

The increasing relevance of a health and safety track record – a good thing?

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8 September 2016

What will we cover?

- H&S track records in tendering
- H&S convictions as propensity evidence
- Sentencing considerations
- Implications



Importance of a H&S track record in tendering

- Increased importance following HSW Act
- Can be disqualified at EOI stage
- H&S Questionnaires
 - Declaration of prior prosecutions, investigations, prohibition/improvement notices
 - Safety records, policies, accident investigation, emergency procedures
- Weighting – H&S scoring more heavily



Propensity Evidence

- ❖ Section 40 – Evidence Act 2006



Evidence that 'tends to show a persons propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, evidence or circumstances which the person is alleged to have been involved in...'

- ❖ Could include a company's knowledge of hazards/risks and the ways of dealing with them – as shown by a previous conviction relating to a similar incident

Admissibility Criteria



❖ Section 43 – Evidence Act 2006.

‘The prosecution may offer propensity evidence about a defendant in a criminal proceeding only if the evidence has probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant.’

Probative value vs. Prejudicial effect

❖ Assessing probative value: section 43(2)-(3)

- ❖ Nature of the dispute
- ❖ Frequency
- ❖ Connection in time
- ❖ Extent of the similarity

❖ Assessing prejudicial effect: section 43(4)

- ❖ Is it likely to unfairly predispose fact finder against defendant?
- ❖ Will the fact finder tend to give disproportionate weight in reaching verdict?



HSW Act 2015



- Hard to defend health and safety prosecutions
 - No requirement to prove intention or recklessness (in most cases)
 - No requirement to prove offending actually caused harm
- Costly process – trials can take weeks, lots of complex expert evidence
- Significantly higher penalties for offences – and big discounts for guilty pleas

How to plead?



- Not guilty
 - Expensive process, hard to win – but delays / avoids conviction
- Guilty – go for discharge without conviction?
 - Test – consequences of conviction must be out of all proportion to gravity of offending (Sentencing Act sections 105, 106)
 - Reparation can still be awarded
 - DWC not usually appropriate under HSW Act
 - But has been granted in some cases
 - Can seek sentence indication – often overlooked

Case study: *Tyco Flow Control* (2010):

Granted discharge without conviction

1. Strong health and safety culture
2. One step removed from control over accident
3. Potentially serious consequences for tender processes

Sentencing considerations – HSW Act

Health and Safety at Work Act 2015

- Section 151(2)(e): Court must have particular regard to:
 - ‘**the safety record of the person** (including, without limitation, any warning, infringement notice, or improvement notice issued to the person or enforceable undertaking agreed to by the person), to the extent it shows whether any aggravating factor is present’
- Must also apply the Sentencing Act 2002



Implications

Better safety outcomes OR more not guilty pleas and expensive trials?



VS



Any questions?

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