SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2015 0013

DIRECTOR OF PUBLIC PROSECUTIONS — Appellant

v

VIBRO-PILE (AUST) PTY LTD — Respondent

S APCR 2015 0014

DIRECTOR OF PUBLIC PROSECUTIONS — Appellant

v

FRANKIPILE AUSTRALIA PTY LTD — Respondent

S APCR 2015 0021

VIBRO-PILE (AUST) PTY LTD — Applicant

v

THE QUEEN — Respondent

JUDGES:	MAXWELL P, REDLICH and WHELAN JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	14 July 2015
DATE OF JUDGMENT:	24 March 2016
MEDIUM NEUTRAL CITATION:	[2016] VSCA 55
JUDGMENT APPEALED FROM:	*DPP v Frankipile Australia Pty Ltd* (Unreported, County Court of Victoria, Judge Wischusen, 18 December 2014)

CRIMINAL LAW – Appeal – Conviction – Occupational health and safety – Duty to ensure safe workplace 'so far as reasonably practicable' – Duty to provide safe system of work – Duty to provide necessary induction, training, supervision – Collapse of pile-driving machine – Procedures for erection of machine not followed – Risk of collapse – Whether identified measures would have eliminated or reduced risk – Whether measures reasonably practicable – Whether duties of induction/training/supervision subject to 'reasonable practicability' qualification – Causation – Death of worker – Whether proof of causal connection required – Verdicts not unsafe – Leave to appeal refused – *Occupational Health and Safety Act 2004* ss 20, 21, 23, 33(2).

CRIMINAL LAW – Practice and procedure – Pleading – Particulars – Occupational health and safety – Charge alleged breach of general safety duty – Particulars alleged three separate breaches of specific duties – Joinder of separate allegations undesirable – Inscrutability of guilty verdict – Implications of joinder for sentencing and conviction appeals discussed – *Occupational Health and Safety Act 2004* s 33(2).

CRIMINAL LAW – Occupational health and safety – Risk-based offences – Objective gravity – Occurrence of death or injury irrelevant to criminal liability – Little relevance to offence gravity – Directly relevant to impact on victims – *Sentencing Act 1991* s 3.

Sentence appeal – *Vibro-Pile*

CRIMINAL LAW – Appeal – Sentence – Occupational health and safety – Failure to ensure safe system of work – Failure to provide necessary induction, training and supervision – Conviction after trial – Aggregate fine of $100,000 – Whether manifestly inadequate – Serious breaches – Significant safety risk – General deterrence – Victim's family affected as 'direct result' – Fine inadequate – Appeal allowed – Resentenced to fines of $250,000 (Charge 3) and $500,000 (Charge 4) – *Occupational Health and Safety Act 2004* s 21, *Sentencing Act 1991* s 3.

Sentence appeal – *Frankipile*

CRIMINAL LAW – Appeal – Sentence – Occupational health and safety – Failure to ensure safe system of work – Failure to provide necessary induction, training and supervision – Conviction after trial – Aggregate fine of $350,000 – Whether manifestly inadequate – Serious breaches – Significant safety risk – General deterrence – Victim's family affected as 'direct result' – Fine inadequate – Appeal allowed – Resentenced to fines $250,000 (Charge 1) and $500,000 (Charge 2) – *Occupational Health and Safety Act 2004* s 21, *Sentencing Act 1991* s 3.

WORDS AND PHRASES – 'reasonably practicable', 'victim'.

APPEARANCES:	Counsel	Solicitors
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For Vibro-Pile (Aust) Pty Ltd	Mr N J Clelland QC with Mr G H Livermore	Sparke Helmore
For Frankipile Australia Pty Ltd	Mr S T Russell	Sparke Helmore

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MAXWELL P
REDLICH JA
WHELAN JA:

Summary

1 All too often, the existence of a workplace safety risk only comes to notice when the risk materialises and a worker is killed or injured. Inevitably, the ensuing investigation by the Victorian WorkCover Authority addresses two distinct questions:

(a) what caused the death or injury?; and

(b) was the employer in breach of its duties under the *Occupational Health and Safety Act 2004* (the 'OHSA')?

2 That is what occurred in the present case. A pile driving machine collapsed at a building site, killing an employee. After investigation, the Authority concluded that there had been breaches of OHSA, and a prosecution was commenced. But because the Authority will have investigated both questions, it should not be thought that an affirmative answer to (b) depends upon the answer to (a).

3 Axiomatically, proof of a breach of the OHSA does not require proof that the breach caused actual harm to any person.[1] The offences created by the Act (and by its 1985 predecessor)[2] are risk-based, not outcome-based, offences. The breach consists in the employer's failure to eliminate or reduce a *risk* to employee safety. The occurrence of death or injury is of evidentiary significance only. It is not an element of the offence.

4 This is one of the most important — but, it seems, least well-understood — features of criminal liability under the OHSA. As will appear, this characteristic of OHSA offences has very significant implications for the conduct of a trial of alleged breaches of the Act.

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1 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 553 [13] ('*Kirk*').

2 *Occupational Health and Safety Act 1985* ('the 1985 Act').

5 Crucially, the prosecution does not need to prove that the employer's breach 'caused' the accident, or that the taking of particular safety measures would have changed the course of events on the day in question. Put another way, the prosecution does not need to establish that the defendant employer should have anticipated the risk of events unfolding precisely as they did on the day of the fatal accident.

6 As we have said, proof that the alleged breach caused the death (or injury) is not an element of the offence charged. On the contrary, as explained in the reasons which follow, the prosecution need only establish that:

(c) there was a risk to employee health and safety;

(d) the measures identified as necessary would have eliminated or reduced the risk (as the case may be); and

(e) it was 'reasonably practicable' in the circumstances for the employer to have taken those measures.

7 The risk particularised in the indictment was the risk of the piling rig collapsing if it was not erected correctly.[3] The measures which the prosecution alleged would have eliminated or reduced that risk were:

- the identification and documentation of the risk of collapse;
- the documentation of the correct procedure for erection of the rig;
- the provision of the necessary induction and training for employees who would be involved in the erection procedure; and
- the supervision of the erection of the rig to ensure that the correct procedure was followed.

8 These measures were said to have been reasonably practicable in the

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[3] See [17] below.

circumstances, given:

- the likelihood of collapse if the correct procedure was not followed;
- the harm likely to be caused if the rig collapsed;
- the suitability and ready availability of the measures; and
- what the defendants knew or ought to have known about the risk.

9 In the Victorian Criminal Charge Book, however, the elements of an OHSA offence are not set out in this way. Instead, the Charge Book says that the prosecution must prove:

> that the accused's failure to take the identified measures led to their employees' health and safety being placed at risk.[4]

And further:

> The prosecution must prove that there is *a substantial and significant causal relationship* between the measures it is alleged the accused should have taken and a risk to their employees' health and safety'.[5]

10 The trial was conducted with the critical issue articulated in this way. There are three potential problems with this articulation of the issue. The first is that, whilst the formulation is logically correct, it does not state the elements of the offence in the terms of the statute. The second is that, where there has been an accident, this articulation — focusing on whether the omission to take the measure caused the risk — can too readily lead to a focus on the 'cause' of the accident. Thirdly, and consequently, this articulation can be mischaracterised as placing a burden on the prosecution to prove that the defendant caused the accident. As we have said, that is not what the offence provision requires. Each of these problems is illustrated by the way this trial was conducted by the parties.

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4 Judicial College of Victoria, *Victorian Criminal Charge Book* '7.9.1.1 Bench Notes: Employer's Duty to Employees' [29].

5 Ibid [31] (emphasis added).

11 The same misconception about causation can also affect the approach to sentencing. For the reasons we have given, the gravity of a breach of the OHSA is not to be measured by the particular consequences of the breach. For example, a very serious breach, involving clear disregard of the safety of workers, might result in only a minor injury — or no injury at all. Conversely, a relatively minor breach could result in a death, in circumstances which could not reasonably have been anticipated.[6]

12 In this case, as in previous similar cases,[7] the judge was given a table of cases involving sentences imposed for OHSA breaches where a death had occurred. Because the occurrence of a death will not necessarily provide any guidance as to the seriousness of the breach, information of this kind is at best of limited value to a sentencing judge, and may be misleading.

The charges

13 On 28 May 2011, at a building site on Southbank, a section of a piling rig collapsed. The rig was being operated by Wayne Te Are ('WT'), an employee of Vibro-Pile (Aust) Pty Ltd ('Vibro-Pile'). Sonny Swannenbeck, an employee of Frankipile Australia Pty Ltd ('Frankipile'), was attached by fall protection devices to the top of the section that collapsed. He fell approximately 40 metres, and sustained extensive injuries from which he died at the scene. The collapse was caused by a failure to insert particular bolts when erecting the piling rig.

14 After a 17 day trial in the County Court, Frankipile and Vibro-Pile were each convicted of two offences under s 21 of the OHSA. Vibro-Pile was acquitted of a charge under s 23(1) of the Act.

15 The companies were sentenced as follows:

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6 *DPP v Frewstal Pty Ltd* [2015] VSCA 266 [48] ('*Frewstal*').

7 See, eg, *Frewstal* [2015] VSCA 266.

Charge on Indictment	Defendant	Offence	Maximum	Sentence
1	Frankipile	Sections 21(1), (2)(a)	$1.075 million (9000 penalty units)[8]	Aggregate fine of $350,000
2	Frankipile	Sections 21(1), (2)(e)	As above	
3	Vibro-Pile	Sections 21(1), (2)(a)	As above	Aggregate fine of $100,000
4	Vibro-Pile	Sections 21(1), (2)(e)	As above	

16 Vibro-Pile has sought leave to appeal against both conviction and sentence. The Director has appealed against each of the sentences on the ground of manifest inadequacy. For reasons which would follow, we would refuse Vibro-Pile's applications, allow both appeals by the Director and resentence each company to fines totalling $750,000.

17 The relevant charges on the indictment read as follows:

> CHARGE 1
>
> **[Frankipile] failed to maintain systems of work that were so far as reasonably practicable safe and without risks to health in that it:**
>
> Particulars
>
> (a) Failed to identify and document the hazard of the Fundex F3500 Piling Rig ('the plant') collapsing if there was a failure to insert all bolts while connecting each section of the leader together;
>
> (b) Failed to ensure the risk of the plant collapsing was eliminated or reduced by ensuring that there was a documented procedure for correctly attaching the 1.8 metre section to the 20.3 metre section of the leader.
>
> (c) The risk created by the accused's failures was a risk of death or serious injury;
>
> (d) Employees placed at risk by the accused's failures were Allan Springall, Mark Drew, Jay Offord and Sonny Swannenbeck.

8 At the time of the offences, a penalty unit was $119.45. The maximum fine was therefore $1,075,050.

CHARGE 2

[Frankipile] failed to provide such information, instruction, training or supervision as was necessary to enable those persons to perform their work in a way that was safe and without risks to health in that it:

Particulars

(a) Failed to ensure that its supervisor Allan Springall and leading hand Mark Drew were, in respect of the rigging of the Fundex F3500 Piling Rig ('the plant'), inducted into a documented procedure for correctly attaching the 1.8 metre section to the 20.3 metre section of the leader;

(b) Failed to ensure that Allan Springall and Mark Drew were trained in the correct procedure for attaching the 1.8 metre section to the 20.3 metre section of the leader;

(c) Failed to supervise the rigging of the plant to ensure that the correct procedure for attaching the 1.8 metre section to the 20.3 metre section of the leader was followed.

(d) The risk created by the accused's failures was a risk of death or serious injury;

(e) Employees placed at risk by the accused's failures were Allan Springall, mark Drew, Jay Offord and Sonny Swannenbeck.

CHARGE 3

[Vibro-Pile] failed to maintain systems of work that were so far as reasonably practicable safe and without risks to health in that it:

Particulars

(a) Failed to identify and document the hazard of the Fundex F3500 Piling Rig ('the plant') collapsing if there was a failure to insert all bolts while connecting each section of the leader together;

(b) Failed to ensure the risk of the plant collapsing was eliminated or reduced by ensuring that there was a documented procedure for correctly attaching the 1.8 metre section to the 20.3 metre section of the leader;

(c) the risk created by the accused's failure was a risk of death or serious injury;

(d) An employee placed at risk by the accused's failure was Wayne Te Are.

CHARGE 4

[Vibro-Pile] failed to provide such information, instruction, training or supervision as was necessary to enable those persons to perform their work in a way that was safe and without risks to health in that it:

Particulars

(a) Failed to ensure that Wayne Te Are ('Te Are') was, in respect of the rigging of the Fundex F3500 Piling Rig ('the plant'), inducted into a documented procedure for correctly attaching the 1.8 metre section of the 20.3 metre section of the leader.

(b) Failed to ensure that Te Are was trained in the correct procedure for attaching the 1.8 metre section to the 20.3 metre section of the leader.

(c) Failed to supervise the rigging of the plant to ensure that the correct procedure for attaching the 1.8 metre section to the 20.3 metre section of the leader was followed.

(d) The risk created by the accused's failures was a risk of death or serious injury.

(e) An employee placed at risk by the accused's failures was Te Are.

18 In late May 2011, Frankipile had been contracted by a developer/builder to perform piling work at the building site in Sturt Street, Southbank. For the purposes of performing the work, Frankipile had brought to the site a pile drilling machine, a Fundex 3500. The machine was manufactured by Fundex, a Dutch company.

19 Frankipile requested Vibro-Pile to provide an operator to perform the piling work at the site on the Fundex machine. Vibro-Pile arranged for WT, an experienced Fundex operator, to perform the work. As will appear, WT was told by the Frankipile supervisor that his employees would work to WT's directions.

20 At its base, the Fundex machine is a tracked vehicle fitted with counterweights, stabilising outriggers, a power plant, winches, a cabin and what is called a 'mast'. The mast is 18 or 19 metres in length and is capable of being raised from the horizontal — the position used when the machine is being transported — to the vertical, by means of a very large hydraulic ram which also appears to act as a backstay for the mast when it is upright.

21 In the mast are channels called 'slides' or, sometimes, 'the cradle'. They extend, but not continuously, from the jaws at the foot of the mast to the top. The drilling device itself (which is a hydraulically-powered gearbox), and its associated small

crane, called 'the cathead', are supported for drilling purposes by a large reinforced oval section metal tube called 'the leader'. There are two rails, fixed to and running the length of the rear of the leader, which fit into the slides of the mast. By this means the leader is held to, and supported by, the mast.

