



Neutral Citation Number: [2011] EWCA Crim 2015

Case No: 201002020 D2 201004882 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM BOURNEMOUTH CROWN COURT, MAIDSTONE CROWN
COURT
HIS HONOUR JUDGE HARROW, HIS HONOUR JUDGE STATMAN
T20090175, T20090747

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/08/2011

Before :

LORD JUSTICE HUGHES VICE PRESIDENT OF THE COURT OF APPEAL
CRIMINAL DIVISION
MR JUSTICE ANDREW SMITH
and
MR JUSTICE WALKER

Between :

Tangerine Confectionery Ltd and Veolia ES (UK) LTD	<u>Appellants</u>
- and -	
The Queen	<u>Respondent</u>

Mr John Cooper (instructed by Beachcroft LLP) for the **Appellant (Tangerine Confectionery Ltd)**

Mr John Cooper & Harry Vann (instructed by Weightmans LLP) for the **Appellant (Veolia ES (UK) Ltd)**

Mr Richard Matthews QC, Mr Mark Balysz and Ms Deanna Heer (instructed by Lester Aldridge) for the **Respondent**

Hearing date : 24th May 2011

Judgment Approved by the court
for handing down
(subject to editorial corrections)

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Lord Justice Hughes :

1. We have heard together two cases in which convictions of companies under sections 2 and/or 3 of the Health and Safety at Work Act 1974 (“HSWA 1974”) are challenged.
2. It is apparent from the history of these cases, and of others which have been cited to us, that the deceptively concise terms of these sections may have given rise to a number of unresolved conceptual debates which are troubling Crown Courts. The present two cases are said to give rise to the following questions, inter alia:
 - i) what is the relationship between ‘safety’ (s 2) and ‘risk’ (to safety) (s 3) ?
 - ii) where there has been an injury is the Crown required to prove that the offence caused it ?
 - iii) to what extent must the Crown prove that the risk ‘derives’ from the defendant’s activities ?
 - iv) what, if anything, is the relevance to these offences of foreseeability of injury or of an accident which has in fact happened ?
3. Although we accept that some of these questions are causing difficulty, we do not agree, as we shall show, that all of them necessarily arise in the two cases before us.

The offences

4. Section 2(1) HSWA 1974 provides:

“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.”
5. Section 3(1) HSWA 1974 provides:

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

The offences generally and the relationship between them

6. Both these sections create criminal offences. They use the word ‘duty’, as do or did many other statutory provisions in the context of safety at work, such as those contained in the Factories Act 1961, the Offices Shops and Railway Premises Act 1963 and in multiple Regulations in the same general field. However, the two sections now under consideration do not create civil liability for breach: that is expressly provided by section 47 of HSWA 1974. They are concerned only to create criminal offences. Many other statutory provisions in the same field, for example in the statutes just mentioned, carry both civil and criminal liability for breach.

7. The difference between the two sections lies in the persons to whom the obligation is owed. As is apparent, section 2 creates an obligation towards employees and section 3 creates an obligation towards non-employees. To the question “which non-employees?”, section 3 returns the answer: “those who may be affected thereby”. The section makes it clear that the word “thereby”, which appears twice, relates back the defendant’s undertaking. Thus the test is whether there is a non-employee who may be affected by the undertaking being carried on (or ‘conducted’). If there is, then the employer commits an offence if he does not ensure, so far as reasonably practicable, that such a person is not exposed to a risk “thereby” – i.e. that the conduct of his undertaking does not expose the non-employee to risk. The non-employees who are relevant under section 3 to the obligation, and to the offence of non-compliance with it, may be in a wide variety of positions. Some may be other people working alongside the employees of the defendant (such as agency workers, or the employees of independent contractors or of collaborators in the operation). Some may be visitors to the premises operated by the defendant (such as, for example, the child visitor to the defendants’ swimming pool in R v Upper Bay Ltd [2010] EWCA Crim 495). Sometimes they may simply be members of the public generally (such as, for example, those who might breathe in the legionnaires’ disease bacteria in R v Board of Trustees of the Science Museum [1993] 1 WLR 1171).
8. The obligation in respect of employees under section 2(1) is somewhat wider than that towards non-employees under section 3(1) because the former extends to ensuring the welfare of the employee at work. But so far as safety and health are concerned the sections create similar obligations and similar offences. For the purpose of what follows we refer for convenience to ‘safety’, but the same applies, *mutatis mutandis* to ‘health’ and, in relation to section 2 and employees only, to ‘welfare’.
9. Although section 2 speaks in terms of ensuring safety and section 3 in terms of ensuring an absence of risk to safety, it is plain that these two concepts are the same thing. Safety is not ensured, for the purposes of section 2, if there is a relevant risk to the safety of one or more employees. This was common ground before us. It follows, we agree, from the language of the statute and is also implicit in the leading decision of the House of Lords in R v Chagot Ltd [2008] UKHL 73; [2009] 1 WLR 1, where an alleged risk to the safety of a dumper truck driver was in question. There, exactly the same considerations applied to the two defendants, the first of whom was the employer of the driver and charged under section 2, and the second of whom was not his employer, but was carrying out the undertaking and was charged under section 3.
10. In each section the obligation is qualified by the words “so far as is reasonably practicable”. So the offence under section 2 is committed if there is a relevant risk to the safety of an employee and the defendant has not taken such steps as are reasonably practicable to avoid it, whilst the offence under section 3 is committed if there is a relevant risk to the safety of a non-employee who may be affected by the conduct of the undertaking and the defendant has not taken such steps as are reasonably practicable to avoid that.
11. In the case of each section, section 40 HSWA places on the defendant a reverse onus of proof (on the balance of probabilities) on the issue of reasonable practicability:

