

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

SYMONS, David James

v

COX CONSTRUCTIONS PTY LTD  
(First Defendant)

and

SSL LIFTS PTY LTD  
(Second Defendant)

**JURISDICTION:** Prosecution

**FILE NO/S:** 5423 of 2007

**HEARING DATES:** 29 October 2008

**JUDGMENT OF:** Industrial Magistrate M Ardlie

**DELIVERED ON:** 28 November 2008

**CATCHWORDS:**

*Prosecution - Guilty plea by first defendant to one count - Failure to provide a safe working environment and information, instruction, training and supervision - Leave to proceed ex parte against the second defendant pursuant to s 62BA Summary Procedure Act 1921 - The defendant neither appeared nor entered a guilty plea in writing - Alleged failure to take reasonable care to avoid adversely affecting the health or safety of other persons not being employees employed or engaged by the second defendant through an act or omission at work - Building operations being conducted at a shopping centre - Moving walk (travelator) undergoing inspection and testing - Person inspecting and testing the travelator removed a pallet from the travelator - The person testing the travelator operated the same intermittently whilst carrying out testing - A construction worker at the building site became trapped, entangled and subsequently crushed by the exposed components of the travelator - Another worker at the site was exposed to a risk of injury and risk to health namely entanglement and/or crushing - The first defendant charged with an offence under s 19(1) of the Occupational Health, Safety and Welfare Act 1986 - The second defendant charged with two offences under*

*s 22(2) of the Occupational Health, Safety and Welfare Act 1986 - Compensation applied for - **Held:** - As regards the first defendant conviction and a fine imposed (after a discount of 15%) of \$59,500 plus levy and costs - As regards the second defendant a conviction on both counts and a fine imposed of \$120,000 plus levy and costs - Compensation awarded and apportioned - S 19(1), 22(2) Occupational Health, Safety and Welfare Act 1986, S 62BA Summary Procedure Act 1921, S 53 Criminal Law (Sentencing) Act 1988.*

*R v Michael Robert Morgan BC 9700125*

**REPRESENTATION:**

Counsel:

Complainant: Ms C Shanks

First Defendant: Mr R Manuel

Second Defendant: N/A

Solicitors:

Complainant: Crown Solicitor's Office

First Defendant: Lynch Meyer

Second Defendant: N/A

## Introduction

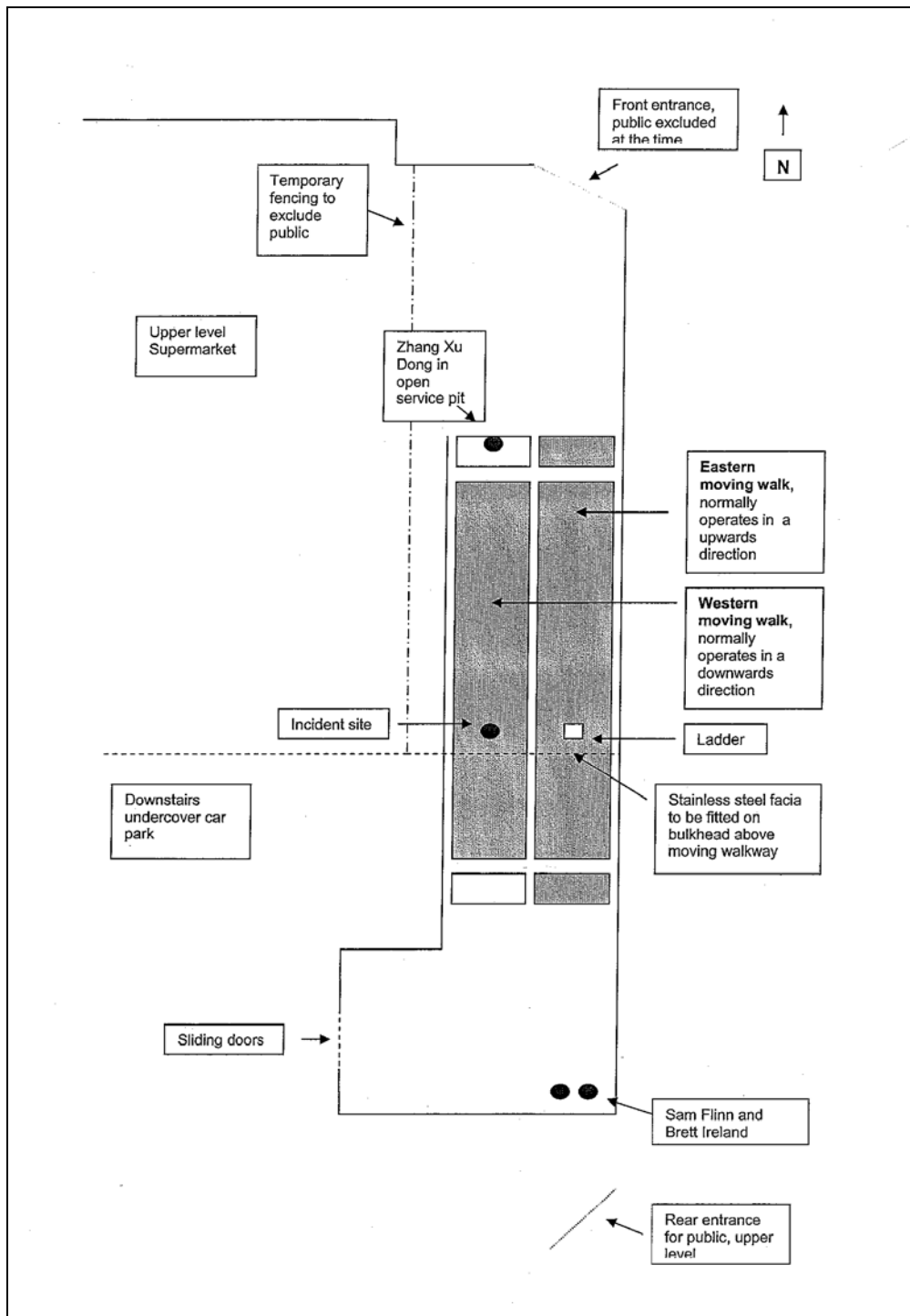
- 1 In December 2005 construction work was taking place at the Pasadena Foodland. Part of the construction work involved the installation of travelators as a means of access between the upper level supermarket and lower level or downstairs car park. The eastern travelator was designed to operate in an upward direction and the western travelator was designed to operate in a downward direction<sup>1</sup>.
- 2 The first defendant had entered into a contract with the operators of the Pasadena Foodland for the performance of building works. Part of the building works to be performed included cutting out a floor slab to enable the installation of the travelators linking the car park on the lower level to the upper level supermarket.
- 3 The first defendant entered into a contract with the second defendant for the second defendant to supply and install the travelators<sup>2</sup>.
- 4 On 14 December 2005 an employee of the second defendant Zhang Xu Dong (“Dong”) was on site in order to carry out testing and inspection of the travelators in particular the western travelator.
- 5 The first defendant had various employees on site that day including Stuart Munzberg (“Munzberg”). Also present were Sam Flinn (“Flinn”) and Brett Ireland (“Ireland”) apprentice glaziers employed by Federation Glass to carry out glass fitting in a kitchen on the upper level and around the bottom of the travelators on the lower level.
- 6 Gino Ganeo (“Ganeo”), an employee of the first defendant, was the site supervisor and was responsible for the day-to-day running of the project.
- 7 In the afternoon of 14 December 2005 Munzberg was involved in the task of installing timber framework onto the bulkhead above the travelators to enable stainless steel fascia to be fitted. This task required Munzberg to use a stepladder which was set up on the eastern travelator to enable him to reach the bulkhead.
- 8 CCTV footage revealed that Munzberg descended the stepladder placed on the eastern travelator moved down the travelator and then disappeared from view. For some unknown reason Munzberg went onto the western travelator which Dong activated for the purpose of testing. Munzberg fell through the gap in the travelator created by the removal of a pallet or pallets, and as a result he became entangled, tragically resulting in his death.

