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Diving Off a Bridge is an Obvious Risk

The NSW Court of Appeal has recently handed down the long awaited decision of *Great Lakes Shire Council - v - Dederer & Anor and Roads & Traffic Authority of NSW - v - Dederer & Anor*, and in doing so has provided further guidance into the interpretation of the provisions of the *NSW Civil Liability Act 2002*, ("CLA 2002") particularly the provisions relating to obvious risks and dangerous recreational activities.

In NSW the CLA 2002 codifies the term "obvious risk" as a risk that "would have been obvious to a reasonable person in the position of that person". In NSW injured persons are presumed to be aware of obvious risks and there is no duty on a defendant to warn of an obvious risk. The Act does not provide that there is no duty owed for obvious risks, there is simply no duty to warn. The Act also provides that if the harm is the result of the materialisation of an obvious risk of a dangerous recreational activity then a defendant will not be liable.

Philip Dederer was a 14 year old boy who, on 31 December 1998 dived off the Foster-Tuncurry bridge. Dederer dived off the bridge at a point that was about nine metres from the surface of the water. He dived into approximately two metres of water, struck his head on a sandbar and was rendered a paraplegic.

As a consequence of his injuries, Dederer commenced proceedings in the Supreme Court of NSW. Initially proceedings were only commenced against the RTA but later the Great Lakes Shire Council was joined to proceedings. As a consequence of the late joinder of the Council, the provisions of the CLA 2002 applied to Dederer's claim against the Council but not to the claim against the RTA.

The bridge had two flat central horizontal railings beneath the flat top railing. Dederer was able to use the two central railings to step on to the flat top railing. He used the flat top railing as a platform for diving off the bridge.

Both on the bridge and on the approach to the bridge there were pictograph signs which prohibited diving and signs that, in words, prohibited climbing onto the bridge. Dederer admitted when giving evidence that he saw and understood the signs but ignored them.

Dederer's claim was originally heard in front of Justice Dunford in the Supreme Court of NSW. At trial Justice Dunford found both the Council and the RTA were liable. Justice Dunford noted that people frequently jumped or dived off the bridge and this was known to the Council and the RTA. Justice Dunford determined that a 14 year old boy would not understand the potential danger of his actions and the risk of serious permanent injury would not have been obvious to him even if the risk was obvious to a mature adult. Justice Dunford was not satisfied that the activity was an "obvious risk". Justice Dunford therefore noted that the Council and the RTA had breached the duty of care that they owed Dederer by failing to provide adequate warning signs notifying of the danger of diving from the bridge. Justice Dunford deducted 25% from Dederer's damages for his contributory negligence.

Both the RTA and the Council appealed to the NSW Court of Appeal.

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As the claim against the RTA was not governed by the CLA 2002 and the claim against the Council was, the Court took a different approach in each claim.

The leading judgment was delivered by Justice Ipp.

Justice Ipp noted that:

"The risk that materialised in this case was that of serious spinal injury flowing from the act of diving off the bridge. Section 5F [of the CLA 2002] requires the question of whether that risk was obvious to be answered by reference to a reasonable person in the position of Mr Dederer. In accordance with Fallas - v - Mourlas, regard must be had to the particular circumstances in which the harm was suffered.

Whether the risk was obvious to a person in the position of Mr Dederer, has to be answered objectively, attributing to the notional reasonable 14 and a half year old person the knowledge of the area and conditions possessed by Mr Dederer at the time."

In considering whether an adequate warning had been provided by virtue of the signs on the bridge Justice Ipp stated:

"Due regard must also be had for the pictograph prohibiting diving. Mr Dederer understood that the pictograph told him not to dive, that diving was not permitted. He said he ignored the pictograph because he did not see any danger in diving. Nevertheless, in cross-examination he accepted that the pictograph was an indication that some person in authority thought there was a risk involved in diving.....

In fact, the pictograph sign went so far as to prohibit swimmers from entering the water head first. It was generally ineffective. But it was a sign that, in my view, would have warned a reasonable 14 and a half year old that diving into the water was dangerous.

Justice Ipp found:

"Mr Dederer dived from a height of some nine metres into the estuary, and entered the water about 10 metres from a visible sandbar. In my opinion, even without the sign, it should have been obvious to a reasonable 14 and a half year old that such a dive was dangerous and could lead to catastrophic injuries".

