Prosecutions of company directors for workplace accidents

In this edition of *The Legal Lounge* I summarise the outcome of some prosecutions against company directors for breaches of workplace health and safety laws arising out of workplace accidents in New Zealand and Australia.

Liability of directors under s56 HSE Act 1992 – recap

I have outlined in previous editions of *The Legal Lounge,* the range of duties and offence provisions that apply to employers, contractors and employees for workplace health and safety law breaches. Section 56(1) stipulates that directors, officers or agents who have *"directed, authorised, assented to, acquiesced in, or participated in",* the failure of a body corporate to comply with the Act, are party to and guilty of the failure of the corporate entity, and thus subject to conviction and orders for reparations and fines of up to $250,000. Below are some examples of successful prosecutions under this section, and under broadly similar statutory offence provisions in two Australian states.

***Department of Labour v IcePak Coolstores* [2009] NZHSE 39**

IcePak Coolstores Ltd (IcePak) operated a large cool store facility. The company had recently changed to a hydrocarbon-based refrigerant system, which was environmentally friendlier to run, and cheaper, but highly inflammable. IcePak had contracted Mobile Refrigeration Systems Ltd (MRS) via its sole employee Mr Cook, to install the new system.

On 5 April 2008 a fire alarm activated in a plant room at the cool store facility. The fire brigade attended and, after contacting one of the directors via telephone, cut their way into the plant room. As they did so, vapours emerged, and one fire fighter noticed what appeared to be a gas leak. At that moment, a large explosion occurred. One fire fighter was killed, and seven others were injured, some severely. The explosion was caused by the leaking of a hydrocarbon-based refrigerant that somehow ignited. This was thought to have been through a spark in the main switchboard.

The system installed by MRS was found to be defective and did not meet the relevant standard, AS/NZS 1677. IcePak accepted that its own systems were not adequate, and that safety equipment was inadequate to deal with any hazards. There was no continuous ventilation system, electrical equipment was not explosion proof, there were inadequate gas detection devices, and there was no means of eliminating all sources of ignition on detection of a leak.

MRS as the primary contractor responsible for installing the system was charged for failing to ensure that no action or inaction of its employees caused harm in the workplace, and was ordered to pay reparation of $175,000 and fined $56,000. IcePak pleaded guilty to failing to take all practicable steps to protect their employees, and of warning persons other than employees or contractors who had a legitimate right to be in the workplace of risks or hazards in the work place. They were ordered to pay reparation of $95,000 and fined $33,600.

The Managing Director of IcePak also pleaded guilty to a charge under s56 of the HSE Act that as a director, he *acquiesced in* the failure of IcePak to ensure the safety of its employees while at work, and was convicted and fined $30,000. As he pleaded guilty, this case does not provide much guidance as to how a directors' culpability might be assessed under s56 HSE by the New Zealand Courts in a defended hearing. However, two recent Australian decisions may shed more light on this.

***Fry v* Keating [2013] WASCA 109 (Western Australia)**

D&G Cranes is a crane and hoist hire company. A rigger operator employed by the company was killed when a pack of 16 crane components – weighing over 375kg – fell from a crane and struck him. The company was prosecuted for failing to provide a safe working environment for their employees, and its two company directors were prosecuted under s 55 of the Western Australian Occupational Safety and Health Act, on the basis that the offending was attributable to their neglect. The company was convicted and fined $90,000, and the directors were convicted and fined $45,000 each.

The Court of first instance heard evidence that there were two methods for stacking and lifting the parts – the first method was a safe method where all parts were securely encapsulated for lifting; the second was an unsafe method, where all parts were not secure and were at some risk of falling. The directors had earlier identified in 2004 that some rigger operators used the second unsafe method, and it was resolved that method 1 should be the only method used. However, the Court heard that method 2 was in fact used by some riggers, and the evidence before the Court was that the yard supervisor had a number of other duties that prevented him from providing his full attention to what was happening in the yard. The Court held that the company failed to ensure, so far as is practicable, that employees were not exposed to risk of death or injury, and the directors had neglected their duty to ensure method 1 was used at all times.