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<sup>1</sup> See Exhibit C2, reproduced on following page.

<sup>2</sup> See Exhibit C5.

Diagram – Exhibit C2



### Allegations as to the breach of legislative obligations

- 9 The first defendant took no steps to ensure that Munzberg was excluded from working on or in the vicinity of the travelator whilst it was being inspected and tested. In addition the fact that Munzberg was using a stepladder to carry out part of his work meant that he could fall from a

height onto the western travelator which was being operated intermittently.

- 10 To allow the use of the western travelator during the process of inspection and testing was inherently unsafe. Both Munzberg and Flinn actually performed duties in and around both travelators whilst the process of inspection and testing was being carrying out. Flinn refers to fixing protruding aluminium on the western travelator and accessing the western travelator to carry out the work.
- 11 The work carried out both by Munzberg and by Flinn was not work that was required to be carried out at that time and could have been delayed to another occasion when the travelator was not being inspected and tested. Job plans did not schedule the concurrent performance of the work that Munzberg and Flinn were carrying out, and the inspection and testing of the travelators<sup>3</sup>. The first defendant had control over the site and should have excluded people from working on or in the vicinity of the travelators whilst they were being inspected and tested.
- 12 Subsequent to the incident a safe work method statement<sup>4</sup> was prepared by the first defendant. One of the requirements referred to was that before any work is carried out on the bulkhead, that is the work that Munzberg was undertaking, the person carrying out the work should ensure that the travelator is isolated in the off position and should advise the travelator technician that work will be conducted in and around the travelator and the travelator must not be turned on under any circumstances. Only when the task is completed and the worker involved advises the site supervisor of this fact and all tools and access equipment have been removed will it then be in order for the travelator technician to carry out testing on the travelator.
- 13 The first defendant instructed Munzberg to perform work that required him to place a ladder on the eastern travelator. This was done in the vicinity of the operating western travelator. Whilst warnings may have been given concerning accessing the western travelator this was not enough as there should have been total exclusion from the area. Apart from exclusion from the area there were no signage or barriers in place and workers had been accessing and working on both travelators. Ganeo had observed workers in the vicinity and accessing the travelators.
- 14 The second defendant failed to ensure that Munzberg, Flinn and others did not work on or in the vicinity of the travelators. It was incumbent upon the second defendant to ensure that the travelators were not used by other persons on the site that day.

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<sup>3</sup> Exhibit C6.

<sup>4</sup> Exhibit C14.

- 15 Dong knew that persons on site were accessing the travelators. Dong allowed Flinn to ride down the western travelator. The eastern travelator was being frequently used as a means of access and a stepladder had been placed on it.
- 16 A previous director who no longer works for the second defendant indicated that it was common sense not to allow other trades to work in proximity to the travelators when being tested. The same director expressed a view that there were to be no other trades working in the area when the testing was being carried out. No relevant checks were carried out to ensure that all other personnel were excluded. Dong in fact knew and consented to the use of the travelators.
- 17 No physical barriers were erected around the entrance to the travelators. Australian Standard 1735.5 refers to the requirement of barriers being erected at the ends of travelators and escalators at any time when inspection or maintenance is being undertaken. The barriers are the main method of excluding people from gaining access to a travelator or similar when work is being carried out. In addition the Australian Standard refers to the requirement for signage to be affixed to the fences or barriers at the ends of the travelator.
- 18 Dong was working alone. He was using the automatic control to operate the travelator. On the basis of the CCTV footage Dong at the moment of the incident was crouching outside the line of sight and could not therefore have had an overview of the full length of the tread way. Dong should have been using the inspection controls available such that he could view the entire tread way or should have had a second person with him to act as a monitor during the inspection and testing process. If monitoring had taken place Munzberg would have been observed in the vicinity of the western travelator. The use of the automatic control meant that Dong had to walk around the moving walkway of the travelator to access the stop button located on the other side. A portable manually operated control device was available but not being used. Had Dong been using this device he could have immediately cut power to the moving travelator by releasing the button.
- 19 Pallets had been removed but at the time of the incident Dong was performing a task at the upper end of the western travelator which did not require the pallets to be removed. Dong was apparently investigating noises emanating from the handrail area and there was no reason why the pallets should not have been replaced prior to him performing this task. The task of replacing the pallets is not particularly difficult or time consuming.

