MAGISTRATES COURTS OF QUEENSLAND

CITATION:	*Guilfoyle v AP* [2021] QMC 6
PARTIES:	**Aaron John GUILFOYLE (Work Health Safety Prosecutor)** (Complainant) **v** **AP** (Defendant)
FILE NO/S:	MAG-00021741/21(3)
DIVISION:	Magistrates Courts
PROCEEDING:	Sentencing Hearing
ORIGINATING COURT:	Beenleigh Magistrates Court
DELIVERED ON:	17 September 2021
DELIVERED AT:	Beenleigh Magistrates Court
HEARING DATE:	17 September 2021
MAGISTRATE:	T. E. Mossop
ORDER:	**Sentence Order, with Reasons**
CATCHWORDS:	Work Health & Safety prosecution – Breach of Duty Category 2 offence – using a forklift with platform not securely fitted per Australian Standards – friend helping electrical contractor (defendant) replace an air-conditioning unit – injury – platform fell from a height – Sentencing factors for first time offender *Work Health & Safety Act (Qld) 2011, ss3(1)(a)&(2), 7, 16, 17, 18, 19(1)&(3), 32* *Wong v R (2001) 207 CLR 584* *Markarian v R (2005) 228 CLR 357* *Steward v Mac Plant Pty Ltd and Mac Farms Pty Ltd [2018] QDC 20* *Comcare v Commonwealth of Australia [2007] FCR 207* *Workcover Authority of New South Wales (Inspector Farrell) v Schrader (2002) 112 IR 284*

Safe Work NSW v Chemstore Group Pty Ltd [2019] NSWDC 598

SOLICITORS: Complainant represented by J M Henderson, Office of the Work Health and Safety Prosecutor

Defendant Represented by Liam Dollar, Counsel instructed by Raniga Lawyers

Ignorance, Injury, and Investigation

[1] What seemed like a simple task of an air-conditioning mechanic replacing an air-con' unit at a business premises [for a modest financial reward, with some assistance by his friend, using a forklift with attached work platform provided by another] became an incident involving ignorance, injury and investigation. If only the "i's" had been as dotted as the last five substantive words at the end of the previous sentence, figuratively speaking, this decision would not exist.

[2] The unsecured work platform placed on forklift arms (or times as they are properly named) raised to a height of some metres to enable the air-con' replacement task to be carried out, ended up falling some 4 metres. Working from it at that time was a friend of the Defendant who was helping the Defendant that day. That friend was a worker in accordance with section 7 of the *Work Health and Safety Act 2011* (WHS Act). He sustained injury, namely lacerations and a dislocated shoulder, which required medical attention.

[3] The Defendant, AP *(identified by his initials for the purposes of providing this precedent case to assist in any future prosecutions of a like nature)*, was a self-employed air-con' mechanic. He failed to comply with his health and safety duty set by section 19 of the WHS Act, which is an offence under section 32 of the same Act. As a person conducting a business or undertaking, AP failed to ensure, so far as reasonably practicable, the health and safety of a worker engaged by him while the worker was at work. And this failure exposed that worker to a risk of death or serious injury.

[4] The incident occurred on 19 December 2019. The first court mention was 12 March 2021.

[5] A plea of guilty was entered at the third mention on 29 July 2021. It is considered to be an early and timely plea given the prosecution also discontinued a second charge on that day. The matter had one Covid lockdown related adjournment before proceeding to sentence hearing on 17 September 2021. Sentence was pronounced but written reasons were reserved for the purpose of publication, to assist in providing a comparative source for an area of law where this is lacking.

Statement pf Facts and Particulars

[6] AP operated a business and held a Queensland Building and Construction Commission trade contractor licence of the class "Refrigeration, Airconditioning and Mechanical Services including Limited Design."

[7] AP agreed to provide an installation service at a customer's business premises. Under AP's instruction the customer had purchased the intended replacement air-

con' unit. That unit was for an office on an enclosed mezzanine floor that took up a small section inside a large industrial style shed. This meant the task of replacing the air-con' unit required some raised structure to attach necessary air-con' elements to the outside wall of that second storey, internal office structure.

[8] To help with the installation, an employee of a neighbouring business brought over a forklift (also know as a reach truck) with a work platform sitting on the forklift tines. Unfortunately, the work platform was not secured in any way. The platform consisted of a flat floor with metal cage style walls and hinged door, which opened inward. It weighed 70kg. It did not have tine pockets to secure it to the forklift tines. It did it have any form of harness to secure the platform, or person using it, to the forklift. Nor was there any clamp system in use.