22 In the course of rigging the machine for any particular use, the length of the leader can be adjusted by the addition or subtraction of sections of varying lengths. Each section of the leader is fastened to those above and below it by means of a flange, which runs around the perimeter of the ends of each section. Through holes in the flange 12, and sometimes 16, large bolts secure the joint. By this means, the drilling height of the machine can be extended up to its maximum operational height of 40 metres.

23 According to the Fundex manual, the standard operating configuration is with a leader length of 35 metres.[9] Extending the leader length to 40 metres requires the insertion of two additional sections, one of 3.2 metres, the other of 1.8 metres. It is the latter section (referred to in these reasons as 'the 1.8 metre section') which was not properly attached, resulting in the fatal accident.

24 In all drilling configurations other than when the machine is extended to 40 metres, all the joints in the leader are supported also by the structural rigidity of the mast, by means of the slides already referred to. The longest and top section of the leader (which has affixed to it the cathead and which carries the gearbox) is the 20.3 metre section, which stays on the machine, effectively, at all times. All the additional lengths of the leader are inserted below it.

25 When the machine is rigged to 40 metres, the 20.3 metre section of leader is clear of the mast and sits on top of the 1.8 metre section to which it should be bolted. Crucially, the joint between the 1.8 metre section and the 20.3 metre section sits clear of the top of the mast. In short, this joint is not braced or supported by the mast at all.

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9 See [67] below.

26 In this configuration, the following sections sit above the bolted flange: the 20.3 metre section of leader, estimated to weigh a little over eight tonnes; the 3.3 tonne cathead; and an 8.8 tonne drill head. This very tall, heavy mass of steel is not otherwise stayed or braced. Should the flange fail — as it did here — the 20 odd tonnes of machinery above it falls a great distance.

27 On the afternoon of the day before the collapse, the 20.3 metre leader section was joined to the piece below — the 1.8 metre section. But only six of the 16 bolts which are needed to connect the two sections had been inserted and tightened — the six along 'the front side' of the leader. As the centre of gravity of the structure above it was located forward of the leader, and of the machine, the leader's tendency to bow in that direction was all but unrestrained.

28 In the collapse, the front row of bolts acted like a hinge. The absence of the six bolts along the back side (closest to the mast) meant that the tendency of the structure above to fall away from the mast met with virtually no resistance. That is how the machine collapsed.

A. CONVICTION APPEAL — VIBRO-PILE

29 Vibro-Pile advances two grounds of appeal against conviction. The first is that the trial judge should have upheld its no case submission and directed verdicts of not guilty on charges 3 and 4. It is common ground, however, that on an appeal against conviction, the question is not whether the judge's ruling on the no case submission was correct but whether the verdicts are unsafe and unsatisfactory.[10] As the latter question is raised — expressly — by the second ground of appeal, the two grounds may be considered together.

30 We deal with the charges in turn. Charge 3 was based on s 21(2)(a) and charge 4 on s 21(2)(e). As one of the questions to be addressed is a question of construction of the provisions, we will first set out ss 20 and 21 in full.

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10 See *Samuels-Orunmwense v The Queen* [2015] VSCA 152 [52].

20 The concept of ensuring health and safety

(1) To avoid doubt, a duty imposed on a person by this Part or the regulations to ensure, so far as is reasonably practicable, health and safety requires the person —

(a) to eliminate risks to health and safety so far as is reasonably practicable; and

(b) if it is not reasonably practicable to eliminate risks to health and safety, to reduce those risks so far as is reasonably practicable.

(2) To avoid doubt, for the purposes of this Part and the regulations, regard must be had to the following matters in determining what is (or was at a particular time) reasonably practicable in relation to ensuring health and safety—

(a) the likelihood of the hazard or risk concerned eventuating;

(b) the degree of harm that would result if the hazard or risk eventuated;

(c) what the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk;

(d) the availability and suitability of ways to eliminate or reduce the hazard or risk;

(e) the cost of eliminating or reducing the hazard or risk.

Division 2—Main duties of employers

21 Duties of employers to employees

(1) An employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health.

Penalty: 1800 penalty units for a natural person;

9000 penalty units for a body corporate.

(2) Without limiting subsection (1), an employer contravenes that subsection if the employer fails to do any of the following—

(a) provide or maintain plant or systems of work that are, so far as is reasonably practicable, safe and without risks to health;

(b) make arrangements for ensuring, so far as is

reasonably practicable, safety and the absence of risks to health in connection with the use, handling, storage or transport of plant or substances;

(c) maintain, so far as is reasonably practicable, each workplace under the employer's management and control in a condition that is safe and without risks to health;

(d) provide, so far as is reasonably practicable, adequate facilities for the welfare of employees at any workplace under the management and control of the employer;

(e) provide such information, instruction, training or supervision to employees of the employer as is necessary to enable those persons to perform their work in a way that is safe and without risks to health.

(3) For the purposes of subsections (1) and (2) —

(a) a reference to an employee includes a reference to an independent contractor engaged by an employer and any employees of the independent contractor; and

(b) the duties of an employer under those subsections extend to an independent contractor engaged by the employer, and any employees of the independent contractor, in relation to matters over which the employer has control or would have control if not for any agreement purporting to limit or remove that control.

Charge 3: hazard identification and mitigation

31 Charge 3 was directed at what the Crown contended were inadequacies in the operating manual for the Fundex machine prepared and maintained by Vibro-Pile. As appears from particulars (a) and (b),[11] the charge comprised two distinct complaints.

32 The first complaint (particular 3(a)) was that Vibro-Pile had 'failed to identify and document the hazard', that is, the risk that the rig would collapse if there was

[11] See [17] above.

> a failure to insert all bolts while connecting each section of the leader together.

The second complaint (particular 3(b)) was that Vibro-Pile had failed to ensure that the risk of collapse was eliminated or reduced

> by ensuring that there was a documented procedure for correctly attaching the 1.8 metre section to the 20.3 metre section of the leader.

Did the prosecution change its case during the trial?

33 Before dealing with the ground that the conviction on charge 3 was unsafe, we should address a submission advanced by Vibro-Pile, that the prosecution changed its case during the trial in alleging a failure to warn of the hazard, when the pleaded allegation was a failure to undertake a risk assessment. Although considerable oral argument was addressed to this issue, counsel for Vibro-Pile ultimately eschewed any claim that there had been any procedural unfairness.

34 As to particular 3(a) — the alleged failure to identify the hazard — Vibro-Pile conceded that there was nothing to show that it had ever identified, or documented, the risk of collapse if bolts were left out. Its argument at trial, and again on the appeal, was that the failure to identify and document the risk was immaterial, given that the Vibro-Pile manual contained instructions which, if followed, would have completely eliminated the risk. (The adequacy of the instructions is the issue raised by particular 3(b), discussed below). The contention was that, since the company had put in place the appropriate 'control measure' to eliminate the risk of collapse — by giving correct instructions in the manual — it was irrelevant that no 'risk assessment' had been undertaken and that the risk had not been identified.

35 This submission was rejected by the judge at the no case submission stage, and we would likewise reject it. Put simply, it does not address the Crown case as advanced at trial. The complaint was not directed at some prior failure to identify and document the hazard. Rather, the allegation was that the hazard should have been identified and documented in the manual.

36 The Crown opening — both in the written version and as presented to the jury by the prosecutor — made this clear, as it also did in respect of the corresponding charge against Frankipile. Thus, the prosecutor said in opening:

> As for Vibro-Pile, its documentation failed to identify the hazard of the collapse of the leader, if the extensions were not all properly and completely bolted together.

37 Senior counsel for Vibro-Pile maintained on the appeal, however, that the Crown's case on particular 3(a) had changed in the course of the trial. We have reviewed the trial transcript in its entirety and are quite satisfied that there was no relevant change in the Crown's case. Vibro-Pile was at all times on notice as to how this allegation was to be put against it.

38 The trial judge was certainly in no doubt as to what was alleged. In the course of Vibro-Pile's no case submission, his Honour identified the allegation in particular 3(a) as being that:

> the failures of the systems are that [Vibro-Pile] didn't have in place anything that alerted people to the risk, however obvious it might seem, that this thing will fall over if you don't put all the bolts in.

When counsel for Vibro-Pile maintained that what was alleged was a failure to have a documented risk assessment, the judge asked:

> So where's the document identifying the hazard that it will fall over if you don't put the bolts in?

Counsel conceded that there was no such document.

39 No complaint was made by Vibro-Pile during the trial — either during argument on the no case submission or at any other time — that the Crown's case had changed in this respect. Although counsel for Vibro-Pile, in his reply on the no case submission, reiterated that 3(a) was 'a risk assessment particular, not a warning particular', he did not submit that there had been any change of case.

40 In his final address, senior counsel for Vibro-Pile submitted to the jury that the prosecution had to show that, if Vibro-Pile had done what it had allegedly omitted to do, that would have 'eliminated or materially reduced' the risk of the failure of the

Fundex. Counsel then said:

> I'll just take an example. If charge 3 against Vibro-Pile, in particular (a), is that notwithstanding the manual that said this is how you install the 1.8 metre section, [*the*] *prosecution as I understand it say there should've been a statement in [it] that said 'If you don't put the bolts in, it might collapse'*. I'd submit to you that that is not causally connected to what happened on 27 and 28 May 2011.

41 On numerous occasions in the course of his final address, the prosecutor pointed out that the manual contained no warning of the risk of collapse if all the bolts were not put in. Nothing was said by counsel for either defendant, either during or at the conclusion of that final address, to suggest that the Crown had changed its case. Counsel for Frankipile was likewise in no doubt as to the nature of the corresponding allegation against his client.

No mention of the four side bolts

42 A separate aspect of Vibro-Pile's complaint about the Crown changing its case mid-trial concerned the allegation that the manual contained no reference to the four side bolts which — like the six rear bolts — must be fastened as part of the installation of the 1.8 metre section. In his 'no case' reply submission, counsel for Vibro-Pile complained that the prosecutor had suggested for the first time that the absence of any such reference in the manual formed part of the particulars under charge 3.

43 As the prosecutor pointed out, however, this matter was squarely raised in the written opening, in these terms:

> The Fundex Manual, which the crew had access to on the job, does not specifically deal with the installation of the 1.8 metre section of the leader. There is no reference [to] the need to fasten 16 bolts at the top of the 1.8 metre section (including the [four] side bolts). There is only a reference to 12 bolts.

44 Importantly, Vibro-Pile did not ask the judge to rule on the issue. Instead, counsel for Vibro-Pile submitted as follows:

> And even if they do put the case on that — what I call [a] new basis, because it is a new basis — it must fail because neither of those particulars can possibly be found to have materially contributed to Mr Te Are's failure to put

in the six rear bolts which caused the collapse.

45 As already indicated, this submission, and the content of its counsel's address set out in the preceding paragraph, reflected a misapprehension that, in order to prove a breach of s 21(1), the prosecution had to establish a 'causal connection' between the employer's act or omission and the accident.[12] For present purposes, it is sufficient to say that this complaint about a change of case was also unfounded.

46 As noted earlier, it was eventually clarified on the appeal that Vibro-Pile made no complaint about any breach of the requirements of procedural fairness. The only issue was whether the verdict was unsafe.

Was the verdict on charge 3 unsafe?

3(a) Failure to refer to hazard in manual

47 In our opinion, it was reasonably open to the jury to be satisfied that Vibro-Pile had breached its duty under s 21(1) of the OHS Act as alleged in particular 3(a). As noted earlier, charge 3 relies on s 21(2)(a), which obliges the employer (relevantly) to provide or maintain

> systems of work that are, so far as is reasonably practicable, safe and without risks to health.

48 The specific allegation in particular 3(a) was that Vibro-Pile had breached its duty by failing to identify the risk of collapse which would arise if

> there was a failure to insert all bolts while connecting each section of the leader together.

49 Vibro-Pile's obligation under OHSA was to provide a safe system of work so far as it was 'reasonably practicable' to do so. As s 20(2) of the Act makes clear, and as the judge correctly instructed the jury, in determining what was reasonably practicable at the relevant time regard must be had to the following matters:

> (a) the likelihood of the hazard or risk concerned eventuating;

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12 See paras [78]–[91] below.

(b) the degree of harm that would result if the hazard or risk eventuated;

(c) what the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk;

(d) the availability and suitability of ways to eliminate or reduce the hazard or risk; and

(e) the cost of eliminating or reducing the hazard or risk.

50 Plainly enough, the second of these considerations was very significant. That is, if the risk of collapse eventuated, the consequences would almost certainly be catastrophic. A collapse of the rig would be likely to cause serious injury, if not death. In addition to the risk affecting any person working on the rig at the time (as in the present case), there would be very grave risks for any workers on the ground in the vicinity of the machine. Vibro-Pile did not suggest otherwise.

51 As already noted, however, Vibro-Pile maintained that there was no need for any highlighting of the risk, since the manual contained the correct instructions and, as employer, Vibro-Pile could reasonably expect that those instructions would be followed. This submission fails, in our view, to address adequately the considerations specified in the definition of 'reasonably practicable', which direct attention to the actual state of affairs in the employer's workplace at the relevant time(s).

52 As the High Court said in *Kirk:*[13]

> What measures are necessary to be taken [by an employer] will depend upon the particular circumstances prevailing at the workplace, what activities are there conducted, what machinery, plant or substances are involved, the tasks undertaken by the employees and the skills of the employees, to mention but a few factors. What the terms of sub-s (2) make plain is that an employer must identify risks to health safety and welfare of employees at the workplace and take steps to obviate those risk.[14]

53 Although the manual contained the correct instructions with respect to the rear

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13 (2010) 239 CLR 531, 552 [11].

