

INDUSTRIAL DEATH – THERE ARE NO EXCUSES!

Director of Public Prosecutions –v- Amcor Packaging Australia Pty Ltd
(t/as Amcor Fibre Packaging Australasia) [2005] VSCA 219 (6 September 2005)

In the recent Victorian Court of Appeal decision of **DPP v Amcor Packaging Australia Pty Ltd**, the Court has sent a clear message to employers that they must take extremely seriously their obligations as employers to protect the health and safety of their employees.

With the Court of Appeal substituting the County Court's two \$60,000.00 fines (totalling \$120,000.00) following a fatal industrial accident with two \$180,000.00 fines (totalling \$360,000.00) for two offences, each with a maximum penalty of \$250,000.00, it is evident that the potential consequences for employers are significant. This is before regard is had to the *Occupational Health & Safety Act 2004*, which came into effect on **1 July 2005**, which has now lifted the maximum fine for each of these offences to \$943,290.00.

Importantly, the Court of Appeal has made it abundantly clear that the focus of sentencing in an OH&S prosecution will be the objective seriousness of the offence. Actions taken after the incident such as remorse, an early guilty plea or swift action to abate the risk will be given comparatively little regard in the sentencing process.

FACTS

Amcor Packaging produces paper products from pulp at its premises in Fairfield, Victoria.

On 25 March 2003, an employee, Mr Moon, was working near very large unguarded rollers on a paper manufacturing machine, when he was drawn against the rollers and killed. The machine, in use at the factory since 1966, had never been fitted with a relevant guard. Further, it appears accepted that there was little or no instruction or supervision of employees in relation to the machine, other than "on the job" training.

Two risk assessments had been carried out, one in 1988 by two long standing employees (including, ironically, the father of the deceased) and another, a Plant Risk Assessment, some time after. The 1988 assessment had identified the risk of entanglement, crushing, shearing, striking and ergonomic risks, among others. The Plant Risk Assessment noted the nip points of the rollers presented an entanglement risk and had also noted evidence of hazardous conduct by employees reaching into the moving machine to remove material. However, whilst recording these risks, the Plant Risk Assessment stated that the *"history would suggest however that this is a remote possibility, hence the low [risk] rating"*. That being said, the risk of entanglement had been recognised and possible remedial action was specifically recorded in response to that risk.

Prior to the incident, the possibility of the risk of injury was further demonstrated by other injuries and "near misses".

Following Mr Moon's death, Amcor Packaging took immediate steps to reduce the risk of injury or death, including the installation of guards on the machine and on the air house. An "industry alert" was sent out to all relevant businesses with similar machinery.

THE PLEA IN THE COUNTY COURT

At an early stage, Amcor Packaging entered a plea of guilty in the County Court of Victoria to two counts under Section 21 of the *Occupational Health and Safety Act 1985* ("OHS Act"). That Section provides that it is an offence not to provide and maintain, as far as was practicable, a safe working environment. The basis of the two charges were first, failing to have an appropriate guard fitted and secondly, failing to instruct and supervise employees operating the machine.

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The maximum penalty for each offence under Section 21 *OHS Act* was \$250,000.00 at the time. The Sentencing Judge convicted Amcor Packaging of both offences and fined the company \$60,000.00 for each offence, giving a total of \$120,000.00.

JUDGMENT OF THE COURT OF APPEAL

The decision of the County Court was appealed to the Court of Appeal by the DPP on the grounds that the individual sentences were manifestly inadequate in the circumstances of the case and further, the Court failed to differentiate between the respondents culpability in each charge and to reflect greater culpability in respect to the guarding charge.

In a joint judgment of the Court of Appeal, Vincent, Eames & Nettle J.J.A reviewed the role of the OH&S Act, highlighting the fact that the Act exists in an environment where the risks to which the Act relates are essentially economic for an employer, whilst employee risks relate to their physical and mental well being, or indeed, their life.

Noting that the provisions in the OH&S Act talk of the failure to do certain things, and not the consequence of those failures, the Court of Appeal stated that when considering the objective seriousness of the offence and the relevant penalty:

"To a substantial extent the seriousness of a breach must be assessed by reference to those potential consequences and the measures of evidenced disregard concerning the safety of employees in the circumstances"

The Court of Appeal adopted the position of the Industrial Relations Commissions of NSW in *Workcover Authority of New South Wales v Profab Industries Pty Ltd* where the Commission had stated that the primary factor to look at was the objective seriousness of the offence and that subjective mitigatory factors such as a plea of guilty, co-operation with an investigation or subsequent measures to improve safety must be given a subsidiary role in the sentencing process.

The primary consideration here was, in the view of the Court of Appeal, the fact that the potential risk, for which little perception was required to recognise it, was that someone could be killed or seriously injured.

The Relevance of Prior Offences.

Before the sentencing Judge, the DPP had introduced evidence of a prior OH&S offence

committed in Queensland that lead to a \$3,000.00 fine and an offence in Victoria under the *Environment Protection Act 1980*.