“In any proceedings for an offence under any of the relevant statutory provisions consisting of a failure to comply with a

duty or requirement to do something so far as is practicable or so far as is reasonably practicable...it shall be for the accused to prove (as the case may be) that it was not practicable or not reasonably practicable to do more than was in fact done to satisfy the duty or requirement.”

Causation

12. These offences are not primarily concerned with ascribing responsibility for the cause of injury. Indeed, they are primarily concerned with avoiding injury. The offences can just as well be committed when there has been no injury as when there has. Of course, it often happens that an injury, especially a severe one, is the occasion of an investigation of the systems of work and that an allegation of one or both offences is the outcome of the investigation. The offence(s) may well be alleged to have been committed on the day of the injury. But that does not mean that the offence has as one of its constituents the causing of any injury at all. Neither offence has. The offence lies in the failure to ensure safety so far as reasonably practicable, ie in exposure to risk of injury, not in the doing of actual injury. Causation of the injury is not an ingredient of either offence.
13. This is quite apparent from the terms of the sections. If further authority be required for it, it is provided by explicit decisions to this effect in Chargot at [30] and R v EGS Ltd [2009] EWCA Crim 1942 at [28].
14. We recognise that it may happen in a particular case that the Crown alleges that the offence did in fact cause injury or death. This has the potential to divert attention, unless care is taken, away from the real issue and onto the mechanics of the accident. Indeed, the mere fact of injury, sometimes very serious and perhaps in striking circumstances, has the same potential even when causation is not alleged by the Crown. There is also scope for misunderstanding, as it seems to us, in too superficial a citation of a part of the principal speech in Chargot, that of Lord Hope. It is important to note what the issue was in that case. It was whether the Crown is required to identify specific acts or omissions on which it relies, or whether it may, if it wishes, simply assert in general terms that the employee or non-employee has been exposed to risk and await reliance on the defence of all reasonably practicable steps having been taken. The answer was that it may do the latter, because the sections prescribe the result, namely the absence of exposure to risk, rather than the means by which it is achieved. Of course the Crown may, and often will, rely on specific allegations of acts or omissions; if it does so fairness requires that notice be given by way of particulars to the indictment (see [26]). It was in that context that Lord Hope said this at [22]:

“..the statute prescribes the result which 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.”

This, we think, is often casually taken to mean that once there has been an injury then ipso facto there was a relevant risk. That is not what Lord Hope was saying. The context of his speech makes clear that he was saying no more than that the fact of the injury is *evidence* of the existence of the risk. Of course, it may well be very strong evidence, and this is what he was saying.