14 The Court was here referring to s 15(2) of the *Occupational Health and Safety Act 1983* (NSW), which was in substantially the same terms as s 21(2) of OHSA.

bolts in the 1.8 metre section, the critical issue was whether there were systems in place to ensure that the instructions in the manual were read, understood, and followed in practice. That turned on the nature and extent of the training of those who would be responsible for rigging and operating the machine, and on 'what might reasonably be expected' of them.[15] And, as the prosecutor correctly told the jury, account must always be taken of the risks associated with tiredness, inadvertence, inattention and haste.[16]

54 It is here that consideration (c) of the matters to which regard must be had[17] in determining whether a measure is 'reasonably practicable' is especially relevant, for it draws attention to what Vibro-Pile knew, or ought to have known, about the quality of the training given to those who would be called on to rig and operate the machine.[18] The employer's duty is 'with his experts to consider the state of the place of work in all its circumstances and to take whatever steps he can, so far as practicable, to make it safe'.[19] With dangerous plant such as this, the employer would be expected 'to have knowledge of the hazards and risks associated with [the] particular piece of plant', having regard to its use in the employer's business.[20]

55 In our view, Vibro-Pile knew, or ought to have known, that:

- the training which Fundex as manufacturer of the rig had considered necessary for Mr Ashcroft (the first Vibro-Pile operator to be trained on the rig) involved actually rigging and de-rigging the 1.8 metre section three times in the course of one day;
- Mr Ashcroft's view was that merely reading the manual was likely to confuse and that the only way to understand how to

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15 *Slivak v Lurgi (Australia) Pty Ltd* (2001) 205 CLR 304, 323 [54], 333 [91] ('*Slivak*').

16 *R v Commercial Industrial Construction Group Pty Ltd* (2006) 14 VR 321, 332 [49] ('*CICG*').

17 See [49] above.

18 *Slivak* (2001) 205 CLR 304, 322–3 [53].

19 *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107, 122, quoted in *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249, 262 ('*Chugg*').

20 *Chugg v Pacific Dunlop Ltd* (No 2) (1999) 3 VR 934, 964-5 [134].

rig the 1.8 metre section was to see it done;[21] and

- WT had never had any practical training in erecting the rig to its full height or, in particular, in installing the 1.8 metre section, and had never seen it done.

56 In that state of knowledge, the risk of collapse was real and foreseeable. The manual was long and complicated and — as Mr Ashcroft candidly acknowledged — the section dealing with the installation of the 1.8 metre section was liable to confuse.[22] Contrary to Vibro-Pile's submissions, this conclusion about risk does not turn on whether it was foreseeable that WT might form a positive (mistaken) view that the rear bolts were not required. The obligation to eliminate or reduce risk does not relevantly depend on the particular way in which the risk ultimately materialises (if at all).[23]

57 According to the submission for Vibro-Pile, however, there was no evidence before the jury on the basis of which they could reasonably have found that:

(f) the inclusion of a warning was reasonably practicable; or

(g) the absence of a warning had 'any material connection to obviating the risk of an incident such as that which occurred'.

58 According to Vibro-Pile's written submission:

> No evidence was led by the prosecution to demonstrate that a reasonable employer in the position of VP would have foreseen the risk of a highly trained and experienced Fundex operator ignoring the clear direction to insert all the *rear bolts* or that *the inclusion of a warning would have had any impact whatsoever on the behaviour of Mr Te Are on the day*. The fact is the procedure contained clear instructions to insert the subject bolts and described how to do it.

59 This submission posits something which an employer is not entitled to assume in determining what measures are required of it, namely, that the relevant employee

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21 See paras [123]–[124] below.

22 See [123] below.

23 *Holmes v R E Spence & Co Pty Ltd* (1992) 5 VIR 119, 123–4.

would be 'highly trained and experienced'. The evidentiary significance of the circumstances of the accident in this case was that they illustrated the risk that an employee might not have those characteristics.

60 Vibro-Pile further submitted that evidence adduced in cross-examination of the Crown witnesses showed that the inclusion of a warning was not reasonably practicable. The evidence was said to show that:

(h) no rig anywhere in the world had collapsed in similar circumstances;

(i) Vibro-Pile had developed its own training and competency assessment requirements for Fundex operators;

(j) witnesses such as Mr Ashcroft regarded it as 'inexplicable' that someone with WT's training and experience could have left out the rear bolts;

(k) WT had been inducted into the manual and had his own copy of it; and

(l) nothing had occurred to alert Vibro-Pile to the possibility that WT had somehow formed the erroneous view that the rear bolts were not required.

61 Central to Vibro-Pile's argument was the proposition that, since the instruction in the manual was clear, there was no need for the manual to contain a warning as to the consequences of failing to follow the instruction. Examination of the Fundex manual reveals, however, a series of warnings which accompany various of the instructions given. These warnings — in bold type and beginning with the word 'DANGER' in capitals — draw attention to risks of injury or death and to risks of damage to the machine (or both).

62 In a number of instances, the same warning is repeated — in relation to precisely the same matter — in several different parts of the manual. For example, there are repeated, highlighted, warnings about:

- the need for the machine to be only on 'a surface with sufficient load bearing capacity'; and
- the maximum permissible load with the pile hoist being 10 tons.

As to the nature of the risk involved, the warnings variously refer to:

- the risk of personal injury or death;
- the safety of 'the operator and other persons' being endangered; and
- the risk of 'serious accidents for humans and machine!!'.

63 Importantly for present purposes, these warnings were evidently viewed as necessary to reinforce the importance of complying with instructions (or prohibitions) which were separately set out in the manual. For example, the manual contains a clear instruction that the machine can only be installed, and used, 'on a flat and sufficiently solid surface'. Yet, as already noted, the risks of non-compliance with that instruction are repeatedly highlighted in the manual.

64 The same is true of the operating requirement to lock the leader to the mast. Section 7.8 of the manual provides instructions as to how this is to be done. Then there appears the following warning:

> **DANGER: When working with standing leader without having inserted the locking pin, the machine may tilt, causing serious accidents to humans and machine!!**

At the end of section 7.8 then is another warning, in these terms:

> **ATTENTION: Always pay attention to the stipulations in the tables concerning the use of the locking pins and adjusting the leader.**

65 The inclusion of these warnings in the manual demonstrates that the provision of correct instructions was not viewed as removing the need to highlight the risk of collapse if those instructions were not followed. Plainly, the inclusion of such a warning was a simple and straightforward step.

66 As counsel for Vibro-Pile acknowledged at the trial, an operator was not expected to memorise the entire manual. This is hardly surprising, given that the manual runs to almost 200 pages (not including the very detailed tables which show maximum loads in a whole range of circumstances). Moreover, some of the operating

instructions are extremely complicated. It is unsurprising, therefore, that the manufacturer viewed it as necessary to include warnings to ensure that attention was drawn to areas of particular risk.

67 It is notable, therefore, that the sections of the manual relevant to the present case — 6.9 and 6.10 — include no such warnings. This may reflect the apparent assumption in the manual that, in its standard operating configuration, the machine will be extended only to 35 metres. According to the manual:

> *As a standard* the foundation machine has been equipped with a leader length of 35.0 metres. This is sufficient for driving piles to a length of 27.0 metres and drilling to a length of 30.0 metres. *Extension of the leader on the lower side to 40.0 metres is an option.* The maximum lengths for driving or drilling then increased to 32.0 and 35.0 metres respectively.[24]

68 Moreover, a later section of the manual sets out 'General stipulations', with which (it says) the operator 'must also be fully familiar'. That section makes no reference at all to s 6.10 of the manual (which contains the instructions for installing the 1.8 metre section). The only reference to leader extensions is to s 6.9 of the manual.

69 That was not, however, Vibro-Pile's standard operating configuration. On the contrary, the leader on Vibro-Pile's machine was used at its maximum length of 40 metres 'most of the time'. As a result, Mr Ashcroft said, he had obtained approval from Fundex for the 1.8 metre section to be left on the machine permanently. In consequence, the installation or removal of the 1.8 metre section was — to Vibro-Pile's knowledge — a rare occurrence. That was another factor contributing to the risk of the key section of the manual either not being read or not being followed.

70 It follows from this analysis, in our view, that it was open to the jury to conclude that charge 3(a) had been made out. Having regard to:

- the risk of the erection instructions in the manual not being followed;

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[24] Emphasis added.

- the harm that would potentially result if that risk eventuated; and
- the ready availability of the means of reducing or eliminating that risk by providing a clear warning in the manual,

it was open to the jury to conclude that Vibro-Pile had failed to maintain systems of work that were, so far as reasonably practicable, safe.

3(b) Failure to document correct procedure

71 It was common ground that the Fundex manual contained correct instructions with respect to the insertion of the rear bolts. The deficiency on which particular 3(b) rested was the omission from the manual of any reference to the four side bolts which also needed to be inserted. This failure was not the subject of any extensive argument on appeal.

72 The relevant instructions in Part 6.10 of the manual were in these terms:

> …
>
> 5. Place the 1.8 m connecting piece of the leader and bolt it all around to the lower piece;
>
> 6 Close the jaws of the mast;
>
> 7. Hoist the lower leader pieces and bolt those at the front of the leader;
>
> 8. Hoist the leader and dismount the locking blocks;
>
> 9 Connect all relevant hydraulic hoses and electrical cables; and
>
> 10 . Mount the rear bots [sic] of the upper side of the 1.8 m connecting piece through the cut-away in the mast.

73 Counsel for Vibro-Pile accepted that step 7 was referring to the six front bolts and that step 10 was referring to the six rear bolts. There was no reference anywhere to the four side bolts. In short, the manual did not provide a 'documented procedure for correctly attaching the 1.8 metre section to the 20.3 metre section'.

74 This omission, plainly enough, created a risk that even someone who read the manual would not be aware that there were side bolts which had to be attached. The

existence of this risk was eloquently demonstrated by the evidence of Vibro-Pile's Mr McPherson (whose performance as WT's supervisor is discussed below). Asked in re-examination whether the relevant section of the manual referred to the side bolts, Mr McPherson said: 'No. There's no side bolts'. Later, he said, 'It states here that you put 12 bolts — 12 bolts'.

75 The risk to employee safety is self-evident. Equally plainly, it was reasonably practicable for Vibro-Pile to ensure that the instructions in the manual were correct.

76 As noted earlier, Vibro-Pile's argument at trial was that this defect in the manual was causally irrelevant. That is, the absence of any reference to the side bolts could not be shown to have contributed to what happened on 28 May 2011. As Vibro-Pile pointed out, WT had acknowledged under cross-examination that he had intended to make sure that the side bolts were fastened, but had subsequently forgotten to do so.

77 So much may be accepted but, for reasons already stated and those set out in the next section, no such causal connection to the accident had to be established. It was well open to the jury to be satisfied that, because of the error in the manual, there was a risk to health and safety which could easily have been eliminated by Vibro-Pile ensuring that the instructions in the manual were correct.

A causal link?

78 According to Vibro-Pile's appeal submission, it was not open to the jury to be satisfied beyond reasonable doubt that the omission of a warning from the manual

> had a relevant causal connection to the failure of Mr Te Are to put in the bolts.

That is how Vibro-Pile's counsel had argued the case before the jury.

79 When the Court suggested that proof of a breach of s 21 of the OHSA did not require proof of such a causal connection, the parties agreed to provide supplementary submissions on the issue. Vibro-Pile's supplementary submission

contended that it was necessary for the prosecution to prove that either:

- the *measures not taken* would have eliminated or mitigated the risk; or
- the *alleged omissions* made 'a substantial and significant contribution' to the risk.

(It would appear that Vibro-Pile was here using the term 'risk' as meaning the accident which eventuated.)

80 Plainly enough, proof of a breach of s 21 of OHSA requires proof of a nexus between the act or omission of the employer and an identified risk to health and safety. But the nexus which must be proved is that which the statutory provisions themselves require, and no other.

81 The Act obliges an employer to do everything reasonably practicable to eliminate or reduce 'risks to health and safety'.[25] When — as here — the alleged breach consists of an omission rather than a positive act, proof of the breach requires the prosecution to establish each of the matters set out at para 6 above. The Crown's submission to that effect should be accepted.

82 Vibro-Pile relied on decisions of the New South Wales Industrial Court which hold that the question to be addressed is

> whether the defendant's acts or omissions were a substantial or significant cause of the risk.[26]

(As noted earlier, this formulation appears in the Victorian Criminal Charge Book, which cites those decisions).

83 Logically, a failure to eliminate a risk can be said to cause, or contribute to, the persistence of the risk. But the statute does not formulate the issue in those terms

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25 Section 20(1); see *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92, 100 [14]–[15].

26 See, eg, *State of New South Wales v O'Sullivan* (2005) 143 IR 57, 74 [49]–[50] ('*O'Sullivan*') and *New South Wales (Department of Education and Training and Department of Juvenile Justice) v Cahill (No 2)* (2011) 210 IR 112, 180 [261] ('*Cahill No 2*').

and, in our view, the language of causation is best avoided in this context.[27] To speak of a 'causal connection' in this context is liable to suggest — incorrectly — that these offences require proof of a causal link between the employer's conduct and the accident or injury (which, as we have said, will typically have triggered the investigation and prosecution).

84 As has been repeatedly pointed out in the authorities, proof of breach is independent of any link with injury or death.[28] Thus, the High Court in *Kirk* said:

> It is not necessary that harm has already befallen an employee for an offence to have been committed. Where an inspector authorised under the OH&S Act identifies a risk to the health, safety or welfare of employees present at a workplace, which an employer has not addressed, [the general duty] may be contravened. An obvious example would be the failure to guard dangerous machinery.

85 In many instances, as the plurality judgment in *Kirk*[29] pointed out, the specification in the charge of the measure which the employer should have taken will identify the risk being addressed. Proof that the specified measure would have eliminated or reduced that risk establishes the requisite nexus between the employer's omission and the risk. There is no necessity to introduce notions of causation. As we have suggested, such notions are likely to lead to misunderstanding, as occurred in this case.

86 Moreover, undue focus on the accident is likely to lead to an inappropriately narrow definition of the risk the subject of the charges. This point has been succinctly expressed, in terms approved by the New South Wales Industrial Court, as follows:

> [C]areful attention must be paid to the correct identification of the risk the subject of the charges … [I]t is inappropriate to seek to artificially confine the risk to one narrowly defined by reference to an accident with the benefit of hindsight: it is the general class of risk which matters. The danger repeatedly

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27 We note that the NSW Court of Appeal spoke of a 'causal relationship' between the omission and the risk: *Simpson Design Associates Pty Ltd v Industrial Court of New South Wales* (2011) 213 A Crim R 340, 342 [3]–[4], 360 [77] ('*Simpson Design*').

