

**MAGISTRATES COURT OF SOUTH AUSTRALIA
(INDUSTRIAL OFFENCES JURISDICTION)**

HILLMAN, Roger

v

AREA CONSTRUCTION LABOUR SERVICES PTY LTD

JURISDICTION: Prosecution

FILE NO/S: 3146 of 2009

HEARING DATES: 11 September 2009

JUDGMENT OF: Industrial Magistrate SM Lieschke

DELIVERED ON: 20 October 2009

CATCHWORDS:

Prosecution - Guilty plea - Fall from ladder by window cleaner - Failure by employer to ensure so far as reasonably practicable the safety of its employee - Failure to provide a safe system of work - No hazard identification and risk assessment for task of cleaning 7.5m high windows - Failure to provide safe means of access to windows - Defendant failed to comply with its written policy - Rubber feet of 6m extension ladder placed on piece of carpet to avoid marking new timber floor - Defendant provided the carpet - Ladder not lashed at the top or secured by any other means - Ladder slipped on the carpet causing employee to fall - Employee suffered severe brain and physical injuries - Compensation award to employee's wife factored into penalty - Held: Conviction recorded - Fine of \$40,000 after reduction of 25% for contrition and plea - Compensation of \$10,000 awarded - S 19(1) Occupational Health Safety and Welfare Act 1986, S 53 Criminal Law (Sentencing) Act 1988.

REPRESENTATION:

Counsel:

Complainant: Ms C Shanks
Defendant: Mr M Crawley

Solicitors:

Complainant: Crown Solicitor's Office
Defendant: Piper Alderman

- 1 On 1 May 2007 Jamie Castro suffered severe physical and brain injury after falling about 4.5 metres from an extension ladder. He had been provided a 6 metre extension ladder to clean 7.5 metre high windows. The feet of the ladder had been placed on a piece of carpet to avoid marking a new floor. The carpet slipped and caused the ladder to fall.
- 2 Mr Castro's employer Area Construction Labour Services Pty Ltd ("ACLS") provided the carpet for this purpose and did not provide any other means for him to access the high windows.

The Charge

- 3 Following an investigation by SafeWork SA ACLS was charged with one breach of s 19(1) of the *Occupational Health Safety and Welfare Act 1986* for failing to ensure so far as was reasonably practicable that Mr Castro was safe from injury at work.
- 4 The particulars to the charged offence are as follows:
 1. That at all material times ACLS carried on business as a specialist cleaning contractor.
 2. ACLS was contracted by Romaldi Constructions Pty Ltd to undertake the cleaning of windows and frames of newly built commercial premises in Mawson Lakes.
 3. On 1 May 2007 Mr Castro, an employee of ACLS, was exposed to a risk of injury and was injured while using an extension ladder placed on a piece of carpet.
 4. ACLS failed to provide and maintain so far as was reasonably practicable a safe system of work in that it:
 - (a) failed to undertake a hazard identification and risk assessment in relation to the task of cleaning windows at height on the site, and
 - (b) failed to provide Mr Castro with a safe means of accessing the windows that needed to be cleaned.

- 5 ACLS has pleaded guilty and is now to be sentenced.

Circumstances of the offence

- 6 Jamie Castro was then 40 years old and married to Vivian Castro with three young children. He had worked for ACLS or a related entity for twelve years. He was employed as a supervisor, although he was

assigned to perform this particular job on his own. He was a qualified operator of scissor lifts and knuckle booms.

- 7 The defendant company ACLS was formed in 2005 and is effectively a family owned and run business. Its two directors are Roberto and Anna Simmons. Mr Simmons has been involved in the commercial cleaning industry for fifteen years. The core business of ACLS is providing domestic and commercial cleaning services including for construction sites. It has between 20 and 30 employees and subcontractors plus administrative staff at any given time.
- 8 ACLS's letterhead states its other areas of activity include the hire of "General Labour, Traffic Controller, Safety Officer, Working Platform Operator, Forklift Operator, Site Amenities Maintenance and Final Cleaning".
- 9 The task that Mr Castro had been assigned was to clean up all surfaces including windows of newly constructed café premises in readiness for handover to the occupier. A new timber floor had been laid and internal carpentry fit out was taking place at the time.
- 10 Mr Simmons had previously attended the site for the purpose of quoting for the job. ACLS's cleaning fee was \$5,060. The quote specifically stated: "ACLS to provide access to high windows". Mr Simmons had been told to ensure that any equipment used by him did not mark the inside floor. Mr Simmons determined that the exterior windows would be cleaned by use of a scissor lift.
- 11 On the day before the incident Mr Simmons discussed the job with Mr Castro, including how to protect the floor by use of a piece of carpet under the feet of the ladder. Mr Castro said he had a piece of carpet that could be used. As it was, Mr Castro's van was being serviced that day and so Mr Simmons attended the site before Mr Castro arrived and dropped off various pieces of equipment including the extension ladder and two pieces of carpet.
- 12 When on site Mr Castro extended the ladder to its full six metre length. The top ends were padded and taped so they would not scratch the glass or other internal surfaces. He was using cleaning equipment with a standard length pole handle.
- 13 After Mr Castro performed some work that morning he spoke to the Romaldi site supervisor and indicated that he would like to bring scaffolding in to complete the windows. The supervisor said that would be satisfactory so long as the scaffolding had rubber wheels and did not mark the floor. It is not known if Mr Castro attempted to arrange scaffolding or decided against it as he continued to use the ladder for his work and he did not contact Mr Simmons. I accept that if he had done so

ACLS “would have investigated how to make it happen”, as Mr Simmons explained.

