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**Albion Chambers** REGULATORY NEWSLETTER

# Is keeping tigers safe?

On Saturday the 25th May of this year Sarah McClay, a 24 year old zoo keeper, entered the Sumatran tiger enclosure at the South Lakes animal park. She had done this many times before without difficulty. On this occasion, however the tiger turned on her and she was tragically killed. An inquest into her death was opened and has been adjourned. The zoo had been open for some 14 years and the owner was committed to conservation and helping to save endangered species such as the Sumatran tiger. There had been no previous tragedies of this type.

Tigers are by nature intrinsically dangerous and the keeping of tigers in a zoo or wildlife park must carry with it risk. The risk to the public can be greatly reduced by the building of enclosures with high walls and fences, but the risk of a tiger escaping can never be removed completely. In 2012 a Siberian tiger in a zoo in Cologne, Germany escaped from its enclosure through an insecure door and mauled to death a zoo keeper working in an adjacent cage. In 2009 a tiger in a zoo in Vietnam leaped over a 2.5 metre electric fence and attacked a worker who was planting trees nearby. Fortunately he survived.

These examples show just how risky the keeping of tigers can be. How, then is it possible that the keeping of tigers is allowed at all? Is it ever possible fully to comply with the requirements of S. 2 or 3 of the Health and Safety at Work Act?

This issue was considered in *Canterbury City Council v Howletts & Port Lympne Estates Ltd [1997] ICR 925*

A zoo-keeper was mauled to death by a Siberian tiger after he had entered the tiger's enclosure in a zoo owned by the appellants. An inquest found that he was in the process of looking for a safer job at the time as he was worried about the dangers of being in the same cage as a tiger.

Following the incident a Health and Safety Inspector visited the zoo and carried out an investigation. He unsurprisingly took the view that permitting employees to enter the tiger enclosure whilst tigers roamed wild and free inside failed to provide a safe system of work (contrary to S.3 HSWA 1974). Accordingly he directed that the activities should stop forthwith and issued a prohibition notice that essentially prevented the zoo from functioning. The owners of the zoo appealed on the basis that the feeding of tigers should not to be regulated by the HSWA 1974. It seems that the employment tribunal were unimpressed with this argument and the notice was upheld. The case eventually found it's way to the High Court which carried out an analysis of the difficulties of keeping tigers. Such a course inevitably carries with it risks, but did it need to be banned? The answer was no.

The appellate court found that the purpose of Part 1 of the HSWA 1974 is not to legislate what work could be carried out, but rather was properly concerned with reducing the level of risk associated from such work so far as is reasonably practicable.

In assessing the risk a tribunal should consider the nature of the business being carried out, in terms of ethos and idiosyncracy. If work which by ordinary standards could be described as dangerous, was necessary, it was permissible for risks arising from it to persist as long as it was properly controlled, i.e. removed or reduced so far as was reasonably practicable.

The import of this case is that if tigers are to be kept then the expectation is that all necessary steps that will lower the risk must be taken, however expensive or inconvenient they may be. This is a good example of the principle expounded in *Edwards v National Coal Board [1949] 1K.B. 704*. It is only if there is a "gross disproportion" between the risk and the steps required to reduce that risk, that the step in question will not be reasonably practicable. In the field of tiger care, the risk if necessary but expensive steps are not taken is of death or catastrophic injury.

The test of "gross disproportion" has formed the basis of the approach by the Health and Safety Executive to the issue of risk reduction for many years. If a risk is small, but requires a substantial amount of time or effort to reduce it then there is an argument that the step need not be taken as to do so would be "grossly disproportionate".

This of course requires an assessment of the type of risk that needs to be guarded against. If the risk is of minor injury and the time and expense required to remove the risk is substantial then failure to remove that risk would not necessarily found criminal liability under S.3. If the risk is of serious injury or death then it would be extremely difficult to argue that the failure to reduce that risk could be excused, however expensive or time consuming it would be to implement the measure.

The moral of the story is that if you are going to keep tigers you will need deep pockets and nerves of steel. If you have neither, the best advice that I can give is to keep meerkats instead.

**Stephen Mooney**

# Badger Law

At the time of writing, there is a wealth of publicity surrounding the badger cull which is currently being piloted in West Somerset and West Gloucestershire in an attempt to tackle the spread of bovine tuberculosis. It is not the purpose of this article to comment on the merit of the cull as a matter of principle. Those arguments continue to be hotly debated and publicised elsewhere. It may be, however, that a side effect of such emotive media coverage is that little attention is paid to the legal context in which the issue is being played out.

