HOUSE OF LORDS SESSION 2008–09
[2008] UKHL 73
on appeal from: [2007] EWCA Crim 3032

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

R *v* Chargot Limited (t/a Contract Services) and others (Appellants) (On appeal from the Court of Appeal Criminal Division)

Appellate Committee

Lord Hoffmann
Lord Hope of Craighead
Lord Scott of Foscote
Lord Brown of Eaton-under Heywood
Lord Neuberger of Abbotsbury

Counsel

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Respondent:
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Richard Matthews
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LORD HOFFMANN

My Lords,

1. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hope of Craighead. For the reasons he gives, with which I agree, I too would dismiss these appeals.

LORD HOPE OF CRAIGHEAD

My Lords,

2. On 10 January 2003 Shaun Riley was working in the course of his employment with the first appellant, Chargot Ltd, at Heskin Hall Farm, near Chorley in Lancashire. Extensive works were being carried out on the farm, which was owned by the Ruttle Group of companies. The second appellant, Ruttle Contracting Ltd, a member of the group, was the principal contractor. The third appellant, George Henry Ruttle, was a director of the first appellant. He was also the second appellant's managing director. The works included the construction of a car park. This required the excavation from the site of a quantity of topsoil. A dumper truck was then used to move the spoil over a distance of about 500 yards to a depression in a field, beside which a ramp had been created to provide the dumper truck with a means of access.

3. During the previous day and for part of the morning on the day in question the dumper truck was driven by another employee. But he left the farm after receiving a telephone call telling him that his mother had

been injured in a road accident. Shaun Riley was asked by the foreman to take over the driving of it. He made two trips carrying spoil from the car park to the depression without incident. While he was making a further trip that afternoon he met with an accident. The dumper truck tipped over on its side and he was buried by the load of spoil that he was transporting. It was some time before he could be pulled out, and attempts to revive him were unsuccessful. He died the following day in hospital.

4. The investigation which followed the accident revealed that there were various shortcomings in the health and safety organisation at the farm. But there were no witnesses to the accident, and the precise cause of it was never established. The dumper truck itself had no defects, and it was fitted with a seat belt. Unfortunately Mr Riley was not wearing the seat belt at the time of his accident.

5. Criminal proceedings were brought against the first appellant under section 33(1)(a) of the Health and Safety at Work etc Act 1974 alleging a breach of section 2(1) of the Act. The case against it was that it had failed to ensure, so far as was reasonably practicable, the health and safety at work of its employees. As the operations were under its control the second appellant was also prosecuted. In its case the allegation was that there had been a breach of section 3(1). This was because it had failed to conduct the undertaking in such a way as to ensure, so far as was reasonably practicable, that persons not in its employment who might be affected thereby were not exposed to risks to their health and safety. The third appellant was prosecuted under section 37 of the 1974 Act in respect that, through his connivance, consent or neglect, he had caused the second appellant to commit a breach of section 3(1) in failing to ensure, so far as was reasonably practicable, that persons not in its employment were not exposed to risks to their health and safety. In each case the particulars of the offence identified the date and place where these risks were said to have arisen, and they said that this was in relation to the driving or use of dumper trucks. In their defence the appellants maintained that they had done everything that was reasonably practicable to ensure the health and safety of persons working on the site, including Mr Riley.

6. On 10 November 2006 the appellants were found guilty of the charges that had been brought against them. The first appellant was fined £75,000 and ordered to pay £37,500 costs. The second appellant was fined £100,000 and ordered to pay £75,000 costs. The third appellant was fined £75,000 and ordered to pay £103,500 costs. They

were granted leave to appeal against both conviction and sentence. On 13 December 2007 the Court of Appeal, Criminal Division (Latham LJ, Gibbs and Jones JJ) dismissed the appeals [2007] EWCA Crim 3032; [2008] ICR 517.

7. The principal issues in the appeal were directed to the way in which the case for the prosecution had been presented to the jury. In simple terms, the prosecution based its case against the first and second appellants on the proposition that it was sufficient for it to identify and prove a risk of injury arising from a state of affairs at work. The contention for the appellants was that it was for the prosecution to identify and prove particular acts or omissions consisting of a failure or failures to comply with the duties laid down in sections 2 and 3 of the Act respectively. The Court of Appeal held that the policy of the 1974 Act was to impose a positive burden on employers, rather than simply disciplining them for the breach of specific obligations. That being so, the prosecution was entitled simply to point to a state of affairs as amounting to a breach of the statutory duty: paras 22 and 23. In this case the relevant risk was the risk of injury caused by driving the dumper truck. That this was a real risk, as opposed to a purely hypothetical one, was established by the fact that there was an accident. That was sufficient to justify the requirement that the first and second appellants should have the burden of proving that they had done all that was reasonably practicable to protect against that risk: para 26.