28 *Kirk* (2010) 239 CLR 531, 553 [13]; *Frewstal* [2015] VSCA 266 [41], [126]-[127].

29 *Kirk* (2010) 239 CLR 531, 553 [14].

> cautioned against of focussing too much attention on an accident is twofold: such a misguided focus can obscure the relevant risk, and it can also misdirect an analysis of causation.[30]

87 At trial, as described below, the parties appear to have assumed that the prosecution had to establish that the failure of the relevant employer to take a particular safety measure had caused or contributed to the rig collapsing on the day of the accident. As pointed out already, that was not something which the prosecution had to prove.

88 The issue was whether there was a risk to health and safety in relation to the erection of the Fundex machine and whether there were reasonably practicable steps which the employer could have taken, which would have eliminated or reduced that risk. Once the issue is formulated in this way, it can be seen that there is no occasion to consider whether the employer's omissions were causally 'significant' or 'substantial'.

89 Contrary to Vibro-Pile's appeal submission, it was not necessary for the prosecution to establish — or for the jury to be satisfied — that the inclusion of the warning would have made a difference to what WT did on this particular day.[31] That would be a question of causation properly so-called, of the kind which routinely arises in actions for damages for personal injuries. In an action of that kind, the plaintiff must prove that the defendant's breach of duty caused her loss and damage.[32]

90 This might seem an elusive distinction but it reflects the essential character of OHS offences, as defined in the OHSA and in comparable legislative schemes. As we have said, the offences are risk-based, not outcome-based.[33] The breach consists

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30 *New South Wales (NSW Police) v Inspector Covi* [2005] NSWIR Comm 303 [26], cited in *Cahill No 2* (2011) 210 IR 112, [39], [45].

31 Erroneously, the prosecutor told the jury that such a causal link had to be proved.

32 See, eg, *Wodonga Regional Health Service v Hopgood* (2012) 37 VR 284, 292 [31].

33 *Diemould Tooling Services Pty Ltd v Oaten* (2008) 101 SASR 339, 349 [34].

in the failure to eliminate or reduce risk, not in causing the accident to occur.[34]

91 Of course, the circumstances of the accident will often be of evidentiary significance, as they may shed light on:

- the existence of the risk;
- the likelihood of the risk eventuating;
- the gravity of the consequences should the risk eventuate; and
- hence, whether all reasonably practicable steps had been taken to eliminate or reduce the risk.[35]

But the trial judge needs to ensure that any exploration of the circumstances of the accident is for these purposes only, and does not mislead the jury into thinking that they need to decide whether the alleged breach caused the accident.

92 It follows that proof of the breach alleged in particular 3(a) did not depend on the jury accepting a particular version of WT's evidence. The question for the jury was whether the inclusion of a warning in the manual was a reasonably practicable measure, which would have eliminated or reduced the risk of collapse. The prosecution did not have to establish that the presence of a warning would have changed the course of events on 28 May 2011.

93 We deal finally with Vibro-Pile's submission on the need for evidence. For the reasons already given, it was open to the jury to conclude that there was a risk that the rig would not be erected correctly and might therefore collapse. Moreover, it was open to them to conclude that the insertion of a warning in the manual was reasonably practicable. Those matters having been established, there was no need for further evidence — whether expert or otherwise[36] — to establish that the

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34 *Kirk* (2010) 239 CLR 531, 553 [12]–[13]; *Simpson Design* (2011) 213 A Crim R 340, 342 [3]–[4], 360–1 [77]–[78].

35 *Orbit Drilling Pty Ltd v The Queen* (2012) 35 VR 399, 414–5 [62] ('*Orbit Drilling*'); *Frewstal* [2015] VSCA 266 [127].

36 On appeal, Vibro-Pile repeatedly asserted that there had to be evidence.

inclusion of the warning in the manual would have reduced the risk of the bolts being left out. It was open to the jury to draw this inference as a matter of simple common sense.[37] No separate proof was required.

Causation in this trial

94 In the present case, the parties approached the matter on the basis that the prosecution did have to prove that one or more of Vibro-Pile's alleged breaches had caused the fatal accident. Thus, from the start of his opening address, the prosecutor told the jury that the 'complete and utter lack of training and supervision' had 'directly led' to the collapse of the rig and the worker's death.

95 The focus of the cross-examinations, and of both final addresses, was on questions of causation, namely:

- why WT had directed that the rear bolts not be inserted in the 1.8 metre section; and
- whether he would have acted differently if there had been a warning in the manual and/or if the induction/training/supervision had been different.

The prosecutor in final address told the jury that there had to be 'a causal link, a real link' between the employer's failure(s) and 'what happened'.

96 The vices in this formulation were twofold. First, it equated the accident with the 'risk.' Secondly, it assumed the need for proof that the employer's failure caused the accident. This view of the case led counsel for Vibro-Pile to identify the credibility and reliability of WT as the central issue in the case. Their contention in final address was that the jury could not be satisfied beyond reasonable doubt of 'the accuracy and reliability' of WT's account or, more particularly, of the truth of the explanation he gave for his decision to leave out the rear bolts (that he had been told by Mr Ashcroft that the rear bolts were not required). For his part, the prosecutor

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37 *Chugg* (1990) 170 CLR 249, 260; *O'Sullivan* (2005) 143 IR 57, 85 [88].

invited the jury to find that, because of defects in the manual and in WT's training and supervision, WT had mistakenly believed that he had a correct understanding of how to instal the 1.8 metre section.

97 As we suggested at the outset of these reasons, the likely explanation for the confusion is that this prosecution — like so many other prosecutions under the OHSA — only came about because of the death of a worker.[38] It was that materialisation of the safety risk which prompted the investigation and led to the conclusion that, in the respects alleged, the two employers had breached their respective safety duties. There is a real danger in such circumstances that the trial of the resultant charges will focus — wrongly — on whether the alleged safety breaches caused the worker's death.

98 As we have noted, the Victorian Criminal Charge Book adopts the NSW formulation. Understandably, the trial judge followed the Charge Book when he addressed the issue of causation as it had been argued by the parties. His Honour directed the jury that the prosecution must prove 'that the risk resulted from' the particular failure pleaded and that the alleged failure 'contributed to the risk.' He further directed the jury that the prosecution must prove 'a substantial and significant causal relationship' between the failures and the risk. (We note that each of the charges in the indictment included a particular stating that the relevant employer's failure had 'created a risk of death or serious injury'.) For the reasons we have given, such formulations should be avoided in the future.

99 For the assistance of trial judges and trial counsel, we would summarise the position as follows. In a case such as the present, where the prosecution leads evidence of an accident said to be connected with the alleged safety breach, the judge should direct the jury (preferably at the start of the trial, as well as in the charge) that:

(m) the prosecution must prove that the employer failed to take reasonably

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38 See *Boral Gas (NSW) Pty Ltd v Magill* (1995) 37 NSWLR 150, 157C.

practicable measures which would have eliminated, or reduced, an identified risk to the health and safety of its employees (or non-employees, if a breach of s 23 is alleged);

(n) the prosecution does not need to prove that the failure to take the identified measures caused or contributed to the occurrence of the injury or death;

(o) the occurrence of the accident is of evidentiary significance only, to the extent that it may bear upon

- the existence of the risk to health and safety;
- the likelihood of the risk eventuating;
- the gravity of the consequences if it did; and
- hence, whether all reasonably practicable steps had been taken to eliminate or reduce the risk;

(p) any exploration by counsel of the circumstances of the accident is for the sole purpose of establishing, or refuting, its evidentiary significance.

Charge 4: induction, training and supervision

Section 21(2)(e) not subject to qualification of reasonable practicability

100 Charge 4 was based on s 21(2)(e). As noted earlier, that paragraph obliges the employer to provide to its employees

> such information, instruction, training or supervision … as is necessary to enable those persons to perform their work in a way that is safe and without risk to health.

101 Charge 4 comprised three distinct allegations of breach[39] relating, respectively, to Vibro-Pile's failure:

(q) to ensure that WE was inducted into the procedure for attaching the 1.8 metre section;

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[39] See [17] above.

(r) to ensure that WT was trained in that procedure; and

(s) to supervise the erection of the rig, to ensure that the correct procedure was followed.

102 A reading of the trial transcript makes it necessary to address a preliminary question in relation to these allegations, namely, whether the duty imposed by s 21(2)(e) is subject to the qualification 'so far as is reasonably practicable'. It can readily be seen from the text of s 21(2)[40] that sub-paragraph (e) — in contrast to all of the other sub-paragraphs — does not include the phrase 'so far as is reasonably practicable'.

103 The argument put to the trial judge by counsel for Frankipile, however, and supported by the prosecution, was that the 'practicability' qualification did still apply to sub-paragraph (e). The basis of the submission appears to have been that, because the qualification appears in the statement of the general duty in s 21(1), it must necessarily apply to each paragraph of s 21(2).

104 For reasons which follow, however, the submission was incorrect. This is, of course, a question of statutory interpretation. And the statutory language is clear and unambiguous. The opening words of s 21(2) are as follows:

> Without limiting sub-section (1), an employer contravenes that sub-section *if the employer fails to do any of the following* …[41]

In other words, proof of a failure to comply with a sub-paragraph of s 21(2) will — without more — prove a breach of s 21(1).

105 Nor is this a new interpretation. It has been accepted for almost 30 years. Thus in 1991 Brennan J said in *Chugg*:[42]

> Although sub-s (1) is the sub-section which creates the obligation …, sub-s (2) prescribes a series of duties a failure to fulfil any one of which amounts, *by*

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40 See [30] above.

41 Emphasis added.

42 (1991) 170 CLR 249.

force of that sub-section, to a contravention of sub-s (1).[43]

Fullagar J had made the same point very clearly at first instance in that case, in a passage later approved by the Appeal Division:

> The effect of s 21(2) is to ensure that, if the acts or omissions charged and proved establish one or more of the several general failures set out in the lettered paragraphs of sub-s (2), then that, *without more*, *automatically establishes a failure to comply with the general duty* laid down by sub-s (1) …[44]

106 Each of the sub-paragraphs of s 21(2) is self-contained. When there is an allegation of breach of one of the sub-paragraphs, the only question for the jury is whether it has been proved that the employer failed to do that which the particular sub-paragraph prescribes.

107 Take, for example, an allegation that the training provided to employees was inadequate. The question for the jury under s 21(2)(e) would be whether the employer had failed

> to provide such training to employees as was necessary to enable the employees to perform their work in a manner that was safe and without risk to health.

108 If that question were answered affirmatively, the breach of s 21(1) would be established. The language of s 21(1) itself is irrelevant to the issue, since non-compliance with s 21(2)(e) 'automatically establishes' a breach of s 21(1). No question of reasonable practicability therefore arises.

109 It is surprising that submissions to the contrary were made to the trial judge. As counsel for Frankipile pointed out to the judge, his submission was directly contrary to what was said by this Court in 2006 in *CICG*.[45] (The Court was there dealing with s 21(2)(e) of the 1985 Act but noted that what was said would apply equally to s 21(2)(e) of OHSA.) Because there were no words of qualification, the Court said, the obligation imposed by s 21(2)(e) was 'absolute'.

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43 Ibid 252 (emphasis added).

44 *Chugg v Pacific Dunlop Ltd* [1988] VR 411, 415 (emphasis added), cited with approval in *R v Australian Char Pty Ltd* [1999] 3 VR 834, 842–3.

45 (2006) 14 VR 321, 331 [44].

110 It was not, of course, open to defence counsel to invite the judge to disregard a decision of this Court. And, far from endorsing defence counsel's submission to that effect, the prosecutor should have insisted that binding authority be adhered to.

111 Because of the erroneous submission advanced by defence counsel and agreed to by the prosecutor, the trial judge was led into error. His Honour directed the jury that the obligations imposed by s 21(2)(e) were subject to the qualification of reasonable practicability. The error was, of course, favourable to the defence, as it had the effect of reducing the stringency of the duty.

112 In the event, nothing turns on it for the purposes of this appeal, as the jury still returned a guilty verdict. And, as will appear, our conclusions regarding the separate particulars of charge 4 would have been the same even if the qualification had been applicable.

Charge 4(a): induction

113 As noted earlier, particular 4(a) alleged that Vibro-Pile failed to ensure that WT was

> inducted into a documented procedure for correctly attaching the 1.8 metre section to the 20.3 metre section of the leader.

114 On the appeal, senior counsel for Vibro-Pile conceded — correctly, in our view — that if the jury found his client guilty on charge 3(a) or 3(b), it was 'inevitable' that they would convict the company on charge 4(a). That is, if the absence of a warning about the risk of collapse meant that Vibro-Pile's documentation was deficient, it followed that WT's induction into that documentation was also deficient.

115 We have already rejected the challenge to the guilty verdicts on charges 3(a) and 3(b). It follows that the challenge to the verdict on charge 4(a) must also fail.

Charge 4(b): failure to provide the necessary training

116 The allegation in particular 4(b) was that Vibro-Pile failed to ensure that WT

> was trained in the correct procedure for attaching the 1.8 metre section to the 20.3 metre section of the leader.

According to Vibro-Pile's submission, this allegation could not be made out on the evidence. Counsel for Vibro-Pile told the jury that WT's training was 'exemplary'. On appeal, it was submitted that the evidence was 'overwhelming … that Mr Te Are was experienced in, and had been trained in, operating and rigging the Fundex'.

117 In fact, the evidence revealed a critical gap in WT's training. Although he had spent between 1500 and 2000 hours as an 'offsider' on the machine, and long periods as operator, he had never:

- been trained in the installation of the 1.8 metre section;
- taken part in its installation; or
- seen it installed.

118 WT made repeated statements to this effect in his evidence, and was not challenged on the point. Nor was Mr Ashcroft challenged when he said, quite clearly, that he had not trained WT in the installation of the 1.8 metre section, and had never assembled it with him.

119 As we have pointed out, the question which arises on a charge of this kind under s 21(2)(e) is: what training was *necessary* to enable the employee to perform his work 'in a way that [was] safe and without risks to health?' On the evidence before the jury, it was open to them to conclude that the necessary training had to involve the actual carrying out — under the supervision of an appropriately-qualified trainer — of the rigging and de-rigging of each section of the machine.

