

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

SYMONS, David

v

CEDAR COLLEGE INCORPORATED

JURISDICTION: Prosecution

FILE NO: 3579 of 2011

HEARING DATES: 14 and 22 December 2011

JUDGMENT OF: Industrial Magistrate M Ardlie

DELIVERED ON: 19 January 2012

CATCHWORDS:

*Prosecution - Guilty plea to one count - The defendant being an employer failed to ensure so far as was reasonably practicable that persons not employed or engaged by it were safe from injury and risks to health whilst those persons were at a workplace that was under the management and control of the defendant - Three persons were in attendance at the workplace under the management and control of the defendant for a junior school sports day - The three persons were exposed to risk and were injured when a part of a tree fell on to them - Failure to ensure that the tree was removed prior to sports day - Failure to ensure that given the wind conditions on the day of the sports day activities were not scheduled under or near the tree - **Held:** Conviction - Penalty \$108,750 (after 25% discount) plus levy and costs - Ss 22(2)(a), 60A Occupational Health, Safety and Welfare Act 1986, S 10 Criminal Law (Sentencing) Act 1988.*

Hillman v Barossa Enterprises Incorporated [2011] SAIRC 26

REPRESENTATION:

Counsel:

Complainant: Mr M Opacic

Defendant: Mr T Martin

Solicitors:

Complainant: Crown Solicitor's Office

Defendant: Minter Ellison

Introduction

- 1 The defendant is a not for profit religious and educational association based at Northgate. It was established as an outreach ministry of the Oakden Baptist Church on land acquired by the church on what was formerly an agricultural research laboratories property.
- 2 The defendant commenced operations in 1997 and at that time had only 34 students. It has since that time been in a constant state of development and now has almost 600 students across primary, middle and senior schools. It has about 60 employees.
- 3 The defendant is registered by the Non-government School Registration Board for years reception to twelve.
- 4 On the day of the incident, namely 11 September 2009, a junior sports day was being conducted at the defendant's premises. Most of the activities were scheduled to take place on the oval, but some had been scheduled to take place around the administration area in proximity to a large tree.
- 5 At about 11.00am on the day of the incident part of the trunk of the tree collapsed and fell onto three persons who were standing under or near the tree.
- 6 John Duthie, one of the victims, was the father of two children who were students at the defendant's institution. Mr Duthie sustained serious injuries and is now a paraplegic as a result of the incident. Bronwen Cox a mother of three children who were students at the defendant's institution sustained a dislocation and a fractured ankle, a bruised right shoulder and a large laceration to the head. Bailey Hames a student of the defendant's institution suffered two fractures and a break to the left leg, a broken ankle, a bruised face, arm and hand. All three victims suffered associated psychological problems.

Guilty plea

- 7 The defendant, through its counsel, entered a plea of guilty. It was acknowledged by counsel for the complainant that the defendant entered a plea of guilty at the earliest possible opportunity.
- 8 The single count alleged in the complaint and summons concerned a breach of s 22(2)(a) of the *Occupational Health, Safety and Welfare Act 1986* ("the Act"). The complaint and summons alleged that:

“Offence details

1. On 11 September 2009, at Northgate in the State of South Australia, the defendant, being an employer, failed so far as was reasonably practicable to ensure that persons not employed or engaged by it, namely John Alexander Duthie, Bronwen Cox, and Bailey Alexander Hames, were safe from injury and risks to health, while they were at a workplace that was under the management and control of the defendant.

Contrary to section 22(2)(a) of the *Occupational Health, Safety and Welfare Act 1986*.

This is a summary offence.

Particulars

- 1.1 At all material times John Alexander Duthie (‘Duthie’), Bronwen Cox (‘Cox’), and Bailey Alexander Hames (‘Hames’) were persons neither employed nor engaged by the defendant.
- 1.2 On 11 September 2009, Duthie, Cox and Hames were at Cedar College, a workplace under the management and control of the defendant, while attending the Cedar College primary school sports day.
- 1.3 On 11 September 2009, Duthie, Cox and Hames were exposed to risk, and were injured, when a part of a tree fell on to them.
- 1.4 The defendant failed to ensure:
 - (a) that the tree was removed prior to the sports day;
 - (b) that given the wind conditions on the day of the sports day, activities were not scheduled under or near the tree.”

