*Baker v Jean Bryant Fisheries Pty Ltd and Another* **[2010] SAIRC 33**

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

BAKER, Neill Thomas

v

JEAN BRYANT FISHERIES PTY LTD (First Defendant)

and

MARKELLOS, Arthur (Second Defendant)

**JURISDICTION:** Prosecution

**FILE NO/S:** 5755 of 2007

**HEARING DATES:** 4-15 May, 12 June, 13-17 July and 16 November 2009. (Further submissions 13 May 2010)

**JUDGMENT OF:** Industrial Magistrate R E Hardy

**DELIVERED ON:** 2 July 2010

**CATCHWORDS:**

*PROSECUTION - Not Guilty Pleas - Two defendants - Two separate charges - First defendant operator of shark fishing vessel "Jean Bryant" - Second defendant skipper of that vessel - Deckhand was killed when he sustained severe crush injuries in large rotating net spool on foredeck of vessel - First defendant charged with failure to provide and maintain safe systems of work and failure to provide and maintain plant in a safe condition - Multiple particulars including failure to conduct adequate hazard identification and risk assessment, failure to provide adequate safe operating procedure that ensured that deckhand was at all times standing clear of spool, that operator of spool maintained a line of sight with deckhand, that operator of spool stopped the spool if deckhand not within line of sight, failure to fit plant with emergency stop device, failure to fit adequate braking mechanism, fitment of valve which could override braking mechanism, failure to mark positions of levers that operated valves - **Held:** Several particulars made out and charge against first defendant was proven - Second defendant charged as a self employed person with failure to ensure so far as was reasonably practicable that deckhand was safe from injury and risks to health - Multiple particulars including failure to instruct deckhand to stand clear of spool, failing to ensure*

*deckhand was standing clear, failing to instruct deckhand to maintain line of sight, failure to stop spool if deckhand not within line of sight, failing to maintain line of sight and failure to adequately supervise - Whether second defendant was self employed person or an employee -* ***Held:*** *Second defendant was a self employed person and all particulars made out and charge proven against second defendant - Matters further adjourned for submissions concerning penalty - Ss 19 and 22(2)(b) Occupational Health, Safety and Welfare Act 1986.*

*Marcos v Dinko Tuna* (2006) SAIRC 8
*Kirk v Industrial Relations Commission* [2010] HCA 1 (3 February 2010)
*Okmasich v Evans* (1980) 25 SASR 481
*O'Sullivan v De Young* [1949] SASR 159
*Laffitte v Samuels* (1972) 3 SASR 1
*Lenzoot Haulage v Sinclair* (1986) 42 SASR 506
*R v Mayne* (1975) 11 SASR 583

**REPRESENTATION:**

Counsel:
Complainant: Mr C Jacobi with Mr T Griffin
1st Defendant: Mr D Edwardson QC
2nd Defendant Mr G Algie SC
Solicitors:
Complainant: Crown Solicitor's Office
1st Defendant: Coates Lawyers
2nd Defendant: Coates Lawyers

1 The defendants are charged as follows:

"**As to the first defendant**:

1. On 1 November 2005, on a South Australian ship, the first defendant, an employer, failed to ensure so far as was reasonably practicable that its employee, namely Giacomo Salvemini, was whilst at work, safe from injury and risks to health.

Contrary to section 19 of the *Occupational Health, Safety and Welfare Act 1986*

Particulars

(a) The first defendant carried on business as the operator of a fishing vessel, 'Jean Bryant' ('the vessel').

(b) At the material times, Giacomo Salvemini ('the employee') was employed or engaged by the first defendant as a deckhand on the vessel.

(c) The employee was exposed to a risk of injury at work, and was killed, whilst he was assisting in the retrieval of a fishing net and associated equipment and its winding on to a spool fixed to the deck of the vessel.

(d) The first defendant failed to provide and maintain so far as was reasonably practicable safe systems of work in that it failed to:

(i) conduct an adequate hazard identification and risk assessment in relation to the task of retrieving the fishing net and associated equipment and its winding onto the spool ('the task');

(ii) provide and maintain an adequate safe operating procedure for the task that ensured that the employee was at all times standing clear of the spool whilst he could become entangled;

(iii) provide and maintain an adequate safe operating procedure for the task that ensured that the operator of the spool maintained a line of sight with the employee whilst the spool was moving;

(iv) provide and maintain an adequate safe operating procedure for the task that ensured that the person in control of the spool stopped the spool if the employee was not within the operator's line of sight;

(v) ensure that there was an adequate system of maintenance for the plant;

(vi) (withdrawn).

(e) The first defendant failed to provide and maintain so far as was reasonably practicable plant in a safe condition in that:

(i) the plant was not fitted with sufficient or adequate emergency stop devices;

(ii) the controls for the plant within the wheelhouse could be set to operate without the requirement to apply sustained manual pressure;

(iii) the controls for the plant were not situated such that their operator at all times had a full view of the area in front of the spool;

(iv) the plant was not fitted with an adequate braking mechanism;

(v) the plant was designed such that the counterbalance was not connected directly to the hydraulic motor and was connected to it by a rubber hose;

(vi) the plant could be configured (by adjustment of a valve on the hydraulic system) such that the controls for the plant within the wheelhouse were either entirely overridden, or had diminished operation, such that the plant could not be stopped either at all, or with diminished effect;

(vii) the plant was fitted such that the levers operating a ball valve were configured in a manner opposite to the accepted practice of the design and fitment of such valves;

(viii) the levers on the plant that operated the valves were not clearly marked to indicate their position of operation;

(ix) there were not in existence a set of overall clear and comprehensive drawings describing the plant;

(x) there were not design records for the plant.

**In the alternative to Count one:**

2. (withdrawn)

3. (withdrawn)

**As to the second defendant:**

4. On 1 November 2005, on a South Australian ship, the second defendant, being a self-employed person failed to ensure, so far as was reasonably practicable, that another person, namely Giacomo Salvemini, not being an employee employed or engaged by the second defendant, was safe from injury and risks to health while he was in a situation where he could be adversely affected through an act or omission occurring in connection with the work of the second defendant.

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

Particulars

**(**a) The second defendant was a self-employed person engaged by the first defendant as the skipper of a fishing vessel, 'Jean Bryant' ('the vessel').

(b) At the material times Giacomo Salvemini was employed or engaged by the first defendant as a deck hand on the vessel.

(c) Giacomo Salvemini exposed (sic) to a risk of injury at work, and was killed, whilst he was assisting in the retrieval of a fishing net and associated equipment and its winding onto a spool fixed to the deck of the vessel ('the task').

(d) Whilst Giacomo Salvemini was performing the task, the second defendant was in control of the operation and speed of the spool.

(e) The second defendant, whilst operating the spool, failed to ensure as far as reasonably practicable that Giacomo Salvemini was, whist (sic) he was in a situation where he could be adversely affected by an act or omission of the second defendant, safe from injury and risks to health in that he:

(i) failed to provide any, or adequate, instruction to Giacomo Salvemini to at all times stand clear of the spool whilst he could become entangled;

(ii) failed to ensure that Giacomo Salvemini was at all times standing clear of the spool whilst he could become entangled;

(iii) failed to provide any, or adequate, instruction to Giacomo Salvemini to at all times maintain a line of sight with the operator of the spool whilst it was moving;

(iv) failed to maintain at all times a line of sight with Giacomo Salvemini whilst the spool was moving;

(v) failed to stop the spool if Giacomo Salvemini was not within his line of sight;

(vi) failed to provide any, or adequate, supervision to Giacomo Salvemini in the performance of his duties."

2 As is evident from the above, the charges arise out of the death of the deckhand Giacomo Salvemini aboard the fishing vessel *Jean Bryant* on 1 November 2005.

3 The *Jean Bryant* is a shark fishing vessel, which, like many others is a converted crayfishing boat. I do not have precise dimensions of the vessel itself and neither is knowledge of them essential to this matter but for present purposes and to put matters in some perspective, I note that it is about 18m in overall length, has a beam of about 5.5m and a forward deck length from bow to wheelhouse of about 12m. On the port or left side of the foredeck, hard against the port side of the wheelhouse and the port bulwark, is installed a large reel or spool. The whole spool assembly is 2.237m wide and thus approximately half the beam of the vessel. The spool itself has a diameter of 1.83m and the height of the spool above deck is 2.1m. There is thus a clearance from the lowest point of the rim of the spool to the deck of about 300mm. In front of the spool and the widest part of the assembly (the spool itself is a little narrower at about 1.8m wide) is a spreader bar (set 1 metre above the deck) which is a device designed to train the net evenly onto the spool. The means of doing so involve the manipulation of the net by a series of discs attached to the spreader bar so that the two lines – the float line and the lead (lead-weighted) line - are contained (and applied to the spool) within the discs. This is to avoid uneven buildup of the net and lines. The spreader bar is not powered to rotate but does so as the net and the two lines are drawn over it by the spool. The net is strung between the two lines which are, generally speaking, parallel. On the port half of the spreader bar where a deckhand standing near the starboard end of the spreader bar would have difficulty or be unable to reach fully across the net to the float line, is installed a hydraulically operated, moveable mated pair of discs, rather like a large cotton reel. The operator is able to move this 'reel' hydraulically, laterally, across the port side half of the spreader bar by means of a shrouded lever situated near the starboard end of the spreader bar. On the starboard half side of the spreader bar are eight fixed disks between which the operator manually lifts or pushes the lead line laterally to feed it to the appropriate part of the reel. The evidence is that lateral pressure on this line - the lead line - is sufficient to move that line over the next disc while the net, the spool, and the spreader bar are all in motion. The spool rotates in a direction whereby the net and lines

are drawn over the spreader bar downwards to the bottom of the spool, so that, in other words, the face of the spool is moving downwards as a deckhand looks at the spool with his back to the bow of the vessel.

4 As I understand the evidence, a hydraulic port side spreader substantially improves safety in that it removes the necessity for a deckhand to lean across the moving net to manually move the float line about on the port side of the spreader bar. It replaces a further group of port side discs seen in earlier applications on other boats, where it was necessary first to move the lead line to port and closer towards the centre of the spreader bar, just to reach the float line.

5 The net in this case was approximately 4200m long. It could be varied but such a length was not unusual. It consisted of segments so that from time to time lengthy portions of it could be replaced or removed for repair. The net was basically comprised of the two lines described above between which lay the mesh of the net itself. The net itself is about 3.4m wide. The two lines are, respectively, the float line which has its own inherent buoyancy and the lead line which is weighted. The effect is that the bottom of the net lies on the sea floor, held down by the lead line but the net remains upright by virtue of the float line and in between stands the mesh, upright, in which the fish are ensnared. The system is not unlike a very long tennis net that at its lower edge rests on the ground. At either end of the lead line, by a short line or lanyard, is affixed a substantial weight and at either end of the float line is affixed a buoy line of variable length according to the depth in which the net is set. A large, red, highly visible buoy, also referred to in evidence as a “pinky”, is affixed to the end of each buoy line so that the ends of the net can be located and the net retrieved. Between the float line and the lead line at either end of the net, and a few metres from it, is fastened a further transverse rope called a bridle which is a little longer than the net is deep and which is intended to transfer the strain from the buoy to the weight so that the net is not pulled apart. There were also other similar cross ropes joining the float and lead lines at certain intervals along the length of the net.