Many readers will be aware of the High Court Injunction granted by Turner J on 22nd August 2013 on the application of a number of representative Claimants led by the NFU. In summary, the injunction prohibits a range of activities by anti cull activists. The injunction, with schedules, runs to 19 pages can be viewed at:

http://www.nfuonline.com/nfu-ors-v-tiernan-and-ors-sealed-order/

While the injunction makes interesting reading, this article is not the place to analyse its terms in detail; they are numerous and largely self-explanatory. Neither is it the purpose of this article to discuss the issues of human rights and civil liberties associated with such a case. It is however notable that following the hearing, the first Defendant to the Claim made the following statement to the media:

*'We will use every piece of legislation and every method we can that is lawful to make farmers' lives a misery'.*

Practitioners who represent those who may have an interest in the issue may therefore feel that a basic working knowledge of 'badger law' is no bad thing at the moment!

## Legal protection of badgers

The Badgers Act 1973 provided specific protection to badgers. That was amended and supplemented by the Badgers Act 1991 and by the Badgers (Further protection) Act 1991. In 1992, all three of these Acts were repealed and consolidated by the Protection of Badgers Act 1992 which, subject to subsequent amendment, remains in force today and is the most significant piece of primary legislation on the issue.

Section 1(1) of the Badgers Act provides that:

*'A person is guilty of an offence if, except as permitted by or under this Act, he wilfully kills, injures or takes, or attempts to kill injure or take, a badger'.*

Sections 2 to 4 create further offences relating to the treatment and possession of badgers, and also offences relating to Badger habitats. By virtue of s.12(1) a person guilty of an offence under s.1(1) is liable, on summary conviction, to imprisonment for a term not exceeding six months, a fine not exceeding level 5 on the standard scale or both.

Further protection exists by virtue of Schedule 7 to the Wildlife and Countryside Act 1981. In addition, protection is provided by the 1979 Convention on the Conservation of European Wildlife and Natural Habitats (the Bern Convention), to which the Untied Kingdom is a signatory. The European Badger (Meles Meles) in included as a 'protected fauna species' in Appendix III of the Convention. The UK government is therefore bound by convention obligations relating to the protection and promotion of the species and actions such as the present cull must be conducted with regard to and without contravention of the convention.

## Exceptions

The words 'excepts as permitted by or under this Act' in s.1(1) of the PBA are given meaning by ss6-10. The relevant section so far as the cull is concerned is s.10(2)(a) which provides that:

'A licence may be granted to any person by the appropriate Minister authorising him, notwithstanding anything in the forgoing provisions of this Act, but subject to compliance with any conditions specified in the licence…

(..) for the purpose of preventing the spread of disease, to kill or take badgers, [...], within an area specified in the licence by any means so specified'.

The 'appropriate minister' is the Secretary of State for Environment, Food and Rural Affairs. However, under s.78 of the Natural Environment and Rural Communities Act 2006 he may enter into agreements with 'designated bodies' to carry out DEFRA functions. S.1 of the same act created 'Natural England', a non departmental public body and a 'designated body' for the purposes of s.78 and, in October 2006, an agreement was entered into authorising natural England to exercise licensing functions under the PBA in England. Accordingly, Natural England is responsible for the grant of licences in relation to the cull. In 2011 the Secretary of State issued guidance to natural England under s.15(2) of NERCA in relation to its badger licensing functions in the context of the governments policy on bovine TB. Natural England is obliged, by virtue of s.15(6) to have regard to such guidance.

The first licences in the pilot areas were issued in the autumn of 2012, however authorisation letters confirming that final conditions had been met were not issued until February 2013. This followed a request by the NFU that the scheme be delayed until summer 2013 *'to allow farmers to continue their preparations and have the best possible chance of carrying out the cull effectively'.* The delays in commencing the pilot have been much publicised and, if one has regard to the licensing regime, it is not hard to understand why problems may have arisen and may continue to arise.

The licence requirements reflect, in large part, the DEFRA guidance to Natural England. One of the requirements is that there must be access for culling to at least 70% of the total land within the licence area. The DEFRA guidance expands upon this by providing that 90% of land must be 'accessible land' or within 200m of accessible land. With many of those opposed to the cull having been actively engaged in a policy of dissuading (to use a neutral term) land owners from allowing access, it is easy to see what problems might have arisen and why the protection of the injunction was considered so important. An obvious question arises as to whether this issue might become contentious in due course, not least because the proportion of accessible land must continue to be 70% or more, with an obligation to inform Natural England if access to any land is withdrawn. The scope for ongoing legal wrangling is obvious.

