DAVID BEATS GOLIATH IN HIGH COURT SHOWDOWN - FEBRUARY 2010

Picture this: experienced postie on his rounds drives his motor scooter knowingly and inexplicably straight through a major highway intersection, where the lights are red. Unsurprisingly he is killed. His employer is then criminally charged for violations of Occupational Health and Safety law.

Impossible you say? How could it be possible that an employer have absolute responsibility for his/her employees? Should an employer face criminal charges when an employee takes actions that are inexplicably reckless and contrary to established safety codes?

Until last week that was effectively the situation under the law in NSW. Rather than employers having a liability that covered all circumstances that were reasonably practicable as is the case in most other states, Workcover had effectively placed the onus on them to prove their innocence of any charges laid. The anomaly of this is that in other criminal matters such as murder or theft the prosecution has to prove "beyond reasonable doubt" that the person charged committed the crime.

To some, especially those in potentially dangerous environments such as building worksites, absolute liability may appear to provide the safest possible workplace.

To NSW employers however, the scenario not only reversed the fundamental common law rule that a person is innocent until proven guilty but also meant that to mount a defence and prove one's innocence, one had to have considerable financial resources, something many small business owners simply don't have.

In effect it meant that when most business owners were charged under the NSW Occupational Health and Safety Act 1983 (OH&S Act) had no choice but to plead guilty. The system overseen by Workcover had all the bearings of a modern day Goliath.

That was until our modern day David entered the fray. David in this case was the CEO of Kirk Group Holdings, Graham Kirk, the owner of a small farm near Picton in NSW, who was prosecuted by Workcover for the death of his close friend and farm manager, Graham Palmer. Mr Kirk was uninvolved in the day to day operations of the farm, had no experience of such, and consequently made a decision to appoint Mr Palmer, an experienced farm manager. At the time of the accident Mr Kirk was severely ill.

On March 28, 2001, Mr Palmer, for reasons unknown to anyone but himself, decided to leave a purposely constructed road on the property and drive his All Terrain Vehicle (ATV), towing long metal rods, down a short cut on a hillside on the property. The ATV, questionably stable at the best of times, overturned and crushed him to death.

In 2003 both Mr Kirk and his company were prosecuted under sections 15 and 16 of the OH&S Act. The charges included that he had failed to ensure Mr Palmer's health safety and welfare at work. Under its interpretation of s15 the Industrial Court of NSW effectively maintained the Workcover premise that employers held an absolute liability for the safety of their staff and others present at the workplace who were not employees.

To add to the difficulties faced by those charged, there was effectively no line of appeal. Section 179 of the Industrial Relations Act 1996 (NSW) prohibits an appeal against a review, the quashing or calling in to question of "a decision of the Industrial Court". Kirk's attempt to have the NSW Court of Appeal review the decision was even derided as "forum shopping" a label Justice Heydon in turn condemned as a "misconception.

Consequently Kirk vs Industrial Court of NSW assumed unusual importance when the High Court granted leave to appeal against Kirk's prosecution and fines totalling $121,000. The court was being asked to reverse a system that had forced some employers into a questionably impossible position of responsibility and the necessity to plead guilty to charges levied.

Section 53(a) of the OH&S Act provides a defence in the context of proceedings against s15 or 16 if an employer can establish it was not reasonably practicable to take the measure which would have obviated the identifiable risk.

However the circumstances of Mr Kirk's case identified how the system had failed him as it had other employers who had been prosecuted. The High Court held that any statement of an offence arising under either s15 or 16 of the OH&S Act had to identify not only the risk but also what the measure the employer could have taken to address the risk, otherwise it would be impossible for a defendant to establish whether it was reasonably practicable to take such a measure. The offences under which Mr Kirk and the company were charged did not identify the acts or omissions which constituted the alleged offences.

Moreover as Justice Heydon noted, " [t]he suggestion that the owners of farms are obliged to conduct daily supervision of employees and contractors – even the owners of small farms like Mr Kirk's – is, with respect, an astonishing one" and "[t]he suggestion reflects a view of the legislation which, if it were correct, would justify...it as being offensive to a fundamental aspect of the rule of law on the ground that it imposed obligations which were impossible to comply with and burdens which were impossible to bear."

In Mr Kirk's circumstances there was also the anomaly that the Industrial Court had allowed Mr Kirk to be called as a prosecution witness against himself in contradiction to s 17(2) of the Evidence Act 1975 (NSW).

In relation to the prevention of appeals, quashing and reviews of decisions of the Industrial Court under s 179 of the Evidence Act, the High Court held that "decision" does not include a purported decision made outside the limits of the powers of the Industrial Court.

Furthermore, Chapter III of the Constitution requires there to be a body in each state fitting the description "the Supreme Court of a State". A necessary feature of a Supreme Court, which it is beyond the power of a State legislature to remove, is the ability to grant relief on account of jurisdictional errors of courts and tribunals of limited jurisdiction. Thus s179 could not prevent the NSW Court of Appeal nor the High Court on appeal from quashing the convictions and sentences of Mr Kirk and the company.

By the time the High Court appeal concluded, it was estimated that $2 million in legal and other fees had been incurred. Seven years of Graham Kirk's life had been spent fighting the charges.

Kirk, a gentle man who had stood strong throughout the nine year ordeal, refused to believe when Chief Justice French handed down a unanimous judgment from the court in his favour. After seeing the written judgment he realised that the matter was finally over and that he was vindicated.

His face flushed and tears welled up in his eyes. After what seemed like a short eternity of gentle sobbing he looked up and quietly uttered, "You just have no idea how much this means to me".

David had indeed slayed Goliath.

Mark Hanna is a Solicitor with Canberra firm David Lardner Lawyers.

David Lardner Lawyers represented Graham Kirk from the original Industrial Court proceedings and was the instructing firm for his appeal to the High Court in 2009.