6 It is important to note that the net itself was, at 3.4m, wider than the spool which was, in turn, only 2.2m wide. The net was comprised of a mesh of fine filament nylon, an example of which was tendered in evidence. Accordingly it could never be stretched tightly between the lines when on the spool and tended to bulge out wherever it was not contained by the lines. Part of the spreading process was to contain the mesh as well as to maintain even winding on the spool. There is no dispute among the witnesses about the fact that from time to time the mesh was loose and sat loosely above the spool and that it bellied out and blew in different directions according to the wind, rotation of the spool and centrifugal force. In broad terms there was always a loose

component which by my estimate could theoretically extend at least half a metre from the surface of the spool, and more if both lines were close together, but in practice it was usually far less than this because the lines were both spread across it and served to restrain it. A similar situation arose with the bridle. It was wider than the net and could not be stretched directly across the spool, and accordingly, the practice arose of tucking a loop of it under the buoy rope to keep it tight on the spool. It need hardly be stated that an otherwise unrestrained bridle constituted a hazard as it could form a transverse loose loop across the moving spool. It would appear that such a loop, which was probably the bridle, was involved in the incident involving Mr Salvemini.

7 Although the apparently unprecedented incident involving Mr Salvemini involved a loop of rope, there were other dangers posed by the loose mesh and by the mesh generally. There were numerous references in the evidence to the fact that the mesh was responsible for snagging the clothing of deckhands on innumerable occasions. The evidence indicates that the skippers generally were aware of the dangers of the mesh and would not permit the wearing of exposed buttons, or other clothing items which could snag on the mesh. The mesh was known to snag on new boots, pockets and other items such as watches, belts and rings. Deckhands were requested to remove such items. There is no question that if snagging occurred, a deckhand could be pulled at least momentarily towards the spool.

8 As indicated above, the spool on the *Jean Bryant* was installed on the port side of the foredeck as close as possible to the wheelhouse which was thus immediately behind it, so that the spool axis was not at right angles to the centreline of the vessel but instead at an angle of (again, my estimate and of no real significance other than assisting in orientation) about 30 degrees from it so that the spool faced across the deck, but still largely forwards to the bow, towards a large roller installed on the starboard side of the deck. The net was retrieved after each “shot” or setting of the net, over this roller which was aligned with the spool.

9 Accordingly, the spool, because of its height, size and location, presented a very large visual obstacle on the foredeck. It completely blocked forward vision from the port side forward facing window of the wheelhouse and significantly obscured vision from the centre window. The helm and controls for the vessel were situated on the starboard side of the wheelhouse so that the captain retained unrestricted vision directly in front of him through the starboard forward facing window but suffered restricted vision to his left because of the spool. Basically all he could see immediately to his left was the hydraulic motor which drove it and the large, circular, starboard face of the spool which, as I have said, was over 2m high and 1.8m in diameter. Further, the skipper was unable to

see the full front face of the spool from his wheelhouse position. He could in fact see more of the rear of the spool. I will return to this topic.

10 As the net is wound on to the spool, it presents a progressively decreasing gap to the spreader bar. There is little or no prospect of entrapment between the spreader and the net in the initial stages of retrieval but the possibility increases as the bulk of the net is wound on until, as occurred on 1 November 2005, when fully wound on there was a gap of only 150mm between the spreader bar and the rotating net surface. A gap of that order is clearly too small to permit the passage of a human body. However the gap does not always reduce to that size. Should the *Jean Bryant* have been fishing in deeper waters the tension on the net would become somewhat greater during retrieval and the net become more tightly wound on the spool with the effect that when fully wound, the gap from spreader to net surface would be somewhat larger. I am unable to say how much larger or whether such a gap poses much less danger to a person who might become caught in it. Whatever, at least at times, the pinch point formed by the spool and the spreader poses a danger to persons in the vicinity.

11 The evidence, particularly that of Mr Terry Toumazos who was a director and the fishing operations manager of the first defendant, indicates that the location of the spool on the deck was a well considered compromise. The spool which had been bought as a used item from another fisherman, the witness Steel, had already been in use on his own shark fishing vessel. Accordingly, its dimensions were already fixed and most of its features already set by the time the exercise of installing it on the *Jean Bryant* was undertaken in 2001. Thus the aspect of restricted visibility was one known to the first defendant from the time of the installation of the spool. It would also appear to be common in the fishing industry to installations of this nature on similar vessels. There is no reason to doubt or criticise the decision to position the spool in the location that was chosen given that the vessel and its deck layout, and the dimensions and operation of the spool, were fixed parameters to be worked around. I am not aware of any superior location for the spool on the deck of the *Jean Bryant* nor of any means by which even if a vessel had been designed as a purpose built shark fishing vessel it would have produced a set up which was superior overall. Other layouts might suggest themselves but whilst it might be possible to improve the skipper's view of the front of the spool it is difficult to envisage an arrangement whereby he could have a better view of the deck and work area, and a better view of the net as it is retrieved over the bow roller, in terms of seeing fish before and after they are aboard, and of the buoy as it approaches the vessel. Be that as it may, the spool does represent a substantial destabilising mass above deck and I accept that the bow roller being placed upon the other (starboard) side of the vessel had some compensating or stabilising effect for the port side weight bias of the

spool as well as affording a clear view of the deck. There were other factors involved. One of these was the existing installation of the helm and controls on the starboard side of the wheelhouse of the vessel which dictated the placement of the spool in front of the port and centre windows. *Jean Bryant* was built with an aft wheelhouse and a large foredeck which, as indicated, resulted in a large working space directly ahead of the skipper which was largely within his view. Another was the spool itself which had the heavier components such as the hydraulic motor and the heavier lead line on the starboard side and which, in this installation, resulted in a stability advantage in that the heavier side or end was thus closer to the centre of the vessel. The evidence does not permit me to be precise about the weight of the complete loaded spool and net but there are estimates in evidence that the loaded spool, complete with over 4km of net, weighed about four tonnes. The inertia or kinetic energy of the spool turning at speed was also the subject of some evidence, in particular in relation to the means of suddenly bringing it to a halt in an emergency. Again, there was no precise evidence of the time taken or angle through which it would rotate after any braking action was applied at operational speed but it was variously estimated to be at least a quarter of a turn. I will return to this topic.

12 The rest of the spool assembly which included the hydraulic motor, the spreader assembly and the pivot or axle supports were heavy as well. Mr Clarke, who constructed the spool, estimated that without the net wound onto the spool the assembly weighed about two tonnes. With the net wound on, it is difficult to assess, but the entire loaded assembly would seem to have weighed about five tonnes and was of course, all perched above deck. The entire spool assembly was made of stainless steel to what I accept to be a very high standard indeed. It has been described as “state of the art” and was one of the better examples of such a spool according to the witnesses.

13 A considerable portion of the evidence related to an alternate spool set up which was not as frequently seen and which involved shark fishing vessels with forward, not aft, wheelhouses. Particular attention was paid to that of the witness McWhirter. In such applications and typically on his vessel *Falcon II*, the shark spool was mounted upon the stern deck and the bow roller remained in approximately the same position as the *Jean Bryant* on the starboard bow. In a typical configuration on such a forward wheelhouse vessel, the net, during retrieval, would pass parallel to the centre line of the vessel from the roller but remain on the starboard side, alongside the wheelhouse, past the skipper to the rear mounted spool. Thus the entire net and spool set up was installed on the starboard side. I will refer later to Mr McWhirter’s vessel and to his evidence. For the moment I observe that the substantial differences between such a forward wheelhouse with a stern spool setup and that of the aft wheelhouse set up like the *Jean Bryant* are that with the former the

skipper has a better, more complete view of the front face of the spool in that he can potentially see the net over its entire length but in a sense, although he can potentially see it all, he has a worse overall view in that he can only look to his right to the spool or left to the bow roller at any one time from the wheelhouse door. It is not all in his field of view at the same time.

14 Reference was also made in evidence to yet another configuration. This was similar to that on *Jean Bryant* in that the spool was mounted on the port foredeck (it also being an aft wheelhouse vessel) but the axis of the spool, which was also adjacent to the wheelhouse, was parallel to the central axis of the vessel so that the net was paid out transversely across the deck directly in front of the wheelhouse and the roller was amidships on the starboard side. This configuration was seen on the deck of the witness Steel's vessel *Susan's Pride* (Exhibit C47). This configuration had the advantage of vision to the skipper over the entire length of the net on deck including the spreader and the front of the spool but the dual disadvantages of being only a short length of net, and hence a short working area, only as long as the beam of the boat, and of the vessel being unable to steam up directly on to or away from the net to rewind it or shoot it. In this configuration it was not an easy task to keep the desirable tension on the lines that was referred to by some skippers.

15 In short, each of these three configurations had its own benefits and disadvantages. Wheelhouse placement and deck layout dictated the placement of the spool. The *Jean Bryant* layout appears to me to be a reasonable choice in the circumstances with operational advantages over the transverse net configuration seen on the vessel *Susan's Pride*.

16 A most significant aspect of the Jean Bryant installation was that the skipper was unable to see a triangular shaped area in front of the spool from the wheelhouse. That area was wider on the port side and tapered to nothing at the starboard or nearest side of the spool. In fact even if the skipper stepped outside the starboard door of the wheelhouse to widen his field of view he still could not see all of the triangular area in front of the spool although he could see a little more of it. However his controls for the spool were inside the wheelhouse as were the helm, engine and gearbox controls – not to mention the other electronic equipment the vessel carried such as navigation and radio installations - so that he could not maintain effective control of the vessel from outside the wheelhouse even if he was able to mildly improve his view by peering around the spool from there. The skipper clearly had a number of different functions to perform at that time and, according to the evidence, also had to deal with the possibility of overrunning the net which might become entangled in the propeller with dangerous disabling consequences, or, if he had permitted the lines to become too tight, might have to deal with broken lines and lost nets. For these reasons it was important that he

maintain a close watch on net or line tension and keep an eye on the net as it emerged from the water. The evidence is that the vessel was driven and steered along the net itself. It was not advisable to drag the net sideways out of its set position or to use tension of the net (via the spool) as a means of pulling the boat along it. Accordingly, maintaining an even tension in the float and lead lines so that neither was strained was an important part of the skipper's function.