Another requirement which has the potential to cause contention is that which stiplulates the number of badgers to be culled. The DEFRA guidance requires that Natural England impose minima and maxima in this regard in each area, where the minimum number is designed to reduce the population in the area by at least 70%. In fact, the ranges set out in the licences that have been granted are tight and the minimum numbers are high. For example, the final authorisation letter for West Somerset, a redacted version of which appears on NE's website, stipulates a minimum of 2081 and a maximum of 2161. What then might be the consequence if the minimum number is not reached? There can be no certainty in this answer, but with recent media reports suggesting numbers

are falling far short of estimates, the potential for legal argument is again obvious.

In reality, the issues of law which relate to the badger cull are manifold and varied and no comprehensive coverage could ever be achieve in an article of this brevity. It might be that the number of issues left unaddressed and the questions left unanswered simply underline the fact that the need for advice and representation on matters related to the cull is unlikely to diminish for some time yet.

**Derek Perry**

# Caselaw update

## *R v D Roche Ltd* [2013] EWCA Crim. 993

The case of *Roche*, summarised below, provides some guidance on the level of penalty to be imposed, and the principles pertaining thereto, where breaches leading to death or serious injury occur.

### Key points

- Fine imposed reduced
- Good Health and Safety record crucial to decision
- G plea also
- Small business
- Appealed on basis fine would put out of business; fine reduced to a level where, after discount for plea, the effect was to enable the company to break even in that financial year rather than suffer a substantial trading loss
- Because of other relevant factors no helpful guidance re. whether putting the defendant company out of business sufficient factor in itself to reduce fine – but, on a sensible analysis that may depend on whether breaches repeated, and prior H & S record (i.e. whether closure of business effectively a way of safe-guarding public?)
- NB Crown Court and Court of Appeal can impose payments to be made at regular intervals.

### Case summary

In the case of *R v D Roche Ltd [2013] EWCA Crim 993* the deceased, Joan Bloore, was a care home resident aged 80 suffering from dementia and diabetes, whilst not wholly wheelchair dependent she was very frail and had sustained two falls during her residence at the home.

A risk assessment identified that a wheelchair was necessary for outdoor travel whilst she used a wheeled Zimmer frame for indoor movement.

On the day of the accident a junior care worker was instructed to visit the shops for bread and asked if the deceased could accompany her, there was confusion as to whether she was told to use a wheelchair by her manager; in any event the wheeled Zimmer frame was used instead.

The care worker and the deceased had almost reached the shop when the deceased fell, striking her head. She died in hospital four days later.

The evidence of the care manager was that the majority of communication was verbal and there was no system of work in place to ensure that the residents' care plans were implemented properly. As a remedial measure following the accident, a 'safety check sheet' system when leaving the home with residents was introduced.

Two breaches were alleged against the company: a failure to implement measures to ensure Joan Bloore's safety, and that there was a failure to undertake suitable and sufficient risk assessment for escorting residents away from the home.

The company pleaded guilty at the first opportunity and submitted a basis of plea pointing out that:

- Assessments had been carried out and identified the risk and need for a wheelchair
- There was a written policy in place covering the situation in question
- There was a conflict of evidence between the manager and the carer as to the instructions issued.

The plea accepted that the checks in place were insufficient and it was the Judge's uncontested view that the breaches had caused the death.

The Judge at first instance imposed a fine of £100,000 citing the Sentencing Council's guidelines and noting that:

- The company had responsibility for the care of old and vulnerable residents
- There had been previous incidents involving the deceased falling
- There was no proper system in place to check appropriate equipment was in use outside the home
- The written procedure had not been communicated to staff via training.

By way of mitigation the company had pleaded guilty, had been co-operative, had an excellent record with a high staff to patient ratio and there was no implication of cost cutting. In addition systems and external monitoring had been improved post accident. Once the one third guilty plea reduction is taken into account this reflects an original fine level of £150,000.

The company appealed the sentence of £100,000 on the basis that it was manifestly excessive and would put them out of business.

The Court of Appeal upheld the Judge's key findings that the failure to risk assess escorting of patients outside of the care home was a serious breach relating to a systemic failure and that the previous incidents should have served as warnings.

However this had to be set in the context of the company's assets, at the time of the initial sentence net assets stood at only £187,000 with profit of £46,000. With the fine taken into account the subsequent year's profit dropped to a loss of £31,000.