15. If the Crown does allege that the offence caused the injury, the jury should be directed that the injury is relevant only insofar as it goes to an issue in the case. It may do so, because it might go towards showing either (i) that there was a risk (i.e. by illustrating what might happen) and/or (ii) that the defence of reasonably practicable precautions taken is not made out (e.g. by showing how serious the possible consequences might be if precautions were not taken). But, supposing that it is for these or any other legitimate reasons relevant, that does not make causation of injury an ingredient of either offence.
16. What may happen at trial is illustrated by one of these cases, *Veolia*. We are told that the Crown opened the case to the jury by asserting that the death which had occurred had been the direct result of the defendant company's commission of the section 3 offence. Counsel for *Veolia* then took issue with that assertion. It seems that some time was spent debating it at the trial. Submissions to the judge included argument about whether count 2 (section 3) and/or count 1 (section 2) were "causative", by which seems to have been meant that causation of the injury had been injected into the elements of the offence as charged. At one point it was suggested that either a special verdict might be taken to determine causation, or one or more counts added for the same purpose.
17. Absent a ruling by the judge that the death had no or insufficient relevance (as sometimes may be the case), there was nothing necessarily improper in the Crown contending that the result of the offence was a fatality, for it was part of the history and was, it seems, relied on to show the risk which the Crown said existed. If the Crown does so contend, the defendant is of course entitled to submit that the contention is ill-founded. But this will in nearly every case be a side-issue. The parties are wise to avoid it, and if they do not the Judge ought to make it plain to the jury that it is a side-issue. If this kind of debate does arise, the Judge ought ordinarily to tell the jury that the issue is not whether the defendants did or did not cause the death but whether the offence was committed – i.e. whether there was exposure to risk to safety which reasonably practicable precautions should have avoided. He will normally warn the jury that in deciding that issue it should guard against being over-influenced by the fact of a death. There may be a death of which the offence was a significant cause, there may be a death which occurred on the occasion of an offence but of which it was not a significant cause, and, importantly, there may be a death but no offence at all. The fact of death (or lesser injury) may well be evidence that there was a risk to safety which reasonably practicable precautions should have avoided, but it is not always sufficient evidence; the issue is for the jury. The jury must concentrate on whether the offence is made out and not be side-tracked into what the cause of injury was.
18. None of the rest of the discussion in *Veolia's* case was either necessary or appropriate. The judge was right to think that an additional count alleging that the offence had caused a death was impossible; the additional averment would have been an immaterial one. For the same reason, a special verdict would have been quite

wrong. It is certainly true that if and when it comes to sentence, the judge needs to decide what the harm done by the offence was. The relevant Sentencing Guidelines Council guideline (“Corporate manslaughter and health/safety offences occasioning death”) deliberately apply only to offences which are a significant cause of death and not to ones which are not: see page 3 paragraph 4(c). That is because an important element of sentencing generally is the harm done by the offence; section 143 Criminal Justice Act 2003 requires all sentencing courts to have regard to the harm done. But this sentencing decision falls to be made by the judge who has presided over the trial, just as do many other decisions affecting sentence which cannot be resolved by jury verdicts. In the usual way, he will hear submissions if necessary and apply the criminal standard of proof. If authority for this be required, see among many other cases R v Solomon and Triumph (1984) 6 Cr App R (S) 120 at 126, R v Young (1990) 12 Cr App R (S) 279 at 281 and R v Hopton [2005] EWCA Crim 794.

“Derivation”

19. In the case of Veolia, Mr Cooper advances an argument slightly different from causation. He submits that any risk which existed in that case did not ‘derive’ from the defendant. Rather, he submits, it ‘derived’ from the driving of the two drivers involved.
20. We agree that the risks to which both sections are directed are those materially related to the activities of the defendant. In the case of section 3 that is apparent from the word “thereby”: see [7] above. The risks with which section 3 is concerned are those which arise out of the defendant’s conduct of his undertaking. Section 2 is differently expressed because there is no need for a definition of persons to whom the duty is owed beyond ‘employee’. But section 2 is only concerned with health, safety and welfare “at work”. Obviously, the employer is under no duty to keep his employee safe away from work. So the risks with which both sections are concerned are those relating to the activities of the defendant.
21. It does not follow that it is useful to propound an additional test of ‘derivation’. This would be potentially misleading. Although section 3 requires the risk to arise from the conduct of the defendant’s undertaking, there may well exist concurrent risks from both his undertaking and something independent for which he is not responsible. In R v Upper Bay Ltd [2010] EWCA Crim 495, a section 3 case, the defendants ran a public swimming pool. They stipulated that young children should be accompanied by an adult. There was a plain risk to a non-swimming child from both (i) the parent/adult taking his eye off the child and (ii) lack of supervision by the defendants. The existence of the first risk did not mean that the defendants were not responsible for doing what was reasonably practicable to avoid the second risk. In the case of section 2 it is not difficult to postulate circumstances in which the employer defendant may be responsible for failing to ensure that the employee is not exposed to a risk at work which ‘derives’ from someone else, or indeed from nature; that might be so, for example, if the defendant expected his men to work on a steel pylon in an electric storm or alongside untrained non-employees using dangerous equipment.
22. In the case of Veolia the ‘derivation’ submission is either that there was no risk which the defendants could do anything about or is causation of the particular death dressed up in different clothes. The former is really a submission that there was nothing reasonably practicable that the defendants could do about the risk. The second is

misconceived for the reasons already given; section 3 speaks of the undertaking being the source of the risk, not the source of the accident. Whilst we agree that it will sometimes be necessary to address the source of a risk, we suggest that the introduction of a separate test of ‘derivation’ is more likely to confuse than to illuminate. The jury will, we suggest, find the case more straightforward if it is asked to concentrate on the two central issues of (1) exposure to risk and (2) (assuming the issue is raised) whether it was reasonably practicable to avoid it.

Extent/level of risk; foreseeability.