8. The case against the third appellant was that he was directly involved in the works, as he gave specific instructions as to how they were to be performed. He had signed a statement in December 2004 in which he said that his involvement in the project at Heskin Hall Farm was considerable, that he ran the job and that he made most of the decisions. It was submitted on his behalf that the judge gave no guidance to the jury as to how the words “neglect, connivance or consent” in the charge against him could be relevant to the facts of the case. But there was no submission that he had no case to answer, and the court said that the only sensible inference was that, if it was established that the company had committed an offence, he willingly allowed it to do so or knowingly turned a blind eye to it. The jury could not have been in any doubt about what those words meant in the context of this case: para 15

9. The Court of Appeal certified that the following points of law of general public importance were involved in the decision:

"i. In proceedings against an employer under section 2 of the Health & Safety at Work etc Act 1974 is it sufficient that the prosecution proves merely a risk of injury arising from a state of affairs at work, or, need it go on to identify and prove specific breach or breaches of duty;

ii. In proceedings against an undertaking under section 3 of the Health & Safety at Work etc Act 1974 is it sufficient that the prosecution proves merely a risk of injury arising from a state of affairs at work, or, need it go on to identify and prove specific breach or breaches of duty;

iii. In proceedings against a person under section 37 of the Health & Safety at Work etc Act 1974 is it sufficient as regards the predicate offence under section 3 of the Act that the prosecution proves merely a risk of injury arising from a state of affairs at work, or, need it go on to identify and prove specific breach or breaches of duty."

The statutory provisions

10. The 1974 Act was designed to give effect to the recommendations of the Report of the Robens Committee on Safety and Health at Work 1970-72 (July 1972) (Cmnd 5034). Among its main recommendations was the revision and re-organisation of the statutory provisions dealing with safety and health at work within the framework of a single comprehensive enactment. It recommended that there should be a new statute which should be primarily enabling in character. It should be limited to matters that would not require frequent amendment but would provide a foundation for a practical and efficient code of occupational health and safety: para 127. The law as it then stood lacked any central statement of general principle governing the wide variety of detailed provisions on specific matters, which were spread over a number of main statutes and a host of subordinate statutory instruments: para 128. So it recommended that the general principles of safety responsibility and safe working should be embodied in a statutory declaration which would set all of the detailed statutory and other provisions in a clear perspective, and that the Act should begin by enunciating the basic and over-riding responsibilities of employers and employees: para 129.

11. Part I of the 1974 Act, in which all the provisions that are relevant to this case appear, is designed broadly to follow these recommendations. It begins with a preliminary section which sets out the general purposes of that Part. Section 1, so far as relevant to this case, provides:

> "(1) The provisions of this Part shall have effect with a view to –
>
> (a) securing the health, safety and welfare of persons at work;
>
> (b) protecting persons other than persons at work against risks to health or safety arising out of or in connection with the activities of persons at work.
>
> …
>
> (3) For the purposes of this Part risks arising out of or in connection with the activities of persons at work shall be treated as including risks attributable to the manner of conducting an undertaking, the plant or substances used for the purposes of an undertaking and the condition of premises so used or any part of them."

12. Sections 2 to 7 set out a series of general duties for the achievement of those purposes. The provisions that are relevant to this case are in sections 2 and 3. So far as relevant they provide as follows:

> "2(1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.
>
> (2) Without prejudice to the generality of an employer's duty under the preceding subsection, the matters to which that duty extends include in particular –
>
> (a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health;
>
> (b) arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;
>
> (c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far is

reasonably practicable, the health and safety at work of his employees;

(d) so far as is reasonably practicable as regards any place of work under the employer's control the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks;

(e) the provision and maintenance of a working environment for his employees that is, so far as it reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.

…

3(1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health and safety.

…"

13. The primary means of enforcing these provisions is through a system of inspection. As the Robens Committee recommended in para 261 of its report "Safety and Health at Work" (1972) (Cmnd 5034), the Act provides a means for ensuring that practical improvements are made and preventative measures adopted to promote occupational health and safety. Various powers are given to the inspectors appointed under the Act. These include powers of entry and investigation: section 20. Improvement notices may be served if an inspector is of the opinion that a person is contravening the statutory provisions or has done so and is likely to do so again: section 21. Section 47(1) provides that nothing in Part I of the Act is to be construed as conferring a right of action in any civil proceedings for any failure to comply with any duty imposed by sections 2 to 7. A note to this section in *Current Law Statutes* explains that the policy of the Act was not to create any new liability for personal injury pending the report of the Pearson Commission on civil liability and compensation for civil liability, leaving the position as regards breaches of any existing statutory provisions unaffected. But the Act provides for the imposition of criminal sanctions.