The Court of Appeal on considering the accounts held that the fine would not have the effect of ruining the business but nevertheless revised the fine down to £70,000 as:

- This was a small company
- The breach was in the context of a generally good health and safety record and attitude
- There were strong points in mitigation

In spite of the reduction of the fine it can be seen that the level of fines in cases involving a fatality are invariably high, once the one third guilty plea deduction is taken into account the company were still fined over £100,000.

The recent Court of Appeal decision of *R v Merlin Attractions (Operations) Limited [2012] EWCA Crim 2670* confirms emphatically that the purpose of a fine is punitive and should be painful for the defendant. *Merlin* involved a similar isolated but systemic breach in an otherwise positive health and safety culture, yet the fine with costs totalled £495,000.

Whilst this must be set in the context of a not guilty plea and a much larger organisation it is clear that fines continue to increase, in relative terms the fine imposed on the defendant in Roche was more punitive as it wiped out annual profits.

In the Care Home sector, injuries to residents who depend on the care and expertise of the care provider will be treated as an aggravating feature and fines are likely to be very substantial. Maintaining a good health and safety record and appropriate culture, as the defendant in this case established in evidence, is an essential prerequisite, if the defendant is to avoid a level of fine of the sort imposed in Merlin, if health and safety failings occur which are causative of death or serious injury.

**Ignatius Hughes QC**

# Albion Chambers Regulatory Team incorporating Health and Safety

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# HSE's Safer Sites

## Targeted inspection initiative September 2013

There will have been trepidation in the construction industry during last month, as between 2nd and 27th September, HSE Construction Inspectors carried out a major inspection and enforcement initiative targeting the refurbishment sector. This is not the first time such a targeted intervention has taken place, as HSE has used a similar approach in 2006/7 and earlier this year. Between February and March spot checks were carried out focussing in particular on safe management of high risk activities such as working at height. The areas of safety targeted during this "initiative" (is it still an initiative if you've done it before?) were more wide ranging and included falls from height, site good order, structural stability, asbestos, respirable silica and welfare. It is likely that this is to be an ongoing series of such initiatives.

The object of the exercise is obvious but is stated to be in particular an improvement in industry standards at smaller sites. The aim is not only to bring home to those working in the industry what HSE expects of them, but also that those expectations have teeth: "HSE will use the enforcement tools at its disposal to prevent immediate risk and bring about sustained improvements".

Last month, on finding unsafe or unsatisfactory practices, inspectors would issue improvement or prohibition notices, and take photographs which made their way into the "safer sites image gallery". Whilst it would be easy to mock the fact that the main area of inadequate provision for workers' welfare was found to be the lavatorial facilities, unfortunately also photographically recorded, perhaps unsurprisingly the unannounced visits also found extremely dangerous practices. Photos of a completely unguarded open lift shaft, machinery balanced precariously on the edge of an unguarded roof, and a balancing of untied ladders in place of scaffolding which would make Mr O'Reilly of Faulty Towers fame proud, all feature in the gallery and demonstrate obvious risk.

It seems extraordinary that in spite of all HSE's interventions, falls from height are still reported to be the single biggest killer in the workplace, so such spot checks should be welcomed. Non-fatal falls are even more common. During the month of the initiative, the owner of a Leeds building firm was fined £2,000 and ordered to pay £3,210 in costs after two workers were injured, one seriously, when they fell from a mezzanine floor they were dismantling onto the concrete floor below. The defendant admitted a breach of Regulation 4(1) of the Work at Height Regulations 2005. One worker suffered lasting spinal injuries which meant he had to give up work.

Similarly a St-Helens based roofing firm was fined £4,000 and ordered to be pay costs during September, when a failure to board over sky-lights which had been covered with soft felt led to a worker falling three metres after he stepped backwards onto the felt. He too suffered spinal injuries, only narrowly avoiding paralysis, and his wife had to give up work to look after him.

Arguably, fines of a few thousand pounds are too low where very simple steps have not been taken which protect employees from loss of life and income, or at best serious injury. The low levels of fines may of course have been influenced by low profit levels in the companies concerned, as the court in another case reported on HSE's website last month fined a company £14,000 where a worker fell two metres from an unguarded internal roof, and suffered a fractured arm. Given the prevalence of these incidents, the potentially fatal and frequently dire consequences, HSE needs to look not only at detection through initiatives like that of last month, but also deterrence through consistent levels of fine which mark the seriousness of such breaches.

**Anna Midgley**