120 There were three relevant parts of the evidence. We refer, first, to the training which the manufacturer, Fundex, gave Mr Ashcroft in May 2008, when Vibro-Pile first purchased one of its machines. As Mr Ashcroft said in evidence, it was

'definitely hands on training. Erecting and dismantling the machine in the yard quite a few times over a couple of weeks.' The jury book included the Fundex service report on that training program, which recorded what took place:

> 7-5-2008: Looked at all the parts the machine survived the transport began training John [Ashcroft] the operator how to erect the machine we did that a few times until he was satisfied.
>
> 8-5-2008: We put on the counterweights all three of them just to see if they fit. We started fitting the 1.8 meter extension for the 40 meters of leader we did that three times and left it in until the next day.
>
> 9-5-2008: We took out the 1.8 meter again and started fitting the 10 meter extension. We did that two times John was satisfied with that and the other guys to. We put in the drill table and fitted the bottom section and put in the big Vibropile secret.

121 As can be seen from this record, the 1.8 metre section was rigged and de-rigged three times over a 24 hour period, with Mr Ashcroft participating 'until he was satisfied'. Mr Ashcroft's recollection was that it was the Fundex trainers themselves who had suggested that the exercise be done over and over again.

122 Secondly, the Vibro-Pile Fundex manual stated very clearly what must occur before the 'first putting into use' of the machine:

> The first putting into use of the foundation machine is usually done by following two instruction days. These days are organised and conducted by IHC Fundex Equipment in Goes. If necessary, this can be deviated from in consultation with the customer. *The instruction days are supervised by an experienced trainer. These days must be attended by the driving/drilling team that will operate the machine in the future* (in the Netherlands an operator with the diploma 'operator mobile driver or foundation installation').
>
> *Further it is recommended to have the technically responsible person of the buyer of the machine attend the instruction days.* During these instruction days all important items with respect to the operation of and working with the Fundex foundation machine are discussed on the basis of an instruction list, such as sliding the track beams in and out, swinging and driving, erecting and lowering the leader and mast, reeving the steel cables, functions of the various winches, the hydraulic and electrical systems, checks and maintenance.

123 Thirdly, the evidence of Mr Ashcroft himself made quite clear that merely reading the manual was not sufficient. He was asked in cross-examination about the occasion when he had taken WT to the section of the manual dealing with the

installation of the 1.8 metre section. Mr Ashcroft recalled saying to WT on that occasion:

> *[I]t looks confusing. It's a little bit different than what we're used to when putting in leader sections but once you've seen it done it all becomes, very clear* … reading it step by step if you know a little bit about rigging the machine you would get an idea of how it went together. But again, it's very hard to explain step by step procedures just on pictures. *So once you've seen it done, once you're involved in it being done, it all makes perfectly good sense.*

124 In short, it was the view of Vibro-Pile's own trainer that it was not possible to understand how to rig the 1.8 metre section without seeing it done and being 'involved in it being done'. And that was precisely the training which — to Mr Ashcroft's knowledge — WT had never had. What the manufacturer viewed as necessary, and what Mr Ashcroft himself said was necessary, did not occur. The necessary training was not provided.

125 In those circumstances, in our view, it was well open to the jury to conclude that Vibro-Pile had breached s 21(2)(e). In the absence of the necessary training, there was a real and foreseeable safety risk, namely, that the Fundex machine would not be correctly assembled and would collapse. It was not enough to rely on what was in the manual. As will be apparent, our conclusion with respect to the existence of this risk does not depend at all upon WT's state of mind. That is to say, whether or not WT was misled by Ashcroft (as he claimed) about the rear bolts not being required did not inform the question as to the existence of risk.

126 Proper training would have eliminated or reduced the risk. Had WT been trained to the same standard as Mr Ashcroft, the risk of incorrect assembly of the rig would have been reduced, if not eliminated.

127 WT's evidence before the jury was that he had been acting in the mistaken belief that the rear bolts were not necessary. The submission for Vibro-Pile was that the evidence supported an alternative hypothesis, namely, that WT had simply forgotten to insert (or require the insertion of) the rear bolts. This submission was put as part of the final address to the jury on behalf of Vibro-Pile. It relied on WT's frank

admission that he had forgotten to insert the side bolts, even though he knew that they were required and had intended to insert them.

128 We have already pointed out that proof of the breach did not require proof that the lack of training had caused the fatal accident. It was therefore unnecessary for the jury to form a view as to why WT left the rear bolts out. But, if it had mattered, it was well open to the jury to reject the alternative hypothesis beyond reasonable doubt. As the prosecutor pointed out in his final address, there was a 'triangle' of corroboration of WT's account. Specifically:

- Mr Drew of Frankipile said that WT had told him not to put the bolts in;
- Mr Springall (the Frankipile supervisor) said that, following the accident, Drew told him that he had followed WT's instructions; and
- Mr Ashcroft said that, when he asked WT why he had not put the rear bolts in, WT said that it was because he (Ashcroft) had told him not to.

Charge 4(c): supervision

129 As noted earlier, particular 4(c) alleged that Vibro-Pile had

> failed to supervise the rigging of the plant to ensure that the correct procedure for attaching the 1.8 metre section of the leader was followed.

Both at trial and on appeal, Vibro-Pile contended that this charge should not have been left to the jury because — so it was said — the particulars did not identify an offence.

130 According to the no case submission made to the trial judge at the conclusion of the prosecution case, the indictment needed to set out 'a specific practicable measure that should have been implemented'. Counsel for Vibro-Pile gave the following examples of the kinds of specifics which should have been included in the charge:

- Vibro-Pile should have had a full-time supervisor present at the

work site;

- Mr McPherson should have attended three times each day; and/or
- Mr McPherson should have sat in the cab of the rig with WT.

131 As Redlich JA pointed out during argument, the challenge to these particulars should properly have been raised before the trial began. The contention was that charge 4(c) was bad in law and should be struck out. The correctness of that contention did not depend on the evidence which the prosecution would lead. A complaint about particulars — where it is said that they do not disclose an offence known to the law or would otherwise be productive of unfairness — should be raised at the outset of the trial. There are real difficulties in the way of an accused who waits until the close of the prosecution case, or until an appeal, to complain that unfairness has resulted from the form of the particulars.[46]

132 The complaint raised in the no case submission rested on what was said by the High Court in *Kirk*.[47] The High Court held that an employer's convictions (under the equivalent New South Wales legislation) should be quashed because the statement of the relevant offence did little more than follow the words of the statutory provision defining the employer's duty.[48] What was required, the Court held, was an identification of

> the measures which should have been taken. If a risk was or is present, the question is — what action on the part of the employer was or is required to address it? The answer to that question is the matter properly the subject of the charge.[49]

133 Since the hearing of the present appeal, this Court has had occasion to consider the implications of the *Kirk* decision for the drawing-up of charges under the OHSA.

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46 *Patel v The Queen* (2012) 247 CLR 531, 550-1 [66].

47 (2010) 239 CLR 531.

48 Ibid 557 [25].

49 Ibid 560–561 [34].

In *Baiada Poultry Pty Ltd v Glenister*,[50] the Court rejected a challenge to the adequacy of a charge under s 26 of the OHSA. In their joint judgment, Ferguson and McLeish JJA said:

> It is plain that a charge under s 26(1) of the OHS Act must identify the act or omission which constitutes a contravention of the section. *In our opinion, the reasoning in Kirk does not support the proposition that this requires specification of the detailed actions which it was reasonably practicable for the defendant to take*. *Kirk* concerned a trial that had been heard and determined on the basis of charges which were particularised almost entirely in terms of the words of the statute, in circumstances where the onus of proof on the question of reasonable practicability lay on the defendant. Such particulars, as well as failing to inform the defendant of the substance of the charge, amounted in effect to little more than a statement of the statutory offence.
>
> References in the plurality's judgment to 'particular measures' need to be read in that light. *The fundamental requirement is that the act or omission that constituted the contravention be specified. Analysis of a failure to do so in terms of the need to specify a 'measure' or a 'particular measure' does not say anything as to the degree of particularity required.* It serves, instead, to emphasize what is the relevant act or omission which gives rise to the offence, namely the measure or measures which the defendant has failed to take to prevent an identifiable risk eventuating. The convictions in *Kirk* stemmed from charges which wholly failed to identify any such measure. That sufficed to require the convictions to be set aside. Baiada's submissions sought to attribute too much significance to the plurality's use of the word 'measure'.[51]

134 We respectfully agree. Applying that analysis to the present case, there was no deficiency in the charge.[52] Particular 4(c) specified with sufficient precision what Vibro-Pile ought to have done. That is, it should have supervised the rigging of the plant to ensure that the correct procedure was followed for attaching the 1.8 metre section. There was no obligation on the prosecution to specify 'the detailed actions which it was reasonably practicable' for Vibro-Pile to take.

Single charge: multiple particulars

135 Although the ground has not been made out, it is desirable to refer to the discussion in the course of argument of the difficulties which can arise when — as

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50 [2015] VSCA 344 ('*Baiada*').

51 Ibid [48]–[49] (emphasis added) (citations omitted).

52 The Court sought, and received, supplementary submissions on the effect of the decision in *Baiada* [2015] VSCA 344.

occurred with charge 4 — a charge has multiple particulars, each alleging a distinct breach of duty by the employer. In the case of charge 4, as already discussed, the particulars alleged failings on Vibro-Pile's part in its induction, training and supervision respectively. The Crown case was that, if the identified measures had been taken in discharge of each of these distinct duties, the risk of incorrect assembly and consequent collapse would have been eliminated or reduced.

136 Inevitably, the jury had to give separate consideration to each of Vibro-Pile's duties — to induct, to train and to supervise. The identified measures had to be taken at different times — induction first, training next, and supervision at the time of the doing of the particular work. And different factual questions were likely to arise as to what was reasonably practicable at the relevant time.

137 The jury's guilty verdict on charge 4 is, of course, inscrutable. It provides no indication of which particulars were found proved. This created at least two potential difficulties. First, the sentencing judge — who was bound to impose a sentence consistent with the jury's verdict — knew no more than that the jury must have reached a unanimous verdict on at least one of the particulars on charge 4. (As will appear, one of the grounds of Vibro-Pile's appeal against sentence is that the judge sentenced the company — impermissibly — on the basis that all three of the particulars had been established).

138 The second difficulty emerged during argument on the appeal against conviction. As noted earlier, Vibro-Pile advanced two separate challenges to charge 4(c), the first directed at the form of the charge, the second at whether it was open to the jury to conclude that the particular allegation had been established. Success on either of those challenges would have meant that one of the three possible pathways to conviction on charge 4 had not been open to the jury. In those circumstances, the appeal against conviction on charge 4 would necessarily have succeeded, notwithstanding our view that it was open to the jury to reach guilty verdicts in respect of the allegations in both particulars 4(a) and 4(b).

139 In response to the Court's request for supplementary submissions on this question, the parties drew attention to s 33(2) of the OHSA, which provides:

> Subject to any contrary court order, two or more contraventions may be charged as a single offence if they arise out of the same factual circumstances.

This provision was enacted pursuant to a recommendation arising from the 2004 *Occupational Health and Safety Act Review*.[53] The Review report drew attention to the decision of Fullagar J in *Chugg v Pacific Dunlop Ltd*[54] (subsequently approved by the Appeal Division in *The Queen v Australian Char Pty Ltd*),[55] which upheld a complaint of duplicity in relation to an information alleging a breach of s 21(1). The particulars in the information had alleged breaches of two different sub-paragraphs of s 21(2).

140 The Review recommended that:

> [T]he Act should be amended to remove any legal obstacle to the laying of a single information under s 21(1), the particulars of which refer to more than one of the sub-paragraphs of s 21(2).[56] *There will, of course, be many cases in which it will be necessary for separate informations to be laid. In the example referred to earlier, the allegation of a failure to provide safe plant would typically be the subject of a separate information, because quite different issues of 'reasonable practicability' would apply from those which would be applicable to a failure to provide appropriate training and supervision.*
>
> The real benefit of the change I am recommending would be to avoid the need for a multiplicity of informations where what is to be alleged is a variety of instances of non-compliance with a particular sub-paragraph of s 21(2). It is easy to contemplate in relation to s 21(a), for example, that the failure to provide a safe system of work might be particularised by reference to a series of specific acts or omissions. The provision of s 31 of the NSW Act provides a useful model for amendment.[57]

141 As appears from the highlighted passage, the Review pointed out that separate charges would be necessary where the individual allegations of breach raised different issues of reasonable practicability . That is, in our view, what should have happened in the present case.

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53 Chris Maxwell, *Occupational Health and Safety Act Review,* March 2004 ('Maxwell Review').

54 [1988] VR 411 ('Chugg').

55 [1999] 3 VR 834, 842–3 [38].

56 The decision in *Chugg* concerned an information. The Review recommendation applied equally to indictments.

57 Maxwell Review 382 [1854]–[1855] (emphasis added).

142 As we have said, each of the sub-allegations in charge 4 raised its own set of factual and legal issues — as to whether Vibro-Pile had provided the necessary induction, or the necessary training, or the necessary supervision, to eliminate or reduce the safety risk. Presenting each allegation as a separate charge would also have drawn attention to the fact that s 21(2)(e) imposes a variety of distinct obligations, each requiring the employer's separate attention.

143 It follows, in our view, that the prosecuting authorities should be selective in their use of the power conferred by s 33(2). As the legislative history shows, the provision should be understood as having an essentially remedial or protective function, to avoid duplicity arguments where more than one breach has been particularised.

144 Importantly, the provision permits joinder of particulars under the single charge only where they arise from the same 'factual circumstances'. It is necessary to keep clearly in mind that the relevant 'factual circumstance' is not the occurrence of the accident that gave rise to the investigation, but the act or omission (or the course of conduct) constituting the breach of the Act.[58]

145 Given the difficulties to which we have referred, the option of charging more than one contravention in a single charge should be reserved for cases where proof of the same — or substantially the same — facts will establish each contravention. In such a case, and provided that the jury has been directed appropriately, the judge should be able to infer from a guilty verdict on the particular charge that each particularised contravention was found proved.

Unsafe?