- 20 The second defendant prior to the incident did have a written safe work method<sup>5</sup>. This document was deficient. Subsequent to the incident the second defendant produced an improved specific safe work method<sup>6</sup>.
- 21 Certain facts are agreed between the complainant and the first defendant namely:
- The contract between the first defendant and the second defendant provided that subcontractors were to provide a copy of their company health and safety policy and safe procedures to the site supervisor;
  - The site meeting records of 17 October 2005, 31 October 2005 and 21 November 2005 record that the travelator installation method statement was to be obtained from the second defendant;
  - The second defendant did not provide its travelator installation safe work system to the first defendant;
  - The first defendant made numerous requests from the second defendant for it to provide its safe work system;
  - The second defendant states that it was never requested to provide a copy of their safe work system;
  - If the first defendant had perused the second defendant's safe work system it would have or should have been apparent that there were no systems or controls excluding access to the moving walks;
  - Absent viewing the second defendant's written procedures the first defendant was in a position where the risks presented by the process of inspection and testing must have, if not should have, been apparent on general observations;
  - Ganeo had recognised and appreciated that there were hazards associated with the inspection and testing of the moving walks as he had spoken to Munzberg regarding access issues associated with the western moving walk.
- 22 Responsibility for the installation of the travelators lay with the second defendant. The first defendant allowed Munzberg to work in the danger zone instructing him to perform certain work. Both defendants are highly culpable.

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<sup>5</sup> Exhibit C15.

<sup>6</sup> Exhibit C16.

- 23 These are first offences under the legislation in relation to both defendants. The first defendant is charged with a single offence which carries a maximum fine of \$100,000. The second defendant is charged with two offences each separate offence carries a maximum fine in the amount of \$100,000.
- 24 The risk was that of death.
- 25 The incident that occurred was foreseeable and easily avoidable.
- 26 The first defendant fully cooperated with the investigations. The attendance by the directors of the first defendant in Court demonstrates contrition.
- 27 The first defendant is to be given credit for its plea of guilty.
- 28 The second defendant in failing to provide instructions or attend Court demonstrates a disregard for the proceedings.
- 29 The second defendant is still registered according to an ASIC search.
- 30 Victim Impact Statements either read out or provided to the Court make claim on behalf of the authors of those statements for the payment of compensation. Compensation is sought pursuant to s 53 of the *Criminal Law (Sentencing) Act 1988*.

#### **Summary of submissions of counsel for the first defendant**

- 31 The first defendant has been involved in the building industry in South Australia and Victoria for some 58 years undertaking projects for both Commonwealth and State Governments as well as major private commercial projects.
- 32 The project at Pasadena Foodland was the first occasion on which the first defendant was involved with the installation of a travelator. The process involved putting out a tender and seeking quotations. Previous installations involving elevators have involved the tender process and reliance upon the tenderer being a specialist in the area to carry out the work without incident.
- 33 The first defendant recommended a particular contractor to carry out the installation of the travelator but this was rejected by its client who chose the lowest price which brought the second defendant into the project. The first defendant had never dealt with the second defendant before and it soon became apparent that there were limitations as far as the use of the English language was concerned.
- 34 Aside from the difficulties with communication on a daily basis there was a reliance upon the second defendant who was both manufacturing



and installing the product to carry out such installation in accordance with Australian Safety Standards. In this context there was the failure by the second defendant to supply safety documentation and in any event such safety documentation that was subsequently revealed was inadequate.

