



Determining and Mitigating ‘Material Risk’

The recent decision in C-T Aviation Solutions Limited v Regina (Health and Safety Executive) [2015] EWCA Crim 1620 sets out the guidance on what is a material risk and therefore when an organisation should implement control measures sufficient to control it. In this case the risk was to a pedestrian crossing an airport road.

Background

C-T Aviation Solutions Limited is a civil engineering design company which specialise in traffic management designs for airports. It was contracted to redesign the vehicle and pedestrian arrangements at Luton Airport between 2008 and 2009.

However, following implementation of the redesign, a pedestrian died when she was run over by an HGV lorry while walking between the Terminal and the Drop Off Zone.

C-T Aviation Solutions were prosecuted for undertaking their design in a way that exposed pedestrians to a material risk to their health and safety and that they failed to avoid foreseeable risk when preparing their design.¹

The prosecution’s case was that pedestrians should be segregated from traffic to the maximum extent possible, and had that been done, pedestrians would not be crossing a vehicle access road. However, if segregation was unachievable, then any crossing built had to eliminate risk to pedestrians so far as reasonably practicable. In this respect, the HSE made a number of criticisms of the crossing where Mrs Whiting was killed:

- The absence of “give way” lines, which should have been present and at least the 1.1 metres specified minimum distance in the Zebra, Pelican and Puffin Pedestrian Crossings Regulations and General Directions 1997 (the “Pedestrian Crossing Regulations”);
- The incident crossing was 2 metres wide which is narrower than the originally designed 2.5 metres and less than the minimum width of 2.4 metres specified in the Pedestrian Crossing Regulations;
- There was a gap in the guard railings which permitted pedestrians to enter the road before the designated crossing;
- The access road carried two-way traffic, but the absence of road markings created the false impression that pedestrians were crossing a one-way road; and

- The exit carriageway on the road had a vehicle barrier close to the crossing which created a ‘blind spot’ for drivers of large vehicles to pedestrians already on the crossing.

C-T Aviation Solutions were found guilty on both charges, fined £70,000 and ordered to pay £30,000 towards costs.

An incident of everyday life?

C-T Aviation Solutions appealed the decision on the grounds that the Judge should not have denied their submission that it had no case to answer as there was no or insufficient evidence of material risk.

C-T Aviation Solutions argued that a pedestrian crossing the road and colliding with a vehicle was an “incidence of everyday life that is tolerated by society”. Therefore in absence of evidence that the ordinary risk was increased for a particular reason, a person being hit by a vehicle while crossing a road could not be a material risk under the legislation.

‘Material Risk’

When reviewing the appeal the Court referred to the case of *Porter*² where there was a successful appeal against the conviction of a school headmaster following injury to a boy who jumped from some playground steps. In that case the Court determined that the risk of a child jumping down steps and hurting themselves in the grounds of a school was unremarkable. It was a trivial or everyday risk.

The issue for C-T Aviation Solutions was whether the crossing designed with the particular features it had, or did not have, had exposed pedestrians to a material risk to their health and safety.

In dismissing the appeal the Court considered that while pedestrians crossing a public road and colliding with a vehicle may be an “incidence of everyday life that is tolerated by society”; that unlike the facts in *Porter* this was not a trivial or unremarkable incident. The crossing was situated on private land and C-T Aviation Solutions had been specifically contracted to redesign the parking and pedestrian arrangements.

continued overleaf

¹ Pursuant to section 3(1) of the Health and Safety at Work Act 1974 and regulation 11(3) of the Construction (Design and Management) Regulations 2007.

² *R v Porter (James Godfrey)* [2008] EWCA Crim 1271, [2008] I.C.R. 1259.

Specifically, this crossing was quite different from those on a public road in that pedestrians at an airport were either the airports' guests or employees and present as part of its business, as was vehicle traffic, for which the roads and parking were provided. Therefore pedestrians and vehicles were brought together on the land for the airports' business; the material risk created being "pedestrian and vehicle conflict" which could cause serious injury or death.

The combination of an overly wide gap in the crossing guard rail (coupled with the pedestrian direction of approach), together with an absence of "give way" lines, had led to a situation where pedestrians trailing suitcases could enter the crossing and not be seen by an approaching vehicle. The Court described this as ample evidence of material risk.

What does this mean?

What is a material risk will always be very fact specific. However, in cases where an organisation is specifically contracted to design something then it is implied that they must consider the risks in the design and take all steps to reduce the risk to a level that is as low as reasonable practicable. An unsafe situation created by a poor design which increases the risk or fails to include measures which are reasonably practicable to control that risk may result in a prosecution. It is unlikely to be a defence to say that you have no duty to control risks you were contracted to mitigate simply because it is of a type which may be experienced everyday by the public at large. Ultimately, if you are contracted to design or remodel any project you should conduct a full risk assessment to identify all foreseeable risks and either eliminate, mitigate reduce or control them. When operating on private land, awareness and adherence to any relevant regulations is essential to demonstrating that all steps to reduce the risk to a level that is as low as reasonable practicable were satisfied.

Contact:

For more information please contact:



Ann Metherall
Partner

+44 (0) 117 902 6629
ann.metherall@burges-salmon.com



Matt Kyle
Senior Associate

+44 (0) 117 902 7215
matt.kyle@burges-salmon.com



Michael Mercer
Solicitor

+44 (0) 117 902 7761
michael.mercer@burges-salmon.com

Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400
6 New Street Square, London EC4A 3BF Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7980 4966

www.burges-salmon.com

Burges Salmon LLP is a limited liability partnership registered in England and Wales (LLP number OC307212), and is authorised and regulated by the Solicitors Regulation Authority. It is also regulated by the Law Society of Scotland. Its registered office is at One Glass Wharf, Bristol BS2 0ZX. A list of the members may be inspected at its registered office. Further information about Burges Salmon entities, including details of their regulators, is set out in the 'Who we are' section of the Burges Salmon website at www.burges-salmon.com.

© Burges Salmon LLP 2015. All rights reserved. Extracts may be reproduced with our prior consent, provided that the source is acknowledged. Disclaimer: This briefing gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.

Data Protection: Your details are processed and kept securely in accordance with the Data Protection Act 1998. We may use your personal information to send information to you about our products and services, newsletters and legal updates; to invite you to our training seminars and other events; and for analysis including generation of marketing reports. To help us keep our database up to date, please let us know if your contact details change or if you do not want to receive any further marketing material by contacting marketing@burges-salmon.com.