The Court held that prior offences including interstate offences **can** be relevant in the sentencing process. However, the relevance and weight of any corporate history is to be considered in light of the circumstances of the case. Here for example, the EPA offence, was disregarded as possessing minimal, if any, significance.

Action Taken After Incident

Amcor Packaging submitted that mitigatory circumstances included the fact there was no guarding available from the manufacturer, the cost of rectification exceeded \$700,000.00 with an additional per annum cost of \$1,000,000.00 and the new guarding has resulted in significantly greater "down time."

In response, the Court of Appeal said that these submissions in fact "*significantly increased the sense of unease*" it had regarding the circumstances in which the deceased met his death and took these facts as evidence that changes could have and should have been made to prevent this man's untimely death.

Specifically, the Court stated:

"In our opinion, the inference is irresistible that the respondent approached the situation from the viewpoint that as little untoward had happened over a long period of operation, it could be assumed that nothing ever would and therefore that the substantial expenditure and increased operating costs involved in the removal of the danger were not regarded as justified. A degree of complacency based upon the acceptance of that assumption can be seen to have contributed to the death of one of its employees."

Differentiation Between Charges

Whilst the DPP submitted that the Sentencing Judge should have differentiated between the two charges when imposing a penalty, arguing that the failure to guard charge was more serious, the Court held that both charges constituted a serious breach by the respondent of its statutory obligations and that differentiation in this case was unnecessary.

The Court of Appeal stated that sentences representing less than 25% of the available maximum were grossly inadequate. It allowed the

appeal and substituted fines of \$180,000.00 for each offence.

The fines did take into account principles relevant to appeals by the Crown against sentences involving the principle of double jeopardy of twice standing for sentence, which usually resulted in a lesser sentence being imposed than had the sentence been correctly imposed at first instance. However, whilst the Court of Appeal held that these principles would apply to corporate citizens, in this case there was no evidence of the adverse consequences or significant damage to its business or general standing. Therefore, there was limited regard given to the double jeopardy principles.

THE PRACTICAL IMPLICATIONS

The practical lessons for employers include:

- A. Whilst not specifically stating that the company was required to engage independent contractors to conduct risk assessment reports, it was clear that the Court of Appeal was very concerned with the use of “*long-standing employees*” to assess such risks in circumstances where the Court of Appeal thought it would seem clearly beyond dispute that these employees were not qualified to undertake risk assessments and were so accustomed to performing their duties in an unsafe environment that they were oblivious to the risk.
- B. When considering sentencing, whether under the OH&S 1985 Act or the new 2004 Act, the most important factor is the objective seriousness of the offence, which will focus on what the employer did before the incident, not after and general deterrence being of considerable importance.
- C. In the case of serious injury or death, future prosecutions will probably now be handed over to the DPP and pursued in the County Court of Victoria rather than in the Magistrates Court.
- D. Given that the Court of Appeal chose not to differentiate between the two offences, an employer could face multiple charges arising out of what appears to be the same “factual scenario”.
- E. Post incident conduct such as remorse or an early plea will be given relatively little weight in OH&S prosecutions. Therefore, if it is clear that an early guilty plea is being entered, the best time to obtain any benefit from that early plea

may be in negotiating with the VWA or DPP to obtain a withdrawal of some multiple charges.

- F. The Court may, in appropriate circumstances, take into account corporate criminal history during sentencing but the relevance of that criminal history must depend on the facts of each case. Therefore, it is essential that any defendant company and its lawyers are fully informed regarding any corporate criminal history and the circumstances relating to any offences that may be referred to by the prosecutor.
- G. Other sentencing principles may retain relevance in an appropriate case. For instance, a small employer may be able to successfully argue that any penalty should take into account its financial circumstances. However, such an argument will almost certainly not be available to a large employer. Further, having entered a plea of guilty to an offence of failing to take all practicable steps, an employer will almost certainly obtain no benefit from arguing that the cost of such steps was previously regarded as too expensive or unaffordable.

THE FUTURE COST OF A BREACH

Employers need to be aware that the Court of Appeal was dealing with the OH&S Act 1985. The maximum penalty in that case was \$250,000.00 for each offence under Section 21 of the Act. However, since 1 July 2005, the OH&S Act 2004 has been in place and the equivalent offences under the OH&S Act 2004 carry maximum penalties for individuals of **\$188,658.00** and for corporations, **\$943,290.00**.

The principles relevant in this case will almost certainly be carried over in to prosecutions under the OH&S Act 2004. Indeed, had Amcor Packaging been prosecuted under the OH&S Act 2004, adopting the same approach the fines would have been closer to \$690,000.00 for each offence, giving a total of **\$1,380,000.00**.

Any risk of serious injury or death in the Workplace should be reason enough for employers to take action to abate such risks. However, this decision combined with the new OH&S Act 2004 makes it financially imperative that all practicable steps are taken to avoid such risks.

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