23. We received careful submissions, understandably, on the question of the impact, if any, on these offences of the decision of the Supreme Court in Baker v Quantum Clothing [2011] UKSC 17, on the inter-relation between that case, R v Chargot [2008] UKHL 73; [2009] 1 WLR 1, R v Porter [2008] EWCA Crim 1271; [2008] ICR 1259 and R v EGS Ltd [2009] EWCA Crim 1942, and on the relevance of foreseeability to these offences. As we shall explain, we do not think that the answer to these questions affects the outcome of the cases before us, but it is necessary to set out how we arrive at that conclusion.

24. These offences are concerned with exposure to risk. The present questions relate to the level or extent of risk required for them. In Chargot the actual issue before the House of Lords, which we have set out at [14] was nothing to do with level of risk or foreseeability. In the course of the principal speech, with which all their Lordships agreed, Lord Hope however made clear an important feature of these offences. He said this at paragraph [27]:

“....when the legislation refers to risk 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.....

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’ in the statute 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.”

25. This passage might be given effect either (a) by requiring the risk to be of a foreseeable danger or (b) via the essential statutory element of reasonable practicability, for after all if a danger is not foreseeable it is difficult to see how it can be practicable, let alone reasonably practicable, for the defendant to take steps to avoid it. There is no doubt that foreseeability of the danger is relevant to reasonable practicability: this was common ground before us, was decided in R v HTM Ltd [2006] EWCA Crim 1156, and was accepted by all the justices in Baker v Quantum. The question debated before us has been whether it is also relevant to the prior question of whether a material risk has been established.

26. In introducing the passage which we have quoted at [24] *supra*, their Lordships approved the decision of this court in R v Porter [2008] EWCA Crim 1271; [2008]

ICR 1259, describing it as an exceptional case which made an important point. There, a child had fallen in the school playground when jumping down some steps. The decision was that although there may always be some possibility (thus, we observe, *some risk*) that a child may fall, or jump unwisely, there was no risk such as section 3 identifies arising from the conduct of the school undertaking. The question of reasonable practicability was not reached. That decision is thus one focussing on the first (risk) stage of the enquiry and not on the second (reasonable practicability) stage. The judgment of Moses LJ does not employ the expression ‘foreseeability’. It concentrates upon whether there was or was not a real risk, as distinct from a fanciful or hypothetical one. It holds that this is a question of fact in each case, and that a number of indicia may be relevant to answering it. In that case, they included the fact that there had never previously been any accident on the steps, or even elsewhere in the playground, from jumping, that the steps were not in any way faulty, and that a properly prepared risk assessment made before the incident had not identified any risk from jumping or from the differing levels of the playground. Underlying the decision was, plainly, the fact that any risk of injury was no different in the playground from what it inevitably and unavoidably is in any other place that a child might be.

27. In R v EGS Ltd [2009] EWCA Crim 1942 the defendants had installed the electric control mechanism for heavy metal gates at the entrance to a block of flats. An operating button designed for people leaving the compound was placed on the inside of one of the pillars on which the gates were hung and it was possible for a small child to put his head between the pillar and the heel of the gate to reach it. He did so and when the gate opened was crushed. The defendants faced a count charging specific breach of relevant regulations, as well as one laid under section 3 HSWA. Both were subject to the reverse onus defence of reasonable practicability. The actual issue in the case was whether the judge had wrongly acceded to a submission of ‘no case to answer’: R v Galbraith [1981] 1WLR 1039; 73 Cr App R 124.
28. This court held that the judge had fallen into a number of errors in acceding to the submission of no case. First, he had held that the Crown had to prove that the defendants’ conduct caused the injury, which plainly it does not: [28]. Second, he had held that the regulation count ought to be withdrawn from the jury on the grounds that the Crown had not rebutted reasonable practicability. That was plainly wrong because the onus lies on the defence and the time for discharging it had not yet arrived: [39]. Thirdly, even if foreseeability of danger was relevant, he had erred in thinking it a matter for him rather than the jury question which it clearly is: [31].
29. Fourthly, the Judge had held that there was no case to answer because the Crown could not show that the accident or risk was foreseeable. He had appeared to use those two expressions interchangeably. We observe that to ask whether the *accident* was foreseeable is, as a general proposition, clearly wrong for the same reason that the Judge’s self-direction about causation was wrong. If it is not an element of the offence that it caused the accident, it cannot be an element of it that the accident must be foreseeable. It may of course be true on some facts that the only danger suggested is the danger which eventuated, in which case the question arises of the relevance of foreseeability of that *danger*, but even then there can be no question of the law requiring that the circumstances of the accident be foreseeable. This court addressed the issue of foreseeability in general terms, since that is what the judge had done, and did so by reference to the decision in Chargot.