17 There are several photographic depictions of the spool/wheelhouse location, their relative positioning and the skipper's line of sight on *Jean Bryant*. I will return to the topic later but I reiterate that there can be no doubt that vision was restricted and that the triangular area commencing at the starboard side of the spreader and increasing along that bar towards the port side of the vessel, as observed above, as well as the front face of the spool, were almost entirely out of the sight of the skipper. I also observe that because the spool presented a rounded obstacle to vision that it was possible for the skipper, at times when the deckhand was in certain positions, to see something of the head and shoulders of a deckhand if he was standing close towards the starboard side of the spool and for him also to see a short portion of the starboard end of the spreader bar. Apart from that, the skipper could not see a crewmember standing directly in front of the spreader bar at any point further to port if he was standing in the aforementioned deck triangle. Such a crewmember was simply unable to be seen by the skipper. This general conclusion is strongly supported by the photographic evidence which has views in both directions. It is not absolutely clear at which point a deckhand might disappear from view but photographs C14 (7, 9, 10), taken outside the wheelhouse make it clear that this is so. Photographs C37 (8, 9, 10) taken from the opposite direction along the spreader back towards the wheelhouse also indicate the difficulty for a deckhand to maintain eye contact with the skipper.

18 The retrieval process, about which this prosecution is concerned, was for the vessel to approach the buoy, usually upwind, bring it on board, disconnect it, attach the buoy line to a rope already on the spool and to set the spool in motion. When the buoy line, which as I have observed was of varying length depending upon the depth of water in which fishing operations were taking place, had been retrieved and the bridle and weight brought up to the deck the latter was removed from its short lanyard and the rest of the net reeled in, utilising the spreading process described above. There is not much evidence about it, but as I understand the process, prior to reeling in the net, it was first necessary to attach the bridle or tuck it and the beginning of the lead line under the float or buoy line on the spool in order to ensure that the desirable tension was also applied to the lead line. Mr Maczkowiak, who was the usual skipper of the *Jean Bryant* gave evidence that in order to initially tuck-in the lead line and bridle, the deckhand would have to lean over the spreader bar to

reach near to the hub of the spool (which at that stage of retrieval had no net on it). He described this first tucking-in as the more critical by which I understand him to mean the more difficult or dangerous. However, I note that it was then also necessary for the deckhand to approach quite closely to the spool, which, of necessity to the process, still had to be turning, at the point of tucking-in the lead line both before and after winding on the net, i.e. twice on each retrieval.

19 The deckhand would, during the retrieval and spreading process of the net, for the most part, stand well in line of sight of the skipper but with his back turned to him, at the hydraulic controls for the spreader situated at the starboard end of the spreader bar. He would leave the spreader position when it came time to retrieve or extract a fish from the net. The spool would be stopped by the skipper when a fish had been brought over the bow roller on to the deck and the deckhand would remove it, and pass it to the second deckhand, if there was one aboard, at the gutting box. The second deckhand standing on the other (port) side of the net at the gutting box would gut and clean the fish and deposit it for storage. *Jean Bryant* was in fact licensed for operation with only one deckhand, but in this case, on the day specified in the complaint, the vessel had two crewmembers, the deceased, and Mr Nick Toumazos who described his duties and presence as being for the purpose of quality control. It was the skipper and the skipper alone who controlled the rotation of the spool by means of a "joystick" situated on the far starboard side of the wheelhouse. He would push the joystick forward to start the drum turning to wind on the net and lines and bring it back to reverse the motion of the spool and turn it backwards. Each motion was proportional to the amount the joystick was moved. If the joystick was moved only slightly the spool would turn slowly but if moved to its fullest extent it would turn at maximum rpm. Between the forward and backwards motion was a neutral or stop position which brought the spool to a halt and held it there. At this point the joystick was vertical. This joystick control in the hands of the skipper was the only effective means of operating the spool although by operation of another lever on the side of the spool it was possible for a crewmember to disengage the joystick in the wheelhouse so that the skipper's control was lost and the spool would then 'free spool' without any hydraulic influence. It was, in that state, then subject only to the forces exerted by the net itself, which, for instance, if it was under sufficient tension, could cause it to reverse the direction of the spool during retrieval and pay the net out again. This condition was basically that utilised for setting the net in the first place when the net was 'shot' over the stern of the vessel and which I will return to later.

20 The spool was operated hydraulically in that the joystick controlled a hydraulic motor attached to the shaft on the starboard side of the spool directly in front of the central wheelhouse window. Thus it was up to the

skipper, as well as everything else he was required to do, to keep an eye on the net for fish, to stop the net moving at suitable points for retrieval of fish, or removal of detritus or disconnection of the weight and the buoy by the crew, and then to restart it to continue the retrieval process. As the spool was turned the net was, of course, progressively rolled up on to the spool. In so doing it passed across the skipper's field of vision across the deck, directly in front of him. He was able to see the net almost in its entirety from the bow roller until it reached a point where it was out of view as it was rolled on to the spool in the above-described area restricted from his vision. Ultimately, after a period of about two hours, depending on the number of fish in the net and upon factors such as the weather, the end of the net was reached, the second weight would be brought on to the deck and removed, and the rest of the net rewound on to the spool. The bridle and lead line would then be tucked under the sole remaining line, the buoy line, wound on further, and the second buoy removed. I will return to this in more detail later.

21 I will deal with the setting or 'shooting' of the net more briefly and only for the sake of completeness, because the substance of the complaint and emphasis of the evidence in this matter was upon the retrieval process of the net and in particular upon the end of that process which was under way when Mr Salvemini was killed.

22 Shooting of the net was accomplished by leading the rewound buoy line from a full spool through two large, in-line, circular stainless steel hoops which were mounted high on the port side stern deck of the *Jean Bryant* aft of the wheelhouse. The first buoy and weight were attached and set and the vessel would steam away from them. As it did so the net was unrolled, passed through the hoops, and dropped to the bottom. Then the second weight and buoy were installed at the other end. This process of shooting took place much more quickly than retrieval. As I have said, during this operation the spool was permitted to free-wheel and in that condition was solely subject to forces produced by the pull of the net or position of the vessel.

23 Of more importance to these proceedings is the fact that this free-wheel function was controlled by the aforementioned lever positioned on the starboard side of the spool about halfway between the axis of the spool and the hydraulic float-line spreader control. The lever could be moved through an arc of 90 degrees. When the lever was horizontal and parallel to the piping in which it was installed the valve was closed and the wheelhouse lever was able to operate in the manner described above but when it was in the down or vertical position the valve was open and operated so as to bypass the supply of high pressure hydraulic oil to or from the hydraulic motor so that regardless of the position of the wheelhouse lever, the spool was able to turn freely depending upon the forces exerted upon it by the net. Thus, as the vessel steamed away from

the deposited weight and buoy during shooting the spool released the net as required by the speed of the vessel and the resultant drag upon the net, and it could not be controlled from the wheelhouse. The fishing operation might involve up to two such shots (and retrievals) each day.

24 The bypass lever position was not marked in any way so that the functions described above were not obvious to anyone not familiar with the equipment. Further, and I will also return to this, the bypass lever did not and could not operate as a brake upon the motion of the spool. The only means by which the spool could be braked was through the wheelhouse lever being returned to the vertical position, but if the valve on the bypass lever was open, even that braking function was not available.

25 These three levers, the port spreader control valve, the wheelhouse joystick and the bypass lever were the only controls on the spool and only the last two had anything to do with the speed or operation of the spool.

26 I observe that in order to wind a net 4km long back on to the spool in two hours the speed of the net across the deck must average about 2kph. This is only an average speed as the net would at times be stationary for fish removal and for other reasons but still represents for indicative purposes a slowest average net speed across the deck from the bow roller of about half a metre per second. Of course, at other times, the speed would be greater than this. The speed was at all times not only dependent upon the position of the joystick in the wheelhouse but upon the length of the net that had already been wound on to the spool. It is obvious that the effective diameter of the spool increased dramatically during retrieval, from very little initially at the empty shaft or hub width at the commencement of the retrieval to the full diameter of the spool when the retrieval was almost complete. The evidence also indicates that in the initial stages of retrieval the joystick was pushed fully forward for a high oil flow and a high spool speed to compensate for the small shaft diameter and pushed forward a lesser amount for a lesser flow when the spool was full and the diameter at its largest. In his statement (Exhibit C41), Mr Brenton, a retired skipper, made reference to the fact that the highest net speed was potentially achieved when the spool was full and turning at its maximum speed. He said that it was necessary to keep the spool speed down as the spool filled with the net. I also note the similar evidence of other skippers including Mr McWhirter who referred to the fact that the control became much coarser at the end and Mr Maczkowiak who described it as “touchy”. In this context I also note the evidence of Inspector Dolphin that in a subsequent demonstration on 2 December at high speed the full drum turned five times in seventeen seconds which would equate approximately to a net or circumferential speed of about 1.7m per second. On the other hand, Mr Markellos was unable to achieve

what he (Dolphin) described as a slow spool speed with the drum fully wound.

27 I will also return to the measures taken by the first defendant to prevent entrapment in the spool and to the defendant's rules to safeguard its deckhands but I observe that they were principally to instruct its crewmembers that they were not to step off a black rubber mat laid along the centreline of the deck of the vessel and that the crew were also not to step out of direct line of sight of the skipper. They were to remain in view of the skipper at all times. The rubber matting was laid over two in-line hatches that were of the same size and installed on the centre line of the vessel. The black mats represented an area upon which the deckhands could stand and work. They represented a 'go' or working zone and any area to port of the edge of the mat was a 'no-go zone'. I note however that particularly at the time of the Salvemini incident the black mat port edge did not align with the starboard edge of the spreader bar or spool. In fact it was well to port of it so that it was possible to stand on the black mat and hence still be on a go zone and yet be quite close and right up to the spreader bar albeit in view of the skipper. I also observe that for most purposes the net was moving across the mat and ostensibly leaving little area, on the mat, for the crew to walk upon.

28 I observe at this point that I consider the spool/spreader unit to be very dangerous indeed. There is no question of this. In fact the danger was one of which almost all witnesses were aware. The danger was the single one of entrapment in the spool. It is important to note that the risk is not just one of being caught in a nip point as might occur for instance between two rollers but is heightened by the fact that the net, in which a crewmember might be ensnared, actively draws such a person towards the nip point. The evidence indicates a number of ways in which this might occur. There was always the potential for an arm or even a leg to become caught in the nip point between the spreader bar and the spool. I note that the deckhand, when using the hydraulic spreader, although in plain view of the skipper, had his back to him, but was still within easy reach of the spreader bar and spool. Further, during manual spreading of the starboard side lead line the deckhand was required to apply sideways pressure to the lead line either by pushing it away from him or pulling it towards him whilst the line was moving and the spool still turning so that the lead line rode up over the next disc and dropped the other side of it. The alternative to this was to lift the line over the discs when it was stationary but this involved greater effort by the crewman because it entailed a physical lifting of the lead line itself against the tension which had to be maintained on that line. I accept that the vessel might be manoeuvred by the skipper to ease that tension but the act of lifting and the act of pushing both demanded that the deckhand be quite close to the spreader bar for them to be effective. Mr McWhirter said that to avoid entrapment during manual spreading it was necessary to press the lines

with a palm rather than to use fingers. Mr Harrold said that it was necessary to "get in close" to influence the line over the disc or "flick it". He said it was "silly practice". In fairness to the defendant there is no evidence that it required the deckhand to spread the lead line while it was in motion but neither is there any mention of a further direction in any form let alone a written one that the spool was to be stationary at such a time.