Summary of allegations made by counsel for the complainant

- 9 The defendant is an incorporated association. According to its constitution it is a not for profit religious and educational association established as a ministry of the Oakden Baptist Church. The school grounds located at Fosters Road, Northgate are leased by the defendant from the Oakden Baptist Church.¹
- 10 The defendant is registered by the Non-government School Registration Board for years reception to twelve.

¹ See Exhibit C1 – Memorandum of Lease.

- 11 On the day of the incident the three persons who sustained injuries were present at the school grounds to observe, participate or assist in the junior sports day for students between years two and seven.
- 12 The wind conditions on the day of the incident were severe. All three persons were standing under or near a large tree located outside the administration area. Whilst most activities were scheduled to take place on the school oval, some had been scheduled in and around the administration area near the tree concerned.
- 13 At or about 11.00am on the day of the incident a part of the trunk of the tree collapsed and fell onto the three persons trapping them underneath. Each of the three persons sustained serious injuries.
- 14 The trees located in the defendant's grounds were the subject of an arboricultural survey conducted on the 29 April 2005.² The tree involved in the incident was designated with a number 21. The comments made about the tree were that at the time it was in good health but had poor structure and it required high priority pruning at an estimated cost of \$690. The high priority pruning related to trees located in high use areas. The investigations revealed that the recommendation as regards tree 21 was not acted upon.
- 15 A follow-up arboricultural survey of trees was conducted in December 2007.³ The survey mentions that two significant trees and sixteen non-significant trees had been recommended for removal. In relation to the tree in question, identified by the number 21, the recommendation was that this tree be removed. The estimated costs was said to be \$1,950. The removal of the tree was expressed to be of medium priority. The life expectancy was expressed to be less than five years. The maintenance, recommended as medium priority, was to be carried out in the time frame of six to eighteen months. The tree was identified as having poor structure.
- 16 As at the day of the incident almost 21 months had passed since the second arboricultural survey had been carried out. The time recommended for the removal of tree 21, namely six to eighteen months had lapsed. The defendant had not followed through on the written recommendations made in relation to the tree. Previously it had not followed through the recommendations made as regards pruning the tree.
- 17 The tree was removed the day after the incident, namely 12 September 2009.

² See Exhibit C4.

³ See Exhibit C5.

- 18 The defendant should have scheduled activities elsewhere on the school grounds away from tree 21. The majority of the activities were undertaken on the oval. The wind conditions on the day of the incident were severe. There was in fact a discussion taking place as to whether the sports day should continue given the wind conditions.
- 19 Following the incident a third report was obtained following an arboricultural survey conducted in October 2009.⁴ Also post-incident the defendant prepared and implemented a policy entitled “Outdoor Activities Around Trees Policy and Procedure”.⁵
- 20 There was a foreseeable risk of injury as the removal of the tree had been recommended and the time period for such removal had lapsed. The risk was exacerbated by the fact that activities were scheduled to take place under or around the tree whilst severe wind conditions prevailed.
- 21 All of the injuries sustained were serious but the risk in relation to all three persons was that of fatal injuries.
- 22 Victim impact statements have been received from the three persons who sustained injuries. Additional victim impact statements have been provided by various family members of the three persons.
- 23 This is a first offence and the maximum penalty applicable to the defendant as a body corporate is a fine of \$300,000. It is acknowledged that the defendant is entitled to a discount by reason of its plea and further that the plea was entered into at the earliest possible opportunity.
- 24 The defendant has at all times assisted and cooperated with SafeWork SA during the course of the investigation and also participated in a record of interview.