- 35 There was a failure on the part of Dong when testing the travelator to use the inspection control which would have enabled him to actually see what was going on on the travelator and had the added benefit of quickly stopping the travelator if the finger was removed from the button. In automatic mode the travelator keeps operating until it is turned off.
- 36 The failure on the part of the first defendant is clear. It should not have allowed workers into the area when the travelator was being tested.
- 37 Whilst the second defendant should have erected barriers and excluded people from the travelators whilst testing was being carried out this does not preclude the first defendant's responsibility. The first defendant was in control of the site. It was clearly within the first defendant's control to put in barriers.
- 38 The first defendant throughout its 58 years of operation in the construction industry has never had a prosecution for a breach of safety standards. Prior to the incident its levies for WorkCover were less than the industry standard for building and construction.
- 39 Since the incident the first defendant has introduced the Mobile Loss Prevention System not only with respect to its operations but also its subcontractors. The focus is on continuous improvement which involves getting out and identifying risks and acting in a preventative manner.
- 40 The Managing Director and the Financial Officer (the Managing Director's wife) have both attended Court. A guilty plea has been entered at the first reasonable opportunity. There has been full cooperation with respect to the investigation.
- 41 It is accepted that the risk involved was that of serious injury or death. The affidavit of the Managing Director<sup>7</sup> contains information which indicates that the first defendant has not wilfully or without any regard for the safety of others created a risk which has caused the tragic outcome. There were quite complex interactions between the first and second defendant. The first defendant has an excellent safety record. This is a first offence.

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<sup>7</sup> See Exhibit D1.

- 42 Prior to the incident the first defendant had in place policies and procedures and inductions but those procedures did not in this instance go far enough.
- 43 As far as compensation is concerned the first defendant acknowledges what was contained in the Victim Impact Statements. The Court is able to award a maximum of \$20,000. As to the break up of that amount amongst the individuals seeking compensation the first defendant has no view.

### **Consideration**

- 44 The first defendant pleaded guilty to one count relating to a breach of s 19(1) of the *Occupational Health, Safety and Welfare Act 1986*. For a first offence there is a maximum penalty of \$100,000 with no minimum penalty.
- 45 The duty imposed upon the first defendant as the employer is to protect against the risk of injury or impairment to health of its employees. The risk herein, given the involvement of machinery was that of fatal consequences.
- 46 The first defendant has been operating for more than 58 years. As at the time of this incident it employed 42 persons and in addition had approximately 500 contractors on its books.
- 47 Prior to the incident the first defendant had a commitment to safety in relation to the projects it carried out<sup>8</sup>. At the time of the incident the first defendant had in place various occupational health and safety procedures including a detailed inducting process, a detailed occupational health and safety policy and procedure and integrated management system that joined both quality and safety together. In 2005 the first defendant was introduced to the Loss Prevention System used by Mobil relating to safety at all Mobil facilities. Mobil was and currently still is a significant client of the first defendant. Since the first defendant was introduced to the system by Mobil as part of its continued improvement it has developed its own system of safe work observations<sup>9</sup>.
- 48 Since the incident the first defendant has further revised and updated the induction process and the occupational health and safety policies. As Christopher Cox mentions at para 42 of Exhibit D1:

“The occurrence of the incident has highlighted some inadequacies in the Cox work method, and refocused our attention on the need to ensure that we not only have the appropriate documentation but also the practical structures to ensure compliance.”

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<sup>8</sup> See Exhibit D1 paras 30 - 38 inclusive.

<sup>9</sup> See CC5 – Annexure to the Statement of Christopher Cox – Exhibit D1.