[9] Australian Standards have requirements for such platforms that include fork tunnels or the use of clamps. These requirements ensure the platform is secured to each of the two forklift tines, to avoid the platform falling off the tines. The set up on this day very clearly did not comply with the Standards in any way.

[10] Standards also apply to persons operating or elevating such device. Those Standards relate to persons understanding the lifting capabilities of the forklift and checking compliance with the secure attachment standards.

[11] Neither the customer nor AP's friend were qualified or trained to operate the forklift. The friend had never operated one before.

[12] The forklift and platform were raised and lowered three times in total. Firstly, with the customer operating the forklift with AP on the platform, then a second time and third time in the absence of AP (who went to attend to other work tasks from within the office). For those latter two lifts, the customer raised and lowered AP's friend (at that friend's request) to allow the friend to work on related pipe work. It was after the second raising of AP's friend that the customer went to take a phone call from his office. This then left AP's friend working on the raised platform totally unsupervised. The friend moved to stand to one side of the platform and for some reason, he looked down over the side of the platform. It was then that the platform toppled off the forklift tines. Both platform and person hit the concrete floor. Upon hearing a yell, the customer returned from his office and found the injured worker.

[13] The friend's injuries (from falling from a height of around 4 metres) included a cut to a lip, a 15cm long by 5 cm deep laceration to his lower left leg, bruised ribs, and a dislocated shoulder. He was subsequently treated at the PA Hospital.

[14] A Work Health and Safety investigation subsequently commenced.

[15] AP had failed in his duty to ensure as far as was reasonably practicable the provision of:

(a) Safe plant and structures;
(b) Safe systems of work;
(c) Information, training, instruction or supervision necessary to protect persons health and safety from work carried out as part of the conduct of is business or undertaking.

[16] AP would not have so failed if he had complied with Australian Standards relating to work platforms. Instead, he permitted the use of an unsafe platform and allowed untrained, unsupervised persons to operate and use the forklift and platform.

[17] The risk of injury from a potential fall whilst working at such a height should have been identifiable and known to AP.

[18] Australian Standards explicitly state requirements for the use of forklifts and work platforms, to prevent any risk of harm.

[19] The risk of harm was serious, including possible death or serious injury.

[20] AP had the means to implement necessary safety measures, the cost of which would not grossly disproportionate to the risk.

[21] By his failure to comply with his duties, AP exposed both himself and his friend to a risk of death or serious injury, with his friend sustaining actual injury.

Legislation and Penalties that apply

[22] Section 3(1)(a) & (2), 7, 16, 17, 18, 19(1) & (3) and 32 of the Work Health and Safety Act 2011 contain the relevant provisions referring to the legislature's purpose, duties imposed, relevant definitions that apply and categories of offences.

[23] Categories of offending referred to in the WHS legislation are: -

(a) Category 1, section 31, the most serious category of offending is when an offender engages in conduct, without reasonable excuse, which exposes an individual to a risk of death or serious injury or illness and is reckless in that regard.
(b) Category 2, section 32, is when the offender, fails to comply with a health and safety duty, exposes an individual to a risk of death or serious injury or illness.
(c) Category 3, section 33, is when the offender fails to comply with a health and safety duty.

[24] AP's offending fell within Category 2.

Sentencing Principles

[25] When sentencing on WHS matters, legislation and caselaw set out principles and factors that apply. Some of these factors are echoed.

[26] The governing approach is that there must be a consideration of all relevant features of the offending to determine an appropriate penalty, an approach of instinctive synthesis. Wong V R (2001) 207 CLR 584, at page 611, and Markarian v R (2005) 228 CLR 357.

[27] Using this approach regard must then be specifically had to sentencing factors contained within the Penalties and Sentences Act 1992 (Qld) including: -

(a) General deterrence;
(b) Maximum penalty;
(c) Nature and gravity of the offending;
(d) Blameworthiness;

(e) Injury sustained;
(f) Mitigation – such as a lack of any prior offending, early guilty plea, co-operation
(g) Defendant's capacity to pay a fine, as balanced with the penalty to be imposed which must still be reflective of the objective seriousness of the offence.[1]

[28] State Caselaw principles identified by Judge Fantin in Steward v Mac Plant Pty Ltd and Mac Farms Pty Ltd [2018] QDC 20 include: -

(a) Potential consequences of the risk;
(b) The probability of the risk;
(c) The availability of steps to lessen, minimise or remove the risk;
(d) Whether those steps would have been complex and burdensome or mildly inconvenient;
(e) The particular offence in the context of penalties imposed by legislation.