Justice Ipp found there was no liability on the part of the Council. This was the unanimous decision of the Court of Appeal. The Court of Appeal determined that the risk was an obvious risk of a dangerous recreational activity and therefore the claim against the Council must fail as a consequence of the provisions of the CLA 2002.

In essence the claim against the Council failed because the Court of Appeal determined that the injury to Dederer was the result of the materialisation of an obvious risk of a dangerous recreational activity. Warning issues were therefore not relevant to the Council.

In relation to the claim against the RTA there was a different finding. Again, the leading judgment on this issue was handed down by Justice Ipp. The evidence demonstrated that for more than 20 years prior to Dederer's accident the RTA knew, or ought to have known that people, including children, were jumping and diving from the bridge. Justice Ipp noted that the only measure taken by the RTA to combat the practice was to arrange for the pictographs to be erected.

Justice Ipp commented:

"The obvious risks involved in jumping and diving off the bridge were not a deterrent. Many of the visitors to the bridge were children and young people. The RTA could not assume that these persons would take reasonable care for their own safety. Experience over many years had shown that, in large numbers, this was not what they were doing."

Justice Ipp continued:

"As Justice Dunford pointed out, the bridge constituted an allurement to young people. It was located amidst camping grounds, beaches, lakes and other tourist attractions that were heavily frequented in the holiday seasons. The bridge and its surrounds were designed to attract persons who would walk on the bridge and enjoy the bridge from the walkway. To the RTA's knowledge, amongst the persons so attracted were those who jumped and dived off it."

In Justice Ipp's opinion, the erection of the pictographs was not a reasonable response as it was evident that these signs were

not serving their purpose and were not having a noticeable effect on persons jumping and diving off the bridge.

The RTA could not argue that resources were not available as the cost of replacing the signs with other signs would have been minimal.

In addition, Dederer argued that the existing flat top handrail on the bridge did not comply with the Road Bridge Design Code. Dederer argued that pool type fencing should have been installed on the bridge.

The Court of Appeal agreed. Justice Ipp held that in circumstances where the RTA had created the structure and maintained the structure, an argument that there were practical difficulties to prevent the RTA from taking steps to minimise the risk was not persuasive. Reasonable remedial measures were relatively inexpensive. The funds to make the modifications were available after the RTA was sued.

Justice Ipp concluded that had all the steps been taken by the RTA then Dederer probably would have not dived off the bridge.

In relation to contributory negligence, the Court of Appeal increased the finding of contributory negligence of Dederer from 25% to 50%.

Justice Handley disagreed with Justice Ipp and Justice Tobias in relation to the claim against the RTA.

According to Justice Handley:

"The plaintiff saw the sign, and knew that it mean he should not dive, but he deliberately disregarded it. He also knew that the depth of the water was variable, and that diving from heights could cause injury. Thus, none of the suggested signs would have told the plaintiff anything he did not already know and the failure to erect them could not be a breach of any duty owed to the plaintiff, and if there was any breach it was not a cause of his injuries."

The RTA is considering an appeal to the High Court in this matter.

The decision is an interesting one in light of the recent High Court decisions of Mulligan and Vairy. Ernest Vairy was rendered a quadriplegic after diving off a rock platform into the sea. Gary Mulligan was rendered a quadriplegic after he dived into a creek in Coffs Harbour. In both *Vairy* and *Mulligan*, the High Court determined that no warning sign was necessary.

Perhaps the High court will have a different view to the Court of Appeal in relation to Dederer's claim against the RTA. It will be interesting to see. The decision highlights the impact of the CLA 2002 on claims. The Court's determination that the risk was an obvious one was sufficient to absolve the Council from liability but not the RTA who did not have the benefit of the CLA 2002 provisions.

There continues to be debate on what amounts to an obvious risk, whether it is preferable to provide warnings about obvious risks and whether warning signs are adequate in all the circumstances.

The case demonstrates there is a real difference between cases determined under the CLA2002 on those determined under the regime that predates the introduction of the CLA2002 when there are considerations of the issue of the obligation to warn where there is an obvious risk.

Watch this space for more warnings on the approaches of the Courts to the different factual scenarios.

Trial by Ambush

Relatively simple factual circumstances in personal injury claims can sometimes lead to expensive litigation. Care needs to be taken when defending a claim to ensure that claimants are well aware of the defences which will be raised to resist a claim. A defendant does not want to embark on the process of trial by ambush otherwise there can be significant cost implications.