- 14 When he fell Mr Castro was attempting to clean a pane between 6.2 and 7.5 metres high.
- 15 The feet of the ladder were placed on top of a small piece of carpet. One witness suggests the softer side of the carpet was placed directly onto the wood, whereas other evidence suggests the carpet may have been placed soft side up. Whilst it is not necessary to resolve that dispute I accept it is likely that Mr Castro would have placed the side with the appearance of greater friction closest to the timber as neither side of the carpet was likely to scratch the floor surface. Nothing turns on this as it is not disputed that placing the ladder on either side of the carpet on top of a smooth wooden surface would impair its stability.
- 16 Based on the height of the ladder, together with its angle to the wall and the fact that Mr Castro would not have been standing on the top few rungs, I infer his feet were between 4.5 to 5 metres above ground level when the ladder started slipping.
- 17 A witness who was working in the same area described Mr Castro’s fall in the following terms:

“I didn’t hear anything but as I looked up and saw the ladder sliding down and the person was half on the ladder and half off. He had one leg through the centre of the stiles and as he hit the ground I noticed that his legs were wrapped between the ladder.

...

When I saw the ladder sliding down what I meant was that it slid out from the bottom like it had come out from underneath him. It didn’t tip backwards.

....

I then went to him. I had now idea what to do as I have no first aid experience. I called out to him and got no response. His eyes were rolled back and he looked like those people who are unconscious or knocked out.”

Consequences for Mr Castro

- 18 Immediately after the fall Mr Castro was unconscious and bleeding through his mouth and eyes. An ambulance was called and conveyed him to hospital for emergency treatment.
- 19 The injuries sustained by Mr Castro have been catastrophic and devastating to him and his family. He sustained multiple skull fractures

and underwent two operations to relieve pressure on his brain. He also suffered five broken ribs, a broken clavicle and scapula, fractures to six spinal vertebrae, spondylolisthesis at L5/S1, and a fractured leg. His treatment was complicated by pneumonia and a set back due to significant cerebral infection. He has suffered a high level of permanent brain damage resulting in a range of impairments including: cognitive impairment; loss of vision; loss of speech and functional communication; epilepsy; and poor mobility. This has resulted in a complete disruption of all personal relationships. Mr Castro is currently living in a supported residential care facility as his family is unable to provide all the care he requires. He also requires long term, if not life long, structured therapy. Mr Castro is in receipt of workers compensation benefits.

- 20 Mr Castro's family has also suffered a great deal of psychological trauma, as detailed in a statement from Vivian Castro.

A foreseeable and preventable risk of injury

- 21 It is obvious there is a risk of serious injury or death from a person falling from near the top of a six metre extension ladder.
- 22 It is obvious that a six metre extension ladder that is not secured in any way at the top may slip and fall.
- 23 It is obvious that a six metre extension ladder that is placed at an angle less than vertical, on a small piece of carpet on a smooth surface has impaired stability and may slip and fall.
- 24 It is starkly obvious that a person working at the top of a six metre free standing ladder that is not in direct contact with the floor, is in danger of falling and suffering serious injury or death.
- 25 These were the dangers presented to Mr Castro by this method of work.
- 26 In addition to these risks being obvious, the relevant Australian Standard 1892.5 – Portable Ladders spells this out by providing in paragraph 2.4:

“Ladders should be placed on a firm and level footing. Ladders should not be used on slippery surfaces unless suitable means to prevent slipping are employed. Stiles are not to be supported by boxes, loose bricks or other loose packing or unstable surfaces. Non self supporting ladders should be lashed. Where lashing is impracticable other precautions should be taken so as to eliminate the risk of ladder movement.”

- 27 The standard also requires that feet of ladders are to be made of material that will resist slipping.