[29] Further, Comcare v Commonwealth of Australia [2007] FCR 207 also provides a helpful guide including: -

(a) the penalty must be such as to compel attention to occupational health and safety generally to ensure workers will not be exposed to risks;
(b) it is a significant aggravating factor that the risk of injury was foreseeable even if the precise cause or circumstances of exposure were not;
(c) further aggravation if the risk of injury is actually foreseen and an adequate response is not taken by an employer
(d) the gravity of the consequence of the accident does not itself dictate the seriousness or amount of penalty but may manifest the degree of seriousness of the detriment to safety
(e) systemic failures are more seriously viewed than an exposure by inadvertence and momentary lapse of supervision;
(f) general personal deterrence;
(g) precautions, vigilance, proactivity which set the level of diligence demonstrated by an employer is a relevant consideration in mitigation;
(h) applicable maximum penalties;
(i) neglect of simple, well-known precautions to deal with a risk of injury make matters worse;
(j) the objective seriousness of the offence may alone call for the imposition of a very substantial penalty to vindicate the social and industrial policies of legislation and its regime of penalties.

Sentencing Submissions

[30] The WHS Prosecutor sough a fine in the range of $30,000 to $45,000 in the absence of any actual knowledge as to the defendant's financial situation. The WHS Prosecutor classified the offence as being a Category 2 offence.

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[1] WorkCover Authority of New South Wales (Inspector Farrell) v Schrader (2002) 112 IR 284 at 309; and SafeWork NSW v Chemstore Group Pty Ltd [2019] NSWDC 598 at [84]

[31] Defence Counsel submitted $20,000 fine and tendered independent evidence supporting Defendant's limited financial capacity to pay a fine.

[32] Both prosecution and defence made specific comment on the limited availability of sentences delivered or recorded for WHS prosecutions in Queensland. Written reasons in support of this sentence are now provided to assist both prosecution and defence in that regard.

[33] The WHS Prosecutor relied upon SafeWork NSW v Ru Dong Li [2018] NSWDC 189. The defendant in that case installed security systems. He used a friend to help him on a job. The friend fell some 2.4 metres from an extension ladder whilst attempting to drill a hole in a wall. He sustained what later proved to be fatal head injuries in addition to fractures to his jaw, shoulder and hip. The offence was a category 2 offence, a breach of duty exposing an individual to risk of death or serious injury. The defendant was fined $60,000.

[34] Defence Counsel provided a case of SafeWork NSW v B & J Benchtops Pty Ltd [2019] NSWDC 674. Whilst that case involved a different duty and offence, it involved a breach of duty concerning a forklift in circumstances and the same maximum penalty applied. The personal defendant (as opposed to the corporate entity co-accused), one Michael Herbert, was fined $15,000.

[35] Both cases provided some valuable assistance in the mix of sentencing considerations.

More about the Defendant AP

[36] The Defendant AP was a Fijian migrant living in Australia some 32 years. He was 53 years old at sentence. He lived with his wife and their two children, who were both dependant university students.

[37] At 25 years of age, AP obtained a trade qualification in air conditioning. He worked full-time in that industry. For the last 15 years before this incident, his first WHS incident, he worked as a sole trader.

[38] Unsurprisingly, he had no prior criminal convictions and is a valuable contributing member of society. He engages in voluntary charitable assistance (within the practice of his religion) and makes regular monthly financial donations to both the Mater Children's Fund and Fred Hollows Foundation.

[39] He maintains a friendship with his injured friend after the incident.

[40] In defence submissions, AP had both seen and used the same forklift and platform on an earlier occasion, for and at that neighbouring business to whom the forklift and platform belonged.

[41] AP did not hold a forklift licence. It is clear AP had a misplaced reliance upon others providing the forklift and wrongfully made uninformed assumptions that disregarded safety and his duties in that regard. His breach was inadvertent, based on ignorance as opposed to a deliberate disregard for safety.

[42] The fee AP had quoted for the installation task was only $350 to $400.

