

MANAGE RISK—OR BAN IT?

When it comes to working with danger, how much is too much, ask Grant Nicholson and Charlotte Hatlauf. They examine a recent case which suggests that if a risk cannot be properly managed, work should not proceed.

PEOPLE WORKING IN DANGEROUS industries are often fatalistic about the risks they face. But is this acceptable? The High Court has recently considered whether there may be circumstances in which the potential harm to people carrying out employment tasks is so severe, the risk of harm is so high, and the costs of ensuring a safe work environment are so prohibitive, that those tasks should not be carried out.

Martin Simmons Air Conditioning Services Ltd specialises in supplying and maintaining air conditioning units (often located on the roofs of commercial buildings). In 2007, the company was prosecuted for failing to take all practicable steps to provide and maintain a safe working environment after an accident where an employee of the company was killed in a fall after a fibrolite roof gave away beneath him.

Martin Simmons had been concerned about the stability of fibrolite roofs for some time. All employees had been instructed to use internal gutters to access the

rear unit and to walk on the nail lines on the roof when accessing the front unit. An employee failed to follow these instructions and walked on the fibrolite roof in an attempt to access the back unit for maintenance. Unfortunately, the roof gave way and the employee fell 8.1 metres to the ground and later died.

The District Court held Martin Simmons failed to take all practicable steps to provide a safe work environment because it did not arrange a cherry-picker for workers to access the front air conditioning unit. The Court fined Martin Simmons \$60,000 and ordered reparations of \$45,000.

Martin Simmons appealed the decision to the High Court, claiming it was not clear that using a cherry-picker was affordable. The High Court disagreed, and held that a cherry picker was available and the cost was not prohibitive.

In addition, Martin Simmons claimed that it could not be proved beyond reasonable doubt that the use of the cherry-picker

was likely to have prevented the accident, because the cherry-picker would have only provided access to the front unit and the accident occurred on the rear unit. The High Court said whether hiring the cherry-picker would have prevented the accident was irrelevant.

The offence under section 6 does not require a person to suffer from any particular harm (although practically speaking it is usually an accident that triggers an investigation by the Department of Labour), and it is the failure to take all practicable steps to provide a safe working environment that constitutes the offence. The harm suffered by a person only becomes relevant at the sentencing stage.

While this case mostly reaffirms principles that have become well-established under current health and safety legislation, it is interesting for a wider audience because the High Court was also asked to reconsider the District Court's view on assessing cost as part of risk management.

The District Court Judge had

said that "Alternatively, if the cost is not acceptable, the risk should be avoided altogether," a proposition with which the High Court agreed.

This is an important decision for businesses involved in dangerous work. The law has traditionally not sought to ban risk, and instead has compelled businesses to manage it as best they can. The definition of reasonably practicable steps in the Health and Safety in Employment Act specifically recognises cost as a factor (but not the only factor!) in deciding whether a particular protection is required.

Until now, even when potential harm is severe and the associated risks high, if the cost of mitigating a hazard is prohibitive the work could arguably still proceed. That has now changed. If a risk cannot be properly managed then, if business does not want to risk prosecution, work should not proceed. **ct**

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