

- The law says the offence is simply the creation of risk.
- The reality is that prosecutors, regulators and courts often become involved only after harm has occurred.

For investigation and sentencing –

The occurrence of injury or death is a relevant factor in sentencing.



Test for causation in Scots criminal law

- Definition in English Sentencing Guidelines appears to reflect the position at common law in Scotland:

- **The Jury Manua**l on causation:

'In law, an accused's act need not be the sole cause, or even the main cause, of death: it is enough if his act made a ***material contribution*** to that result. To put it another way, accused's act need not be the only cause, or even the main cause, of the death, it is enough if his act made ***a significant contribution*** to death occurring.'

- **Johnston v HMA 2009 JC 227:**

'Although the correct identification of the causal connection required by the law can in some contexts be a matter of difficulty (as has been illustrated, for example, by cases in the law of negligence concerned with industrial diseases), in the present context the law's requirement — **that the wrongful act of the accused should have materially contributed to the death of the deceased** — is not in doubt.'

Causation – Bowie v PF, Falkirk [2023]



- Appeal against conviction of director under s37 HSWA.
- Defence argued that the Crown had failed to establish

that **but for** the offence death would not have occurred.

- The Sheriff Appeal Court held that there was:

"no requirement for the Crown to prove that the failure arising from the appellant's neglect was the sole or even the main cause of the death." Instead: "*It sufficed if that failure made a* ***significant or material contribution*** *to the death.*"



Causation - Sentencing Guidelines

- English sentencing guidelines: assesses harm categories by combining two factors: 1. **The seriousness of the harm risked** (Levels A-C), and 2. **The likelihood of that harm occurring** (high, medium, or low).
- Level A represents the most serious outcomes, including death, lifelong dependency on care, or significantly reduced life expectancy. Level B covers substantial and long-term impairment or progressive, permanent conditions. Level C captures less serious cases.
- After deciding on harm category, the guidelines state that the court **must** consider (ii) whether the offence was a *significant cause of actual harm*



- Guidelines require Court to consider whether the offence was **a significant cause** of actual harm and extent to which other factors contributed to harm caused. [Actions of victims unlikely to be considered contributory events for sentencing purposes.]

- **"A significant cause is one which more than minimally, negligibly or trivially contributed to the outcome. It does not have to be the sole or principle cause."**

- Guidelines are available a cross-check

Impact of injury on Sentencing

- *HMA v Munro & Sons* 2009 SCCR 275: *"where death occurs in consequence of a breach that is an aggravating factor."*[adopting the sentencing principles set out by Court of Appeal in *R v Balfour Beatty Rail Infrastructure Services Limited* [2006] EWCA Crim 1586]
- Sentencing Guidelines: Where offence has been significant cause of actual harm, Court can move up a harm category OR increase sentencing within a category range.
- For example:
- Very large organisation turnover £50 million +/ Very High Culpability
- Harm category 2: Range of £1,000,000 - £5,250,000 [starting point £2m]
- Harm Category 1: Range of £2,600,000 - £10,000,000 [starting point [£4m]

Evidential & Tactical Considerations

Necessary for defence to consider whether:

- the breach was a significant or material cause of the injury OR
- whether it may be argued that no causal link; or that any contribution to the injury was only *minimal, negligible or trivial*
- If the latter, delicate tactical questions may arise:
  - tender plea of guilty to non-causative breach?
  - go to trial on causation; or have a proof in mitigation?
- If a causative breach is accepted on the basis of a material contribution only, along with other contributing factors may be important to ensure that Crown narrative reflects that – *may* affect level of fine.
- Can an expert assist with analysis of factors contributing to the injury?



And finally…Novus Actus Interveniens?

- No talk on causation complete without it albeit will rarely arise in practice in this context. But if it does….
- Decision of House of Lords in *Environment Agency (Formerly National Rivers Authority) v Empress Car Co (Bertilly) Ltd* [1999] 2 AC 22. [prosecution for causing polluting matter to enter controlled waters under Water Resources Act 1991]





- Speech of Lord Hoffman:

- *"If the defendant did something which produced a situation in which the polluting matter could escape but a necessary condition of the actual escape which happened was also the act of a third party or a natural event, the justices should consider whether that act or event should be regarded as a normal fact of life or something extraordinary. If it was in the general run of things a matter of ordinary occurrence, it will not negative the causal effect of the defendant's acts, even if it was not foreseeable that it would happen to that particular defendant or take that particular form.* ***If it can be regarded as something extraordinary, it will be open to the justices to hold that the defendant did not cause the pollution****."*

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