[43] The WHS incident resulted in AP surrendering his licence and no longer trading. Since then, he has remained unemployed and without savings. His family home is estimated to be worth about $400,000 but subject to a modest mortgage. Exact figures or evidence in this regard were not proffered but came from Defence assertions that were not challenged by the Prosecution.

[44] Taxation returns for the last 5 years show AP as having a decreasing income ranging from $39,770 in 2016 until an income of just $2861 in 2020. That final income amount reflects the cessation of operation of the Defendant's business.

[45] AP's wife is a qualified nurse working in aged care and is now the main income earner receiving about $1,700 a fortnight on a $26 per hour pay rate. The Court was not informed as to whether this is gross or net, and again this was the subject of unchallenged assertions.

[46] References were tendered in support of the defendant's good moral character.

Sentencing Synthesis

[47] Any reasonable person using equipment supplied by another to undertake work, particularly where additionally, there are other persons assisting in that work task who are also using such borrowed equipment, has a clear duty to ensure that their personal safety duties are not compromised at the risk of injury or death to themselves and others. In addition, leaving any subsidiary worker in control of borrowed equipment, in the absence of any specific training, prior knowledge or supervision as to the use of such equipment, naturally increases the risk of mishap and harm.

[48] A large fine, comparative to financial means, for breaches of safety obligations should act as both general & personal deterrence for any persons engaged in work for modest financial reward. When monetary penalties are considered for first time WHS offenders, from the few relevant cases that do exist in that jurisdiction, a starting point for the fines issued seem to range from 5 to 10% of the maximum fine. This is not to suggest there is a formula but is merely an observation of where penalties fall when mitigating factors also feature. The penalty, in the context of maximum penalties and capacity to pay a fine, is one that must be objectively viewed as compelling a tradesman operating a business to regard the health and safety of others implicated in their work. In other words, fines for breaches of duty over and above any civil claims or personal remorse, add an extra layer of implication and consequence that should cause those with safety duties to make a real effort to abide by them.

[49] The offending in this case had the capacity to cause far greater adverse consequences than what occurred. For a person to be raised to a height of around 4 metres over a concrete floor where the risk of the work platform toppling was real, then serious injury or even death was a real risk.

[50] The Defendant did not have regard to those risks at all and left untrained and unsupervised persons using equipment that did not comply with safety standards.

[51] It is clear the Defendant even failed to act in his own personal interest when he also used the same dangerous equipment set up. His actions were negligent and careless, they were not deliberate and reckless.

[52] Because of his negligence, AP's friend was injured. These injuries as an actual outcome were, thankfully, less serious than the potential consequences of the risk.

[53] The probability of the unattached platform falling off the forklift tines was high but not certain given the few other times it was raised, used and lowered without incident. Just because unsafe practices occur without incident does not alleviate the risk but may lead to a false sense of security detracting from the risk.

[54] To comply with his duty, the Defendant had choices that would have somewhat increased the customers costs, by hiring an appropriate forklift and platform set up or a scissor lift as opposed to blindly trusting the loan of equipment from another. The latter was obviously easier and had no additional expense attached to it. It would not have been an issue if that borrowed equipment had complied with Australian Standards. Any increased costs for a safe work platform to be used at a raised height would not have been onerous when balanced with safety. Addressing this issue would not have been complex or burdensome but simply been an added necessity of mild inconvenience.

[55] The current breach of duty was not a systemic failure but was inadvertent, making it less serious in the scheme of breach classifications. The failings of AP can be attributed to a lack of vigilance, proactivity and diligence when using equipment he did not commonly use. That does not excuse his offending behaviour but puts it into context. His failings related to factors within the scope of his work and there are actions he should and could have taken.

[56] AP provided some co-operation with the WHS investigation. He was not obstructive in the investigatory process and entered an early guilty plea. He clearly had in his favour the factor of no prior offending history.

Sentence

[57] On 17 September 2021, the Defendant was fined $20,000, a sum that is not insubstantial nor manifestly excessive when having regard to his circumstances.

[58] Costs and outlays sought by the prosecution were also deemed reasonable and did not unfairly increase the total monetary punishment to be suffered by the Defendant. Professional costs of $1000 and outlays of $99.70 (for the court filing fee) were also ordered.

[59] The fine, costs and outlays were referred to SPER (*State Penalties Enforcement Registry*) for registration and collection.

[60] A conviction was not recorded, due to absence of any prior offending history over the duration of a relatively lengthy period of business operation.