29 A further danger is the abovementioned tucking-in of the lead line which also requires a close approach to the spool whilst it is moving. As indicated above the deckhand is required to perform this action twice for every retrieval. There is little evidence of a set procedure in relation to tucking-in. There is certainly no mention of such a procedure either informal or in Exhibit C24 even though this point of retrieval (after the net is wholly wound on) was regularly referred in evidence to as the most dangerous aspect of the retrieval process.

30 Finally there is the danger of becoming caught in the mesh itself. This is far more dangerous when the deckhand is close to the rotating spool. I refer to the discussion above in this respect. It is evident that some entrapment occurs from time to time. It can occur to any area of the body, upper, lower or anywhere in between. There was also nothing solid upon which an overbalancing deckhand could grab or steady himself or resist being drawn into the spool or falling against the spreader bar in a sea. Such a grab bar was installed on Falcon II. I note that new boots were regarded as a hazard by witness, McWhirter which might have resulted in a deckhand being drawn feet first towards the spool (hence the possibility of a leg entrapment - I put it no higher than that). Significantly to my mind, an entrapment or even a mild catching upon fingers or clothing might serve to overbalance a deckhand who is close to the moving spool and given the propensity of the mesh to blow over or outside the lines themselves there is a clear danger presented to those involved. I note that Mr Salvemini was wearing gloves.

31 Finally I consider that the environment of the operation of the spool has to be taken into account. At any time the operation of the spool might take place in high winds, on a wet and slippery surface (due not only to sea water, but to the presence of fish or other detritus on deck) not to mention seawater spray itself, in changeable lighting conditions, day or night and on a deck which is pitching and rolling. It is my view that a shark spool of the nature of that present on the *Jean Bryant* would have constituted a danger to its operators even if it had been firmly mounted on a fixed base in a sheltered, well lit and controlled environment, but when these additional factors are added to the situation, it is my view that it was very dangerous indeed. Even further, the spool was operated by a person who was quite removed from it and who did not have a complete view of the area of danger. His view was such that he could

usually not see the hands of the deckhand who was, for the most part, facing away from him. The skipper was reliant upon what he saw or heard or was told as to the control of the spool. It seems to me that the safe operation of the spool depended to a large degree upon a level of understanding and anticipated procedure between the operator and the deckhand particularly in relation to tucking-in. In order to apply an emergency braking force via the joystick in the wheelhouse the skipper had first to appreciate that there was an emergency or entrapment and then had to react. It is the first of these that concerns me because much of the danger area of the spool was not visible to the skipper. This point is illustrated by the circumstances of the death of Mr Salvemini when it was the second crewman who shouted to the skipper to stop the spool and not the skipper himself who had perceived the need to do so. Had that crewman not been present it is not known how much further the spool might have turned.

32 In summary the spool was inherently a very dangerous installation, made more so by environmental factors. It was also controlled by a distant operator who did not have a complete view of the area of danger or the functions of his deckhand.

33 The extent of the danger to my mind dictates safety measures of a very high order and a substantial onus upon the first defendant to ensure, of course within reasonably practicable limits, the safety of its deckhands.

34 The danger is a common one of entrapment. One can speculate about the effect of being drawn into the spool when the net had not been fully rewound but at best at such times when the gap was less, the danger was one whereby serious injury was still a possible consequence. The danger was greatest when the gap had been reduced to a point when a severe crush injury was likely, namely when a body would not pass through the gap. It appears to me that had a larger gap been maintained between spreader bar and spool, the risk, although still one of serious injury or death, would have been less, simply because a crush injury would not have occurred and a body would simply have been caught in the mesh which was potentially more forgiving. This leads to the events of 1 November 2005.

**The death of Mr Salvemini**

35 The death of Mr Salvemini illustrates the risk of entrapment. His death was the result of asphyxiation by virtue of both a rope around his neck and the severe crush injuries he sustained. According to the autopsy report he was strangled by a ligature (the rope) and crushed to the point where chest movement was prevented and respiration was not possible. He suffered extensive bodily injuries including a fracture dislocation of the spine and sixteen broken ribs. All of his upper body was dragged

between the spool and the spreader bar. He was trapped upside down. It took some time to free him. He was 36 years of age and previously in good health.

36 The death of Mr Salvemini occurred at a point when the net had been fully wound on to the spool and thus when the diameter was at its largest, when the wound net was closest to the spreader bar and when potentially the speed of the net or in this case the buoy line was at its greatest. That is not to say that the speed of the spool was excessive in the circumstances but it was at a point when the diameter was greatest and a slower speed was more difficult to achieve. The incident occurred at a point when the bridle had been retrieved and only the buoy line remained. At that time, the net, which was closely wound and quite hard to the touch and difficult to compress, had expanded to a distance of only 140mm from the spreader bar. The discs on the spreader bar protruded a further 35mm into this space.

37 The only witness to the incident was Mr Nick Toumazos. He said that Mr Salvemini had been standing adjacent to the spreader bar at a point that he himself thought was less than a metre from and too close to the spool. That point was on the port side and close to the middle of the spool. He was not in view of the skipper, Mr Markellos, and he was not standing on the black mat. Further, he, Mr Salvemini, could not see Mr Markellos. Mr Toumazos was standing and working at the gutting box. He said that the weights had come up to the bow roller, that Mr Salvemini had unclipped them, put them on the deck and had returned to the spreader bar with the float line in his hands. He said that he was close to the spreader bar - within about 10cm - when Mr Toumazos saw a loop of rope above Mr Salvemini's head, which hooked him around his neck and drew him over the spreader bar and into the spool up to his waist. He yelled "Stop!" to Mr Markellos when he saw the rope overhead and Mr Markellos brought the spool to a halt. He said that the spool had been running very slowly and at about net retrieval speed at the time. When the drum came to rest Mr Salvemini was trapped between the spool and the spreader bar against the net. He was upside down with his stomach against the spreader bar. It took a considerable time to free him but he was already dead. Mr Toumazos said that some buoy line was still in the water which he retrieved by hand and that he brought in the buoy himself.

38 It is not really necessary for the purposes of these proceedings to dwell much further on the incident itself but I find that Mr Salvemini had tucked in the lead line, and bridle had permitted the spool to wind on a few revolutions to capture the lead line, net and bridle and was at, or getting close to, the point of stepping back from the spool with a view to leading on the remainder of the float line. It would appear that he was caught around the neck by a loop of rope which was almost certainly part

of the bridle which had been flung out centrifugally or by some other means from the spool and had not yet been fully tied in. I have dealt above with how this might occur. The details do not matter for the purposes of these proceedings. It would appear in any event that the circumstances of the accident were unusual and whilst it might have not been difficult to anticipate generally that a person could be trapped and drawn into the spool, these precise circumstances do not appear to have been anticipated by any of the witnesses. It is difficult to be more precise. The evidence does not permit it. The loop which caught Mr Salvemini was probably the bridle but might also have been some unexplained configuration of the buoy line or (far less likely), a transverse spreader between the float and lead lines. By the time the spool had been examined and photographed after the incident the remainder of the buoy line had been wound on and it is not known what might have been altered beforehand in the course of freeing Mr Salvemini's body.

39 I consider the salient features of Mr Nick Toumazos' evidence to be that Mr Salvemini was standing close to the spool, that he was to the port side of the centre of the spreader and that he was out of sight of the skipper. In fact the last conclusion, that he was out of sight of the skipper Mr Markellos was not in dispute but in any event seems self evident. Mr Toumazos indicated where Mr Salvemini was standing when he was trapped and the position was clearly out of sight of Mr Markellos.

40 It remains to note that the entrapment of Mr Salvemini was unprecedented. Despite what I have found to be a particularly dangerous installation no other similar incident of actual entrapment was known to any of the witnesses let alone a death or bodily injury. The witness McWhirter was aware of an incident where a crewman had been caught by the net and pulled off his feet over the spreader bar before other crew stopped the spool and, what might have been the same incident, of a crewmember toppling backwards and being pulled feet first towards the spool. There were however several other unspecific incidents relating to the mesh catching on clothing etc referred to above and some of overbalancing of deckhands due to an entanglement in the mesh. These incidents had occurred over many years and through countless shootings and retrievals of similar nets. Similar equipment has therefore been used and operated for years with no major incident and whilst that is so it must be observed that that fact does not mean that the system and equipment are acceptably safe. As I have said the dangers are obvious and serious and I am of the view that the lack of any other incident has largely been due to good management and an awareness of the dangers posed by the rotating spool rather than being indicative of safe plant and procedures.

**Safety measures taken by the first defendant**

41 There is no doubt that the first defendant was aware of the danger posed to deckhands by the spool. Apart from a quite comprehensive oral induction process undertaken for each new crewman, including the skippers, which covered all manner of safety equipment and procedures and which are not of concern, the first defendant had put in place its own net handling protocols. These were not recorded in writing at any stage prior to 1 November 2005 either but I am satisfied were emphasised and reinforced verbally to the crewmembers including to Mr Salvemini and Mr Markellos both of whom were experienced fishermen at the time of the incident.

42 The first defendant directed that crewmembers were not to step off (to port) the rubber mat covering the hatches. The mat was a designated work area and the area to port of the mat was regarded as a ‘no-go’ area. I find that whilst standing on the mat in its proper location the deckhands could still be seen by the skipper even when close to the spool. The net itself was drawn across the mat during retrieval so that little of the mat was then available to the deckhand in any event. That could vary a little with the position of the lead line. The deckhand could not venture far to port during the actual net retrieval stage because the net was travelling across the mats. He was unlikely to even get to the port side of the mat for this reason. Importantly, on the night in question the black mat was wrongly positioned and met the front of the spool some distance further to port which actually enabled the deckhand to still be on the mat but close to the spreader bar.

43 Further, the first defendant also directed that crewmembers were always to stay within sight of the skipper and also that deckhand was also to maintain a line of sight back to the skipper.

