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Are OHSA Offences Necessarily Strict Liability?

Tuesday, Apr 4th, 2017 | Criminal Liability (http://jbrucemcmeekinlaw.com/category/criminal-liability/), Regulatory Offences (http://jbrucemcmeekinlaw.com/category/regulatory-offences/), Workplace Safety (http://jbrucemcmeekinlaw.com/category/workplace-safety/)

This is the question that the Alberta Court of Appeal has the opportunity to consider after granting the Crown leave (http://jbrucemcmeekinlaw.com/wp-content/uploads/2017/04/leave.pdf) to appeal the Queen's Bench decision in *R. v. Precision Diversified Oilfield Services Corp (http://jbrucemcmeekinlaw.com/wp-content/uploads/2017/04/R.-v.-Precision-Diversified-Oilfield-Services-Corp.pdf)*.

As the result of a 2010 tragic workplace fatality, Precision was charged with two offences contrary to Alberta's OHSA:

(1) As an employer, failing to ensure, as far as it was reasonably practicable to do so, the health and safety of a worker engaged in the work of that employer, contrary to section 2(1)(a)(i) ("Charge 1"); and,

(2) Being an employer where an existing or potential hazard to workers was identified during a hazard assessment, failing to take measures in accordance with section 9 of the *Occupational Health and Safety Code 2009*, to eliminate the hazard or, if eliminated was not reasonably practicable, to control the hazard, contrary to section 9(1) ("Charge 2").

A plain reading of Charge 1, and, possibly, Charge 2, and the provisions on which they rely, would suggest that the gravamen of both offences is the negligent failure of the defendant to provide a safe workplace; that is, in order to obtain convictions, it is incumbent on the Crown to prove the negligence of the defendant beyond a reasonable doubt. At trial, however, the defendant agreed with the Crown that the alleged offences were offences of strict liability. Presumably this was because of the 2009 Queen's Bench decision in *R. v. Rose's Well Services Limited (http://jbrucemcmeekinlaw.com/wp-content/uploads/2017/04/R.-v.-Roses-Well-Services-Limited.pdf)*. It found that the ss.2(1)(a) was an offence of strict liability. There, the court found that the phrase "reasonably practicable" was tantamount to the legislature in an accompanying provision identifying the offence as one of strict liability to which the defence of all reasonable care was available. In other words, the burden of proof going to "reasonably practicable" was reversed and placed on the defendant to establish on a balance of probabilities.

The parties disagreed on the relevance of the fatality to the proof of the *actus reus*. The Crown argued that the fatality *prima facie* proved the offence. The trial judge agreed and convicted the defendants, staying the second count to avoid offending the rule against multiple convictions.

On appeal to the Queen's Bench, Veit, J. disagreed with the trial court's application of the *prima facie* breach approach. She found that the Crown had failed to prove the defendant had committed a wrongful act, which was necessary to sustain findings of guilt. Nowhere in her decision, however, does she define the wrongful act proscribed by sections 2 and 9. Presumably, she meant some factual element within the control of the employer that at least contributed to the fatality, such as, as examples, defective equipment or procedures. The Court allowed the defendant's appeal and ordered a new trial.

The Crown sought leave to appeal the summary conviction appeal decision. Greckol, J..A., granted leave, finding that the law in Alberta was unsettled as to what is required by the Crown to prove a breach of ss.2(1). The parameters of the appeal do not appear to include the question of whether the offence is rightly categorized as one of strict liability, although one would think that the issue requires some examination given the breadth of the question on appeal: What is the proper test for determining whether the Crown has proved a breach of ss.2(1)?

Since the decision of the Supreme Court in *R. v. Sault Ste. Marie*, regulatory offences are presumed to be ones of strict liability, unless the language of the offence-creating provision includes some reference to a positive state of

mind or subjective *mens rea* being required, such as “knowingly”, “intentionally” etc. In that exceptional case, it is incumbent on the Crown to prove *mens rea* along with the wrongful act beyond a reasonable doubt.

Negligence or the absence of reasonable care as a level of fault is an objective measure of conduct and not a positive state of mind. As a result, some might conclude that it does not fit into the *Sault Ste. Marie* exception. But keep in mind that *Sault Ste. Marie* was decided in 1978, four years prior to the *Charter* and fifteen years before the Supreme Court released the first in a line of cases (*R. v. Hundal (http://jbrucemcmeekinlaw.com/wp-content/uploads/2017/04/R.-v.-Hundal.pdf)*) affirming that negligence or objective *mens rea* satisfied the section 7/*Charter* minimum fault requirement for criminal liability. This would suggest that negligence should be included in the exception. If the offence creating provision contains language indicating that the gravamen of the offence is the negligent failure of the defendant to meet a prescribed statutory duty, the Crown should be required to prove both negligence and the wrongful beyond a reasonable doubt. To permit otherwise would offend the defendant’s presumption of innocence.

The foregoing is consistent with the apparent intention of the legislature when it enacted s.2(1)(a). Section 41(1) of the legislation classifies a breach of ss.2(a)(1) as an offence. There is no provision in the legislation deeming the offence to be one of strict liability.

This case has obvious implications outside of Alberta. Ontario’s OHSA contains similar provisions. Oft-applied ss.25(2)(h) requires employers to take very reasonable precaution to protect their workers. Both the Crown and defendants appear to have followed the Alberta example with the result that the classification of the offence as one of strict liability has never been challenged. But at least one Superior Court Justice has questioned the correctness of this approach (Hill, J. at paragraph 133 of *R. v. Canada Brick (http://jbrucemcmeekinlaw.com/wp-content/uploads/2017/04/R.-v.-Canada-Brick.pdf)*).

Presumably the appeal will be heard sometime in 2017.

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