GREENWAY CHAMBERS

FORESEEABILITY AND BREACH OF DUTY UNDER THE *WORK HEALTH AND SAFETY ACT 2011* (NSW)

A PAPER PRESENTED AT GREENWAY CHAMBERS
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1. This issue was brought to attention by two judgments delivered in 2019:

   a. *Orr v Cobar Management Pty Ltd*, 27 May 2019, a Judgment of Scotting J; and

   b. *Orr v Hunter Quarries Pty Ltd*, 8 November 2019, a Judgment of Russell J.

2. I will come back to the reasoning in those cases later.

3. However, the issue that excites attention can probably be posed as a question in the following terms:

   > Is there a point beyond which the actions of experienced, highly trained workers who put themselves at risk of injury in a manner which is inexplicable or unexpected can be considered not reasonably foreseeable?

4. The context in which this question should be asked is one where the relevant action occurred during the completion of a task, that task involves exposure to risks to health and safety, those risks having been recognised and in respect to which the PCBU has put in place procedures and policies to overcome those risks.

5. The premise is that if the action of the worker was not reasonably foreseeable then it is hard to discern what "reasonably practicable" steps to prevent or minimise that risk could or should have been put in place by the PCBU.

COMMON LAW DUTY

6. A discussion on this topic begins with the description of the breadth of the common law duty owed by an employer to an employee.

7. In *Dunlop Rubber Australia Ltd v Buckley* [1952] 87 CLR 313 at [320] appears the oft quoted judgement of Dixon CJ who endorses the statement of Denning LJ (emphasis added);

> I think that the test for this purpose is substantially the same as a test where the machinery is "dangerous" within the Factories Act 1937. It is "dangerous" if it is such that it may reasonably be foreseen to be a source of injury to people who may be in the vicinity, taking them with all the ordinary infirmities to which human nature is prone. The occupier must realise that not everybody is careful; many are hasty, careless or inadvertent; some are unreasonable, or even disobedient. It may be unlikely that they will act in such a way, but is not only the likely but also the unlikely accident against which the occupier must guard. **He must guard against all conduct which he can reasonably foresee.** The limit of his responsibility is only reached when the machinery is safe for all except the incalculable individual against whom no reasonable foresight can provide – the individual who does not merely do what is unlikely, but also what is unforeseeable, or, at least, not to be foreseen by any ordinary man.

PRE *WORK HEALTH AND SAFETY ACT* CASES

8. Under the prior *Occupational Health and Safety Act (NSW)* there was an onus upon the defendant to prove, as a defence, that it was not reasonably practicable for the defendant to ensure the health and safety of their employees or others. In *SRA (NSW) v Dawson* [1990] 37 IR 110, the Industrial Commission of NSW in Court session, considered an appeal from the Chief Industrial Magistrate who convicted the appellant following the death of a linesman by electrocution. The deceased was a linesman carrying out adjustments to what was then new overhead electrical wiring near the Lawson train station. The linesman was experienced and competent to perform the work required of him. He died when he placed his left foot on one part of the line structure whilst attaching a rope to a live electric wire and thereby creating an earth for the electric current. The employee had available to him other methods of work which would not have exposed him to the same risk. The Commission upheld the appeal and in doing so made the following statement (at page 124):

> It seems apparent on the evidence that no amount of qualified supervision could have prevented the actual movement by Mr McFadyen in placing his left foot on the channel arm; indeed, the evidence is, which we accept, that he did it for some inexplicable reason. That conclusion, however, cannot be determinative of the liability of the appellant, because it needs to be established that it was a relevant failure by the appellant in respect of the supervision provided by it which caused Mr McFadyen to take that fatal step.

9. Further, at page 125 the Commission continues:

> However, the appellant has laid down a procedure or system of work to meet the eventuality of employees working within a certain distance of live wires, namely that they are to be personally and individually supervised by qualified employees. A number of persons at the time in question, at least three including the foreman, was suitably qualified to provide that supervision. The foreman failed to provide such supervision, and notwithstanding the absence of the leading hand, there was no

> redeployment by him of other qualified and available employees; there is no evidence of any causal connection between the absence of the leading hand and the failure by the foreman to adequately safeguard Mr McFadyen in the performance of his duties.