44 I have some difficulty with these instructions particularly with reference to Exhibit C24 which is a post incident written re-creation of the verbal safety instructions the first defendant said were in place on 1 November 2005 and which appear to be inconsistent. In that document the black mat is not represented at all in the diagram “1”or mentioned (as delineating an area). In fact the work Area 1 does not conform to the edge of the mat and the port edge of the work area is a line from the port side of the spool to the port edge of the bow roller. Area 1 of the diagram at least suggests a permissible work area wider than the black mats, off them and to port of them. Area 2 is important in that it is a positive expression of a no-go area. It represents the skipper’s line of sight and prohibits entry to the triangular area referred to above. Access to this area is prohibited. It concerns me though that a deckhand is to take his own responsibility for remaining in vision when he is usually looking away and actively engaged in a manual task such as tucking–in. It seems

to me to be preferable for any no-go zone to be clearly marked (as it eventually was) with a high visibility paint. I also note that C24 does not mention, let alone prescribe, a safe procedure for tucking-in and approaching the spool. As I will get to, tucking in involves approaching the spool in Area 1 which is off the mat and approaching close to Area 2.

45 Nevertheless it is evident that Mr Salvemini stepped off the mat to the point and area indicated subsequently by Mr Nick Toumazos which was close to the spool and also that the spool was still turning when Mr Markellos could not see him. I observe that the tucking-in operation which I have found had just been completed by Mr Salvemini at the point indicated by Mr Nick Toumazos, was not within reach of a man standing on the black mat or at best could only be achieved with considerable difficulty by a person in that position. The first defendant thus maintained that Mr Salvemini ignored clear directions given to him on multiple occasions commencing with his induction and later reinforced at sea. I note that he had also served as a deckhand to Mr Maczkowiak who gave evidence about his adherence to such policies so that had Mr Salvemini gone from his line of sight the spool would have been stopped and Mr Salvemini disciplined.

46 It was put to me by Mr Edwardson who appeared for the first defendant, that in determining what was reasonably practicable measures to be taken by the first defendant I must take into account what at the relevant time was regarded as reasonable by employers in the relevant industry. I was referred to the majority decision of the Full Court of the Industrial Court in *Marcos v Dinko Tuna*:[1]

> "139 The Judge was correct in stating that the test is an objective test, and that in applying the test, it is appropriate to take into account what was at the relevant time regarded as reasonable by employers in the relevant industry. He drew support for this approach by reference to a passage in the dissenting judgment of Ormiston J of the Supreme Court of Victoria in *Chugg v Pacific Dunlop Ltd (2)*, [116] which must, with respect, be of limited assistance given that it addresses a different issue arising from a different statutory scheme. [117] To the extent that the comments of Ormiston J throw any light on the issue, they endorse an approach which contemplates consideration of matters within or outside the particular industry in question. [118] His view appears to be in accord with that of the majority (Kaye and Beach JJ) in the same case, who said that in assessing what is 'practicable', knowledge from all sources including those of the particular trade or industry, could be applied.[119]

[1] (2006) SAIRC 8 at p89.

140 The comments made in *Chugg*, albeit in the context of the Victorian legislation, are consistent with common law principles which allow for consideration of matters beyond the practices of employers in the same industry. As counsel for the appellant submitted, in the first half of the last century a narrow approach developed in common law cases in the United Kingdom which gave primacy to the practice of the employer, such that, in the words of Lord Dunedin in *Moreton v Dixon (William) Ltd*, it was necessary to prove that 'the thing which he (the employer) did not do was a thing commonly done by other persons in like circumstances, or to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it.'[120]

141 Lord Dunedin's statement was considered by the High Court in *Hamilton v Nuroof (WA) Proprietary Ltd* to be erroneous. Dixon CJ and Kitto J said that the language of the statement:-

> '... it is not the language of the common law which does not speak of "folly", but of failure in reasonable care for the safety of the workman and does not attempt in advance to reduce possible situations "absolutely" to two categories.'[121]

142 Accepting for present purposes that s 19 restates the common law as Dinko contends, Dinko is correct in asserting that employment practices in the particular industry are relevant to the practical application of the *Shirt* calculus. But practices in comparable sectors of the wider fishing industry are also relevant. Although the *Dageraad* was working in the tuna farming industry at the time of the incident, there was nothing unique to the tuna farming industry about the activities of Mr Grose when he fell overboard. He was cleaning the deck of a vessel whilst it was underway. A reasonable employer in Dinko's position should have considered measures adopted to protect employees working on deck whilst underway in the wider fishing industry when assessing the response to the risk of a fall overboard.

143 It is our conclusion that in applying the *Shirt* calculus as explained in par 95 of his reasons, the Judge wrongly found that the Magistrate applied an incorrect test by having regard to, and giving some weight to, practices in the fishing industry outside the tuna farming industry. This was the only basis upon which the Judge overturned the finding of the Magistrate on the count relating to life jackets. We do not consider he was correct to do so."

47 I bear these words in mind. I accept that it is relevant, and appropriate to take into account evidence of what is regarded as reasonably practicable

by employers within a particular industry but not that it is an invitation to substitute what might be regarded as an industry practice for the function of the Court in this jurisdiction to determine what is reasonably practicable. In other words it might ultimately be determined that an industry has in general operated in an unsafe manner which might not be, when all factors are considered, to be all that was reasonably practicable. In the present matter I have not received evidence about the practice of the shark fishing industry *per se* although considerable evidence has been received about certain fishing practices and about certain installations on other shark fishing vessels. Thus, as I understand the authorities, industry practice is one thing to take into account – not necessarily to be relied upon – along with several other factors such as the seriousness and likelihood of the risk and the cost time and trouble necessary to avert that risk as well as the specific circumstances of the matter before the court.

48 I think that it is difficult in this matter to identify what might be regarded as an industry practice. Even in an informal form, there is no identifiable set of specifications or design, advice or procedures which might for instance be communicated to the operators/owners of fishing vessels by a central body of such persons. In fact the evidence indicates that whilst basic equipment might be similar on shark fishing vessels there are differences in the reels themselves, their operation, placement and controls. There might be certain customs but the evidence indicates a degree of individual improvisation and a measure of evolution in the design and construction of shark spools. An example is the evolution of hydraulic spreaders which were not evident on some vessels but were clearly of benefit to safety and convenience. The *Jean Bryant* had a float line spreader in November 2005 and was apparently ahead of the industry in this regard, and I note that it currently also has a lead line spreader. However, at that time the spool was about nine years old.

49 I approach the matter upon the basis of what was to be regarded as reasonably practicable upon the *Jean Bryant* in the circumstances which prevailed on 1 November 2005. It might be that any determination I make might be of relevance to other similar vessels but that would be a matter for separate consideration. It is not my function to determine whether every single fishing vessel in South Australia has unsafe plant as has been suggested. I agree that there might be similarities in many of those vessels but each has different characteristics. There was no uniform standard.

50 The nature and extent of the particulars provided in this matter has been the subject of much comment and criticism by defence counsel and counsel have accepted an opportunity to address me in relation to the recent decision of the High Court in *Kirk v Industrial Relations*

*Commission*[2]. I have considered that decision and the submissions made by counsel with respect to it and the particulars generally.

51 It is my view that the *Kirk* decision does not change the applicable law in South Australia. It relates to a practice which had grown in NSW wherein it had become unnecessary for the prosecution to particularise an act or omission. The practice was held to have been founded upon an incorrect construction of a defence unique to the NSW Act applicable only in that state wherein the defendant bore the burden of proof of "reasonable practicality". As was remarked by the majority:

> "16. The scheme of this legislation stood apart from other legislation of this type in Australia. In other States the employer's obligation, to take measures for the health and safety of employees and others, was limited to the taking of such measures as were practicable **[16]**. This Court has held that such a provision places the onus upon the prosecution to show that the means which should have been employed to remove or mitigate a risk were practicable **[17]**. A feature of the legislation here in question is that where an employer is charged with an act or omission which is contravention of s 15 or s 16, it will be necessary for the employer to establish one of the defences available under s 53 in order to avoid conviction. Where reliance is placed by the employer on s 53(a), it would be necessary for the employer to satisfy the Industrial Court, to the civil standard of proof, that it was not reasonably practicable to take the measure in question. Such a defence can only address particular measures identified as necessary to have been taken in the statement of offence."

52 I think though that for present purposes the decision in *Kirk* underlines the importance of adequate particularisation of charges and I have no difficulty with the proposition that it has long been accepted in this state that it is necessary to identify acts or omissions in a complaint and that, in terms of s 19 of the Act, it has become accepted that the prosecution must prove the reasonably practicable measure that was not, but could have been, taken by the defendant.

53 I accept that the determination of certain allegations will have no reliance upon specific provisions of the Act or Regulations but will depend upon an assessment of the precise circumstances or facts pertaining to 1 November 2005. I think that most of the allegations will fall into this category and include among others, appropriate hoses, stopping devices and the failure to stop the spool should the employee not be in the skipper's line of sight.

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[2] [2010] HCA 1 (3 February 2010)

54 I consider that s 22A of the Summary procedure Act 1921 remains applicable and that it is sufficient that the defendant be provided with a statement of the specific offence charged together with such particulars as are necessary for giving "reasonable" information as to the nature of the charge. The term "reasonable" has been interpreted by the Court as "reasonable in all the circumstances of the case" *Okmasich v Evans*[3].

55 The requirement that particulars be "reasonable" excluded the possibility of strict rules concerning the degree of particularity *O'Sullivan v De Young*[4].

56 I take the approach therefore that bearing in mind the nature of the charge I am to consider whether the defendants have been provided with a sufficient indication of what is alleged against them. The prosecution is not required to plead evidence nor the surrounding circumstances *Laffitte v Samuels*[5].

57 In this matter, following further recent submissions, I have further considered each of the particulars provided overall to the defendants with emphasis upon the lengthy opening made by the prosecution and have concluded that the defendants could be in no doubt as to the case sought to be proved against them.

58 The charge against the first defendant can be broken down into two basis breaches, each of which is supported by numerous particulars. I see no alternative to dealing with each particular individually and in order even though there is considerable overlapping between several of them. Much of the following material is therefore repetitive but I think unavoidably so.

59 The first defendant is firstly charged with a failure to provide and maintain so far as was reasonably practicable safe systems of work in that it failed to:

**(i) conduct an adequate hazard identification and risk assessment in relation to the task of retrieving the fishing net and associated equipment and its winding on to the spool ("the task").**

60 In my view it cannot be said that the first defendant had no appreciation of the risk posed by the revolving spool. The risk was a singular one of being drawn into the gap between the bar and spool. It was never reduced to writing but it is clear and I find that the defendant was well aware of it and to an extent had identified the hazards involved. That is the only

[3] (1980) 25 SASR 481 at 484
[4] [1949] SASR 159 at 164
[5] (1972) 3 SASR 1 at 6

explanation for the measures it put in place to prevent engagement between the deckhands and the spool by mat and sight protocols. Similarly the measures are indicative of a risk assessment in the sense that they were designed to prevent the risk. The prosecution has of course alleged that the *adequacy* of the identification and assessment was the subject of the complaint. I take into account as was submitted by Mr Jacobi who appeared for the prosecution that there must be a certain degree of care exercised in relation to the evidence on this topic as the defendant over the period between the incident and the hearing has clearly developed systems and learned much in the interim. There have been several improvements and an improvement in the level of detail since the initial interview of Mr Terry Toumazos and the time he gave evidence. It is my view that the evidence of Mr Terry Toumazos is to be treated carefully. It was understandable that he would tend to protect the first defendant and give evidence in a manner most favourable to it but there were still certain deficiencies in his evidence which were brought out by Mr Jacobi and which lead me to treat his evidence with care.