Summary of submissions made by counsel for the defendant

- 25 The defendant is an independent Christian school and a member of the Christian Schools Australia. One of its aims is to be accessible to its local community and through a state government rebate scheme it is able to offer up to 40% discount on its fees to approximately 15% of its student who come from low income families. It is a not for profit religious and educational association.
- 26 Safety has been a focus since its inception. A full safety audit of the land was undertaken before it was converted to a school site. The school facilities and buildings are relatively new and have all been designed with a view to safe use by the occupants. The defendant conducts

⁴ See Exhibit C6.

⁵ See Exhibit C7.

regular maintenance and safety audits on the property. Playground equipment is monitored weekly. Uneven surfaces are identified, marked and dealt with. There are asset management plans involving regular inspections of buildings and facilities. The health and safety committee established by the defendant meets once every school term.

- 27 A volunteer group called the Property Implementation Group holds regular working bees to carry out any minor repair or improvement works. Contractors are engaged for high risk or complex work and for any major construction projects.
- 28 At the end of 2004 the defendant decided that it should conduct an audit of the safety of the trees on its site. The land on which the buildings are located was formerly used as an agricultural research site. There is an unusual number of trees on the property including some very significant trees. The initial report listed some urgent priority management which included the removal and pruning of certain trees. The defendant undertook the urgent priority tasks that were identified. The defendant was not in a position to deal with all of the recommendations at once.
- 29 The decision was made to obtain an arborist report on a two year cycle. The second report was provided in December 2007. Urgent jobs were attended to in the first instance. The defendant did not fully comprehend the risk that was posed by the tree. It did not understand from reading the report that the tree posed a risk to safety. The removal of the tree was not given a high priority. A future property development, being an extension of the car park, was intended for the area which contained the tree. The then Business Manager of the defendant had in mind that the tree could be removed at the time and as part of the process of the extension of the car park.
- 30 It is accepted that when the incident occurred it was two months outside the eighteen month timeframe which was suggested for the removal of the tree.
- 31 The severe winds on the day of the incident were clearly a contributing factor.
- 32 The defendant accepts that its failure to remove the tree meant that it failed to ensure the safety of those persons who were injured so far as was reasonably practicable. The defendant accepts that the removal of the tree was a reasonable practicable measure which, if taken, would have eliminated the risk.
- 33 Without detracting in any way from the plea of guilty, in a sense, the defendant is saddled with liability because of its careful attitude to tree safety. If it had not taken the step of obtaining the arborist's report, and therefore had never received the recommendation to remove the tree,

then it would have been far less likely to have faced the charge that it now does. The defendant accepts that because it had received the recommendation to remove the tree within eighteen months in order to discharge its obligations under the Act it ought to have removed the tree within that time period.

- 34 Activities were scheduled near to the tree rather than directly under the tree. A demonstration of how unlucky it was that the accident occurred in the way that it did comes from a discussion between the Business Manager and the Senior School Coordinator of the defendant, wherein the deteriorating weather conditions were noted along with the increasing strength of the wind. As a result of that discussion they intended to tell the Principal that they wanted to shift any activities away from the trees. The Business Manager had gone to find the Principal to have that discussion when the accident occurred.
- 35 The Senior School Coordinator, who was responsible for physical education and had the role in scheduling the activities, stated that he scheduled activities in the vicinity of the tree because he had confidence in the safety of the tree on the basis of the earlier arborist report.
- 36 The fact that the accident occurred at all is a matter of quite extreme bad luck. A number of factors combined in order for the accident to occur. The winds were extreme, there had been drought conditions leading up to the incident and the fact that the portion of the tree fell on the occasion of the school sports day when three persons were in harm's way. Combined with this the defendant was minutes away from ordering the people in the vicinity away from the tree in question.
- 37 It is accepted the risk was potentially that of fatal injuries. The likelihood of the accident occurring was low.
- 38 It is not to suggest for a moment that the unlucky circumstances resulting in the accident excuse the defendant's failure to discharge its statutory obligation. The circumstances do affect the objective seriousness of the offence and constitute a significant mitigating circumstance.
- 39 The defendant's breach of the Act was caused more by a lack of understanding of the level of risk than by a lack of care. It is reasonable for the Court to infer that the defendant, having obtained the arborist's report in previous years and having demonstrated its attitude to tree safety, if it was cognisant of the material risk it would have taken action to address the same.
- 40 Following the incident the defendant immediately removed the tree. It engaged its arborist ahead of its usual cycle to prepare another report and as a consequence a number of other trees were removed in the weeks following. The defendant now takes an extremely conservative approach