30. This court accepted that the effect of Chargot is that not every risk is within these sections; the risk must be material: Chargot at [27] and EGS at [23]. It derived from Chargot the proposition that ‘material’ meant ‘not trivial or fanciful’, and it interpreted Lord Hope’s reference to ‘risks which any reasonable person would appreciate and take steps to guard against’ as meaning the same. It concluded that the judge was in error. But it observed at [24]:

“It is helpful to ask whether a reasonable person would appreciate and guard against a risk in deciding whether the risk is more than trivial or fanciful.”

31. In Baker v Quantum the Supreme Court was concerned with section 29(1) of the Factories Act 1961, which provided:

“There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work, and every such place shall, so far as is reasonably practicable, be made and kept safe for any person working there.”

This, like many comparable safety at work statutory provisions although unlike sections 2 and 3 HSWA, carries both civil and criminal liability in the event of breach. The case concerned the second limb of the section, viz the duty to keep the workplace safe, so far as reasonably practicable.

32. Baker concerned civil claims for personal injury compensation brought by a number of claimants who contended that their employers had failed to provide protection against ambient noise, resulting in damage to hearing. The claims related to periods before 1990. To simplify greatly some complex evidence, prior to the late 1980s the threshold for unacceptable risk to hearing was generally understood by employers without specialist knowledge to be 90 on the relevant decibel scale. Subsequently, it was generally recognised that the level should be lower. Accordingly the question arose whether in the period before the change in understanding there was a risk to safety for the purposes of section 29 if the ambient noise level was somewhere in the region of 85-89 on the scale. One of the issues in the case was thus whether section 29 contemplated an absolute and unchanging concept of risk or lack of safety, so that the later understanding of the danger levels simply showed that there had been a risk to safety all along, or whether if the danger was not, at the relevant time, foreseeable, that meant that there was no relevant lack of safety at the time. The Court of Appeal had held that the former was the law. It had held, further, that the defence of reasonable practicability could not avail the defendants since even though foreseeability was relevant at that stage, there was *some* risk (albeit generally thought perfectly acceptable) even on the old understanding of the position, and it could have been avoided.
33. The Supreme Court held, by majority, that foreseeability does play a part in assessing risk, or lack of safety. There was, it held, no absolute and unchanging concept of lack of safety. It was wrong to apply retrospectively whatever happened to be the view of safety at the time of trial, rather than what was responsibly thought to be the position at the time of alleged breach. The principal judgments of the majority were delivered by Lord Mance and Lord Dyson. Lord Mance said this at [68]:

“If safety is a relative concept, then foreseeability must play a part in determining whether a place is or was safe.”

He expressly rejected the argument that foreseeability of danger was irrelevant to risk, or safety, and relevant only to reasonable practicability. Lord Dyson, similarly rejecting that argument, said this at [111]:

“Like Lord Mance, I prefer the approach of the judge, with the qualification that what is ‘safe’ is an objective question in the sense that safety must be judged by reference to what might *reasonably* be foreseen by a reasonable and prudent employer....Opinions as to what is safe may vary over time as, with developing knowledge, changes occur to the standards that are reasonably expected to be followed. I do not, therefore, agree with Smith LJ....that what is objectively safe cannot change with time. Standards of safety are influenced by the opinion of the reasonable person and foreseeability of risk plays a part in the forming of that opinion. If reasonable foreseeability is not imported into the concept of safety, then unless the Court of Appeal are right in holding that it is relevant to reasonable practicability, section 29(1) imposes an obligation on employers to guard against dangers of which they cannot reasonably be aware (insofar as it is reasonably practicable to do so). Breach of that obligation exposes the employer to potential criminal liability.... That is an unreasonable interpretation to place on the statute, which I would not adopt unless compelled to do so by clear words... In my view, there are no such words.”

and at [119] and [121]:

“119. The only justification for interpreting ‘safe’ in section 29(1) as not importing the concept of reasonable foreseeability that it is *unnecessary* to do so because reasonable foreseeability is imported into the reasonable practicability qualification. I accept that, if it is imported into the reasonable practicability qualification, there is no *need* to interpret ‘safe’ as importing reasonable foreseeability in order to avoid an inexplicable mismatch between sections 14(1) and 29(1).

...

121. But in my view, the foreseeability of a risk is distinct from the question whether it was ‘reasonably practicable’ to avoid it. Diplock LJ explained the point in *Taylor v Coalite*....It is only *if* a risk is reasonably foreseeable and it was reasonably foreseeable that an injury would be caused that it becomes necessary to consider whether it was reasonably practicable to avert the risk. Thus, for the purpose of deciding the issue of reasonable practicability, it is *assumed* that the risk was reasonably foreseeable.”