61 The first defendant was required to examine its procedures and processes piece by piece especially in the light of less than full visibility by the skipper of the danger area.

62 Nevertheless it is clear that the first defendant had produced no written hazard identification and risk assessment. There was no formal documentation. Although considerable attention was paid to the position of the spool on the foredeck of the *Jean Bryant* at the time of installation there was no evidence of the actual identification of the forms of risks the final placement involved in net retrieval and means by which they might be dealt with. It is true that a verbal but general protocol had emerged but nothing to indicate how it applied to the specific risks involved.

63 The prosecution has maintained that it was necessary to approach the issue of safety in a systematic and organised fashion that quantified risk, addressed the identified hazards and sought to identify the means to eliminate them or if not possible to reduce them. I think it to be correct and I agree that something like the approach adopted by the expert witness Mr Gilbert when he was asked the same question was that which should have been adopted by the defendant. I also accept that the deficiencies pointed out by Mr Jacobi were matters that the defendant should have addressed. There was no evidence of the defendant attempting to understand and test reaction times or the stopping time of the spool loaded and unloaded. In these circumstances safety depended upon the skipper reacting and the spool actually stopping but these were never tested or analysed. There was a further failure to analyse and consider the effects of restricted visibility although it was recognised as a factor. It was abundantly clear that the skipper was unable to see into the

triangular area referred to previously in front of the spool. There was no clear consideration or delineation of that area wherein a deckhand might know when he was stepping out of the line of sight of the skipper.

64 In any event the circumstances in which a deckhand might be permitted to approach the spool such as for tucking-in the lead line and bridle have not been examined. The evidence from all but one of the skippers indicates that this is the most dangerous activity of all but it does not rate a mention in the post-event written directions C24. A deckhand is, universally, on the evidence, required to approach quite close to the spreader bar (how close varies with the evidence and has been described as "almost touching" and "300 mm" away) because tucking-in, which I also understand to entail pulling the bridle with the left hand across the right arm holding the float line is a procedure which does not work from further away. I have mentioned the dangers involved in manual spreading. These were not addressed either.

65 As previously indicated, the first defendant was asked to produce its own written procedures by Inspector Dolphin after the event and when it was apparent that none existed beforehand. These, Exhibit C24, were deficient in several ways.

66 Apart from the above, there was a failure to address tripping and falling and also a failure to address the risk of error, fatigue or mistake. The remedy or solution that was relied upon by the defendant was totally one of administrative controls and the response of Mr Toumazos to the Salvemini incident was to indicate that he was in the wrong position and had simply not adhered to the rules set up by the defendant. Such a response does not address the further issue of what was to be done if the rules were not observed or were otherwise departed from or the nature of injuries and how to manage them in a remote location.

67 It was maintained by Mr Edwardson that it was necessary for the prosecution to identify the specific hazard identification and/or risk assessment in the context of the task of retrieving the fishing net and associated equipment and its winding onto the spool. This had not been done he said and neither did the complaint and summons identify how the relevant hazard identification and risk assessment was reasonably practicable. He said there was a generalised assertion that the risk assessment or hazard identification was inadequate and did not identify precisely what should have occurred and how it was reasonably practicable and how it would have eliminated or reduced risk.

68 I do not agree with this submission. The prosecution does not allege that there was no hazard identification and risk assessment in relation to net retrieval but rather that it was inadequate. I am satisfied that this particular has been made out. Not only was the process not reduced to

writing which seems to me to be an all but essential element but when the first defendant was required to formally express what it had undertaken in that regard, its written formulation was deficient in that there was no evidence that the specific dangers were identified and addressed. There were a number of different tasks and risks at different times. Mr Edwardson submitted that the nub of the prosecution case was the possibility of entanglement and subsequent injury caused by being dragged into the spool. He submitted that the defendant was totally aware of the potential risk of entanglement at different stages of the retrieval process with one result - that of the crewmember being dragged into the spool. I consider that this submission overlooks the fact that although the same ultimate risk potential might exist as a result of several different activities, each risk should be identified and assessed individually to prevent or remove the risk in the first place before the crewmember was drawn into the spool.

69 Mr Edwardson submitted that the configuration and positioning of the spool on the foredeck of the *Jean Bryant* was the best available of the three configurations discussed above, that a series of nonslip mats had been placed on the deck of the vessel to designate the permissible working areas, and that crewmembers understood that the hatches themselves indicated those permissible working areas during all stages of net retrieval. He said the mats covered the corners of the central hatches and therefore reduced a potential tripping hazard. They also reduced the risk of mesh becoming caught on the corners of the hatches, which in turn reduced the possibility of net flapping which could also be a danger to crewmembers. He went on to say, and I agree, that in the context of risk assessment and hazard identification the evidence established that the process of net retrieval necessarily required different tasks at different times each of which posed their own risk. He said that the responsibility for determining the speed of net retrieval, and stopping and starting fell entirely on the skipper, Mr Markellos. While he did that, Mr Salvemini would remove fish and adjust the spreading of the float and lead lines. He said that during spreading the deckhand was clearly visible to the skipper. The latter was in a safe area designated by the mats. Whilst removing fish the deckhand was some distance away from the spool but still in clear visibility of the skipper. He conceded that the most dangerous part of the net retrieval process occurred whilst the net was being drawn on board and in particular during the securing of the bridle. He also conceded that it was imperative that the deckhand was to remain in the line of sight of the skipper at all relevant times. He argued that the crewmember was directed, inducted and told in no uncertain terms that it was his responsibility to remain in line of sight during net retrieval and equally the responsibility of the skipper was to ensure that that procedure was enforced and maintained.

70 He said that in securing the bridle the crewmember was required to physically move towards the spool and ultimately be in close proximity to it and it was at that point that there was potential for entanglement and injury. He said that this risk was identified by the company and was eliminated or minimised by the maintenance of a line of sight of the skipper on the crewmember performing this task who would also slow the spool down to a dead slow speed. I do not agree. Some attention was obviously paid to the risk but there was no set procedure for tucking-in, signalling, slowing the spool and no means of ensuring The proper understanding between deckhand and skipper referred to by the regular skipper Mr Maczkowiak. Other witnesses also referred to this understanding. Whilst I have generally accepted the evidence of Mr Maczkowiak, I have some difficulty in accepting his assertion that the deckhand was always within view, particularly at the time of tuck-in. I consider that at best the deckhand was not within full view and although his upper body might have been visible and in line of sight, his hands and arms were not always so and were usually inside or over the no-go area. The skipper was not able to see the actual tucking-in in any event and the whole procedure was dependant upon the understanding between skipper and deckhand.

71 Thus, it was submitted, that the hazards of general net entanglement and tucking-in the bridle were identified and the risk of each was assessed. However for reasons given above I do not accept that hazard identification and risk assessment were given sufficiently detailed consideration. It is my view that the process undertaken was not sufficiently specific. The prosecution claims only that it was inadequate and in my view that has been made out. It is no argument in my opinion that written directions would not mean much to experienced fishermen any more than to factory workers. There is no evidence to indicate that the actual main hazards themselves were ever specifically brought to the attention of deckhands, whilst it is clear that the means of reducing risk, line of sight, mats etc were emphasised. In my view that is not enough. Proper documentation, although it might be disregarded can serve to reinforce dangers and procedures. I take a similar view in relation to the wheelhouse sign concerning stopping the spool when a deckhand is not visible. That is not to deny that there is a proper place for practical demonstration, reinforcement of procedures by the skipper and the induction. I consider that the defendant should have done more whilst acknowledging its efforts.

**(ii) provide and maintain an adequate safe operating procedure for the task that ensured that the employee was at all times standing clear of the spool whilst he could become entangled**

72 This particular is closely related to that above. There are several instances of the inadequacy of the measures which were put in place.

73 I agree with Mr Jacobi that there were distinct flaws in the safety solutions that were identified. The mats which delineated the no-go zone were movable and had in fact moved and the side lever was well out of reach of anybody at the front face of the spool. Even if it could be reached, it was not a braking mechanism and was not designed for such a purpose. I accept the evidence of both Mr Ridge and Mr Harrold on this point. Once the lever was moved the spool was effectively disconnected and subject to the pull on it by the net. It was not a dynamic brake. If the spool was under net tension during retrieval the spool would eventually come to a halt subject to the pull upon it and the inertia in the reel. However in circumstances of the incident of 1 November 2005 the net was subject only to the greatly reduced drag of the buoy line and would continue to turn.

74 Furthermore, I am of the view that the rules applied by the first defendant were ambiguous and thus less than specific. Firstly, I note again that there is little point in a rule prohibiting stepping off the black mat to port when net retrieval is taking place. The mat is effectively covered at that time by the travelling net and no access to the port side of the mat is possible. It would thus seem that the rule is intended to apply at other times but they are not specified. Secondly, the rule relating to remaining within line of sight would basically be unnecessary if a crewmember was to stick to the mat. Once on the mat a crewmember can always be seen. The implication is one of approaching the spool directly and further to port, which is required for tucking-in. As I have said, this process has not been formally considered and particularised. It is evident that the crewmember is expected to walk the bridle (which is fastened to fixed points of the lead and float lines and must be tucked in at a fairly precise point) up to the spool and at the end of the lead line during rotation, tuck it in without leaving the sight of the skipper. It is evident from several photographs that the mid point of the spool is some distance – more than an arm's length from the sight line which makes the operation more difficult. There must always be the possibility of moving into the no go area by holding on to the bridle pulled by the rotating drum. This is a procedure that should have been addressed.

75 There was no provision dealing with what to do after entanglement and no assessment or procedure relating to the effect of the time taken for the skipper to react or the spool to come to a halt. It seems to me that such assessments are vital before determining where a deckhand ought to be permitted to stand to prevent entanglement, and, in particular, how close to the spool.

76 Given that it is conceivable that two metres of net might still be wound on to the spool, even after the brake is activated, there might be cause to reconsider permitting a deckhand to ever approach the triangular prohibited area.

77 Nevertheless the terms of the written instruction produced after the event indicate that it was permissible to approach the moving spool at any time that the deckhand was visible – even if the defendant would deny the need to do so for any purpose apart from the tucking-in process.