The directors appealed against the conviction. The Supreme Court found that, as active directors with a "hands on" role in the business, they were neglectful in being *unaware* that the supervision had broken down, or that method 2 was used. On a subsequent higher appeal, the directors argued that the prosecution had failed to prove that they *ought to have known* that method 2 was being used. In dismissing this further appeal, the Appeal Court highlighted the fact that:

- None of the employees had a consistent, documented induction process
- There was no written safe working procedure documenting the use of method 1
- The employees had no formal training in the use of method 1
- The company had no dedicated health and safety officer
- The yard supervisor's duties required his attention away from the yard.

In those circumstances, the Court held that the directors were *not entitled to assume* that method 1 was being used at all times, and they had a *duty to take reasonable steps to ensure* that it was in fact being used at all times. The convictions and penalties were upheld.

***Orbit Drilling Pty Limited & Anor v R* [2012] VSCA 82 (Victoria)**

On 9 December 2006 a 21 year old truck driver who had been employed by Orbit Drilling for just over a week, died when the truck he was driving went out of control on a steep slope and flipped. The driver was thrown out of the truck and killed on impact.

The driver had been instructed to park the truck on a drill pad where drilling was to occur. This necessitated driving the truck over the crest of a hill, down a steep slope, before stopping and reversing up on to the drill pad.

The driver was not trained to do this type of driving, and the truck he was in was un-roadworthy, due to seriously defective brakes. The site manager knew that the brakes were defective. The company pleaded guilty to a charge of recklessly engaging in conduct which placed the employee at danger of serious injury or death, and was convicted and fined $750,000.

Although he was not aware of the defective brakes, the sole director of the company also pleaded guilty to a charge of failing to take reasonable care to ensure the safety of the employees, specifically by failing to take reasonable care to ensure that the company provided and maintained plant or systems of work that were, so far as is practicable, safe and without risks to health. He was fined $120,000.

Subsequent appeals by both the company and its director against the level of sentence were dismissed. In relation to the director, the Appeal Court rejected a submission that in setting the fine, the lower court had "assessed the culpability of [the director] as a failure to prevent Orbit's recklessness". While accepting that the director had not known of the defective brakes, the Appeal Court agreed with the lower court's assessment that he bore responsibility for the combination of events which led to the situation where *"an untrained, unsupervised and inexperienced driver could be directed by his supervisor … to drive a heavy vehicle which had not been properly maintained, with a known defect to its brakes, in such dangerous circumstances".* As such the level of culpability was assessed as being correct and the fine upheld. An argument that as he was the sole director, the fine on him as well as the company was effectively a double penalty, was also rejected. The Court was clear that he was being held responsible for his failure to take reasonable care to ensure a safe workplace, and not for the act of recklessness itself for which the company was convicted.

Comment

While a director may not be expected to know everything that occurs within its organisation, these cases illustrate that failure to take reasonable steps to ensure the company meets its fundamental health and safety obligations could have significant consequences, and lead to the prosecution and personal liability of directors for health and safety failures of the company. Further, failure to take adequate steps to ensure that identified safe methods of work are in fact being followed within a workplace, could also result in personal liability. Directors should take care to ensure that safe work practices are properly documented and implemented and that sufficient processes exist to ensure that plant and equipment cannot be allowed to be operated in a deficient state.

While the legislative regimes in each of the Australian states discussed in this article do differ in some respects, pending changes to New Zealand's workplace health and safety law regime are intended to be closely modelled on the federal Australian *Model Work Health and Safety Act 2011*, which is the basis of the legislative regimes applicable in each of the Australian states discussed in this article. The detail of the pending legislative reform to workplace health and safety laws in New Zealand will be the subject of the next edition of *The Legal Lounge.*

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