14. Section 33 sets out the offences that may be committed under Part I of the Act. It provides inter alia:

> "(1) It is an offence for a person –
>
> (a) to fail to discharge a duty to which he is subject by virtue of sections 2 to 7."

Section 37(1), which applies to offences by bodies corporate, provides:

> "(1) Where an offence under any of the relevant statutory provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

The "relevant statutory provisions" to which section 37(1) refers include the provisions of Part 1: section 53(1). Section 40 deals with the onus of proving the limits of what is reasonably practicable. It places the onus of proof of compliance with any duty or requirement which is qualified by those words on the defence. This is the position where compensation is sought for a breach of provisions such as section 29(1) of the Factories Act 1961, which provided that every place at which a person has to work shall, so far as is reasonably practicable, be made and kept safe for any person working there (now repealed and replaced by regulations 5, 12, 13 and 17 of the Workplace (Health, Safety and Welfare) Regulations 1992 (SI 1992/3004): see *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107. Section 40 avoids leaving this important issue to implication by providing expressly where the onus lies.

The issues

15. Mr Lissack QC for the appellants identified the central issue at the outset of his argument. He said that it was for the prosecution to prove the acts and omissions by which it was alleged there had been a breach of duty. It was not enough for it simply to assert that a state of affairs existed which gave rise to risk to health or safety. He said that this proposition applied equally to the third appellant, as the offence alleged against him depended on proof that the body corporate of which he was the managing director had committed an offence under one of

the provisions in Part I. But in his case the prosecution had also to identify and prove a state of facts of which he should have been aware and which should have put him on his inquiry. He submitted that these provisions should be read in a way that was compatible with the presumption of innocence that was guaranteed by article 6(2) of the European Convention on Human Rights. Account must be taken of the reverse burden which section 40 imposed on the accused and of the penalties that may be imposed on an individual. They had recently been increased to up to two years' imprisonment and an unlimited fine when convicted on indictment: Health and Safety (Offences) Act 2008, section 1(1) and (2) and Schedule 1. To be proportionate the prosecution must bear the overall burden of proof.

16. As the argument developed it seemed to me that Mr Lissack's primary submission raised issues about prosecution practice as well as issues of statutory interpretation. The starting point must be to determine what the prosecution must prove in order to show that, subject to issues about reasonable practicability, an offence has been committed. This is an issue of statutory interpretation. The scope of the duties that sections 2(1) and 3(1) prescribe must be identified. Then there is section 37(1). The question is what more must be proved to establish that the officer has committed an offence. An answer to these questions will still leave open issues as to what further particulars, if any, the prosecution must give in the interests of fairness when a prosecution is brought. Mr Lissack said that guidance was needed on this point. The answers to these various questions must then be applied to the facts of this case to determine the outcome of the appeals.

The scope of the duties

17. The first issue is to determine the scope of the duties imposed on the employer by sections 2(1) and 3(1). In both subsections the word "ensure" is used. What is he to ensure? The answer is that he is to ensure the health and safety at work of all his employees, and that persons not in his employment are not exposed to risks to their health and safety. These duties are expressed in general terms, as the heading to this group of sections indicates. They are designed to achieve the purposes described in section 1(1)(a) and (b). The description in section 2(2) of the matters to which the duty in section 2(1) extends does not detract from the generality of that duty. They describe a result which the employer must achieve or prevent. These duties are not, of course, absolute. They are qualified by the words "so far is reasonably practicable". If that result is not achieved the employer will be in breach

of his statutory duty, unless he can show that it was not reasonably practicable for him to do more than was done to satisfy it.

18. This method of prescribing a statutory duty was not new. As Lord Reid explained in the opening paragraphs of his speech in *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107, the steps which an employer must take to promote the safety of persons working in factories, mines and other premises are prescribed by a considerable number of statutes and regulations. Sometimes the duty imposed is absolute. In such a case the step that the statutory provision prescribes must be taken, and it is no defence to say that it was impossible to achieve it because there was a latent defect or that its achievement was not reasonably practicable. In others it is qualified so that no offence is committed if it was not reasonably practicable to comply with the duty. Sometimes the form that this qualified duty takes is that the employer shall do certain things: see, for example – and there are many that could be cited – section 48(1) of the Mines and Quarries Act 1954 which provided that the manager of every mine must take such steps by way of controlling the movement of strata within the mine and supporting the roof and sides of the working place as might be necessary for keeping it secure, and regulation 11 of the Provision and Use of Work Equipment Regulations 1998 (SI 1998/2306) which lays down a series of measures that must be taken with regard to dangerous parts of machinery. Sometimes it is that he shall achieve or prevent a certain result. Section 29(1) of the Factories Act 1961, which was considered in *Nimmo*, took that form. So too do sections 2(1) and 3(1) of the 1974 Act. It is the result that these duties prescribe, not any particular means of achieving it.

