



High Court, Kirk & NSW WorkCover

A recent legal decision handed down by the High Court is summarised in a condensed version of an article written by Minter Ellison Lawyers. The full article is available via the following link:

<http://www.minterellison.com/public/connect/Internet/Home/Legal+Insights/Articles/A-HRIR-Landmark+decision>

The NSW WorkCover Authority prosecuted Kirk Group Holdings, the owner of the farm, and one of its directors, Graeme Kirk, over the death of the farm's manager. The manager was fatally injured when he drove off a formed road and rolled an all-terrain vehicle while travelling down the side of a steep hill.

The company and Mr Kirk defended the prosecution, alleging that it was not foreseeable that a qualified and competent employee would disregard warnings and needlessly drive down a slope. The NSW Industrial Relations Commission found the Company and Mr Kirk guilty of breaching their obligations under the Occupational Health and Safety Act 1983 (NSW) and ordered them to pay a fine of \$121,000 for failing to ensure the safety of employees.

Mr Kirk unsuccessfully challenged the decision at appellate level in NSW before obtaining special leave to appeal to the High Court.

Decision

The Full Court of the High Court unanimously quashed the NSW IRC's decision.

In a joint decision, the court held that WorkCover failed to identify what Mr Kirk and his Company could have done to prevent the incident, denying them the opportunity to properly put a defence. Instead, they were required to show why it was not reasonably practicable to eliminate all possible risks associated with the use of the vehicle - making it practically impossible for Mr Kirk or his Company to formulate a defence to the charge.

An order for costs was made against WorkCover for Mr Kirk and the Company's costs in the Court of Appeal and High Court appeals.

Justice Heydon's judgment

While agreeing with the majority decision, Justice Heydon went further than the majority in his criticism of the prosecution - saying it was time for it (WorkCover) to 'finish its sport with Mr Kirk'. His Honour's judgment also supported a narrower approach to the obligation of an employer with an experienced employee who had been reckless.

'It is absurd to have prosecuted the owner of a farm and its principal on the ground that the principal had failed properly to ensure the health, safety and welfare of his manager, who was a man of optimum skill and experience - skill and experience much greater than his own - and a man whose conduct in driving straight down the side of a hill instead of on a formed and safe road was inexplicably reckless.'



The High Court decision is a breath of fresh air for employers striving to comply with OH&S laws - emphasising that a contravention of OHS laws is a criminal offence and criticising the way in which these prosecutions have been heard and conducted.

What might this mean for employers?

Without access to the full court report it is difficult to make a full assessment. However, in any subsequent case employers may be required to demonstrate that their employees are competent. Paragraph 3 of the shaded section at the end of the full Minter Ellison report states that: Justice Heydon's comments also support a possible narrowing of the duty on employers to ensure the health and safety of competent, well trained employees who engage in 'reckless' behaviour in the workplace.

A future defence may require an employer to demonstrate:

1. Competencies have been identified;
2. Competencies have been assessed;
3. Competency gaps have been identified in employees;
4. Training has been planned/scheduled to eliminate the hazard of low skill or minimise the risks associated with low skill;
5. Training has been delivered; and
6. Training effectiveness has been assessed.