In a decision of *Pringle - v - Everingham* the NSW Court of Appeal has recently reminded defendants that where a claim is defended it is necessary to specify the basis on which the claim will be defended.

Everingham was a hotel licensee of the Tweed Tavern at Murwillumbah. In the early hours of one morning whilst a band was

playing on a semi-trailer parked at one side of the parking area, Everingham was confronted by a police officer responsible for licensing in Murwillumbah. Everingham asserted that he had an oral licence to serve alcohol to patrons in the car park and he alleged the licensing police were harassing him and that dealings between the local council and Everingham were outside the police officer's jurisdiction.

Approximately 2 hours later, three police officers attended the hotel. One police officer was breath testing a driver of a vehicle parked in the hotel car park. The officer was confronted by Everingham who ordered all police officers to leave the car park and once again accused the officers of harassment. The police officers used mace spray on two occasions to subdue Everingham. He was subsequently arrested.

Everingham subsequently sued the three police officers and the State of New South Wales for assault, trespass, and false imprisonment.

At trial, the Court found that Everingham was intoxicated and yelled at the police aggressively. In addition, one of Everingham's hands came in contact with the hand of the police officer who was holding the alcometer.

The Court found that Everingham had adopted a fighting stance and that two of the officers were justified in their response as they were acting in self-defence. The judge, however, was critical of the second use of mace and concluded that the second use of mace amounted to an assault. Surprisingly the Judge found that all three police officers were responsible for the assault whilst only one of the officers used the mace on the second occasion.

The Judge dismissed the claim for trespass on the basis that the police officers were entitled to remain in the car park. The claim for false imprisonment was also dismissed as the Judge held that the officers were entitled to arrest Everingham. Everingham's claim for assault succeeded and he was awarded \$50,000.00 in general damages.

The police officers and the State of New South Wales appealed on the grounds that the damages were excessive. Everingham appealed arguing that the Judge was wrong to dismiss the trespass and false imprisonment claims where the police had not specified the grounds of defence in Court documents. Justification and self-defence were the defences used to resist the claims.

Both Everingham and the police succeeded in the appeal. The Court of Appeal held the damages awarded were too high and concluded that as the police had not identified the defences that would be relied upon, the police and the State of NSW could not rely on those defences to defeat the claim.

The Court of Appeal was left with no option but to refer the trial back to the District Court for rehearing. Damages will be reassessed. Everingham is now on notice of the defences which will be raised by the police and will now be able to call whatever evidence he determines necessary to challenge those defences.

Everingham and the police have incurred substantial legal costs in the first trial, considerable legal costs in a hearing before the Court of Appeal and will now incur the additional costs of a further hearing in the District Court. The Court of Appeal proceedings and the re-hearing may well have been avoided if, before the first trial, the police had properly documented the defences they would argue.

Defendants need to be careful to identify all defences which will be raised otherwise the defences may not be available to be argued and if a Judge does permit the defences to be argued, a successful defendant will be exposed to a potential appeal.

Surely, practicality must dictate a resolution of Everingham's claim without further legal costs.

You're Getting Older: An OH&S Perspective!

Australia's workforce is aging due to our demographic profile, as the baby boomers who are the vast bulk of our population move towards retirement. Irrespective of the current push of policy makers promoting longer working lives, people are also remaining in the workforce; often in roles that are to the detriment of their own health given their physical condition.

Businesses will confront many health and safety issues with older workers wanting to remain in the workforce, especially those workers in demanding physical roles with the core attributes of the role.

Throughout Australia the Occupational Health and Safety legislative schemes impose absolute and wide ranging obligations on businesses to ensure the health safety and welfare of persons.

How then do you balance your legal obligation to ensure a safe workplace with a workforce that's ageing?

Systems of work that involve heavy repetitive physical work and exposure to manual handling will present significant safety challenges for employers regarding balancing their obligations under the Occupational Health & Safety codes against laws dealing with unfair dismissal, protection of injured workers and discrimination.

There are mitigating measures employers can adopt to address the balance between providing a safe working environment for an aging workforce and employer's obligations under OHS, termination and discrimination laws.

Reviewing systems of work so as to prevent or control risks is imperative. Where an injury occurs, return to work programs need to be structured so that time the worker is away from the workplace is minimised and they do not return into a role that will expose them to further risk of injury.

