

BHSEA Mock Trial 11th September 2013

Dear all

Thank you for attending the BHSEA Mock Trial at Birmingham Magistrates Court. We hope that you found it enjoyable and informative (up until the fire alarm went off, at least!).

You will recall that we got as far as deciding that the company should be convicted in this matter, before getting to sentencing had to be adjourned. The judge indicated a relatively hefty fine would have been passed down, particularly in consideration of the Bentley that the Managing Director was driving.

As discussed outside of the Court, many learning points had arisen from the Mock Trial. I am sure that there are many more than will be listed below, but we have considered these as a starting point. Of course, should you have any further question please do not hesitate to contact Chris on Christopher.Hopkins@pinsentmasons.com or Cairo Nickolls on Cairo.Nickolls@irwinmitchell.com

Learning Points

1. **Privilege**

The Accident and Investigation Report was very damning for Scott Painters Limited. Despite being marked as Privileged and Confidential, the HSE inspector challenged Mr Scott's initial assertion that it was privileged. The HSE will often appreciate the importance of the Company's internal Accident and Investigation report. Therefore, they may often question whether it is privileged. It is our experience that inspectors are routinely asking for a copy of the Accident and Investigation Report. Remember – simply because a document is marked as privileged, does not mean that it is!

There can often be a legal question mark over whether or not the document is privileged. Early legal advice can help to ensure that any documents that are produced are covered by privilege and therefore not disclosable. At a later stage, solicitors can advise in relation to whether or not any documents should be disclosed if there is any disagreement in relation to whether or not the document is privileged.

2. **RIDDOR**

Alongside the Accident and Investigation Report, the RIDDOR report also provided the prosecution with some ammunition against the defendant company. The RIDDOR report suggests that the company is blaming the employee: a tactic which, in our experience, can often lead to animosity from the HSE, and the Court! The RIDDOR report also attempts to make conclusions about the cause of the accident. In our experience, a RIDDOR report should be concise and factual, and not speculate in relation to who is to blame and what is the cause of the accident. Many company defendants manage to make life far more difficult for themselves by producing an unsuitable RIDDOR report.

3. **Interview Under Caution**

The interview under caution is a vital stage in the investigation process. Attending an interview under caution without legal representation and, more importantly, without a clear strategy, can lead to adverse inferences being made. The key to ensuring that the Interview Under Caution runs as smoothly as possible is preparation. In this matter, Scott Painters Limited adopted "strategy" of answering some questions and not answering others is inconsistent. It is likely to be considered that the reason that the questions were not answered was because Scott Painters Limited did not have an answer to those questions. The jury will be informed that an adverse inference can be made where an answer to those questions is later given at Court.

Consideration should be given to whether or not to attend the interview under caution. There are many ways in which an interview under caution can be approached, including providing a statement in writing or reading the statement at the beginning of the interview under caution. In certain circumstances, it will be unwise to attend the interview under caution, as the company may provide the HSE with evidence that they were not previously aware of.

4. **Informing your Insurers**

If Scott Painters Limited had informed their insurers of the incident, it is possible that insurers may have provided some coverage for the instruction of regulatory experts. Policies differentiate in relation to when insurance cover is provided. It is also important to remember that the Company has

a choice in relation to which advisers are instructed – although insurance firm's will have their own preferred panel of legal advisors. Many insurance will be pleased to consider your insurance documents for you if it is unclear when your insurance covers any incident. In any event, both prosecution and insurance costs can be extensive, and it is sensible to review your cover to ensure that these are covered under your insurance policy. Any fine will **not** be covered by the insurance policy.

5. **Credibility**

Having creditable witnesses and documentary evidence at trial is vital. Companies should ensure that they have a documentary record of compliance, including the dissemination of documents to employees and workers in the company. In this matter, Peter Scott showed a lack of credibility by failing to communicate accurately and precisely with the HSE, and by not communicating consistently between interview and trial. All communications with the HSE can be relied upon in a trial situation, and it is therefore vital that those communications are clear and legally solid.

6. **Potential Personal Liability**

In this matter, personal liability was not widely considered. It is possible in this case that Peter Scott could have faced a personal prosecution under Section 37 of the Health and Safety at Work Act 1974. The accident investigation report can act as a catalyst for a prosecution to be commenced. Another reason to attempt to ensure that this document is privileged! As you will, I am sure, be aware, it is extremely difficult to defend health and safety prosecutions. This applies to prosecutions of individuals as well as companies. And of course, with the introduction of the Health and Safety (Offences) Act 2008, a custodial sentence can be handed down in certain circumstances.

As stated above, I am sure there are many more learning points that could be highlighted. However, I hope that this helps for the moment – and, should you have any further queries, please do not hesitate to contact Cairo or Chris at the next BHSEA meeting!

Best regards

Cairo Nickolls

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Pictures available at <http://www.bhsea.org.uk/photos2013.htm#2>