10. Further, still on page 125, the following (emphasis added):

> Our conclusion on the facts is that it is equally consistent for the accident to have occurred by reason of a casual omission by the foreman in the allocation of work to Mr McFadyen and in the supervision of him in the performance of that work. **The appellant, in our view, having laid down a safe system of work, has not done or omitted to do anything causally connected with this tragic accident. What occurred was beyond the employer's control.**

11. In *Genner Constructions Pty Ltd v WorkCover Authority of NSW* (Inspector Guillarte) [2001] 110 IR 57 Industrial Relations Commission in Court session, considered an appeal from two judgments of Kavanagh J, a member of the Commission. The originating prosecutions related to the death of an employee who was struck by a reversing truck engaged in roadwork on the side of a major road. The movement of the truck on the day in question was not in accordance with the usual procedures adopted by the employer. The Commission in Court session dismissed the appeal however in doing so made the following statements at [67] (emphasis added):

> In *WorkCover Authority (NSW) v Kellogg (Aust) Pty Ltd (No. 1)* [1999] 101 IR 239 at [259], it was stated that the practicability of adopting measures directed at addressing a particular detriment to safety required a balancing of the magnitude of the risk and the gravity of the harm likely to result with the sacrifice involved in the measures necessary for a averting the risk. It was, furthermore, observed that it would not generally be practicable to take measures to guard against a detriment to safety that was not reasonably foreseeable. This approach was adopted by the Full Bench of this Court in *Kennedy/Taylor (NSW) Pty Ltd v WorkCover Authority (NSW)* (Inspector Charles) [2000] 102 IR 57 at [82]-[83]. **It may be that, in some cases, it would not be practicable to guard against a detriment to safety occasioned by an appropriately trained and instructed employee departing from a known safe procedure.** This may be so because the risk of the employee failing to follow procedures was not reasonably foreseeable, or on a comparison of the training and instruction required to ensure the employee adhered to those procedures with the risks created. There are limits to the degree of instruction which can be expected to be provided to an experienced employee.

12. This line of reasoning was picked up in *WorkCover Authority of NSW (Inspector Charles) v Kirk Group Holdings Pty Ltd* [2004] 135 IR 166 in which Walton VP states (emphasis added):

> I note that the statement of principle in *Arbor Products* appears to qualify the extent of the duty to the hasty, careless, inadvertent, inattentive, unreasonable or disobedient employee to only that conduct which is "reasonably foreseeable". The use of the words "reasonably foreseeable" in that context should not be construed as introducing an element of foreseeability to the duty owed under s.15, or to limit the risks to safety contemplated by s.15 to only those that are foreseeable (as was proscribed by the majority in *Drake Personnel*). Rather to the extent that the behaviour of careless or disobedient employees may not be reasonably foreseen, that

> is a matter which may properly be raised in relation to a defence under s.53 of the Act. That is, **the unforeseen behaviour of a disobedient employee may well lead to the happening of an event that could not be reasonably foreseen, and therefore, which is not reasonably practicable for an employer to guard against.**

13. Whilst the High Court in its judgment in *Kirk v Industrial Court (NSW)* [2009] 239 CLR 531 does not determine the question of the scope of the statutory duty, finding that other features of the prosecution and the reasons given by Walton VP were sufficient to determine the appeal in favour of Mr Kirk and his company, the decision of the plurality at paragraph 26 has in its tone an underlying criticism. Further, at [120], his Honour Justice Heydon stated:

> Yet another curious feature is found in a section of his reasons for judgment recording various facts which he evidently saw was crucial. The Trial Judge there concluded that Mr Kirk "did not supervise the daily activities of the employees or contractors working on the farm". The suggestion that the owners of farms are obliged to conduct daily supervision of the employees and contractors – even the owners of relatively small farms like Mr Kirk's – is, with respect, an astonishing one. A great many farms in Australia are owned by natural persons who do not reside on or near them, and a great many other farms are owned by corporations the chief executive officers of which do not reside on or near them. The suggestion reflects a view of the legislation which, if it were correct, would justify many of the criticisms to which Counsel for the appellants subjected it as being offensive to fundamental aspects of the rule of law on the ground of imposing obligations which were impossible to comply with and burdens which were impossible to bear.

TWO RECENT DECISIONS

14. In *Orr v Cobar Management Pty Ltd* [2019] NSWDC 224, 27 May 2019, Scotting J considered the prosecution of the defendant company consequent upon a worker in the mine having drowned in an underground sump of water. The employee drowned as a consequence of placing himself in the water of the sump for the purpose of unblocking a drain. The drain having been unblocked caused such water pressure to flow against the body of the deceased that he was unable to extricate himself before drowning.

15. At [177] to [199] his Honour summarises the authorities relevant to the breach of duty of a PCBU. At paragraph 206 his Honour makes the following finding of fact:

> The presence of large bodies of water accumulating in the mine was a rare occurrence. The level of water in the sump at the time of the incident was unprecedented.

16. Further at [207], his Honour finds:

> It was unnecessary to enter the water to unblock the drain hole. This was demonstrated by Mr Hern's first attempt to unblock the drain hole with a scaling bar from the basket of the ITC. ... the first method adopted by Mr Hern presented no hazard to the health and safety of Mr Hern and/or Mr Booth.

17. Further at [209], his Honour finds:

> For the reasons given below, it was not reasonably foreseeable that a worker would deliberately enter a large body of water in order to unblock the drain hole.