- 49 Both the Managing Director Christopher Cox and the Financial Director Geraldine Cox were present in Court. This demonstrates concern for what happened and both concern and contrition are referred to in the statement of Christopher Cox<sup>10</sup>.
- 50 The occurrence of the incident demonstrates that the first defendant through its Site Supervisor Ganeo was not properly supervising the project at the time the inspection and testing of the travelator was taking place. The approach to the testing and inspection undertaken by Dong was deficient and more will be said about that subsequently. However Ganeo as the Site Supervisor should not have allowed any other employees or contractors on the site in the area where the travelators were being tested and inspected. The work that was being carried out was not of such a nature that it could not have been deferred to a later time. Ganeo observed the other workers on the site working on or in the vicinity of the travelator whilst it was being inspected and tested. He also observed workers on the site accessing the travelators.
- 51 The complainant sought the opinion of Helmut Meuris, Senior Partner of Lift Consult in relation to the incident<sup>11</sup>. In an executive summary Mr Meuris stated that several violations of sound working practices took place namely:

“No guarding provided at the entrances to the moving walk despite the floor plates being out of position thus exposing the machinery spaces for someone to fall into.

No signage provided at the moving walk entrances prohibiting entry by unauthorised persons.

The moving walk being operated on automatic control for at least two minutes with two pallets missing from its treadway.

Non-use of the inspection controls provided for the express purpose of enabling full control over moving walk movement during inspection, testing and adjusting purposes.

No supervision over the full length of the treadway whilst in the full knowledge that the unit was operating with missing pallets.”

- 52 Mr Meuris made the comment that:

“Two minutes is sufficient time for the moving walk treadway to complete more than a full revolution thus guaranteeing exposure of the treadway gap.”

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<sup>10</sup> Paras 7 - 17 inclusive – Exhibit D1.

<sup>11</sup> See Exhibit C13.

- 53 The second defendant neither appeared nor entered a written plea of guilty. I indicate that I find the two separate charges alleged under s 22(2) of the *Occupational Health, Safety and Welfare Act 1986* to be proved. I am satisfied that the complaint and summons was served upon the second defendant and that the second defendant knew the date set by the Court for the hearing of this matter.
- 54 Dong should have made use of the inspection control which would have enabled him to view the entire length of the travelator during the testing and inspection. The inspection control is operated by a button being pushed down by finger or thumb and as soon as the button is released the moving walk stops. Dong at the time of the incident by using the automatic control had to move from the position he was in to engage the stop button to cease the operation of the moving walkway, all of which took time and no doubt contributed to the tragic ultimate result.
- 55 Dong did not erect guarding and signage at the moving walk entrances prohibiting entry. He was aware of other workers being in the vicinity and should have taken steps to have those workers excluded.
- 56 The comments made by Mr Meuris as to the violations of sound working practices apply to the second defendant as well as the first defendant.

#### **Penalties imposed in relation to the first defendant**

- 57 The first defendant is a first offender under the provisions of s 19(1) of the *Occupational Health, Safety and Welfare Act 1986*.
- 58 The first defendant is entitled to receive discount for its plea of guilty. The amount of such discount is within the discretion of the Court and in this instance must be conservative given the overwhelming facts pointing to the guilt of the first defendant<sup>12</sup>. I consider an appropriate discount to be 15%.
- 59 There are few facts mitigating the objective seriousness of this particular offence. Whilst it is not a case of the first defendant deliberately disregarding safety procedures it is however in my view a matter that can be characterised as approaching the worst category of cases therefore warranting a substantial penalty. There were simple procedures and steps that could have been taken to prevent this incident. These included the erection of barriers and signage at the entrance way to the travelators, as well as the total exclusion from the area of all other workers not involved in the testing and inspection of the travelators.

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<sup>12</sup> See the remarks of Perry J in *R v Michael Robert Morgan* - BC 9700125.

60 I impose a conviction upon the first defendant. I impose a notional fine of \$70,000 to be discounted by 15% resulting in an actual fine of \$59,500.