to its management of its tree. By way of example, it received a recommendation in relation to a tree in an area of high risk that the tree be pruned, but rather than continue that risk, the defendant had it removed.

41 The most recent tree audit was obtained in November 2010. The defendant continues to monitor the condition of its trees.

42 The defendant has prepared an outdoor activities policy in relation to the trees on its site. The defendant has also undertaken a full risk assessment of sports day activities to assess safety more generally.

43 The defendant has responded with compassion to the families affected by the accident. Two out of the three families directly affected still have children at the school. All of the families were offered pastoral support and counselling. At the request of the defendant members of the Baptist Church community delivered meals and did gardening for one family. Children of the families remaining at the school have had ongoing access to pastoral care and counselling. These assertions may to some extent contradict statements made in the victim impact statements.

44 Civil legal proceedings in relation to the accident have been foreshadowed.

45 The incident is a matter of great regret and remorse to the defendant. This is reflected in its plea of guilty at the earliest available opportunity and its full cooperation with SafeWork SA during the course of the investigation. The school Principal and the Business Manager attended court as an expression of the defendant's contrition and acceptance of responsibility for the accident.

46 The defendant recognises that the severe consequences of the accident place its offence in the serious category. There are a number of mitigating factors namely:

- The defendant has demonstrated a responsible and appropriate attitude to safety during its short existence and in particular in relation to tree safety;
- The defendant is a good corporate citizen;
- The objective seriousness of the offence is substantially reduced by the sheer bad luck that was involved in the occurrence of the event;
- The defendant is a not for profit organisation. The defendant has a capacity to pay any penalty imposed but there is very little money in terms of its budgetary position. A substantial

pecuniary penalty will affect the defendant's future program of capital investment in infrastructure.

- 47 In light of the defendant's not for profit status and its public purpose a heavy pecuniary penalty is not in the public interest. An order for a non-pecuniary penalty under s 60A of the Act in lieu of part of the pecuniary penalty should be imposed. The terms of the order under section 60A should incorporate the proposal prepared by the defendant.⁶
- 48 General deterrence would be adequately served by the activities that are contained in the proposal. The facts of the case will be brought home directly to the attention of the educational communities of which the defendant is a member.

Supplementary submissions in relation to the application of s 60A of the Act

Summary of submissions made by counsel for the complainant

- 49 The complainant opposes the defendant's application for partial substitution of the pecuniary penalty by way of non-pecuniary penalties pursuant to s 60A of the Act. It may be appropriate for the Court to consider ordering a non-pecuniary penalty in addition to a pecuniary penalty.
- 50 If the Court is minded to make such orders it is requested that further time be given to negotiate the scope and nature of the order since in the complainant's view the proposed orders are inadequate.
- 51 The defendant does not assert that it does not have capacity to pay. It has \$4 million in borrowing in relation to development projects recently undertaken to expand its operations and only small cash reserves. There is no evidence to satisfy the Court that the defendant's objectives or business operations would be compromised or affected in any way should a fine be imposed.
- 52 It is an inappropriate exercise of the Court's sentencing discretion to award partial substitution of a pecuniary penalty in circumstances where the defendant has the capacity to pay.
- 53 The defendant has an independent revenue stream unlike the situation that prevailed in *Hillman v Barossa Enterprises Incorporated*.⁷ In *Barossa Enterprises* the Court made findings about the defendant's financial position. The findings were made as a result of extensive evidence on the matter being put before the Court.