The management of an injured employee becomes extremely complex where medical evidence suggests there is little or no possibility that worker returning to their pre-injury role, without risk to their or their fellow workers health and safety. Often the worker's injury has stabilised, but the medical evidence indicates the injury is still volatile. Management of these individuals becomes difficult.

Were the employer to place the worker back into the workforce and the worker aggravates, suffers a new injury or causes a fellow worker to be injured, the employer is at risk of breaching the Occupational Health and Safety laws. At the same time the employer will experience significant increases in workers compensation premiums, especially where there is a "new" injury. The worker has also been injured and will experience the pain and suffering associated with such injury. Neither party gains.

To prevent these circumstances occurring, the parties need to implement "fitness for work" policies, more so now with an aging workforce. The primary objective of these review processes is to promote a safe and healthy workplace. Any "review" must be for a valid reason and be fair in its application, otherwise exposure to unlawful termination and discrimination arises.

Essentially, there will be four available outcomes following the review process namely;

- Employee remains in role,
- Termination/retirement,
- Re-employment or
- Mutual separation.

Each outcome has potential to have legal implications for the employer relating to OHS, unfair termination and discrimination actions.

Where clear medical evidence identifies the worker is unable to perform the inherent requirements of their role they were originally engaged to do and they are unable to perform their role without risk of injury either to themselves or others, action must be taken by the employer to prevent legal exposure.

Under these circumstances the contract has been ended, not on the basis of the workers age (the discriminatory issue), but on their inability to perform the inherent requirements of their role. Procedural aspects associated with due process and procedural fairness still need to be followed in any termination.

The worker firstly must be properly assessed by an appropriate medical practitioner, preferably a specialist, with an opinion obtained as to the worker's capacity to perform the inherent requirements of their role. A site visit by the doctor/specialist to see first hand the system of work is recommended.

The assessment should also include an opinion as to whether if the worker returned to their role, a risk increases substantially they may exacerbate their current symptoms or place themselves or others at further risk of injury.

The existing system of work must also be examined to ascertain whether it can be reasonably modified to accommodate the

workers condition and/or be altered to eliminate any risks towards health and safety. If the system can be reasonably modified and the employer does not take steps to implement the modifications, any termination on the basis of fitness for work is likely to be unfair.

Where the system of work cannot be reasonably modified and the worker is unable to perform the inherent requirements of the role, the employer is in a better position to review the worker's engagement and look at alternative options, including re-employment into a role the older worker can perform safely and as a last resort, termination.

This will involve the employer doing a workplace audit as to available roles within the company that the older worker has the skills and capacity to perform and can perform such roles safely. A failure to seriously consider alternative roles will imply the termination was unfair.

Vocational assessments should also be conducted to evaluate what alternative roles other than their current role the worker can perform.

With the parties applying proper and fair policies as to workplace reviews, employers will be able to balance the implications associated with an aging workforce and their Occupational Health and Safety obligations, whilst at the same time reducing legal exposure with unfair dismissal and discrimination actions.

Call Your Witnesses at the Arbitration or Suffer the Consequences

On 2 October 2003 Mrs Geftlick commenced proceedings in the District Court claiming damages for injuries she allegedly sustained on 27 October 2000 when she stepped into an open or uncovered valve pit located in the footpath of Sydney City Council adjacent to a commercial building that was owned by Edremo, and managed by Ronali. She alleged negligence against both the Council and Ronali with the Council denying negligence and Ronali denying responsibility for the management of the immediate surrounds including the valve outlet pit. A number of cross-claims were subsequently filed with the Council suing Ronali and Edremo, Ronali cross-claiming against the Council and Edremo, and Edremo cross-claiming against Ronali.

The claim proceeded to arbitration as is quite common. The claimant was successful and obtained an award of \$39,501.89 against the Council. The claim against Ronali failed.

An appeal followed and the claim subsequently proceeded to a rehearing.

At the rehearing a witness was called that was not called at the original arbitration. The end result was that the claim against the Council failed. Subsequently the District Court Judge ordered the Council to pay the claimant's costs on an indemnity basis and the costs of Ronali and Edremo as he concluded that the new witness was a crucial witness upon who's the evidence the case turned and the witness's evidence could have and should have been called at the arbitration. In those circumstances it was appropriate to order the Council to pay all the costs despite the fact the Council succeeded in the defence of the claim.

The Council challenged the costs decision in the Court of Appeal. The effect of the Trial Judge's costs order was that the Council was liable for the totality of the legal costs of the claimant, Ronali and Edremo on an indemnity basis.