146 The second complaint on appeal was that the evidence could not reasonably have supported the conviction of Vibro-Pile on this charge. As it was expressed in the

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58 A similar issue arises in relation to the imposition of an aggregate fine: see *Frewstal* [2015] VSCA 266 [37]–[42].

written case:

> [T]he evidence was incapable of supporting a finding that a reasonable employer in the position of [Vibro-Pile] would have provided any different form of supervision or that any particular form of supervision that it may have been alleged [Vibro-Pile] should have provided would have had any impact whatsoever on Mr Te Are's conduct in leaving out the six critical rear bolts.

147 This submission, too, must be rejected. As we have already pointed out, the obligation imposed on Vibro-Pile by s 21(2)(e) was to provide 'such supervision as [was] necessary to enable' WT to perform his work in a way that was safe and without risks to health. In our view, it was well open to the jury to conclude that Vibro-Pile had breached that duty.

148 What is 'necessary' supervision for this purpose is to be determined objectively, on the basis of the circumstances as they existed at the relevant time. Evidence of 'the particular circumstances prevailing at the workplace'[59] will ordinarily inform consideration of whether a risk existed; the likelihood of the risk eventuating; the gravity of the consequences should the risk eventuate; and whether supervision was a reasonably practicable step that should have been taken to eliminate or reduce the risk.[60]

149 In relation to supervision, the circumstances to be considered will ordinarily include at least the following:

- the nature of the work which the employee is to undertake;
- the extent of the employee's training and prior experience in the performance of such work; and
- the identity of any co-workers with whom the employee will be performing that work, and the extent of the training and prior experience of those co-workers.

150 In this case, of course, Vibro-Pile was providing the services of its own employee

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59 *Kirk* (2010) 239 CLR 531 [11].

60 See [91] above.

(WT) to another employer (Frankipile), to work in that employer's workplace. Vibro-Pile's safety obligations in relation to WT were thus relevantly analogous to those of a labour-hire company, which hires out its employee(s) to work for a 'host employer'.

151 It has long been established that the safety duties of labour hire employers are not diminished by their lack of control over the 'host' employer's workplace. The labour-hirer must take positive steps to ensure the safety of the hired worker in that workplace, and has a positive obligation to directly supervise and monitor the work of the hired worker to ensure a safe working environment.[61]

152 In the present case, the determination of what supervision was necessary had to take into account the following 'particular circumstances', namely, that:

- WT would be working on a non-Vibro-Pile site;
- the expertise of the co-workers was unknown;
- WT would be required to erect the Fundex machine, as well as to operate it;
- the machine would have to be erected to its full height of 40 metres, which would require installation of the 1.8 metre section; and
- WT had not been trained to instal the 1.8 metre section, had never installed it and had never seen it done.

153 In fact, the Frankipile employees with whom WT would be working had had little or no training or experience in rigging or de-rigging the machine. And Mr Springall, Frankipile's site supervisor, was as ignorant as the other Frankipile employees. He had made this clear to his superiors in advance.

154 When WT arrived, Springall told him that he would have to take responsibility

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61 *Drake* (1999) 90 IR 432. See, generally, Michael Tooma, *Tooma's Annotated Occupational Health and Safety Act 2004* (LawBook, 2005) 59 [1.21.100].

for controlling and directing the entire operation, as neither he nor his crew had any relevant experience. Thus, when the critical issue arose concerning the rear bolts, Frankipile's Mark Drew knew that it would be 'a waste of time' speaking to Springall, since he knew nothing about Fundex machines.

155 Also relevant to the question of supervision was what the Fundex manual said about the respective responsibilities of the foreman and the operator. The manual made clear that the foreman was 'the main person responsible for the foundation machine', while the operator

> may exclusively operate in accordance with the instructions of the pile-driving foreman.

156 Mr Ashcroft's evidence was to similar effect. On a Vibro-Pile site, he said, the responsibility for supervising the erection of the Fundex machine would rest with the foreman. Mr Ashcroft confirmed that the foreman had a different function from the operator. The foreman 'runs the job'. There was no challenge to this evidence.

157 In these circumstances, in our view, the jury were entitled to conclude that the minimum necessary supervision to enable WT to erect the rig safely required the presence of a Vibro-Pile foreman, such as Mr Ashcroft, who had received practical training and had relevant experience in erecting the rig and, in particular, in installing the 1.8 metre section.

158 As to the identification of the work to be done, and of the associated risks, the Vibro-Pile foreman responsible for sending WT to the Frankipile site (Mr McPherson) made no enquiries about either:

- the height to which the Fundex machine would need to be rigged; or
- the relevant capability of Mr Springall as foreman or of the Frankipile crew.

159 Vibro-Pile had no written record of Frankipile's request for an operator, or of the work which was to be done. Mr McPherson had no more than a general impression

of WT's capabilities, and sent him to the site with no written instructions of any kind.

160 The supervision which Mr McPherson provided was wholly inadequate. He did not purport to supervise anything which WT did at the Frankipile site. Indeed, he told the jury that he did not consider that he had any responsibility to do so 'in this type of situation'. He called in to the site only twice. The second occasion was on the Friday afternoon, the day before the collapse. It was about 1.30pm and Mr McPherson was on his way home.

161 On this occasion, Mr McPherson observed that the usually-composed WT was 'pretty agitated'. WT told him that the Frankipile workers were a 'cowboy crew', and had damaged the machine. Despite WT's protest, all Mr McPherson did was to urge him to finish the job, telling him that he would be back on his own machine on Monday. McPherson said nothing to Springall, or to anyone at Vibro-Pile, about WT's concerns at the lack of competence of the Frankipile workers.

162 As we have already explained, proof of a breach of s 21(2)(e) does not involve any question of reasonable practicability. But, even if it did, our conclusion would be unchanged. On the basis of what Vibro-Pile knew or ought to have known about the circumstances that prevailed in the workplace, the risk existed that the rig would not be erected correctly. Proper supervision was essential for that risk to be eliminated or reduced.

'Arising from the conduct of the undertaking'

163 Vibro-Pile was charged with a breach of its duty under s 23(1). As noted at the outset of these reasons, the jury acquitted Vibro-Pile of that charge. Accordingly, the grounds of appeal did not concern s 23. There was, however, debate on the appeal about the scope of the phrase 'risks … arising from the conduct of the undertaking of the employer'. We directed the parties to provide supplementary submissions, so that the point could be addressed for the future.

164 In its supplementary submission, Vibro-Pile accepted that the work performed by

WT for Frankipile was part of its undertaking. The issue at trial, it says, was whether there was a safety risk and whether, if there was, measures should have been taken to address that risk. That does not appear to us, however, to be the way the issue of 'undertaking' was approached at the trial.

165 In addition to the duty to ensure a safe workplace for employees, s 23(1) imposes on an employer a duty to other persons, as follows:

> An employer must ensure, so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer.

166 Charge 5 alleged that Vibro-Pile had failed, so far as was reasonably practicable, to ensure that the Frankipile employees

> were not exposed to risks to their health and safety arising from the conduct of its undertaking.

The particulars of charge 5 repeated the allegations particularised under charges 3 and 4.

167 Vibro-Pile's alleged breach of duty in relation to non-employees was thus said to be constituted by its failure:

- to ensure that the manual included a warning about the risk of collapse;
- to ensure that WT was inducted and trained in the correct procedure for attaching the 1.8 metre section; and
- to supervise the rigging of the plant to ensure that the correct procedure was followed.

168 In the course of argument on the no case submission, the judge asked prosecuting counsel how it was contended that the work carried out for Frankipile at the Sturt Street site could be said to represent the conduct of Vibro-Pile's 'undertaking'. The prosecutor's submission was that:

- Vibro-Pile was a rigging company which owned and operated drilling machines and which employed operators to set up and

operate rigging machines; and

- it was part of that undertaking to send an operator to this site to erect the drilling machine and then operate it.

169 In final address, the prosecutor dealt only briefly with charge 5, submitting to the jury that Vibro-Pile's undertaking included:

> the erection and operation of piling rigs and providing crews and operators to do this. Its business therefore includes providing [WT] to go to the site. That's part of their business.

The submission for Vibro-Pile, on the other hand, was summed up by his Honour in these terms:

> Vibro-Pile argue that what was going on at Sturt Street was in no sense the undertaking of Vibro-Pile. They argue that the evidence is that the site was the site of L.U. Simon who were the builders for the apartments, and that Frankipile had been engaged to carry out the piling work using Frankipile's machinery, crew, supervisor, sub-contractors and crane operators.
>
> You should use your common sense when determining whether the risk of the rig collapsing arose as part of Vibro-Pile's undertaking, taking into account all of the circumstances including the level of control that Vibro-Pile had over the work being carried out at that site. Vibro-Pile argues that beyond making [WT's] services available, it had no control over the workplace and it was in no sense its … undertaking.

170 The focus on Vibro-Pile's lack of control over the Frankipile workers and work site was, with respect, incorrect. The leading authority on this category of employer liability is the decision of the House of Lords in *The Queen v Associated Octel Limited*.[62] In that case, the employer's undertaking was running a chemical plant. The employer engaged a firm of specialist contractors to repair the lining of one of its tanks. One of the contractor's employees was using a volatile substance in the tank when a fire broke out. The submission for the employer was that, since it had not been in a position to control the activities of the contractor and its employees, it should not be liable for any breach of the duty to non-employees.

171 Lord Hoffman[63] dismissed the argument based on lack of control as 'a confusion

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62 [1996] 4 All ER 846 ('*Octel*).

63 With whom the other members of the House agreed.

of thought', saying that the relevant provision (the equivalent of s 23) required the employer to conduct its undertaking

> in a way which, subject to reasonable practicability, does not create risks to people's health and safety. If, therefore, the employer engages an independent contractor to do work which forms part of the conduct of the employer's undertaking, he must stipulate for whatever conditions are needed to avoid those risks and are reasonably practicable. He cannot, having omitted to do so, say that he was not in a position to exercise any control.[64]

172 His Lordship continued:

> The question, as it seems to me, is simply whether the activity in question can be described as part of the employer's undertaking. In most cases, the answer will be obvious. [The employer's] undertaking was running a chemical plant … Anything which constituted running the plant was part of the conduct of its undertaking. But there will also be ancillary activities such as obtaining supplies, making deliveries, cleaning and maintenance and repairs which may give rise to more difficulty.[65]

173 The present case, of course, involved the reverse situation. Whereas in *Octel* the employer claimed not to have been able to control the outside contractor, in this case Vibro-Pile *was* the outside contractor and was claiming not to have been able to control what went on at the Frankipile workplace. But similar considerations apply by analogy. The simple question was whether the provision of the services of WT to Frankipile could be described as part of Vibro-Pile's undertaking. It seems clear to us that it could.

174 There is no difference in character, in our view, between:

(t) WT being sent to a site where Vibro-Pile has been engaged by the builder to undertake drilling work; and

(u) WT being sent — as occurred here — to undertake drilling work which another company has been engaged by the builder to perform.

Put simply, Vibro-Pile is in the business of providing operators of drilling rigs to carry out drilling work and — when necessary for that purpose — to erect the

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64 *Octel* [1996] 4 All ER 846, 850–1.

65 Ibid 851.

drilling rig. That is its 'undertaking'.

175 Our conclusion accords with what was said by Hansen J (as he then was) in *Whittaker v Delmina Pty Ltd*.[66] In that case, the employer operated a horse-riding business in which it hired horses to members of the public for riding on a trail outside the employer's property. A WorkSafe inspector had issued an improvement notice,[67] stating his opinion that the employer was contravening the equivalent of s 23 in that the provision of unsupervised horse rides was 'likely to cause a risk to the health and safety of riders'.

176 Hansen J rejected an argument that the duty to non-employees was confined to the employer's own workplace. Noting that the word 'undertaking' was not defined, his Honour said:

> In my view it means the business or enterprise of the employer … and the word 'conduct' refers to the activity or what is done in the course of carrying on of the business or enterprise. A business or enterprise, including for example that conducted by a municipal corporation, may be seen to be conducting its operation, performing work or providing services at one or more places, permanent or temporary and whether or not possessing a defined physical boundary. The circumstances must be as infinite as they may be variable.[68]

177 So, too, in the present case. As discussed earlier in these reasons, there was a risk that the rig would not be correctly erected and that, as a result, the rig would collapse. That risk existed at the point where Vibro-Pile agreed to provide the services of WT to Frankipile, and it was a risk which could have been eliminated or reduced had Vibro-Pile taken the measures to which we have referred. Those were omissions by Vibro-Pile in the conduct of its undertaking, just as the provision of WT's services and the provision of necessary supervision were part of its undertaking.

178 That this was part of Vibro-Pile's undertaking should not have been in issue at

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66 (1998) 87 IR 268 ('*Whittaker*').

67 Under s 43 of the 1985 Act.

68 *Whittaker* (1998) 87 IR 268, 280–1.

trial. The real issue was whether Vibro-Pile had failed to do what was reasonably practicable to ensure that the Frankipile employees were not exposed to risk as a result of the conduct of Vibro-Pile's undertaking.

179 It follows, in our view, that Vibro-Pile was allowed to advance an argument before the jury — repeated without qualification by the trial judge in his directions to the jury — which impermissibly confined the scope of Vibro-Pile's 'undertaking' to work undertaken where it had 'control of the workplace'. That erroneous submission, and direction, may explain why the jury acquitted Vibro-Pile on that charge.

B. SENTENCE APPEALS

180 As noted earlier, the penalty imposed on Frankipile was an aggregate fine of $350,000. The penalty imposed on Vibro-Pile was an aggregate fine of $100,000. At the time, the maximum penalty for a single contravention of s 21 was $1.075 million. The Director of Public Prosecutions has appealed against both sentences on the ground of manifest inadequacy.

181 Vibro-Pile, for its part, has sought leave to appeal against sentence on two grounds. The first is a ground of specific error, the second contends that the sentence was manifestly excessive. We deal first with the complaint of specific error.

Vibro-Pile sentence appeal — specific error

182 Vibro-Pile's contention is that the sentencing judge erred

> in sentencing on a more aggravated basis than that on which the prosecution had been permitted to go to the jury.

As formulated in the written case, the submission for Vibro-Pile was as follows:

> His Honour should have sentenced VP on the factual basis on which he had permitted the prosecution to go to the jury, namely, that the jury verdicts of guilty on charges 3 and 4 were based on the sole factual premise (which was not in dispute) that VP failed to include in its written procedure regarding the installation of the 1.8m section of the leader, a warning that failing to install all the bolts as set out in procedure might cause 'something to happen'.