- 28 ACLS had previously considered the hazards and risks associated with window cleaning by use of ladders. In June 2005 ACLS adopted a 'Health and Safety Policy and Procedure' document. This must have been the product of some identification of the relevant hazards and of some attempt to devise appropriate risk control measures. Regrettably the policy was not applied to this job.
- 29 The policy does correctly identify the risk of falling from heights while using ladders for cleaning windows. It notes the risks from failing to secure a ladder and from failing to place a ladder on a firm level footing. The policy suggests considering other options for working at heights including scaffolding, scissor lifts and elevated work platforms. It suggests that ladders be secured by using hooks, chains or similar means. The policy does not however establish any safe operating procedures for window cleaning at heights and is expressed as recommendations only.
- 30 Despite the existence of this policy document there was no hazard identification and risk assessment of this particular job, and specifically of the use of this unsecured ladder on a piece of carpet on a smooth surface to access high windows, despite the defendant's actual knowledge that this was the system of work that was to be used.
- 31 Mr Simmons further indicated that he was aware of the concept of risk assessments as he indicated that on other Romaldi sites he had seen Romaldi's own risk assessment forms that covered the work ACLS was to perform. He did not know if Romaldi had prepared one for this cleaning job.
- 32 Despite ACLS's awareness of the significant dangers of falling from extension ladders, and of reasonably practicable measures that could be used to eliminate or reduce such dangers, a narrow focus on avoiding damage to the floor appears to have been the primary consideration when deciding upon the system of work to be employed.
- 33 The result of this unacceptable complacency as to the safety aspects of the system of work for accessing high windows was to expose Mr Castro to the danger that eventuated.
- 34 Any reliance on the employee Mr Castro, to raise a concern about a lack of safety or to specifically object to risk taking is not an acceptable approach irrespective of how much experience he had.
- 35 ACLS suggested that a scissor lift or platform vehicle was not suitable for such indoor cleaning work. I reject that suggestion as mechanised lifting equipment that can pass through a single doorway is readily available for hire and could have been used on this job. That however is not a relevant consideration to penalty because there is no dispute that an unmechanised mobile scaffold could readily have been erected inside the

premises without damaging the floor, and that such equipment was available.

- 36 The complainant does accept that in some circumstances use of an extension ladder may be appropriate if other safer means of access are not reasonably practicable, but provided a ladder is appropriately secured, even if only by a second person holding its base. This concession does not necessarily extend to working on a 6 metre ladder and certainly not to the use of carpet pieces.

Defendant's response

- 37 ACLS responded to the incident by banning the use of extension ladders for window cleaning and by devising a new system whereby risk assessments are performed for each specific job. Its safety induction process has also been improved. I accept that ACLS is unlikely to breach the Act again if its new systems are maintained in practice.
- 38 Mr Castro was a personal friend of Mr and Mrs Simmons. They have expressed their deep regret and contrition to Mr Castro for their responsibility for his present circumstances. They have provided a high level of personal support to Mr Castro and his family whilst he was in hospital and subsequently. This included the following financial support: a payment to Mrs Castro of \$2,000; paying a \$750 car repair bill for her; contributing \$2,000 towards the expenses of Mr Castro's parents and paying air-fares for his father-in-law in respect of their travel from Chile following the incident. Mr Simmons has also taken him to visit other colleagues on different worksites and to some soccer matches.
- 39 ACLS co-operated fully with SafeWork's investigation and later entered an early guilty plea. For its demonstrated contrition I will reduce the fine I would have otherwise imposed by 25%.

Claim for compensation by Vivian Castro

- 40 Mrs Castro has made application under s 53 of the *Criminal Law (Sentencing) Act 1988* for compensation for her injury, loss and damage resulting from the offence. Injury is defined in this context by s 3 to include shock, grief and distress. Some particulars of the adverse emotional and psychological impact on Mrs Castro have been provided to the court but will not be summarised due to privacy considerations combined with a lack of objection by ACLS to the application. Mrs Castro's losses include initial economic loss resulting from having to give up work for three months after the incident to care for Mr Castro.
- 41 Based on the limited evidence provided I conclude that Mrs Castro has suffered loss and damage as contemplated by s 53 and that it is appropriate to make an award of \$10,000 compensation.

42 In view of the considerable financial support already provided by ACLS to the Castro family I will reduce the fine to be imposed on ACLS by the same amount of this award.

Assessment of penalty

43 This is an extremely serious breach of ACLS's safety obligations to its employee. It gave rise to a risk of death to Mr Castro, and had actual catastrophic consequences. The risk was obvious and easily prevented. A director of ACLS Mr Simmons was centrally involved in the offence. The offence was not the result of one flaw in an otherwise complying system of work, but the result of complacency and a failure to apply its own written policy and to respond to its knowledge of the general risks associated with this work.

44 The focus of this law is on preventing workplace injury by requiring employers to take a considered and active role in identifying and eliminating or minimising foreseeable risks of injury as far as reasonably practicable. Having a generalised risk assessment policy is not sufficient compliance because it does not specifically address the questions of what could go wrong with this job on this specific site, and what safety measures should be adopted to eliminate or reduce any identified risk. Accordingly a penalty must be imposed that is both an individual deterrent to ACLS and a general deterrent to other employers.

45 As a first offender ACLS is exposed to a maximum penalty of a fine of \$100,000 for an offence at that time. This maximum must be reserved for the worst breaches of the Act that may involve multiple victims.

46 Having taken account of all the circumstances of the offence and the defendant it is my opinion that a starting point of a fine of two thirds of the maximum is appropriate. Next I reduce that by 25% and then by the award of compensation. This results in a fine of \$40,000.

47 I record a conviction against ACLS.

48 The fees, victims of crime levy and legal costs set out in the following summary of penalty orders are also to be paid.

Fine	\$40,000
Compensation to Vivian Castro	\$10,000
Court fee	\$141
Victims of Crime Levy	\$70
Legal costs (payable to the Crown Solicitor's Office)	<u>\$800</u>
TOTAL	\$51,011