The Court of Appeal disagreed that the costs order was appropriate but held that the failure to call the witness at the arbitration should have detrimental consequences for the Council.

The Court of Appeal noted that had the witness's evidence been called before the Arbitrator, it was not in contest that the claimant would probably have failed before the Arbitrator and there would have been verdicts for all defendants. In those circumstances there was no reason why costs should not follow the event so that the claimant should be ordered to pay the Council's and Ronali's costs of the action in the arbitration on the ordinary basis. On the other hand, the Court of Appeal concluded that the Council should be ordered to pay the claimant's and Ronali's costs of the action on and from the arbitration date on an ordinary basis.

In this case it was noted that the solicitor for the Council could have, with due diligence, ascertained the identity of the witness prior to the arbitration and he would have then become aware of the evidence that the witness would give if called and that evidence would have defeated the claim at the arbitration.

The failure to call a crucial witness resulted in a cost order being made against the Council. Although the cost order imposed by the Trial Judge was far more onerous than the ultimate cost order sanctioned by the Court of Appeal, significant costs must still be paid by the Council despite the fact that the Council succeeded in the claim. It is crucial to ensure that all witnesses are identified prior to arbitration and called at that arbitration. Calling additional witnesses at a rehearing following arbitration can lead to significant cost consequences if that new witness changes the outcome.

The Court of Appeal also commented on the number of barristers who appeared at the hearing before the Court of Appeal. There were seven barristers in total that appeared, three Senior Counsel and four Junior Counsel. At one point the Court considered whether it should, with respect to the costs of the appeal, limit the costs to one Counsel to a party.

The Court noted that it does not follow, and there is no convention that an order for costs made by the Court of Appeal in favour of one party against the other will automatically permit the recovery of costs of the Junior Counsel as well as the Senior Counsel by a party. The Court of Appeal noted that as regards to the recoverability of costs of more than one Counsel as a general proposition, a party to an appeal should only be represented by one Counsel, preferably Senior Counsel, unless the engagement of two Counsel is truly justified by the nature of the appeal or other particular circumstances.

Despite these comments, the Court of Appeal declined to limit the costs payable in the circumstances to one Counsel only. Rather, the Court of Appeal left this issue to a cost assessor.

Costs continue to be a significant issue in multi-party litigation particularly in relatively modest personal injury claims. No doubt, in this case, the level of costs payable pursuant to the original cost order were so great that the Council determined to incur the considerable costs of a Court of Appeal challenge. Was the saving achieved by the challenge worthwhile? Only those involved in the claim will know.

Notice Required For Work Injury Damages

Workers' compensation legislation in NSW imposes obligations on workers to provide information and notice to employers when a work accident occurs. A form must be completed to claim statutory compensation, however there is no specified form to be completed for a work injury damages claim. In most cases, the claim for compensation precedes the claim for work injury damages. But what happens when the worker has not claimed statutory compensation benefits? Must written notice be provided before making the work injury damages claim and if there is no written notice will the claim for work injury damages fail?

The New South Wales Court of Appeal recently determined in *Wollongong Fabrications Pty Limited - v - Ramsbottom* that it is not necessary to pursue statutory compensation benefits before pursuing work injury damages and that an initial written notice was not required before a work injury damages claim is pursued.

Section 151C of the Workers Compensation Act 1987 dictates that a claim for work injury damages cannot be made until 6 months have elapsed since notice of injury was given to the employer. Ramsbottom's notice had been challenged by the employer as it was not in writing. There was no formal notice given to the employer. Ramsbottom had reported the injury to doctors and there was some evidence that principals of the employer had been made aware of the injury, albeit not in a written form. The Court of Appeal concluded that the failure to provide written notice to the employer does not prevent the worker pursuing the work injury damages claim, provided sufficient information is provided to the employer before the claim is made.

The Court of Appeal noted that there are differences between the statutory requirements of giving notice as a pre-cursor to making of a claim for compensation compared to the notice required before pursuing work injury damages. The statutory requirements relating to notice for the recovery of compensation are more formal and detailed.

The notice of injury required before commencing work injury damages does not require information addressing the cause of the injury or the accident, provided sufficient information is given to enable the employer to appreciate that the worker sustained an injury at a particular time, date and place.