### **Penalties imposed in relation to the second defendant**

61 The second defendant is charged with two breaches of the provisions of s 22(2) of the *Occupational Health, Safety and Welfare Act 1986*. The duty imposed upon the second defendant is to take reasonable care to avoid adversely affecting the health or safety of persons not being employees employed or engaged by it through an act or omission at work. The second defendant through acts or omissions at the work site exposed two workers to the risk of serious injury or death.

62 The second defendant neither appeared or entered a written plea of guilty. In the circumstances the second defendant is not entitled to receive any discount.

63 The second defendant prior to the incident did have a written safe work method<sup>13</sup>. There are deficiencies in this document. It is acknowledged that subsequent to the incident the second defendant did produce an improved specific safe work method<sup>14</sup>.

64 I regard the first and second defendants as equally culpable for the incident.

65 I record a conviction on each of the two counts.

66 I propose to impose one penalty pursuant to s 18A of the *Criminal Law (Sentencing) Act 1988*. The two separate offences each have a maximum penalty of \$100000.

67 The second defendant is a first offender. Absent any other submissions in mitigation, due to the failure of the second defendant to appear before the Court or enter a written plea of guilty, I impose a single fine of \$120,000.

### **Compensation**

68 Compensation has been sought by three persons pursuant to s 53 of the *Criminal Law (Sentencing) Act 1988*. Compensation “resulting from the offence of which the defendant has been found guilty”<sup>15</sup> is payable for “injury, loss or damage resulting from the offence”. “Injury” includes mental injury, shock, grief and distress resulting from the offence (s 3(1)).

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<sup>13</sup> Exhibit C15.

<sup>14</sup> See Exhibit C16.

<sup>15</sup> S 53(1) *Criminal Law (Sentencing) Act 1988*.

- 69 The three claimants are Rose-Marie Munzberg (mother of the deceased Stuart Munzberg), Nigel Munzberg (brother of the deceased) and Andrew Munzberg (brother of the deceased).
- 70 All three claimants provided to the Court a victim impact statement. Further victim impact statements or statements were supplied by Bob Munzberg (father of the deceased) and Elizabeth McClintock (the partner of the deceased).
- 71 Any award of compensation is not truly reflective of the shock, grief and distress suffered by the claimants.
- 72 Given the circumstances set out in the Victim Impact Statements provided, which I will not canvas herein, I consider compensation should be awarded and apportioned as follows:
- \$10,000 to be paid to Rose-Marie Munzberg
- \$5,000 to be paid to Nigel Munzberg
- \$5,000 to be paid to Andrew Munzberg.
- 73 The compensation as awarded is to be paid within 28 days. As I regard both the first and second defendants to be equally culpable I order that the first defendant pay 50%, namely \$10,000, and the second defendant to also pay \$10,000.

### **Summary of penalties**

- 74 I impose the following penalties in relation to the first defendant:

A conviction on the one count as charged.

A fine of \$70000 to be discounted by 15%  
resulting in an actual fine of: \$59,500.00

Court costs: \$80.63

Levy: \$70.00

Counsel Fee (payable to the Crown): \$375.00

Compensation pursuant to s 53 of the *Criminal Law Sentencing Act 1988* payable as follows:

Rose-Marie Munzberg:	\$5,000.00
Nigel Munzberg:	\$2,500.00
Andrew Munzberg:	<u>\$2,500.00</u>
<b>Total:</b>	<b><u>\$70,025.63</u></b>

28 days to pay.

75 I impose the following penalties in relation to the second defendant:

A conviction on each of the two counts as charged.

Pursuant to s 18A of the *Criminal Law (Sentencing) Act 1988* one fine of: \$120,000.00

Court costs: \$80.63

Levy: \$140.00

Counsel Fee (payable to the Crown): \$375.00

Compensation pursuant to s 53 of the *Criminal Law Sentencing Act 1988* payable as follows:

Rose-Marie Munzberg:	\$5,000.00
Nigel Munzberg:	\$2,500.00
Andrew Munzberg:	<u>\$2,500.00</u>
<b>Total:</b>	<b><u>\$130,595.63</u></b>

28 days to pay.