19. Examples can be found in the cases to demonstrate that this is how these provisions have been applied in practice. In *Lockhart v Kevin Oliphant Ltd* 1993 SLT 179 the respondent was charged with a contravention of sections 2(1) and (2) and 33(1)(a) of the 1974 Act. One of its employees was electrocuted and died when a street lamp that he was erecting touched an overhead power line. The sheriff acquitted the respondent, holding that the Crown had not established a sufficient case against it because the respondent was entitled to rely on plans and the site engineer's marking of the location of the lamp post. His decision was held by the High Court of Justiciary to be erroneous. Lord Justice Clerk Ross said at p 183E that the fallacy in the sheriff's approach was that he treated the words "so far as is reasonably practicable" as if they were part of the offence. He then added this explanation at p 183F:

> "Section 2(1) of the Act of 1974 is clearly intended to secure that a stated result is achieved, namely, the health, safety and welfare at work of all the respondent's employees. Once it is established that that stated result was not achieved, a prima facie case of breach of statute arises, and in terms of section 40 the onus is on the respondent to prove that it was not reasonably practicable to do more than the respondent did to satisfy the statutory duty."

In *R v Associated Octel Co Ltd* [1994] 4 All ER 1051, 1063a, where the allegation was that there had been a contravention of section 3(1), Stuart-Smith LJ said:

> "If there is a risk of injury to the health and safety of the persons not employed by the employer, whether to the contractor's men or members of the public, and, a fortiori, if there is actual injury as a result of the conduct of that operation there is prima facie liability, subject to the defence of reasonable practicability."

20. In *R v Board of Trustees of the Science Museum* [1993] 1 WLR 1171 it was recognised that this result-based approach is consistent with the general purpose of the Act. The appellants were convicted of failing to conduct their undertaking in such a way as to ensure, so far as was reasonably practicable, persons not in their employment were not exposed to risks to their health and safety. One of their buildings contained two cooling towers which, when inspected, were found to contain the bacteria which causes legionnaire's disease. No-one had actually succumbed to that disease, but there was a risk to health and safety and the prosecution's case was that prima facie there was a breach of section 3(1) because the appellants had failed to ensure that persons not in their employment were not exposed to that risk. The appellants contended that no actual risk to the public had been established. But Steyn LJ said at p 1177G-H that the ordinary meaning of the word "risks" supported the prosecution's interpretation that the section was concerned with the possibility of danger:

> "The adoption of the restrictive interpretation argued for by the defence would make enforcement of section 3(1), and to some extent also of sections 20, 21 and 22, more

> difficult and would in our judgment result in a substantial emasculation of a central part of the Act of 1974. The interpretation which renders those statutory provisions effective in their role of protecting public health and safety is to be preferred."

21. For these reasons I would reject Mr Lissack's primary submission that sections 2(1) and 3(1) require the prosecution to identify and prove the acts and omissions by which it is alleged that there was a breach of the duty to achieve or prevent the result that they describe. What the prosecution must prove is that the result that those provisions describe was not achieved or prevented. Once that is done a prima facie case of breach is established. The onus then passes to the defendant to make good the defence which section 40 provides on grounds of reasonable practicability. A contrast may be drawn with sections 4 to 6, which set out a series of more particular measures that must be taken. Where breaches of those sections are alleged, the respects in which there was a breach must be identified.

Prosecution practice

22. Mr Lissack then said that it was not enough for the prosecution simply to assert that a state of affairs existed. This proposition raises the issue of prosecution practice. As I have said, the statute prescribes the result that must be achieved. That is one thing. How the prosecution proposes to prove that this was so is another. The situation will vary from case to case. In cases such as the present, where a person sustains injury at work, the facts will speak for themselves. Prima facie, his employer, or the person by whose undertaking he was liable to be affected, has failed to ensure his health and safety. Otherwise there would have been no accident. But a case where the alleged risk has not had this result cannot be dealt with so easily. It will be necessary to identify and prove the respects in which there was a breach of duty. This is likely to require more by way of evidence than simply an assertion that that state of affairs existed. The particular risk to which the employees, or the persons referred to in section 3(1) as the case may be, were exposed must be identified. This will require an analysis of the facts in each case. Even where an injury has occurred it may not be enough for the prosecutor simply to assert that the injury demonstrates that there was a risk. Where a prosecution is brought under section 3(1), it may be necessary to identify and prove the respects in which the injured person was liable to be affected by the way the defendant conducted his undertaking.