The Court of Appeal highlighted that the notice of injury for work injury damages claims must provide sufficient detail to put the employer on notice to enable them to investigate the circumstances of the incident. Interestingly, the Court of Appeal has determined that the requirements under Section 151C did not mandate that the notice must state the cause of the injury or the details of the work being performed when the injury was sustained.

The Court of Appeal did not determine the validity of the notice provided by Ramsbottom as the case was remitted to the District Court for reconsideration. The District Court had previously determined Ramsbottom's notice was sufficient but must now re-examine the issue.

This decision highlights once again the inconsistencies in the Workers Compensation Act. Although a claim for work injury damages often involves significant sums, the notice of injury is not required to detail the circumstances of injury unlike the notice required for a claim for compensation. Provided the employer appreciates the worker has sustained an injury at a particular time, date and place and the injury was work related, the onus then seems to shift to the employer to carry out the appropriate investigations.

It should be remembered that the notice of injury for work injury damages claims is only the initial step in a work injury damages claim and should not be confused with other notice and particulars required before the work injury damages claims are advanced to Court. Once a work injury damages claim is made the legislation provides that additional information must be provided by the worker to facilitate the assessment of the claim and that information will include more detailed particulars addressing the cause of the incident and the negligence of the employer.

NSW OH&S Roundup

CEO Fails in Defence of OH&S Charge.

Owens Container Services Australia Pty Ltd ("Owens") recently pleaded guilty to an offence under the NSW OH&S Act as did one director of the corporation who was deemed to have contravened the same provision following a fatality at a worksite. Interestingly however Mr Richie the Chief Executive Officer and a director who was also prosecuted elected to defend the charge.

Owens conducted a business involving the repair, cleaning and storage of shipping containers and tanks. Among the equipment used in this undertaking was a tank wash facility. On 15 January 2003, in operating this business a particular tank was located in the wash bay facility having previously contained resin solution. The task of cleaning that tank had commenced the day before when it was discovered that there was residual resin in the tank requiring further cleaning.

On 15 January 2003, an employee of the company, John Howie, used a spray gun to spray an amount of methyl ethyl ketone (MEK) into the tank. MEK was regarded as a highly volatile and highly flammable substance and had been used as a cleaning agent at the site. After spraying the tank for about five minutes with MEK, the tank was left for between 20 to 30 minutes, when Mr Howie returned and decided to use a high pressure water spray gun to attempt to remove the residual resin. Shortly after other employees left the immediate vicinity, an explosion occurred that resulted in Mr Howie being propelled a distance of seven metres from the opening of the tank. Mr Howie sustained severe injuries and died shortly thereafter.

A pre-requisite to the performance of the method of cleaning work was the electrical earthing of the tank. This was to be achieved by attaching an earthing lead/ static line to the tank.

A gernie high-pressure water spray gun was regularly used in the conduct of the company's tank cleaning operations.

Investigations revealed that there were present at the tank wash bay facility at the site on 15 January 2003 a variety of potential ignition sources of the MEK present in the tank.

These potential sources of ignition included:

- static electrical discharge from the flow of water from the Gernie
- static electrical discharge from the nozzle of the Gernie
- a static electrical discharge from Mr Howie given the highly insulating footwear being worn
- a spark caused by a stray current to which, as a result of its inadequate earthing, tank was susceptible
- a spark from the flint contained in a cigarette lighter that was subsequently found inside the tank. It was well-known that Mr Howie the deceased was a heavy smoker; and
- a spark from possible metal-to-metal contact between the said cigarette lighter and the inside of the tank.

Neither the tank nor the steel platform forming part of the wash bay facility at the site was earthed by an earthing line or

otherwise. The tank wash bay facility at the site provided no means to effect the earthing of tanks.

The corporation did not monitor static electricity in the tank wash facility. The corporation did not have any policy in relation to the control of potential ignition sources in the tank wash facility other than a no-smoking policy. As at 15 January 2003 the corporation did not have in place any "no-smoking" signs in the tank wash facility. An inspection of the wash bay facility at the site on 16 January 2003 revealed the presence of a number of cigarette butts on the ground.

The Owens Group owned approximately 30 companies with staff located in approximately 80 worksites and totalling approximately 1600 in number. In his position as Chief Executive Officer, Mr Ritchie was responsible for all the businesses within the Owens Group and was also a director of in excess of 10 companies within that Group. He lived and principally worked in Auckland, New Zealand and was an accountant by training and experience. He spent approximately 20 to 30 per cent of his time dealing with financially related issues and approximately 20 to 30 of his time liaising with customers and suppliers.