78 I would observe here that if the deck mat was in its proper position, a little to starboard of the position in which it was photographed after the incident it would be more difficult for the deckhand to tuck-in the lead line at any point much to port of the spreader controls. If he was to stay on the mat it would require leaning to the crewman's right in order to get close to the float line and whilst I see no particular difficulty in tucking-in occurring close to the spreader controls the evidence indicates that tucking-in tended to occur to the centre or port side of the spool at which time a crewmember could not be seen by the skipper or that vision was at least marginal. I have previously referred to the fact that the crewman's hands were not visible to the skipper and it seems to me that in those circumstances being able to see the crewman any less than totally, including his hands, permits a dangerous circumstance to arise.

79 I have indicated above that there were no procedures provided in relation to tucking-in of the lead line or with respect to spreading. The first defendant relies at all times upon the fact that the operating procedure in existence was adequate and that if complied with in all material respects would have eliminated or at the very least substantially reduced the possibility of death or injury. I was referred to the comprehensive induction undertaken by all employees which included hands-on instruction and directed specific attention to the blind area on the port side in front of the spool where there were no mats. I find that all employees including Mr Salvemini were made aware of the procedure in respect of the mats, blind area and the maintenance of line of sight in both directions. Mr Terry Toumazos said that the only time that anybody was to go into the no-go zone was when the drum was fully stopped and there was full communication and full visibility between the skipper and crew, however nowhere are those requirements formalised or particularised. I note that the situation calls for full visibility, which in ordinary circumstances would not entail stopping the drum and I assume that there is some understanding or signal causing the skipper to stop the spool at that time. The only circumstances in which the deckhand is required to approach the revolving spool closely are those involving the tucking-in of the lead line and it is evident at that time that the spool is still revolving.

80 Mr Toumazos said that crewmembers were specifically told that under no circumstances were they to go into the no-go zone without first communicating with the skipper and if such a communication had been conveyed to the skipper he then had the responsibility of stopping the spool and it was only after that time that the crewmember was permitted

to move into the blind spot or no-go zone. This was made plain to crewmembers as part of the induction process. The crewmember was informed that he should always be in constant communication and constant visibility with the skipper and skipper was obliged to ensure that he knew the position of his crew. It was a twofold process: the crewmember was instructed and directed to where he could and could not go and in what circumstances that can change, and the skipper had an absolute obligation to make sure that those procedures were enforced and implemented at all relevant times. If a deckhand was to breach specific instructions, the spool was to be stopped immediately and the departure from protocol investigated.

81 I have difficulty with this alleged procedure because it lacks any particularity or formality and has no definition. It relates to spool movement in circumstances outside any description of the retrieval process by the witnesses. I do not know why a deckhand should approach the spool when it is stationary. There is no indication of what is meant by communication. It seems to me that a safe procedure must make it clear what is expected of the parties and what their individual responsibilities are and what is described appears to me to be insufficiently specific.

82 Mr Maczkowiak gave evidence that he could not think of any reason why anybody would need to move off the mat at any stage during the retrieval process and that he had to his knowledge never known a crewmember to move into the no-go zone during that process. However, it is clear that at times it was necessary to approach the spool in order to remove seaweed debris and fish that had been missed. It was also required for tucking-in.

**(iii) provide and maintain an adequate safe operating procedure for the task that ensured that the operator of the spool maintained a line of sight with the employee whilst the spool was moving**

83 The prosecution maintains with respect to this particular that the written procedures which were said to reflect the oral procedures already in existence, only express an obligation upon the deckhand. I agree with this. I have previously indicated that the deckhand does not know whether he is within line of sight for tucking in unless he is looking, because he is working, and because the blind triangulated area was not clearly marked. It is the skipper who is aware that the deckhand is out of sight yet nowhere in Exhibit C24 is there recognition of the fact that the skipper is to maintain a line of sight or to stop the spool when his deckhand is out of view.

**(iv) provide and maintain an adequate safe operating procedure for the task that ensured that the person in control of the spool**

**stopped the spool if the employee was not within the operator's line of sight**

84 According to Mr Maczkowiak, the regular skipper of the Jean Bryant, he would always stop the spool if a crewmember should step outside his vision. He was particularly emphatic about this. If it occurred, he would stop the spool, step outside the wheelhouse and give the crewmember a "bomb". There is no evidence of such a direction from the first defendant to Mr Markellos.

85 Whilst I accept that Mr Salvemini had stepped into an area in which he could not be seen and which he had been told was a no-go zone, the procedures do not deal with such an eventuality. It might be said to be self-evident that the spool be brought to a halt but it ought to have been specified and I note that Mr Markellos did not do so anyway. The defendant was right to exhibit some surprise at the fact that Mr Salvemini was where he was at the time of the incident but it did not deal with the possibility. Additionally I note that there is nothing in the standard operating procedures (C24) which deals with the correct method of conducting tucking-in of the lead line and the manner in which the skipper is to control the spool at the time, eg to proceed at a very slow speed. It is quite evident that the skipper is unable to see the progress of this procedure and is reliant upon signals or observation of the actions of his deckhand at the time and later when the deckhand steps back and the skipper is able to increase the speed of the spool to bring on the buoy line.

86 These procedures were not in writing at the time and yet net retrieval was a repetitive task with identifiable stages and risks. These should all have been formalised. Eventually a clear instruction was posted in the wheelhouse which stated:

> "If you cannot see the crew, do not engage the winch".

87 Mr Terry Toumazos said of this sign that it was no different from procedures that existed on 1 November 2005 and which were drummed into fishing crews. Nevertheless it was not observed by Mr Markellos and I think could have formed part of the safe operating procedure in that it served to reinforce that message.

**(v) ensure that there was an adequate system of maintenance for the plant**

88 With respect to maintenance the evidence is that there were no systematic maintenance records kept by the first defendant although certain maintenance or work was recorded. There was no maintenance program. Even after the incident such records were not kept. There was

no systematic maintenance conducted on the vessel even though it is clear according to Mr Maczkowiak that certain checks were performed. There is no evidence that the *Jean Bryant* was not well maintained or that maintenance in any way led to the events of 1 November 2005. However there was no system and had there been the prospects of plant failures and risks to operators would have been reduced. I include in this regular checks on stopping times and spin down. No one knew the extent of rotation after braking or in an emergency and accordingly that aspect was not factored into the defendant's safety procedures and risk assessments.

89 The first defendant is also charged with failing to provide and maintain so far as was reasonably practicable plant in a safe condition as follows:

**(i) the plant was not fitted with sufficient or adequate emergency stop devices.**

90 The prosecution submitted that the skipper could not maintain a full lookout at all times because of his other responsibilities such as the operation of other equipment within the wheelhouse (which included helm, throttle, radio and to a lesser degree navigation equipment) and the fact that he needed to maintain a watchful eye on the net for fish and ultimately for the weight and buoy – neither of which it was desirable to overrun. I think that this submission is correct. The system in operation was highly dependent on an effective lookout yet the skipper was subject to numerous distractions. This was a matter of concern to some of the witnesses. Mr McWhirter, albeit in the context of a forward wheelhouse vessel, said that it was not possible to watch the crew at all times. (tr 272) Mr Repsas said that it was not possible to watch the roller all the time. (tr.412) Mr Terry Toumazos said that a skipper cannot keep a 100% lookout. (tr 859) Additionally he was only able to see the back of his deckhand almost all of the time he was spreading and retrieving fish. Only the skipper possessed the means of arresting the rotation of the spool by virtue of the joystick in his right hand. There was no means by which a deckhand could stop the spool in an emergency except by signalling to the skipper. Otherwise he had to rely on the skipper's perception of events in front of the spool. It is a matter of concern to me that the skipper rarely if ever could actually see the deckhand's hands. It is true that he might have been able to see the deckhand's arms at times but he would not have known if a hand had been caught until he actually visibly appreciated that the deckhand was being drawn in and only then would he have reacted. It seems to me that the awareness that he was caught must always come first to the deckhand who was in a superior position to know that it was necessary to stop the spool. In those emergency circumstances I think it was essential that an additional means of arresting rotation be made available to the deckhand and that

because of the danger the circumstances were such that extensive efforts ought to have been made to provide the deckhand with that facility.

91 The only limited exception to deckhand control was the bypass valve to the left of the hydraulic spreader controls which in turn was well away and out of reach of the normal functions of the deckhand. I have discussed this. It is not an emergency stopping device although it is able to deprive the spool of a high pressure oil supply. The spool is subject to the pressures or pull of the net once disengaged, but it cannot bring the net to a controlled halt. In any event it was virtually inaccessible to a deckhand at the danger area of the spool and was not intended for such a function. It also had its own deficiencies apart from inaccessibility which I will deal with shortly.

92 I have made the point that the spool was a particularly dangerous item of equipment and that its operation requires substantial efforts to render it as safe as possible - including the provision of mechanical means of protection so far as reasonably practicable.

93 However, the first defendant depended upon administrative controls for the safe operation of the spool which was in turn only ever able to be controlled by a remote operator with a limited view and perception. It is my firm view that in those circumstances, sole reliance upon unwritten administrative controls was inadequate and that significant effort ought to have been applied to the installation of mechanical emergency stop devices to protect a deckhand who was already trapped after the administrative controls had failed. It seems to me that it was quite foreseeable that there could occur a misunderstanding or inadvertent occurrence which would result in the breaching of any verbal rules.

94 I think that the presence of a stop button or in fact any number of stop buttons was a first consideration. As the prosecution maintained, the spool was an item of plant which was subject to Australian Standards by which the fitment of a stop button was necessary. I accept, as Mr Jacobi submitted, that stop buttons are a ubiquitous feature of all manner of industrial equipment including conveyors, augers and grinders, and I would add, of lathes, milling machines, drills, borers, lifts and countless other forms of industrial machinery seen in this jurisdiction. Such stop buttons could have been located in many suitable applications and in the present circumstances upon the winch itself or on a remote pedestal where it would have been able to be used by a deckhand in trouble. There is nothing in the evidence to support the view that a stop button is anything less than reasonably practicable. I include the suggestion that a net would snag upon such a button. As I understand the evidence this is a possibility because of the inherent nature of the net to fly and blow in an unpredictable fashion. I readily accept that when one was first installed by the first defendant the button snagged on the net and was torn off.

However a subsequent attempt to reposition and protect the button produced no further such instances. I accept that appropriate placement would be a matter of some trial and error. A typical mushroom button presents a snagging point but not a condition that is not reasonably practicably avoidable through shrouding and relocation or both. Such buttons should certainly be placed at accessible points but although there are considerations to take into account the evidence is clear from Mr Ridge that solenoid activation of the counterbalance valve could be achieved by one of many such buttons in a manner akin to the placement of the joystick in the central position. The evidence is clear that suitable buttons are available from the point of view of weatherproofing and of reduced or eradicated snagging. Mr Harrold said that it was possible to install the solenoid into the respective pilot line. Either way it appears to me that stop buttons are a reasonably practicable means of improving safety for deckhands working near the spool.