> His Honour should have found that the same conduct that gave rise to the breach alleged in charges 3, namely, that the Manual/procedure did not contain a warning, was precisely the same conduct as that giving rise to the finding of guilt on charge 4 (under particular 4(a)).
>
> By virtue of the way the prosecution was permitted to go to the jury, a verdict of guilty on charge 3, which had to be by virtue of the alleged failure to include a warning (as that was the sole basis upon which it was put by the prosecution) inevitably lead [sic] to a verdict of guilty on charge 4, as it was not in dispute that the procedure that Mr Te Are was inducted into did not contain a warning.
>
> His Honour should have found that the breach established was of the most minor and technical kind, deserving of little if any penalty.

183 Complaint is made about findings by the judge — set out in the sentencing reasons — that:

(v) the rear bolts were not installed because WT 'decided, wrongly, that they did not need to be installed';[69]

(w) WT's instruction to Drew not to insert the rear bolts reflected WT's 'genuinely-held, but wrong, belief' that the critical joint remained within the support of the mast;[70] and

(x) if the manual had identified the risk of collapse if the rear bolts were not inserted, it was probable that WT

> would not have formed or held the belief he had at the relevant time.[71]

184 On the plea, counsel for Vibro-Pile pointed out to the judge — correctly — that the jury's guilty verdict on charge 4 was inscrutable. Counsel accepted that the guilty verdict on charge 3 led inevitably to the jury also being satisfied of particular 4(a), but submitted that it would be 'entirely a matter of speculation' whether the jury then moved to consider either particular 4(b) or particular 4(c).

185 Counsel drew the judge's attention to the decision of the High Court in *Cheung v The Queen*,[72] relying on the helpful explanation of that decision in the Sentencing

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69 Reasons [17].

70 Reasons [18].

71 Reasons [25].

72 (2001) 209 CLR 1 ('*Cheung*').

Manual published by the Judicial College of Victoria. It was submitted that Vibro-Pile could not be sentenced on the basis of particulars 4(b) or (c) unless his Honour was satisfied beyond reasonable doubt that the jury had convicted on one or both of the those bases.

186 As the decision in *Cheung* makes clear, it was the sentencing judge's obligation to make up his own mind about the evidence when performing his task of assessing the degree of culpability of Vibro-Pile for the charges of which the jury had found it guilty.[73] Adverse findings had to be made to the criminal standard. Otherwise, the only constraint was that his Honour's findings not be inconsistent with the jury's verdict.

187 In the present case, the judge instructed himself correctly in this respect. His findings with respect to the failures in training and supervision were expressed to be findings beyond reasonable doubt. For the reasons we have already given, it was open to his Honour to reach those conclusions and to be satisfied to the criminal standard, just as it was open to the jury to convict Vibro-Pile of the distinct breaches identified in particulars 4(b) and (c).

188 This ground must, therefore, be rejected. There was no error in sentencing Vibro-Pile on the basis of all three allegations as particularised under charge 4. It is convenient to deal with Vibro-Pile's ground of manifest excess in conjunction with the Director's appeal.

Director's appeal — Vibro-Pile

189 In addition to the ground of manifest inadequacy, the Director's notice of appeal included a ground contending that the sentencing judge erred in finding that Vibro-Pile's breaches of the Act 'were not causative of Mr Swannenbeck's death'. The written case draws attention to the judge's statement that Vibro-Pile was

> not to be sentenced on the basis that its failures were causes of the death of

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73 Ibid 19 [38].

> Sonny Swannenbeck, rather that they were causes of [WT] being placed at risk of serious injury or death by its failures.[74]

190 According to the Director's written case, it was both open to his Honour to find that the breaches caused the worker's death, and necessary to do so since

> the fact that there has been a loss of life, as a consequence of breaches of the Act, increases the gravity of the offending.

In the course of argument, however, senior counsel for the Director conceded that this statement was incorrect. In a supplementary submission, the Director described as 'plainly correct' the statement by this Court in *Orbit Drilling Pty Ltd v The Queen*,[75] that the consequences of a breach of the OHSA 'are generally viewed as of little relevance to the assessment of objective seriousness'.[76]

191 As reformulated, the Director's contention was that — separately from the assessment of 'the nature and gravity of the offence'[77] — the *Sentencing Act 1991* required the sentencing court to take into account:

- the impact of the offence on any victim of the offence; and
- any injury, loss or damage resulting directly from the offence.[78]

The Director drew attention to the definition of 'victim' in s 3 of the *Sentencing Act 1991*:

> **victim**, in relation to an offence, means a person who … has suffered injury, loss or damage … as a direct result of the offence, whether or not that injury, loss or damage was reasonably foreseeable by the offender.

192 The Director submitted that Mr Swannenbeck's death was the 'direct result' of the breaches of the Act by the respective defendants. The judge should have found, so the Director submits, that WT made a deliberate decision that the rear bolts not be put in and did so 'because his training left him thinking that he did not have to do

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74 Reasons [33].

75 (2012) 35 VR 399, 414–5 [62].

76 Ibid 414 –5 [62]. See also *CICG* (2006) 14 VR 321, 335 [61].

77 *Sentencing Act 1991* s 5(2)(c).

78 Ibid, ss 5(2)(daa), (db).

so'. According to the submission:

> The significant failures of the employers in this case — inadequate training and documentation in respect of how to put the rig together, and inadequate supervision whilst their respective employees did so — resulted in their employees putting together the rig in a way that made it almost inevitable that it would collapse, with death a likely result when it did.
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> …
>
> The connection between these failures and the death is direct; the rig was put together as it was because of the [defendants'] failures, with the consequence that the rig collapsed and the death occurred.

193 The submission for Vibro-Pile was that neither the deceased worker nor any of his family members was a 'victim' for this purpose. Nor was it open on the evidence, in any case, to make a finding that Vibro-Pile's offending had caused his death. Vibro-Pile contends that the guilty verdicts represented

> only a finding that Vibro-Pile failed to take all reasonably practicable measures to mitigate the risk of the rig collapsing by virtue of all bolts not being installed. It is in no respect a finding that Vibro-Pile's omissions caused [WT or anyone else] to fail to put the bolts in.

194 Vibro-Pile further contends that:

- precisely what caused WT not to put the bolts in was 'entirely speculative';
- the judge's findings about causation 'were not open on any sensible analysis of the evidence'; and
- Vibro-Pile was acquitted of the only charge which alleged that it had put the deceased worker at risk (charge 5).

195 In our view, the Director's submission must be accepted. The provisions of the *Sentencing Act 1991* are quite clear. The sentencing court is obliged to consider the impact of the offending on victims, that is, on persons who suffer loss and damage as a 'direct result' of the offending. For these purposes, it makes no difference whether the duty breached is a duty owed to employees (s 21 and s 22) or to others (s 23).

196 The obvious difficulty in sentencing for OHSA breaches is the one discussed

earlier, namely, that proof of a breach of the Act does not require proof that the breach led to injury or death. For that reason, as we have explained, there is no need to explore that question of causation in the course of a trial.[79] And, in the absence of relevant evidence of that kind, it may simply not be possible for the Court — following conviction — to reach any conclusion about what the 'direct result' of the offending was.

197 In the present case, however, that question of causation was exhaustively investigated in the course of the trial, and his Honour was well able to make findings about what happened as a consequence of the defendants' breaches. Indeed, as already noted, his Honour made specific findings about WT's state of mind at the time he directed that the rear bolts did not need to be inserted.

198 While his Honour was correct that the gravity of the offending did not depend on whether death had been caused, it was nevertheless a relevant sentencing factor. The findings which his Honour made about WT's state of mind were, in substance, findings that the respective breaches did lead, as a direct result, to the death of Mr Swannenbeck.

199 We note, in this regard, that victim impact was the first matter which the judge addressed in his sentencing reasons:

> I should immediately recognise the great trauma and prolonged grief that the loss of this young and productive life has caused to his immediate and extended family. The dignified and at times passionate victim impact statements … serve to remind us all why it is that the duty to keep workers safe is so carefully prescribed in the legislation under which these charges are brought.

200 This discussion highlights the complexity of sentencing for OHSA offences. As discussed earlier in these reasons, the question of whether the safety breach caused injury or death is irrelevant to criminal liability. Further, in a case like this, the occurrence of death or injury would not have any bearing on the assessment of the objective gravity of the offence. Yet at the same time it is a matter which must be

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79 Evidentiary relevance is a different matter.

taken into account in assessing victim impact (assuming the availability of sufficient evidence or — on a plea — a relevant admission). This underlines the importance of prosecutors being properly instructed, so that they can explain these distinctions very clearly to the sentencing court.

201 The submission for the Director was that Vibro-Pile's offences were 'serious examples' of offending under s 21, and that Vibro-Pile should be viewed as having 'significant culpability and responsibility' for the offending. More specifically, the Director contends that:

- in circumstances such as these, a failure to comply with the relevant obligations under the Act had 'foreseeable potential consequences' which were catastrophic;[80]
- Vibro-Pile was an expert in the piling industry, routinely working with large and heavy machinery, and its core business had 'an inherent risk' that, unless its machines were properly erected, they could break apart and kill or injure those in the vicinity;
- when WT was sent to the site, Vibro-Pile did not know what he would be required to do and, in particular, did not know that he would have to insert the 1.8 metre section; and
- WT's training was defective.

202 We referred earlier to Vibro-Pile's manifest excess ground. Its contention was that it was not open to find that WT acted under a mistaken belief that the rear bolts did not need to be installed or to find, on that basis, that Vibro-Pile's training was inadequate. Moreover, it was submitted, there was no, or no sufficient, evidence to support the judge's finding that the training was 'not sufficient', not to the 'required standard' and 'deficient'.

203 These submissions may be disposed of shortly. For the reasons given earlier, the

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80 See *DPP v Amcor Packaging Australia Pty Ltd* (2005) 11 VR 557, 565 [35].

finding about WT's state of mind was well open.[81] The finding about the inadequacy of the training was likewise fully justified. We refer to what was said earlier about the 'critical gap' in WT's training.

204 The Director's submission was that an aggregate fine of $100,000 was not reasonably open, given the seriousness of the offending and the importance of general deterrence.[82] Reliance was placed on comparable cases, which we discuss below. The Director also submitted that there was no basis for distinguishing between Vibro-Pile and Frankipile, who 'should have been viewed as equally responsible and culpable in all the circumstances of this case'.

205 As to the last point, the judge explained the sentencing differential between Vibro-Pile ($100,000) and Frankipile ($350,000) in these terms:

> In my view the breaches by Vibro-pile are not so serious as those by Frankipile. This was not Vibro-Pile's site, job, supervisor, crew or machine. The control it could have over what went on at the site was accordingly limited. It had been asked for an operator and provided one, when in fact what was really required was a foreman. Nonetheless, its obligation to know what task its employee was engaged in and to ensure that he performed it in a working environment that was, so far as reasonably practicable, safe and without risk to health in respect of systems of work and training and supervision remained, and Vibro-Pile's failures in this regard exposed Te Are to grave and immediate risk of serious injury.[83]

206 In our respectful opinion, it was not open to his Honour to distinguish between the defendants in this way. We referred earlier to the nature of Vibro-Pile's safety obligations in respect of the provision of WT's services to Frankipile.[84] As we have pointed out, it was immaterial that Vibro-Pile would not be in control of the site. Its obligation to ensure WT's safety was undiminished.

207 The risk of collapse to which WT was exposed was exactly the same whether he was erecting a Fundex machine on a Vibro-Pile site or on any other site. That was

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81 See [128] above.

82 See *DPP v Coates Hire Operation Pty Ltd* (2012) 36 VR 361, 379 [79].

83 Reasons [53].

84 See [150]–[151] above.

the risk which Vibro-Pile could have eliminated or reduced, by the inclusion of a warning in the manual and by the provision of the necessary induction, training and supervision of WT. As discussed further below, Frankipile's breaches were of a different character but there was no basis, in our view, for viewing Vibro-Pile's breaches as less serious.

Director's appeal — Frankipile

208 The Director submitted that the aggregate fine of $350,000 did not adequately reflect the seriousness of Frankipile's offending or its culpability. The circumstances of the offending demonstrated, it was said, that Frankipile's culpability and degree of responsibility for the offending should be viewed as significant. Reliance was placed on the following matters:

- as with Vibro-Pile, Frankipile was an expert in the piling industry, routinely working with large and heavy machinery, and its core business had the same inherent risk of machine collapse and consequent death or injury;
- Frankipile owned the machine which collapsed;
- WT apart, all of those involved in erecting the machine were employed by Frankipile; and
- the Frankipile crew had insufficient training and experience to enable them to participate safely in erecting the machine.

209 To this list we would add the following:

- one of Frankipile's senior managers had been informed by Mr Springall that he and his team had no relevant experience in erecting the machine, and yet those same workers were allowed to participate in this dangerous activity;
- Frankipile did not inform Vibro-Pile that the machine would need to be erected to its full extension of 40 metres or that this would require the installation of the 1.8 metre section; and

- despite knowing about the inexperience of its own team, Frankipile made no enquiries of Vibro-Pile to ascertain whether the person being offered had the necessary training and experience in erecting the machine to that height.

210 In the language of s 21(2)(e), therefore, Frankipile failed almost entirely to

> provide such information, instruction, training or supervision to [its] employees as was necessary to enable [them] to perform their work in a way that was safe and without risks to health.

Put shortly, Frankipile was evidently content to allow its dangerously-inexperienced crew, and supervisor, to participate in a dangerous activity under the direction of an employee sent by another company, on the basis merely of an assurance that he was 'very experienced'.

211 In response, Frankipile submitted that the sentencing judge had been

> entitled to have regard to the extensive safe (sic) systems that were in place and the steps that had been taken to ensure the rig could be erected safely.

The following matters were said to mitigate the seriousness of its offending:

- WT was supplied to Frankipile as a 'qualified and competent person able to safely erect and operate the rig';
- he was in fact a qualified and competent person, with 'extensive experience in operating heavy construction equipment, and specific training and experience in erecting and dismantling the Fundex machine';
- WT had no doubt about his ability to erect the machine and had acknowledged, in evidence, that he did not indicate to the Frankipile crew that he had any doubt about his ability;
- Mr Springall had known Mr McPherson of Vibro-Pile for approximately 12 years and had never been given bad advice. (McPherson said to Springall that WT was one of Vibro-Pile's best operators); and
- the breaches were not in any way 'a result of a deliberate action on the part of Frankipile to cut corners or put anyone at risk'.