As Chief Executive Officer much of his time was spent dealing with external parties, including brokers, analysts, major shareholders financial institutions, the media, customers and suppliers. There was a reporting structure involving seven Divisions. As Chief Executive Officer, Mr Ritchie did not manage the day-to-day operations of the Group but relied on the General Manager of each Division and persons who reported to the General Manager.

The Divisional General Manager of the Container Division was John Rose. The Container Divisions comprised eight companies within the group operating in Australia, New Zealand and Fiji, employing approximately 400 employees. The Australian operations were spread across five container parks in Sydney, Melbourne and Brisbane. The day-to-day management of the Container Division was divided geographically, with Mr Crandles as the Australian country Manager and Mr Swain as the New Zealand country Manager.

Owens was just one of the companies owned by the Owens Group and was just one of the companies in the Container Divisions of the Group. While Mr Ritchie was the Chief Executive Officer he spent a half day to one day a month devoted to the Container Division and only about one-third of that time was devoted to the Australian operations of the Containers Division. Mr Ritchie spent two to three days every two months in Australia, although he did not confine his attention to the Containers Division but attended to all businesses based in Australia. He had visited the Race Park container site on two or three occasions with each visit likely to be around half an hour to one hour's duration.

Mr Ritchie relied on Mr Rose for the management of the Container Divisions in Australia. Prior to joining the Owens Group, he had no knowledge or experience in the management of container parks or the cleaning of ISO tanks. As at 15 January 2003, he had no knowledge of or experience in cleaning methods for tank washing or cleaning agents to be used in tank washers.

The Human Resources Manager looked at occupational health and safety in all divisions: Mr Ritchie met with the Human Resources Manager on average two to three times a week, dealing with occupational health and safety and other matters. There were monthly reports received from the heads of each division and there was a monthly meeting of the Executive Committee. The monthly reports and the Executive Meetings, at Mr Ritchie's initiative, had a specific requirement to deal with occupational health and safety issues. Occupational health and safety became a specific agenda item for the Executive Committee.

In relation to the tank washing procedures of the container services company, Mr Ritchie said he had no general knowledge of these procedures and no knowledge of cleaning methods or cleaning agents. That knowledge was held by the people involved in the particular business employed especially in field depots and was knowledge also held by management.

On 15 January 2003, Mr Ritchie had no knowledge of MEK and had not heard of it at that time and, in addition, he was not at the Race site and was not even in Australia.

The essence of Mr Ritchie's case was that, in his position as Chief Executive Officer of the Owens Group, involving as it did a number of companies operating in a number of cities and countries, he was required to rely upon the expertise of Divisional Managers and site Managers to deal with the detail of occupational health and safety. Thus, he was far too remote to be able to effectively be in a position to influence the conduct of the corporation in relation to its contravention of s 8(1) of the Act. Ritchie also argued he had used all due diligence to prevent the contravention by the corporation.

It has been suggested in commentaries that directors and managers of small to medium sized corporations may face greater

exposure under the provisions of the OH&S Act because of their greater involvement in the operational aspects of the corporation's activities and therefore their individual acts or omissions being more apparent than in the case of larger corporations that may have complex organisational structures.

The judge in his deliberation of Mr Ritchie's case noted:

"He was a Director of a company that had as part of its operation the cleaning of ISO tanks, some of which contained chemicals and materials that were hard to remove. As a Director, he had to be active and diligent in requiring information about the nature of that business, the chemicals being addressed, the risks thrown up by having to work with those chemicals, obtaining expert advice as to the best way to remove risks from the operation and ensure the safety of employees at each site. The system should have made him aware of the existence of MEK and how that was to be properly and safely dealt with when cleaning tanks at any of its sites. He should have been informed of the importance of earthing these facilities and the risks that flowed from not having an effective system of earthing. He should have been informed of the details of appropriate protective work clothing required for this task and the means by which the wearing of this clothing was to be ensured at each site."

The submissions made on behalf of Mr Ritchie, figuratively throw their hands up in despair in contemplating the suggested unachievable level of knowledge about the company's operations that would be involved in him being informed of the matters referred to in the previous paragraph. He was remote from the site, lived in another country, was Chief Executive of the Group and had numerous businesses within his responsibility and, as it was suggested, could not be expected to be across the type of detail that would allow him to be involved in the creation, application and enforcement of the company's safe system of working. This was properly to be performed, so it was said, by those at a lower level who had the expertise to do so and who occupied positions that allowed them to be much more closely involved in the day to day operations of the company.