23. Your Lordships were referred to a number of cases which show how practice varies as to the amount of detail that the prosecutor may give when the charges or counts are being formulated. The overriding test is one of fair notice. In Scotland the prosecutor is required to set out the facts and circumstances of the crime charged. These facts and circumstances must be such as to constitute a crime known to the law. Where a contravention of a statute is alleged it is necessary to specify all the facts and circumstances that constitute the offence. The narrative must be sufficiently detailed to identify the risk that the facts and circumstances gave rise to. In *Lockhart v Kevin Oliphant Ltd*, for example, the charge specified breaches of section 2(2)(a) and (c) as well as of the general duty in section 2(1), and it referred to the fact that the street lamp was being erected in such close proximity to an overhead power line that the deceased was electrocuted. In *Adamson v Procurator Fiscal, Lanark*, 31 October 2000, not reported, the appellants were charged with a contravention of section 3(1) in respect that they failed to ensure that an Ayrshire bull which they kept in a field and attacked a man who was working on the grass verge of an adjacent public highway was securely fenced. Delivering the opinion of the High Court of Justiciary, Lord Carloway said:

> "What requires to be proved by the Crown is that a particular operation exposed persons to the risk of harm, in this case physical injury. It is sufficient for the proof of the existence of risk that a possibility of danger is created. Actual harm need not be proved: *R v Board of Trustees of the Science Museum* [1993] 1 WLR 1171. If such possibility is made out on the evidence then a conviction is bound to follow unless the defence is established. Of course the Crown is obliged, as a matter of fair notice, to specify in the charge the particular operation said to give rise to the risk. In this case, that operation was the keeping of a bull in a field, which was not secured."

24. Narrative charges of the kind used in Scotland are not required in England and Wales. But it is the practice for the statement of the offence to be accompanied by particulars of the offence in which the facts and circumstances are set out. Here again the test of how much detail need be given is that of fair notice. The particulars in *R v British Steel Plc* [1995] 1 WLR 1356 did no more than state the name and address of the undertaking and the names of the persons not in the employment of the defendant who were exposed to risks. But in that case there was no dispute about the cause of the accident: see p 1358B. It was common ground that the operation in which the men were engaged was inherently

dangerous: p 1359B. In cases where the defendant is in real difficulty in framing its defence because insufficient notice has been given, it is open to the defence to ask for further particulars.

25. In *R v Board of Trustees of the Science Museum* the particulars of the offence set out in the indictment specified three failures with respect to the air conditioning system at the museum whereby members of the public were exposed to risks to their health from exposure to the bacteria: a failure to institute and maintain a regime of regular cleansing and disinfection, a failure to maintain in operation an efficient chemical water treatment regime and a failure to monitor its efficiency. It would have been sufficient for the prosecution to prove the presence of bacteria in sufficient quantities in the air conditioning system to expose the public to risks to their health and safety. But where defects in the employer's plant or systems of work giving rise to those risks have been identified the case for the prosecution may well be strengthened by the leading of that evidence. Even in cases where injury or death has resulted, investigations following the accident may not have disclosed the exact cause of it. Proof of its cause will focus attention on the particular aspect of the employer's undertaking that gave rise to the risk. If the prosecution chooses to take this course, fair notice of its case must be given. Details must then be given in the particulars.

26. For the reasons given by my noble and learned friend Lord Brown of Eaton-under-Heywood, I would reject Mr Lissack's argument that allegations such as those in the prosecution's case summary had to be specifically proved and that the jury should be directed that they could only convict if they were unanimous as to which of them had been made out: *R v Brown (Kevin)* (1984) 79 Cr App R 115. Fairness may, as I have said, require giving notice of such allegations. But they are not ingredients of the offence. What sections 2(1) and 3(1) prescribe is the result that is to be achieved or prevented, not any particular way or ways of achieving this. In *Brown's* case the offence was fraudulently inducing the investment of money. The means by which that investment was induced was an essential ingredient. A number of matters were specified in the charge as together constituting that ingredient. As Eveleigh LJ said at p 119, it was enough that any one of them was proved, but that had to be to the satisfaction of the whole jury. In the case of sections 2(1) and 3(1) the result is what the jury must be agreed about. So long as they are agreed on that, they do not need to be agreed on all the details of the evidence.

Proportionality

27. The question then is whether this approach to the legislation is proportionate. The first point to be made is that when the legislation refers to risks it is not contemplating risks that are trivial or fanciful. It is not its purpose to impose burdens on employers that are wholly unreasonable. Its aim is to spell out the basic duty of the employer to create a safe working environment. This is intended to bring about practical benefits, bearing in mind that this is an all-embracing responsibility extending to all workpeople and all working circumstances: Robens report, para 130. The framework which the statute creates is intended to be a constructive one, not excessively burdensome. In *R v Porter (James)* [2008] EWCA Crim 1271 the Court of Appeal set aside the conviction of the headmaster of a school where one of his pupils lost his footing on a step which gave access from one playground to another while he was unsupervised, with tragic consequences. It held that there was no evidence that the conduct of the school had exposed the child to a real risk: para 22. The situation was not such as to give rise to a risk of the type that section 3 identifies: para 25. That was an exceptional case, but it makes an important point. The law does not aim to create an environment that is entirely risk free. It concerns itself with risks that are material. That, in effect, is what the word "risk" which the statute uses means. It is directed at situations where there is a material risk to health and safety, which any reasonable person would appreciate and take steps to guard against.