212 According to Frankipile's written case, WT's

> departure from his training and experience was so remote that it could not be said that Frankipile should have foreseen that [he] would act in such a way by leaving out the bolts that were essential in the integrity of the piling rig.

Director's appeals and Vibro-Pile's proposed manifest excess ground – comparable cases

213 In the present case, as in *Frewstal*, the prosecutor and Vibro-Pile supplied the sentencing judge with tables of sentencing decisions in cases where a death had occurred following a breach of s 21 of the OHSA. For the reasons given by the Court in *Frewstal*, the mere fact that a death occurred (without more) provides little guidance as to the seriousness of a breach.[85] Little assistance can be gained from tables of sentences compiled by reference to the fact that a death occurred and which provide no meaningful information as to the circumstances.[86]

214 As Maxwell P pointed out in *Frewstal*:[87]

> It is well-established that comparable cases can assist a sentencing judge in determining the applicable sentencing range for the case at hand. But if information of this kind is to be of assistance to a judge, it must be confined to cases which are properly described as relevant comparators (whether because they are materially the same or because they are instructively different), and sufficient information must be provided to enable the judge to make meaningful comparisons.

215 On these appeals, the Director referred in his written submissions to the table provided to the sentencing judge by the prosecutor, which was said to reveal that, after a plea to offences of this type, a fine of 'between $300,000 and $400,000 is likely to be imposed'. The Director submitted that five cases 'provide particular assistance'.[88] Each of these cases involved a guilty plea by a corporate employer

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85 [2015] VSCA 266 [47] (Maxwell P).

86 Ibid [49] (Maxwell P) and [117] (Priest and Kaye JJA).

87 Ibid [49].

88 The cases referred to were: *DPP v Tooradin Excavations Pty Ltd* (Unreported, County Court of Victoria, Judge Maidment, 15 September 2014); *DPP v Melbourne Water Corporation* [2014] VCC 184; *DPP v Airroad Pty Ltd* [2013] VCC 1960; *DPP v Australand Industrial Constructions Pty Ltd* (Unreported, County Court of Victoria, Judge Gaynor, 14 October 2011); *DPP v Fonterra Australia Pty Ltd* (Unreported, County Court of Victoria, Judge Gucciardo, 17 October

with no prior convictions for an offence under s 21 of the OHSA where a death had occurred. In those cases, fines of between $300,000 and $400,000 had been imposed for a single offence.

216 Vibro-Pile and Frankipile distinguished the five cases relied upon by the Director, on the basis that each involved aggravating factors not present in the case before this Court, or involved more serious offending.

217 Frankipile submitted that deliberate actions on the part of the offender in these cases, and their relevant prior convictions, were aggravating factors which tended to increase fines imposed for s 21 breaches. Frankipile also relied on this Court's decision in *Baiada Poultry Pty Ltd v The Queen*.[89] There a fine of $100,000 had been imposed, after trial, for a breach of s 21 of the OHSA. The appeal to this Court was against conviction, however, and a review of the County Court's reasons in that case reveals that a co-offending corporation, which was found to have been more culpable than Baiada and which had pleaded guilty, was fined $400,000.[90]

218 In response to a request from the Court, the Director filed a supplementary submission identifying three further sentencing decisions — all from the County Court — said to involve offending comparable in objective gravity to the present case. According to the supplementary submission, the offending in each case could be regarded as 'somewhat comparable' to the present offending, although

> the feature that distinguishes the present case, … is that the rig was particularly likely to collapse if it was constructed without the bolts, and such a collapse was particularly likely to result in death. It follows that the risk to be guarded against in the present case was especially significant.

219 The Director's supplementary submission summarised the comparable cases in these terms:

> *DPP v Tabro Meats Pty Ltd*: Plea of guilty. An abattoir had a box with a door

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2011).

89 [2011] VSCA 23. Baiada successfully appealed to the High Court and a new trial was ordered: *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92.

90 Unreported, County Court of Victoria, Judge Campbell, 29 May 2009.

that would close forcefully, which was used for holding a beast while it was killed. There was a degree of training and supervision of those using it. An employee from another area of the factory performed an extra shift, and was told to hose the box to clean it. That employee did not know how the machine worked. It was obvious that if someone was caught in the machine, he or she would be crushed. The employee apparently knocked controls whilst leaning in, was crushed, and died. The company had an insignificant prior offence in 1996. The company had limited means. Fines totalling $350,000 were imposed; a $125,000 fine on an unsafe system of work charge and a $225,000 fine on an inadequate training charge.

DPP v Hansen Yuncken: Plea of guilty. A worker was working on an elevated work platform which tipped and killed him. The company knew that the ground was unsuitable for the use of that platform. It was easy to provide a safe system of work. There was evidence of systems in place, and senior officers were not aware of the breach. However, the site manager knew of the breach. The company was remorseful. There was a prior matter. However, in the context of the size of company, it still had an excellent work record. Fines totalling $475,000 were imposed; a $300,000 fine on an unsafe system of work charge and a $175,000 fine on an inadequate training and information charge.

DPP v Eliott Engineering Pty Ltd: Trial. An engineering company received containers of heavy steel components for a job. Whilst unloading a container, one of the components fell on a worker, who died. Convictions were imposed on charges of lack of instruction and training regarding how to safely unpack the container and failing to have adequate supervision whilst unpacking. The offending was of mid-range seriousness because: dealing with heavy steel is intrinsically dangerous and oral instructions were given, but were not in writing, which meant a higher risk of non-compliance. Unpacking the containers was high risk work and thus required constant supervision. The company had a prior conviction arising out of defective forklift operations. An aggregate fine of $400,000 was imposed.

220 In a supplementary submission in response, Vibro-Pile contended that the three additional cases relied upon by the Director 'bear no relationship to the instant case' which, it said, was less serious than many cases dealt with in the Magistrates' Court. Vibro-Pile annexed a table headed 'WorkSafe summaries of Magistrates' Court comparative sentencing cases'. The sentences imposed in the cases summarised in that table range from $5,000 to $70,000. The descriptions are in summary form. The cases are not reported.

221 Frankipile responded to the Director's supplementary submission in the following terms:

> The case of *DPP v Hansen Yuncken*: is not at all similar to the circumstances of this case. In that case the site manager was aware of the breach and the

company had a prior conviction. These are factors that increase the culpability of the company. In Frankipile's case, it believed it had engaged a trained, experienced and capable Fundex operator, in circumstances where if that operator had acted safely [he] would have ensured the piling rig was erected safely without risk.

The case relied on by the Crown of *DPP v Tabro Meats Pty Ltd*: was a sentence imposed after trial and was not a plea of guilty. The offending in that matter was not at all similar to the offending in the current case. The case however is of assistance as the fine imposed being identical to the amount imposed upon Frankipile confirms that the fine imposed in this case cannot be said to be manifestly inadequate.

The sentence imposed on *Eliot Engineering* after a trial when taking into account a relevant prior conviction, confirms that the sentence imposed on Frankipile is not manifestly inadequate.

The circumstances of this case are more aligned to the case of *Baiada*[91] … in which the accused in that case relied upon the services provided by a third party expert in that area. A fine of $100,000 was imposed in that case after trial.

222 Only limited assistance can be derived from the cases cited. On the one hand, fines of between $300,000 and $400,000 have been imposed for a single breach, in cases where there is a known or obvious risk with very serious potential consequences, even where the offender has pleaded guilty and has no prior convictions. In other cases, much lower fines have been imposed for what appear to have been serious breaches.

Director's appeals and Vibro-Pile's proposed manifest excess ground – consideration

223 In *Frewstal*,[92] Priest and Kaye JJA made the following observations in relation to the effect on penalty of death or serious injury in this context:

> First, unlike cases of unlawful homicide, the occurrence of death or serious injury is not an element of the offences charged. An accused is punished according to the gravity of the breach of duty owed under the OHSA, not according to the result or consequences of the breach.
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> Secondly, the gravity of the breach is measured by two factors — the seriousness of the breach itself (that is, the extent to which the defendant has departed from its statutory duty); and, the extent of the risk of death or

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91 Ibid.

92 [2015] VSCA 266 [126]–[127].

serious injury which might result from the breach.

Thirdly, an assessment of the extent of the risk itself involves consideration of two factors — the likelihood of the occurrence of an event as a result of the breach (such as the event that occurred in the particular case) endangering the safety of employees or others; and, the potential gravity of the consequence of such an event (in particular, whether there is a risk of death or serious injury).

Fourthly, the fact that the breach in the particular case resulted in death is relevant only in the sense that it might manifest or demonstrate the degree of seriousness of the relevant threat to health or safety resulting from the breach.

224 At the same time, for reasons set out earlier, the occurrence of death or serious injury is likely to be relevant to the separate question of victim impact, that is, when the sentencing court is determining whether any person has suffered loss or damage as a 'direct result' of the offending.

225 In the present case, both defendants pleaded not guilty. Each was convicted of two offences. Allowing for the overlap between particulars, each stood to be sentenced for three distinct breaches of the Act, in relation respectively to:

- the system of work (the deficiency in the manual);
- inadequate training; and
- inadequate supervision.

226 Both Frankipile and Vibro-Pile had instruction manuals which were inadequate for the reasons already explained. The defects in training and in supervision were particularly serious. The evidence of Mr Ashcroft (the first Vibro-Pile operator trained on the machine) was that the only way to understand how to rig the 1.8 metre section was to see it done, as indeed he had been required to do on three occasions whilst undertaking his practical training with Fundex, the rig's manufacturer.

227 WT had never undertaken this practical training. Although he had spent significant periods of time as an offsider and as an operator of the machine, he had never been trained in the installation of the 1.8 metre section, had never taken part in

its installation and had never seen it installed. Reliance on the manual was not enough. There was a real and foreseeable risk that an operator who had never been trained in this procedure, who had never taken part in it, and who have never seen it done would make a mistake, having catastrophic consequences, as did in fact occur.

228 Vibro-Pile and Frankipile failed to provide any supervision of WT in his erection of the 1.8 metre section. Vibro-Pile's instruction manual made clear that the operator was to operate the machine 'in accordance with the instructions of the pile-driving foreman'. Mr Ashcroft said in his evidence that the foreman 'runs the job'.

229 Frankipile never told Vibro-Pile that the machine would have to be erected to its full height and that the foreman and employees WT would be working with had little or no training or experience in rigging the machine, so that any person Vibro-Pile supplied would effectively have sole responsibility for controlling and directing the rigging operation. Vibro-Pile never asked Frankipile for any of this same information, and never told Frankipile about WT's lack of relevant practical training. As the sentencing judge observed, Frankipile really required a foreman, which is what Vibro-Pile should have told Frankipile.

230 Mr McPherson, WT's supervisor who dispatched WT to Frankipile, visited WT at the Frankipile site only twice in the two days WT was there. This supervision was completely inadequate. Mr McPherson failed to act on WT's complaints to him about the lack of competence of the Frankipile workers. It was a real and foreseeable risk that the rig would not be erected correctly if adequate supervision was not provided.

231 As the Crown submitted on the plea, it is not possible to distinguish between the two offenders in respect of the seriousness of their respective offending. Vibro-Pile had responsibility for WT and the work he performed. Frankipile had responsibility for the site and the foreman and the other employees who worked there. Actions taken by either offender would have alleviated or diminished the risk that the machine would not be properly rigged.

232 As counsel for Frankipile correctly pointed out, this was not a case of 'blatant disregard' of worker safety or 'reckless indifference' to risk. At the same time, we reject Vibro-Pile's submission that its departure from its statutory duty was 'minor'. These were very serious breaches. A grave risk to worker safety existed not just for any worker on the rig but also for any worker working on the ground in its vicinity. This was a foreseeable consequence of Vibro-Pile and Frankipile breaching s 21 of the OHSA. If the risk eventuated, the consequences were potentially very grave.

233 The seriousness with which breaches of s 21 of the OHSA are to be treated is, as the sentencing judge observed, reflected in the maximum penalty of 9000 penalty units, or $1,075,050.[93] The sentencing judge also rightly observed that general deterrence is of particular importance in offending of this kind. The sentences imposed need to draw attention to the importance of workplace safety, and to send a message to employers that failure to eliminate or mitigate safety risks will attract significant punishment.

234 In mitigation, the sentencing judge properly took into account Vibro-Pile and Frankipile's prior good safety records, the lack of relevant prior offending, and Frankipile's evidence of its steps taken since the offending to improve its workplace safety.[94] His Honour found, nevertheless, that neither offender had shown remorse.[95]

235 In our view, the sentence in each case was outside the range reasonably open to the judge.[96] In imposing the sentences he did, the sentencing judge failed to have sufficient regard to the maximum penalty, the nature and gravity of the offences, Vibro-Pile's and Frankipile's culpability, and the impact of the offences on the family of Mr Swannenbeck. The sentencing judge failed to give sufficient weight to general deterrence and Vibro-Pile's and Frankipile's lack of remorse, and failed to impose a

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93 Reasons [4] and [51].

94 Ibid [42]–[48].

95 Ibid [50].

96 *DPP v Karazisis* (2010) 31 VR 634, 662–3 [127].

penalty that sufficiently reflected the need for denunciation of these breaches.

236 We would therefore allow each of the Director's appeals, and refuse leave on Vibro-Pile's sentence application.

237 In our view, this is not a proper case for an aggregate fine. Each of the breaches involved a separate course of conduct. The fact that each breach represented a failure to eliminate (or reduce) the risk of collapse which materialised on 28 May 2011 is neither here nor there. The penalty needs to reflect the seriousness of the distinct breaches.[97]

238 We would resentence the respondent companies as follows:

Frankipile

Charge 1: $250,000

Charge 2: $500,000

Vibro-Pile

Charge 3: $250,000

Charge 4: $500,000.

239 We should emphasise that, in determining the sentence for Vibro-Pile, we have wholly disregarded what was said earlier with respect to charge 5, of which Vibro-Pile was acquitted.

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[97] *Frewstal* [2015] VSCA 266 [39]–[42].