This argument was rejected.

The judge found:

"Mr Ritchie had the status and there had been circumstances in which he had influenced the conduct of the corporation in relation to safety matters so that it might not come into contravention of the Act. In relation to this particular contravention there was nothing about his status or his circumstances that stopped him from being able to influence the conduct of the corporation in relation to the contravention but rather, he chose a course of involvement in safety that primarily left safety issues in the hands of others: in making that choice, in my view, he is not able to make out a defence under s 26(1)(a)."

The Commission found Ritchie could not establish a defence to the charge.

The Commission also noted:

"This case provides another example of significant resources being made available to establish a safe system but assumptions about the operation of that system left it significantly flawed in certain areas of its operation. I do not regard the company's system as being merely a paper system but it derived its form from a Group policy dealing with a number of undertakings having regard to the wide corporate interests of the Owens Group and that fact may have masked the need for particular steps to be taken in relation to the creation and continuance of an effective safety system for the operation of the tank wash facility section of the business."

It was relevant to the penalty that the particular facility was allowed to wind down over a number of months until closed in September 2003 and since late 2004, the company has not continued in business and has no intention of doing so and, in particular, in the future will not be operating a business in the speciality of tank wash operations.

The corporation was fined \$160,000 and the director that pleaded guilty was fined \$18,500. The corporation's fine reflected a discount of 25% on the penalty as the company pleaded guilty at an early time. The director's plea of guilty did not occur until the day of the hearing and he only received a discount of 5 per cent in recognition of the limited utilitarian value of the plea. The other director was ultimately found guilty and his sentence has been deferred to another date, however he should not expect any discount on the penalty as he defended the charge against him. The findings highlight the benefits of an early guilty plea.

The case sends a somber warning to all directors of corporations whether they are large or small, or private corporations or multinationals. OH&S must be a significant concern for all directors and directors cannot rely on others to discharge OH&S

responsibilities.

Substantial Fine Following Serious Building Site Injury

Skyrise Installations Pty Ltd and a director were fined in total \$154,000 following guilty pleas of guilty to charges under the OH&S Act

Australand Holdings Ltd was the principal contractor for a large industrial complex consisting of 3 buildings, 2 of which were still under construction. The buildings were approximately 5 levels high and were of concrete slab and column design. Between 13 and 14 January 2003, Australand entered into a subcontract with Sassall Glass & Joinery Pty Ltd for the manufacture, supply and installation of strip windows and curtain wall panels for the project, for an overall contract price of approximately \$2 million. Curtain wall panels are a form of non load bearing cladding that is connected to the structural members of a building to form its external façade. The curtain wall panel consists of equal size quadrants of glass separated by aluminium strips and enclosed in an aluminium frame. The panels can be manufactured in various sizes and weights off-site, and then lifted up the side of the building with the use of a crane or other lifting device to be installed to the outside of the building.

Sassall subcontracted with Skyrise, a façade installation company, to install the curtain wall panels in the buildings under construction at the site.

Mr Hill was operating a crane in the process of moving the largest size panels of a curtain wall in to place. The panel weighed approximately 480 kg and exceeded the maximum weight that the crane could safely lift. While attempting to pull the crane with its suspended curtain wall panel back, the crane suddenly and without warning lifted at the back and began to fall over the edge of the floor breaking through a timber edge stop. Due to a deficiency in Skyrise's system of work, Mr Hill was unattached to the static line at this point. Mr Hill instinctively attempted to stop the crane lifting and was taken over the edge of the building by the crane. He fell 4 floors, approximately 15 metres to the ground. Mr Hill was on life support for 4 days. His injuries were severe and included a jaw fractured in several places, fractures to his left and right arms and punctured lungs. Mr Hill received a tracheotomy and had a pin installed in his left hip.

The reason why Mr Hill was not attached to the static line was because he had to unclip his lanyard from the line in order to pull the crane back far enough into the building. The 2 metre lanyard he was wearing did not enable him to reach far back enough. Mr Hill should have had an inertia reel system which would have allowed him full mobility to move the crane while still attached to the static line.

Warning. The summaries in this review do not seek to express a view on the correctness or otherwise of any court judgment. This publication should not be treated as providing any definitive advice on the law. It is recommended that readers seek specific advice in relation to any legal matter they are handling.

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