34. In arriving at this decision, the majority relied upon a line of authority upon the neighbouring section 14(1) Factories Act (duty to fence dangerous machinery) in which it had long been established that a machine is dangerous only where some foreseeable risk from lack of fencing exists. In the present cases Mr Matthews QC for the Crown asks us to say that Baker is for this reason confined to the Factories Act 1961 and does not extend to sections 2 and 3 HSWA. We do not think that it is possible thus to confine it. The wording of sections 2 and 3 HSWA is in material terms identical to that of section 29(1); the similarity is far closer than between section 29(1) and section 14(1) of the Factories Act. The terms of the majority judgments apply equally to the HSWA and to the Factories Act. Moreover, the HSWA was expressly enacted in 1974 to run alongside the Factories Act 1961 and other relevant workplace legislation, although with a view to gradual replacement of the earlier legislation by regulations made under HSWA: see section 1 and Schedule 1. The Factories Act 1961 remained in force until nearly twenty years later in 1993. In the meantime, an alleged breach of section 29(1) as to unsafe workplace could equally have been prosecuted under section 2 HSWA. It is unthinkable that different tests for safety or risk should apply to the two identically worded provisions.
35. The Supreme Court in Baker was not referred to EGS and none of the judgments speak of that case. But it is clear that the intensity of the enquiry and arguments in Baker far exceeded that of an effectively interlocutory prosecution appeal in EGS, in which moreover the question of foreseeability was only a part of the decision and the judge's ruling plainly had to be reversed for a number of other reasons in any event. More importantly, on close analysis of EGS the difference between it and Baker is more apparent than real. The court in EGS plainly contemplated that not every risk is within the sections and that it 'is helpful to ask whether a reasonable person would appreciate and guard against a risk' in order to decide whether the risk falls within the section or not. That the court spoke in terms of trivial or fanciful risk does not alter this. These words clearly cover the risk which no employer can be expected to foresee arising from his activities. At all events, if and to the extent that there is any difference between EGS and Baker v Quantum, it is clear that we are bound by the latter.
36. The conclusion which we draw is that Baker does apply to sections 2 and 3 of the HSWA. Foreseeability of risk (strictly foreseeability of danger) is indeed relevant to the question whether a risk to safety exists. That accords with the ordinary meaning of risk, as is demonstrated by the concept of a risk assessment, which is itself an exercise in foresight. Whether a material risk exists or does not is, in these cases, a jury question and the foreseeability (or lack of it) of some danger or injury is a part of the enquiry. None of this, however, means that in a prosecution under either section it is incumbent on the Crown to prove that the accident which occurred was foreseeable. That would convert the sections into ones creating offences of failing to take reasonable care to avoid a specific incident. It means no more than that the sections are concerned with exposure to risk of injury, and that the extent to which injury is foreseeable is part of the enquiry into the level of risk. The sections do not command an enquiry into the likelihood (or foreseeability) of the events which have in fact occurred. They command an enquiry into the possibility of injury. They are not limited, in the risks to which they apply, to risks which are obvious. They impose, in effect, a duty on employers to think deliberately about things which are not obvious. In most cases, absent the sort of time factor which obtained in Baker v Quantum, it is

likely that consideration of foreseeability will add little to the question whether there was a risk. In most cases, we think, the principal relevance of foreseeability will be to go to the defence of all reasonable practicable precautions having been taken. We note that this defence does not impose on an employer the duty to take every feasible precaution, or even every practicable one; it imposes a duty to take every *reasonably practicable* one. What is reasonably practicable no doubt depends on all the circumstances of the case, including principally the degree of foreseeable risk of injury, the gravity of injury if it occurs, and the implications of suggested methods of avoiding it.

37. In both the cases before us we have not the slightest doubt that injury was a foreseeable incident of the activity of the employers which was in question. The risk of injury plainly existed in both cases. In Tangerine's case, the judge did leave foreseeability to the jury as a factor. In Veolia's case he did not, but a direction to consider it as part of the exercise of determining whether there was a material risk could not have resulted in different verdicts.

