

Workplace Law Bulletin

AIRD & BERLIS LLP
Barristers and Solicitors

Do You Have Due Diligence and Can You Prove It?

By: Cynthia Sefton

The proof of due diligence by a defendant, on a balance of probabilities, is fact dependent. A recent Ontario trial decision provides a useful overview of the framework for a finding that due diligence has been proven.

The charges stemmed from a tragic 2012 incident in which a worker suffered a serious injury to his foot, which had to be amputated.

The defendant company was a manufacturer of machined metal products. It was in the process of manufacturing six large cylindrical spindles for its customer's massive trucks, which were used in the oil industry. Each spindle weighed about 10,000 pounds and was four to five feet long.

The manufacture of the second spindle was almost completed when the defendant's customer requested that the groove located at one end of the spindle be ground down. This had to be done by hand, since the spindle was already machined.

The task was given to a seventeen-month employee, who was relatively inexperienced in acting as a "deburrer," one whose job was grinding down any burrs or rough edges on the company's products.

The spindle which required modification was lying horizontally on two stands, but had to be rotated to be worked on. The worker made an attempt to rotate the spindle with a piece of rebar that he attached to an overhead crane. When he attempted the rotation, the spindle fell off the stands and onto his foot.

There was some disagreement in the evidence at trial as to the instructions given to the injured worker by the person responsible for supervising him. The injured worker testified that he had been told to "prep and rotate" the spindle. This was denied by the supervisor.

The court found that the prosecution had proven the elements of the offence, namely that the employer had failed to provide information, instruction and supervision to the worker for the safe movement of the spindle. However, the court also held that the company had made out a due diligence defence.

The worker had been given training with respect to general safety measures, as well as specific training for overhead cranes. There was no training provided with respect to the rotation of the product, such as occurred in this case, nor were there any specific procedures in that regard. General safety instructions were clear that equipment was not to be used for anything other than its specific purpose.

The court stated that an employer cannot "merely point to the worker's negligent, careless or even reckless conduct" in order for it to succeed on due diligence. The test was reasonable foreseeability. The court found that it could not conclude on the evidence that the worker had been instructed to rotate the spindle. Significantly, the court found that the worker's attempt to rotate the spindle was, to his knowledge and as he testified, contrary to his training. The court held that there was no requirement that a worker be "contemporaneously supervised at all times."

The employer was acquitted.

What comfort can employers take from this decision? Not all that much, since as stated at the outset, due diligence is so fact dependent. However, this is one example, and there are others, that demonstrates that prosecutions can be successfully defended on the “right” facts. Such facts include that an employer carefully considers hazards which can befall a worker and takes steps to mitigate against those hazards. The right facts also require the right witnesses, namely those who can provide evidence, including documentary evidence, of the measures taken by an employer.

R. v. ABS Machining Inc., 2015 ONCJ 213, April 10, 2015

If you have questions regarding any aspect of labour and employment/occupational health and safety law, please contact any member of the Aird & Berlis LLP Labour & Employment Group or Occupational Health & Safety Team:

Lawyers:

Eldon Bennett	416.865.7704	ebennett@airdberlis.com
Lorenzo Lisi	416.865.7722	llisi@airdberlis.com
Barbra H. Miller	416.865.7775	bmiller@airdberlis.com
Cynthia R.C. Sefton	416.865.4730	csefton@airdberlis.com
David S. Reiter	416.865.4734	dreiter@airdberlis.com
Fiona Brown	416.865.3078	fbrown@airdberlis.com
Meghan Cowan	416.865.4722	mcowan@airdberlis.com

AIRD & BERLIS LLP

Barristers and Solicitors

Brookfield Place
181 Bay Street, Suite 1800
Toronto, Ontario, Canada
M5J 2T9

T 416.863.1500 F 416.863.1515

www.airdberlis.com

This *Workplace Law Bulletin* offers general comments on legal developments of concern to businesses, organizations and individuals, and is not intended to provide legal opinions. Readers should seek professional legal advice on the particular issues that concern them.

© 2015 Aird & Berlis LLP

This *Workplace Law Bulletin* may be reproduced with acknowledgment.