⁶ See Exhibit D1 – Proposal under s 60A of the Act.

⁷ [2011] SAIRC 26.

- 54 As to the submissions that the non-pecuniary penalty sought would provide a greater level of general deterrence, general deterrence can be most appropriately dealt with in this matter by recording a conviction and imposing a fine.

Summary of submissions made by counsel for the defendant

- 55 Section 60A was enacted to provide the Court with a greater range of options for the imposition of a penalty following conviction. The Court is granted a discretion to order a penalty in addition to or substitution for any pecuniary penalty it may impose.
- 56 For the Court to substitute an order for a non-pecuniary penalty for part of any pecuniary penalty is wholly consistent with the purpose and objective of s 60A and established sentencing principles. Section 60A is a recognition by Parliament that other penalties may be more appropriate and more effective in the circumstances. The non-pecuniary penalty may also serve as a form of punishment in itself in that it may cause the defendant to incur a cost in terms of time or financial resources or may cause the defendant harm through reputation that would extend further than that caused by the publication of the Court's reasons and the imposition of a conviction.
- 57 An order for a non-pecuniary penalty is consistent with all the sentencing principles as set out in s 10 of the *Criminal Law (Sentencing) Act 1988*.
- 58 In setting the level of punishment it is relevant that the defendant is a not for profit organisation established to service the needs of its local community. A substantial pecuniary penalty will affect the defendant's ability to service the community by reducing the resources available for the furthering of the defendant's objectives.
- 59 The submission is not directed to the capacity to pay. Given that the defendant is a not for profit organisation any penalty will be taken from financial resources that would otherwise be put towards the objectives of the defendant.
- 60 Specific deterrence should not be of great concern to the Court given the active steps taken by the defendant to address safety including the new policy on outdoor activities, the risk assessment of sports day and the continuing vigilance in relation to tree safety audits. The proposed order that the faculty coordinators attend responsible officer training would go some way in achieving specific deterrence.
- 61 The paramount issue is that of general deterrence. General deterrence would be much better served by the activities proposed by the defendant than by an imposition of a pecuniary penalty. The general improvement of occupational health, safety and welfare within the educational sector

will be better served by the specific measures proposed to publicise the case within the sector.

Consideration

- 62 This is a first offence. The maximum penalty is \$300,000.
- 63 The defendant entered an early plea of guilty and thereby accepted the responsibility for the failure alleged in the complaint. The defendant cooperated with the investigation and willingly participated in a record of interview.
- 64 The matters to be considered by a sentencing court are set out in s 10 of the *Criminal Law (Sentencing) Act 1988*. Matters that are relevant to the prosecution include the circumstances of the offence, other offences (if any), if the offence forms part of a course of conduct, the personal circumstances of any victim of the offence, any injury, loss or damage resulting from the offence, the degree to which the defendant has shown contrition for the offence, if the defendant has pleaded guilty, the degree to which the defendant has cooperated in the investigation of the offence, the deterrent effect any sentence under consideration may have on the defendant or other persons, the need to ensure that the defendant is adequately punished for the offence and the antecedents of the defendant.
- 65 The circumstances of the offence are particularly relevant. On the day of the incident a junior sports day was being conducted at the defendant's premises. Whilst most of the activities were programmed to take place on the oval, some activities had been scheduled to take place in proximity to the administration area and more particularly in and around a large tree. It is accepted that the day was particularly windy. Discussions had taken place concerning the removal of activities away from trees given the conditions. Unfortunately there had been no implementation of this suggestion prior to the incident.
- 66 The site on which the defendant is located was formerly an agricultural research laboratory and had a significant number of trees. The defendant had demonstrated an awareness of the dangers that trees presented by having an arborist inspect the trees on its site and provide written recommendations as regards the trees. The particular tree involved in the incident when first inspected in 2005 was recommended to have pruning undertaken as a matter of high priority given that the tree was located in a high use area in and around the administration block. The recommendation as to pruning was not acted upon. A follow up survey conducted in December 2007 recommended that the tree be removed. Such removal was regarded as being medium priority to be carried out in a time frame of six to eighteen months. The tree was also identified as

having poor structure. Again the defendant did not act upon this recommendation.