Tangerine Confectionery Ltd

38. The defendants are sweet manufacturers. One of the machines in its factory was called a 'WD machine'. Sweets were passed through the machine on trays and various operations were carried out inside it, depending on the kind of product, such as filling and packing. The machine ran continuously. It was a substantial object some 10 meters long by about 2 meters wide and about the height of a man. At one end (the 'dry end') where trays went in, it had a series of metal arms designed to handle the trays fourteen at a time, picking them up automatically. The machine was prone to frequent blockage, as many as twenty times in a shift. There was a 'dry end stop button' to stop the entry end, and a master stop button which halted the whole machine. The former was generally used in order to enable a man to get into the area of the receiving arms to clear a blockage at that end. On the night in question the machine became blocked repeatedly. The line manager, Mr Saywell and the engineer Mr King, were engaged in trying to cure the problem. Mr King wanted to run the machine without trays, which meant unloading those already present. Mr Saywell called out to, and signalled to, an operator (Mr Pejril) to stop the entry end of the machine. He began to help remove the trays when he saw that Mr Pejril had become trapped in the automatic arms. He hit the master stop button but Mr Pejril had been crushed and was asphyxiated. It appeared that for whatever reason the dry end had not been stopped and had re-started and trapped Mr Pejril.
39. The defendant company faced two charges. The first was laid under section 2 HSWA. The second was of failing, contrary to the Management of Health and Safety at Work Regulations 1999, to make a suitable and sufficient risk assessment. A submission of no case was made to the judge on both counts, which he rejected.
40. Mr Cooper's first ground of appeal relates to causation. He does not contend that it is a necessary element of the section 2 offence that the defendant should be shown to have caused the accident which actually happened. But he does contend that where that is what the Crown alleges, it must prove the causative link in order to succeed. Otherwise, he submits, the jury can only be confused. Further, he supports his contention by reliance on the fact that causation is relevant to sentence. Both these arguments fail for the reasons which we have set out above. The accident which

actually happened is no more than *evidence* of a danger or risk. That is how the judge left this case and he was right to do so.

41. The second ground of appeal relates to foreseeability. By that, in this case, Mr Cooper means foreseeability of the accident which happened. He contends that the judge was wrong to rule that there was a case to answer on both counts. Moreover, he says, the accident which happened was simply not foreseeable.
42. So far as the risk assessment count is concerned, the judge ruled that foreseeability of injury was indeed an element of a complaint that no risk assessment was made. In due course, that is how he left the case to the jury. Mr Cooper cannot and does not complain about that, but he does contend that there was on the facts no foreseeable risk. We have no hesitation in rejecting that argument. The risk of operatives, even experienced operatives, for some reason, good or bad, departing from *de facto* procedures in the vicinity of potentially dangerous machinery, especially in situations which are oft repeated, is a classic one. That is why an assessment of the risk ought to be made.
43. So far as the section 2 count is concerned, the judge did rule at the ‘no case’ stage, that foreseeability was confined by EGS Ltd to the issue of reasonable practicability. That, however, was because he was confronting the argument that what Mr Pejril actually did was unforeseeable. For the reasons which we have given, there was no question of the Crown having to prove that the accident which actually happened was foreseeable. If he had meant to rule that foreseeability *of danger* was irrelevant, that would, for the reasons we have given, have been wrong, although in any event there was a plain case to answer of risk of lack of safety, foreseeability included as a factor. But we do not think that he did. He went on to direct the jury that foreseeability of risk generally was a factor to be considered in deciding whether there was a material risk, but that the Crown did not have to prove that the defendant should have foreseen precisely how the accident occurred. This direction was, as we have held, correct. Insofar as it is submitted that there was no evidence on which the jury could find a foreseeable risk, because the machine had operated for many thousands of hours without injuring anyone, we entirely disagree for the reasons already set out. The jury’s conclusion that there was a foreseeable possibility that someone might get entangled in the arms of this machine is wholly unimpeachable.
44. For these reasons, the appeal in the case of Tangerine must be dismissed. As we said at the outset, the general issues on which we have been addressed are largely marginal to this case.

Veolia Ltd

45. The defendants were carrying out litter collection on the verge to the A228 in Kent. The road is a fast dual carriageway with a 70 mph speed limit but is not a motorway. The relevant section was long and straight. There were two lanes in each carriageway but no hard shoulder. The left hand side of the nearside carriageway was marked by a white rumble strip. To the left of that was a little more tarmac and then the grass verge. The litter collectors were two in number, Mr Griffiths walking along the grass verge picking up litter and Mr Seymour driving a Transit-type pick-up at walking pace just behind him, with a large cage on its back to carry away the rubbish. Mr Seymour was able to drive the Transit to the left of the rumble strip with its nearside

wheels on the grass verge and its offside wheels on the extra bit of tarmac between the verge and the rumble strip. Mr Seymour was an employee of Veolia. Mr Griffiths worked as part of Veolia's team but was a contract worker supplied through an agency rather than an employee.