28. Section 40 imposes a reverse burden of proof on the employer. In *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43; [2005] 1 AC 264, para 21 Lord Bingham of Cornhill said that the justifiability of any infringement of the presumption of any innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case. In para 30 he drew attention to the difference between the subject matter in *R v Lambert* [2001] UKHL 37; [2002] 2 AC 545 on the one hand, where it was held that the imposition of a legal burden on the defendant undermined the presumption of innocence, and *R v Johnstone* [2003] UKHL 28; [2003] 1 WLR 1736 on the other, where it was held that there were compelling reasons why there should be a legal burden. In the former case, where section 28 of the Misuse of Drugs Act 1971 was in issue, a defendant might be entirely ignorant of what he was carrying. In the latter, offences under section 92 of the Trade Marks Act 1994 are committed by dealers, traders and market operators who could reasonably be expected to exercise some care about the provenance of goods in which they deal. It seems to me that the situation in which the

reverse burden imposed by section 40 arises is analogous to that in *R v Johnstone*. Sections 2 and 3 impose duties on employers who may reasonably be expected to accept the general principles on which those sections are based and to have the means of fulfilling that responsibility.

29. In *R v Davies (David Janway)* [2003] ICR 586 the judge ruled against a submission that section 40 was not compatible with the presumption of innocence in article 6(1) unless the section was read down so as to impose only an evidential burden on the employer. His decision was upheld by the Court of Appeal. Delivering the judgment of the court, Tuckey LJ said that it had concluded that the imposition of a legal burden of proof was justified, necessary and proportionate. Regard had to be had to the fact that the Act's purpose was both social and economic, to the fact that duty holders were persons who had chosen to engage in work or commercial activity and were in charge of it and that in choosing to operate in a regulated sphere they must be taken to have accepted the regulatory controls that went with it. In para 26 however he added these comments:

> "Before any question of reverse onus arises the prosecution must prove that the defendant owes the duty (in the case of section 3 to the person affected by the conduct of his undertaking) and that the safety standard (in the case of section 3 exposure to risk to health or safety) has been breached. Proof of these matters is not a formality. There may be real issues about whether the defendant owes the relevant duty or whether in fact the safety standard has been breached, for example where the cause of an accident is unknown or debatable. But once the prosecution have proved these matters the defence has to be raised and established by the defendant. The defence itself is flexible because it does not restrict the way in which the defendant can show that he has done what is reasonably practicable."

30. In my opinion the Court of Appeal reached the right decision in that case, and it did so essentially for the right reasons. But I have difficulty with some of its reasoning in para 26, and with the third sentence in particular. Mr Lissack sought support here for his argument that the prosecutor must bear the overall onus of proof. But, as Mr Horlock QC for the respondent submitted, the proposition that it sets out goes too far. The prosecution must show that there was a connection between the work that the employee was doing (in section 2 cases) or

the conduct of the undertaking (in section 3 cases) and the accident. But the fact that the cause of the accident was unknown or was debatable is irrelevant so far as the prosecution's case is concerned. This is because the duty that these provisions lay down looks to the result, not the means of achieving it. Prima facie a breach of section 2(1) arises where an employee is injured while he is at work in the workplace. That fact in itself demonstrates that the employer failed to ensure his health and safety at work. The same is true where a person not in his employment but who may be affected by the undertaking suffers injury. The effect of the reverse burden must be understood against that background. Nevertheless for the other reasons that the Court of Appeal gave in *R v Davies* I would hold that the placing of a legal burden of proof on the employer in the case of this legislation is not disproportionate. The penalties that may be imposed on an individual have now been increased: see para 15. But I do not think that, when account is taken of the purposes that this legislation is intended to serve, this alteration in the law renders what was previously proportionate disproportionate.

31. It was suggested that some significance might be attached to the fact that the qualification of the duty in section 2(1) by the insertion of the phrase "so far as is reasonably practicable" survived without criticism when the legislation was examined by the European Court of Justice in *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* Case C-127/05, 14 June 2007. The Commission sought a declaration that, by restricting the duty of employers in this way, the United Kingdom had failed to fulfil its obligations under article 5(1) and (4) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers. The court held that article 5(1) simply embodied the general duty of safety to which the employer is subject, without specifying any form of liability and that it was not to be read as requiring the imposition of no-fault liability. The focus of the argument was, however, on the question whether qualification of the employer's duty was in conflict with the requirements of the article. The question whether the imposition of a legal burden on the employer was compatible with article 6(2) of the Convention was not, of course, in issue. All one can say is that the ECJ appears not to have regarded the legislation as a whole as disproportionate, bearing in mind that it was accepted that the duty in article 5(1) did not imply that the employer was required to ensure a zero-risk free working environment: para 53.