18. Further at [211], his Honour finds:

> The defendant did not know that Mr Hern was going to enter the water whilst attempting to complete the task of unblocking the drain hole. Mr Hern had not been instructed to enter the water and only did so to retrieve the scaling bar that he lost in his unsuccessful first attempt.

19. Further at [213], his Honour states:

> I am not satisfied that the pleaded risk was reasonably foreseeable for the reasons that follow.

20. After his Honour had set out a number of those reasons he concludes at [226] as follows:

> Whilst it was "within the limits of imagination" to anticipate that a worker may enter the water or fall into it, I am not satisfied that this demonstrates it was reasonably foreseeable that a worker would do so and thereby be exposed to the pleaded risk. In reality, the workers did not enter water contained in sumps because of the way they were designed. ... I am not satisfied that it was reasonably foreseeable that the workers would enter or fall into large volumes of water in the mine where there was a risk of submersion.

21. Further at [291], his Honour finds for the reasons already given:

> Mr Hern knew of the risk posed by entering the water to unblock the drain hole. I am uncertain if declaring the prohibition would have had any impact on safety in the circumstances. At the time of the incident, Mr Hern was in breach of the defendant's safety system on a number of specific respects. First, he removed his underground PPE. Second, he rode in the IPC basket and alighted from it in contravention of the WiB procedure. Third, he failed to comply with the JSA procedure. I am satisfied Mr Hern was aware that he could be disciplined to the extent of being terminated for these breaches of the defendant's safety system, the first two of which were deliberate. In the circumstances, I am satisfied there was a significant possibility Mr Hern would have gone into water to retrieve the scaling bar even if he had been prohibited from entering the water.

22. And finally at [303], his Honour finds:

> I am satisfied that from the training provided to the workers at the mine that they knew that the work in the mine was dangerous and that in order to prevent risks to their health and safety, that it was essential that they complied with the procedures they had been trained in.

23. In *Orr v Hunter Quarries Pty Ltd* [2019] NSWDC 634, his Honour Judge Russell considered the prosecution of the defendant quarry with regard to the death of a worker at the quarry. The worker had been operating an excavator when that excavator rolled over and crushed the worker inside the cabin. The worker (Mr Messenger) died as a

result of the injuries he sustained. The excavator rolled when it was being operated on uneven ground. Mr Messenger, it was found, had, shortly before his accident taken steps with regard to the operation of the excavator which were contrary to well-known safety procedures put in place by the defendant.

24. His Honour as part of his reasoning at [342] states as follows:

> While a person conducting a business or undertaking must guard against the possibility that an employee may be careless or inadvertent in carrying out a task, there is a line to be drawn between such behaviour and the deliberate and unforeseeable flouting of rules in the workplace and the training given to employees. On all the visits by inspectors to the quarry, and in the experience of all employees of the quarry who gave evidence, no-one had ever seen an excavator being operated after driving across a bund; in a no-go zone; across a slope; on unstable ground; or with the boom fully extended near a high wall.

25. At [343]:

> All of these matters lead me to conclude that the risk of death or serious injury from the excavator overturning on the day of the accident was not reasonably foreseeable. It follows that it was not reasonably practicable for the defendant to take provision against the happening of such an event.

26. Further at [349], his Honour states:

> There was no Risk Assessment conducted of the potential for the excavator to overturn when working on the rocky unstable ground, where the accident occurred on 9 September 2014. This was because no-one knew nor could they have foreseen, that Mr Messenger would have operated the excavator in that location, in the fashion which he did.

27. Further at [353], his Honour states:

> The evidence shows that the defendant did have adequate work procedures for assessing any potential for the excavator to overturn, requiring the work to be done in a fashion which eliminated the risk of the excavator overturning. Operators had been taught to adopt measures to eliminate the risk of the excavator overturning. Those measure were observed and enforced within the quarry.

28. Further at [356], his Honour found:

> I have previously found that the way in which Mr Messenger was operating this excavator on the day was against all instruction and training of which he had been provided. Again, it was not foreseeable to the defendant that Mr Messenger would have acted in this fashion. I find that, in any event, adequate information, instruction and training had been provided to all excavator operators by the defendant and thus there was no failure to ensure a safe system of work in that respect.

29. It remains to be seen, and will be of some considerable interest, if the approach taken by these recent cases survive the scrutiny of the Court of Criminal Appeal. However, at the moment, they reflect the views of two of the three judges of the District Court who are dealing with matters pursuant to the *Work Health and Safety Act*.

30. Plainly, in the reasoning of their Honours Judge Scotting and Judge Russell, the answer to the question I posed at the beginning of this paper is “yes”. In other words there is a point beyond which the actions of experienced, highly trained workers who put themselves at risk of injury in a manner that is inexplicable or unexpected can be considered conduct that was not reasonably foreseeable.

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