- 67 I am told that when the second report was received from the arborist following the inspection in December 2007 urgent jobs were attended to in the first instance. The submission was made that the defendant did not fully comprehend the risk that was posed by the tree. I was also told that a future property development on the site, being an extension of the car park, was intended for the area which contained the tree. A decision was apparently made that the tree could be removed at the time and as part of the process of the extension of the car park.
- 68 The defendant had acted with foresight to have the trees on its site assessed. Unfortunately it did not act upon the recommendations. The tree involved in the incident was in proximity to the administration area and was regarded in the arborist's report as being located in a high use area. The defendant's duty is to ensure so far as was reasonably practicable that persons coming on to its site are safe from injury and risks to health. It needed to be aware whether the trees posed any risk to safety. It took steps to ascertain this information but failed to act appropriately.
- 69 The activities of the sports day conducted on the oval would have been away from any dangers presented by trees on the site.⁸ To schedule activities under or near the tree given the conditions was a failure on the part of the defendant as is alleged in the complaint and summons. This is particularly compounded by the fact that the tree was previously identified for removal by the arborist.
- 70 The risk to any persons being under or near the tree was that of fatal injuries. This is accepted by the defendant. All three persons sustained significant injuries and the extent to which those injuries have impacted upon the three persons and their families have been detailed in the victim impact statements provided to the Court.
- 71 Following the incident the defendant prepared an outdoor activities policy which had regard to the trees on its site. It is commendable that it developed such a policy but this is no more than what its responsibility is under the Act. Given the nature of the site and the significant number of trees this was something that should have been considered prior to the incident rather than as a reaction to the incident.
- 72 The suggestion was made that the "unlucky" circumstances resulting in the accident affect the objective seriousness of the offence and constitute a significant mitigating circumstance. I do not agree with this submission. The failure on the part of the defendant to act upon the

⁸ See Exhibit C2 – Diagram.

recommendations of the arborist in relation to this particular tree given its location, coupled with the fact that it scheduled activities in and around the tree on the sports day do not constitute, in my view, “unlucky” circumstances.

- 73 I accept that the defendant demonstrated it had an awareness as to tree safety by commissioning the reports. Its failure was to act upon those reports. There is evidence that it has a responsible and appropriate attitude to safety generally. I also accept that it is a good corporate citizen.
- 74 I was asked to consider an order for a non-pecuniary penalty under s 60A of the Act and, if such an order was to be made, then this should be partly in lieu of the monetary penalty to be imposed. Particular reference was made to the fact that the defendant is a not for profit organisation. Whilst it has a capacity to pay any penalty imposed, there is very little money in terms of its budgetary position. Apparently the defendant has significant borrowings to fund its infrastructure program to enable it to expand.
- 75 Having considered the provisions of s 60A and the submissions made I am not prepared to proceed down the path suggested by the defendant. General and specific deterrence, in my view, will be served by a conviction and a monetary penalty.
- 76 The defendant is entitled to receive a discount for the plea of guilty which was entered at the earliest opportunity. Furthermore I am satisfied that the defendant is genuinely remorseful for the incident. The discount I intend to apply is 25%.
- 77 The maximum penalty is \$300,000. The risk involved was that of fatal injuries to the three persons. The monetary penalty imposed must reflect this. I impose a notional penalty of \$145,000. Allowing a discount of 25% for the early plea and all other relevant matters this results in an actual fine of \$108,750.

Summary

- 78 A conviction is recorded.

A fine (after 25% discount):	\$108,750.00
Court costs:	\$207.00
Victims of crime levy:	\$160.00
Counsel fee (payable to the Crown):	<u>\$800.00</u>

TOTAL: **\$109,917.00**

28 days to pay.