46. Mr Seymour arrived at a 'dolly post' about 3-4 feet high standing in the edge of the grass verge. In order to get round it, he had to pull to his right, putting his vehicle at least partially into the nearside lane of the road. As he did so, he was struck from behind by a large lorry driven in that nearside lane by a Mr Lustig. His van was pushed into Mr Griffiths before careering across the verge and down a bank. Mr Griffiths was killed. Mr Seymour was injured.
47. The defendants faced counts alleging offences contrary to both section 2 and section 3. The section 2 count alleged a breach of duty towards employees, in this instance Mr Seymour. The section 3 count alleged a breach of duty towards non-employees; Mr Griffiths, the agency worker, was the principal example of such people, but the indictment also named Mr Lustig, the lorry driver.
48. The core submission on behalf of the defendants, both in the Crown Court and here, was that the risk which existed, and the accident which ensued, were both inherent in the ordinary use of the road and had nothing to do with the operation of the defendants' undertaking. What happened, says Mr Cooper, is sadly the ordinary incident of inattentive or careless driving, by one or both drivers, to which every road user is inevitably exposed. That submission is translated into the first ground of appeal:
 - i) the judge was wrong to rule against a Galbraith submission of 'no case' in relation to both counts, because there was no evidence that the risk 'derived' from the defendants' activity.

The second ground of appeal relates to causation of the accident. Mr Cooper contends that the Crown had conceded that count 2 (the section 3 count) "was causative" and submits that:

- ii) the judge was wrong to distinguish the two counts and to direct the jury that on count 1 (the section 2 count) the Crown did not have to prove causation of the accident.
49. For the reasons which we have given above, we do not think that it is helpful to inject into these offences a fresh test of 'derivation'. It is clear of course that both offences are concerned with risks which relate to the activities of the defendant: see [20] above. On the facts of this case, we have no doubt whatever that there was a risk to employees within section 2 which related sufficiently to the activities of the defendants. For the purposes of section 3 there was undoubtedly a risk to non-employees which related to the conduct of the defendants' undertaking. It was the activities and undertaking of the defendants which put their employees and agency workers on the road and potentially in the path of road users such as Mr Lustig the lorry driver. They were put there not in the ordinary course of transit from A to B, but in order to clean up the roadside at walking pace alongside traffic, no doubt often heavy, moving at 70 mph. There was the plainest possible risk of contact with the traffic. Indeed, there was the plainest possible risk that the defendants' van might

have to move unexpectedly from time to time into the carriageway and at crawling speed; the dolly post which Mr Seymour drove around was not, and was not likely to be, the only obstruction and in any event was not, we understand, the only one of its kind. Both risks needed forethought. It may well be that if employees are simply being transported to work in a vehicle there is either no material risk beyond the ordinary dangers of road use, or no risk about which the defendant employer can be expected to do anything, at least if he is using an ostensibly competent driver. But that was not this case. We have no doubt that the judge was right to reject the submission of no case. Thereafter, whether there were precautions which were reasonably practicable in all the circumstances for the defendants to take was a matter for the jury. That issue does not arise on appeal and we say no more about it.

50. This case seems to have been bedevilled by confusion as to the role of the accident which eventuated. We do not agree with Mr Cooper that count 2 (section 3) was “causative”, by which he means, as we understand it, that the Crown had to prove that the offence caused the accident. The Crown seems to have been persuaded at trial that there was a material distinction between the two counts as to the role of causation, in part because the lorry driver Mr Lustig was named in count 3 as one of the non-employees to whom a duty was owed under that section. The argument seems to have been that because Mr Lustig was named, the offence depended on proof of causation. The conclusion does not follow from the premise. The Crown was certainly asserting an offence committed *on the occasion* of the accident. That does not in the least mean that it needed to shoulder the burden of establishing that the offence caused the accident, and it should not have done so, even if on the facts the conclusion that it was one of a number of causes was a strong one. As a driver on the road in question, Mr Lustig was plainly a non-employee who might be affected by what the defendants were undertaking there. That is not altered if, as may or may not be the fact, he was himself at fault in failing to spot what Mr Seymour was doing.
51. For the reasons which we have given above at [12] to [18], the Crown did not have to prove, on either count, causation of the accident which in fact happened. The accident was no more than *evidence* of the existence of a material risk or lack of safety, albeit in this case perhaps strong evidence. To the extent that the judge in due course directed the jury that in relation to count 2 (section 3) it must be shown that the litter picking “contributed to the accident” that direction was more favourable to the defendants than it should have been. What had to be shown was that the litter picking undertaking contributed to the risk of danger or lack of safety of non-employees who might be affected by it. In relation to count 1 (section 2), the judge did no more than to rehearse the submissions of each party on the issue of causation. He ought to have given a clear direction that causation of the accident was a matter of evidence but not an essential ingredient of the offence, but his omission to do so cannot on the facts have been to the disadvantage of the defendants. The discussion about possible special verdicts or the addition of counts which alleged causation was misconceived. Upon conviction it was for the judge to determine for himself for the purposes of sentencing, and after hearing any additional submissions necessary, whether the offence had been a significant (but not necessarily the only) cause of a death and injury.

52. Veolia's case has been referred to us by the Registrar. We give leave, but the appeal must be dismissed. As in the case of *Tangerine*, the general questions on which we have been addressed are largely marginal to the case.