Liability of officers

32. The prosecution of a director, manager, secretary or other similar officer under section 37 requires it first to be established that a body corporate of which he is an officer has committed an offence under one of the other provisions in that Part of the Act. Where the offence that is alleged against it is a breach of section 2(1) or section 3(1) the considerations mentioned above will, of course, all apply. So he can say in his defence that there was no breach of that provision by the body corporate or, if there was, that it was not reasonably practicable for the body corporate to avoid it. It is only when it is proved that an offence under one of those provisions has been committed that the question can arise at to whether the breach was something for which the officer too can be held criminally responsible. Then there are some additional facts and circumstances that must be established. The offence which section 37 creates is not an absolute offence. The officer commits an offence under this section only if the body corporate committed it with his consent or connivance or its commission was attributable to any neglect on his part. These are things relating to his state of mind that must be proved against him.

33. Here too the circumstances will vary from case to case. So no fixed rule can be laid down as to what the prosecution must identify and prove in order to establish that the officer's state of mind was such as to amount to consent, connivance or neglect. In some cases, as where the officer's place of activity was remote from the work place or what was done there was not under his immediate direction and control, this may require the leading of quite detailed evidence of which fair notice may have to be given. In others, where the officer was in day to day contact with what was done there, very little more may be needed. In *Wotherspoon v HM Advocate* 1978 JC 74, 78 Lord Justice General Emslie said the section is concerned primarily to provide a penal sanction against those persons charged with functions of management who can be shown to have been responsible for the commission of the offence by a body corporate, and that the functions of the office which he holds will be a highly relevant consideration. In *R v P Ltd* [2008] ICR 96 Latham LJ endorsed the Lord Justice General's observation that the question, in the end of the day, will always be whether the officer in question should have been put on inquiry so as to have taken steps to determine whether or not the appropriate safety procedures were in place. I would too. The fact that the penalties that may be imposed for a breach of this section have been increased does not require any alteration in this test. On the contrary, it emphasises the importance that

is attached, in the public interest, to the performance of the duty that section 37 imposes on the officer.

34. In *Attorney-General's Reference (No 1 of 1995)* [1996] 1 WLR 970 the questions were directed to the effect of section 96(1) of the Banking Act 1987 which is in identical terms to section 37 of the 1974 Act. Lord Taylor of Gosforth CJ said at p 980 that where "consent" is alleged against him, a defendant has to be proved to know the material facts which constitute the offence by the body corporate and to have agreed to its conduct of the business on the basis of those facts. I agree, although I would add that consent can be established by inference as well as by proof of an express agreement. The state of mind that the words "connivance" and "neglect" contemplate is one that may also be established by inference. The offences that are created by sections 2(1) and 3(1) are directed to the result that must be achieved by the body corporate. Where it is shown that the body corporate failed to achieve or prevent the result that those sections contemplate, it will be a relatively short step for the inference to be drawn that there was connivance or neglect on his part if the circumstances under which the risk arose were under the direction or control of the officer. The more remote his area of responsibility is from those circumstances, the harder it will be to draw that inference.

Conclusion

35. How are these various considerations to be applied to the facts of this case? Mr Lissack said that insufficient details were given in the particulars to enable the defendants to fashion their defence and the jury to identify the respects in which the first and second appellants were in breach of duty. He referred to Lord Pearson's observation in *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107, 131C-D, that the prosecutor who alleges a breach of section 29(1) of the Factories Act 1961 must aver with sufficient specification and prove in what respects the place of work was unsafe and that its unsafety caused the accident. In my opinion however sufficient details were given in this case, as it was stated that the risks to the employees' health and safety at work were in relation to the driving or use of dumper trucks. It was not necessary for the prosecution to go further and specify the respects in which risks were associated with that activity or to identify the cause of the accident. The fact that there was an accident showed that the risks in this case were real, not hypothetical.

36. No mention is made of the accident in the particulars. But no complaint was made at the trial that fair notice had not been given. It was common ground that, as the prosecutor said in his opening, the case arose out of Mr Riley's fatal accident when he was driving the dumper truck. The state of affairs that it demonstrated was that the first appellant failed to ensure Mr Riley's health and safety and that the second appellant failed to ensure that he was not exposed to risks to his health and safety. It was then for these defendants to prove to the lower standard that they had done all that was reasonably practicable to protect him against that risk.

37. There was no submission at the end of the prosecution case that there was no case for the third appellant to answer. That being so, I do not think that it can be maintained that he did not have fair notice of the case that he had to meet. He denied that he had assumed any responsibility for what was taking place on the site, but he did not give evidence. The jury's verdict shows that they accepted the case for the prosecution, which was that he was directly involved in the works and that the way they were carried on was subject to his specific instructions and control.

38. For these reasons I consider that the Court of Appeal was right to hold that there were no grounds for setting aside the jury's verdict in the case of any of the appellants. I would dismiss these appeals.

LORD SCOTT OF FOSCOTE

My Lords,

39. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hope of Craighead and, for the reasons he gives, with which I am in full agreement, I too would dismiss this appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

40. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hope of Craighead. I agree with all of it and there is little that I wish to add.

41. At the appellant's trial the jury were directed that if they were sure that the first appellant was the employer and that there was a risk to the health, safety and welfare of employees arising from the driving or use of dumper trucks at the site, they should ask themselves:

> "has the defence proved that it is more likely than not that it was not reasonably practicable for [the first appellants] to do more than it did in order to ensure that employees were not exposed to a risk to the health, safety and welfare of employees arising from the driving or use of dumper trucks at this site?"

If the answer to that question was "no" they should find the first appellants guilty. (Similar directions were given in respect of the second and third appellants, naturally taking account of the section 37 dimension to the third appellant's case.) Counsel then acting for the appellants expressly accepted that these were indeed the appropriate directions to be given. Now, however, it is said by Mr Lissack QC on their behalf that, on the contrary, these directions were fundamentally flawed and that it was necessary for the prosecution to have identified and proved one or more particular acts or omissions constituting the section 2(1) (or section 3(1)) breach of duty.

42. In a case summary provided to the appellants before trial the prosecution had in fact outlined what they contended were a whole series of failures on the appellants' part: amongst them, failures to train employees in the safe use of dumper trucks, to identify hazards in the use of such trucks, to plan safe routes, to instruct employees in the use of safety belts, and to carry out risk assessments. What Mr Lissack now argues is that some such allegations as these had to be specifically pleaded and proved and, moreover, that a *Brown* direction (in conformity with *R v Brown* (1984) 79 Cr App R 115) was also required:

in short the jury should have been directed that they could only convict if they were unanimous as to which (if any) of the various specific allegations were made out to the criminal standard of proof.

43. Just such a direction was held to have been required in *R v Beckingham* [2006] EWCA Crim 773 where the Court of Appeal, Criminal Division, for want of a satisfactory *Brown* direction, allowed Ms Beckingham's appeal against her conviction under section 7 of the 1974 Act in relation to an outbreak of legionnaires disease traced to the cooling towers of an air-conditioning system for which she, the building owners' employed architect, had been responsible. The prosecution had served on Ms Beckingham ten particulars of alleged breaches of duty by way of specified acts or omissions. Rose LJ, giving the Court's judgment, said at para 20 that

> "having regard to the way in which this case was presented by the prosecution, it was incumbent on the judge specifically to direct the jury that they must unanimously be sure that one or more of the particulars relied on as supporting the offence was made out and that this gave rise to a breach of duty under section 7."

Critical to that decision, however, are the terms of section 7 of the Act, strikingly different from those of sections 2 and 3. Section 7 provides:

> "It shall be the duty of every employee while at work (a) to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work . . ."

44. Obviously an alleged breach of duty to take reasonable care must be specified and proved and in this context it is understandable that a *Brown* direction is required. Whilst section 7 concerns employ*ees*, however, sections 2 and 3 deal with employ*ers* and, not unnaturally, a firmer stance is adopted towards them (although not so firm a stance as the European Commission were contending—in Case C-127/05, referred to by Lord Hope at para 31 of his opinion—unsuccessfully in the event, was required by Council Directive 89/EEC to be taken). Sections 2 and 3, in contrast to section 7, do not impose a duty merely to take reasonable care; rather they impose a duty on employers to *ensure*

health and safety—in the case of section 3, to conduct their undertaking so as to ensure that people are not thereby exposed to risks to their health and safety—leaving it to the employers (see section 40 of the Act) to establish if they can, on the balance of probabilities, that it was not reasonably practicable for them to do more than they did do to achieve the required objectives of health and safety. By the same token that no *Brown* direction is required in prosecutions under these sections, so too is it unnecessary for the prosecutor to identify, allege and prove specific failures on the employer's part, for all the world as if these were necessary ingredients of the offence charged.

45. I too would dismiss these appeals.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

46. I have had the benefit of reading in draft the opinions of my noble and learned friends Lord Hope of Craighead and Lord Brown of Eaton-under-Heywood. I agree with them, and accordingly I, too, would dismiss this appeal.