95 I also note in this context that during 2005 the *Jean Bryant* was mostly operated by a crew of three; being the skipper and two deckhands. I also note that as at 1 November 2005 the third crewmember was gutting fish on the port side of the net as described above. It seems to me that, as Mr Ridge suggested, a stop button positioned near the gutting box where such a crewmember has full view of the spool, particularly when another crewmember is required to approach it, is a reasonable alternative. I accept that it is essential to place stop buttons close to workstations and here, within reach of deckhands.

96 I further note the statement of Mr Brenton (C41) who was a retired fisherman with 30 years experience in lobster and shark fishing, mainly in South Australian waters. His vessels all had a forward wheelhouse, as I understand it, similar to that of Mr McWhirter, the *Falcon II*. Mr Brenton said that he had never been on a boat that did not have dual controls in the sense that the skipper was able to stop the hydraulics from the wheelhouse but also there was another cut-off valve either on the spool or close to the spool. He said that this was mainly for safety. He said that at either position the skipper or the deckhand was able to stop, reverse or turn the spool forward.

97 It was the evidence of Mr Retsas, a skipper, that his own vessel was fitted with auxiliary controls that permitted the spool to be stopped. Mr Retsas also gave evidence that vessels in other jurisdictions, particularly Western Australia had different control configurations and in particular a safety bar that he described as being about three or four inches above the spreader bar which he had seen on at least three other vessels, albeit forward wheelhouse vessels.

98 The prosecution produced direct evidence of one example in the form of the vessel *Falcon II* operated by Mr McWhirter which indeed had an

operational device of that nature. It was comprised of a full width hinged bar set about 300mm above the spreader bar and by actuation of a further lever and a stop valve a crewmember was able to stop the spool by pushing it towards the spool and to pull it back in order to restart it. The prosecution also led expert evidence intended to show that such a device would work effectively and could be fitted to the *Jean Bryant's* spool.

99 I accept the evidence relating to Mr McWhirter's vessel to the extent that such a device or bar could be made to work without interfering with the normal operation of the spool. The bar on Mr McWhirter's vessel had worked without difficulty for many years. He said that he had never had a problem with the net becoming entangled in the safety bar or with anything touching the bar (tr 250.0). I note that at the time when the operation of his spool was filmed his vessel had a float line to which was physically attached a series of small floats which to my mind must be regarded as more inclined to snag or catch on any adjacent equipment but more importantly in my view the net and equipment is not distinguishable from that on the *Jean Bryant* in any material way. I say this fully bearing in mind that this vessel had a forward wheelhouse and that the safety bar mechanism clearly also had another purpose namely regulation of the spool speed by the deckhand and further that its form of actuation, namely regulation of speed by a ball valve was not desirable. I think the importance of this evidence is that the location and configuration of the bar itself were workable and reasonably practicable and did not pose any difficulty with respect to net retrieval even if there was a better hydraulic means of achieving a stop device along the lines of those suggested by Mr Ridge or by Mr Harrold.

100 In fact Mr McWhirter's safety or operational bar was a fairly basic device but one which was nevertheless effective. It was also very cheap to install. Although Mr McWhirter's bar attracted the criticisms from Mr Clark who built the *Jean Bryant* spool for Mr Steel, that it was flimsy and might still permit a body to pass beneath it but over the spreader bar and thus afford no protection, I am of the view that neither is of any consequence. I am satisfied that the bar could be made more strongly if necessary and that whatever the distance within reason of the bar above the spreader bar it would still afford a measure of protection. I observe that it would need to be a considerable distance above the spreader bar for a body to pass without contact by an arm or leg. Despite its deficiencies the McWhirter bar made the spool safer for deckhands.

101 Mr Steel said that if nets were raggedy and loose they would flip out and "most probably" hit the bar and activate it. His view was that such a bar was too complicated and "too much hassle and mucking around to get it perfect" so he did not try or develop one. He thought floats attached to a float line would trip a safety bar but that was not Mr McWhirter's experience.

102 Mr Gilbert, an engineer with extensive and varied industrial experience over many years including systems and plant design and safety analysis, gave expert evidence about the feasibility of the installation of a safety bar (which he called a 'kill' bar). He in fact produced designs for such bars. His view was that a safety bar or bars could be fitted even if they might require refinement or adjustment. Even if I did not rely upon the expert evidence of Mr Gilbert, I think that the prosecution has made out this particular with respect to a safety bar having regard solely to the evidence of Mr McWhirter and Mr Ridge. However that conclusion is reinforced by the evidence of Mr Gilbert who approached the matter as a professional designer and whilst his cost estimates were considerably higher his conclusion and design was basically the same.

103 The point is I think, that no matter how the bar is to activate the stop mechanism, and there were several means available all of which were reasonably practicable, it was a simple and reasonably practicable device.

104 It was submitted that the capacity of the crew to stop the winch by use of the safety bar - leaving the skipper unable to further control it - could result in the vessel overrunning the net, snagging it upon the propeller or rudder and creating a hazard in itself. As I understand the evidence such a snagging could result in immobilising the boat with dangerous consequences. I think that the answer to this is firstly that activation would take place in emergency circumstances and that life and limb must take precedence but secondly that overrunning/snagging is not a necessary consequence and further that means of resetting the bar and restoring control to the wheelhouse could be configured to take place in minimal time when the danger is past. I also think that it is true to say, as was submitted by Mr Jacobi, that the means of avoiding such snaggings are the same and as readily available as when the spool is stopped to retrieve fish as when an incident has occurred. I accept though that stopping for a fish occurs with a little more warning and that the skipper is more ready to take action to prevent an overrun.

105 I have made certain comments in relation to industry standards. In addition I would note that the test is whether a particular measure on this particular boat was reasonably practicable and not whether it was the same as other boats within the industry. I note and approve the analogy of vehicular safety belts which were reasonably practicable well before they became ubiquitous. The industry-standard at an earlier time was not to fit them. Prevailing standards might well have failed to take advantage of reasonably practicable safety measures.

106 The first defendant maintained that none of the measures were reasonably practicable in 2005 or that any of them would have eliminated or reduced the risk of injury to Mr Salvemini. The submission

was made by Mr Edwardson that the configuration of this particular vessel on any view was regarded as reasonable by employers in the relevant industry. It was said with some justification that the *Jean Bryant* had "state-of-the-art" equipment and was more sophisticated and advanced than most vessels within the industry. I consider that such comments must be taken to refer to operational sophistication rather than to safety considerations. I have previously noted that industry standards are to be taken into account and I do so but I do not accept that they can in any way operate as a substitute for the issue before me. Further, although there was no recorded incident of the nature of that which involved Mr Salvemini and whilst the evidence suggests that shark fishing vessels in their various configurations have been operating in South Australian waters over many years without incident, that does not mean that deckhands were not exposed to substantial risk but only that by some means the risk had been managed. Whilst an incident of this nature had not occurred before, the evidence is equally clear that snagging in the net as I have earlier discussed was not an uncommon occurrence and I note that any snagging tends to draw a deckhand towards and into the spool. It is not as though the medium was smooth as might be seen with a conveyor belt but the net or mesh was instead said to catch "on everything".

107 It was submitted that there was no evidence of either safety device having been installed on a vessel in South Australia in November 2005 or that such a device could have been installed at that time. I do not accept this. The devices themselves are very simple and have clearly been available in industry for years. The submission is wrong in that it is clear that the joystick operation and all of the necessary hydraulic components were present and operating in November 2005. All that is being suggested by the prosecution is another extremely simple form of actuation of componentry already installed and operating. An actuating lever or bar or stop button present no realistic difficulty in form, concept or execution.

108 The first defendant made much of the fact that the McWhirter vessel the *Falcon II*, was of a different, forward wheelhouse configuration with a different sized spool. It was pointed out that the so-called safety bar was used to control the speed of the drum by crewmembers. The effect was to turn the drum on or off and the purpose was not that of a safety bar. It was also utilising an incorrect component for the purpose - that being a plastic seated ball valve. I accept that these points are correct but not that the evidence of the configuration of the bar and spool is not of relevance. The fact remains that despite differences of location and skipper's view, Mr McWhirter's spool was used for the same purpose, was of similar dimensions and weight, situated above deck, hydraulically operated with similar controls and posed very similar dangers to crew.

109 Objection was made to the evidence of Mr Gilbert. It was submitted that he had no hydraulics expertise, that he had never been engaged to provide forensic or expert evidence in relation to a shark net winch, a fishing vessel or fishing generally, that he had never before been upon a commercial fishing vessel and when he did it was upon the *Jean Bryant* when it was on a slipway and the spool was not *in situ* but had been removed and placed on hard ground away from the vessel. I accept the fact that these qualifications are true but not that they detract from his evidence. I have found Mr Gilbert's evidence of great assistance even though I am also satisfied from other evidentiary sources about the feasibility of his "kill bar" which he described as a larger target (for a crewmember) to hit than a stop button. Mr Gilbert was in my view more than qualified to provide the evidence he gave in relation to the bar. I take into account the above qualifications on his evidence and that he is not an expert in fishing but is generally familiar with plant and has a most substantial field of experience in engineering design and improvements. I repeat that in my view the reasonable practicality of the fitment of a safety bar is a simple issue. The question is a broad one. I am not of the view that the prosecution need show in precise detail the full specifications of such an installation. It needs to show no more than that it is reasonably practicable. There is no issue with the hydraulic componentry required which is basically already present and able to be actuated with only minor modifications. There is also no issue with the means available to be taken above deck to actuate the stop mechanism by either electrical or mechanical means. The bar itself could not be simpler. The configuration suggested by the prosecution and the evidence generally has always been that of a horizontal bar parallel to the spreader bar and somewhere above it supported by two vertical members which are themselves levers and pivoted at their lower ends - those levers or one of them attached to the electrical or mechanical above deck actuation mechanism (although it seems to me that there are also other possible configurations such as below the spreader where one might be activated by a knee or at right angles to the axis of the spool on the spreader control side – still parallel to the deck as suggested by Mr Gilbert). It could not be much simpler. Mr Gilbert said that "It's only a winch" (tr 593) and I agree. It might have been installed in an unusual location but there is little about it that cannot be readily comprehended about it and the factors affecting its operation.

110 Similar objections were made to the evidence of Mr Ridge.

111 Like Mr Gilbert, although he was an acknowledged hydraulics expert, he was said to have never been involved or engaged in a professional capacity in the design and fabrication of (systems for) fishing vessels. He had never seen a shark fishing vessel set or retrieve a net. He acknowledged that the layout including deck space, stability, cost and function were important and in the context of design of hydraulic

equipment different hazards attached to different configurations. Further this was the first time he had been called upon to conduct an analysis of different shark boats and he said that the design of hydraulic systems required consultation or regard to the role and needs of the operator. He had addressed technically possible safety improvements without these and had not drawn upon the expertise of those involved in the fishing industry. It was also pointed out that he had not had demonstrated to him how the accident occurred, that he took no measurements, and made no calculations with respect to the drum he saw. Additionally I would add that he did not see the spool in motion and only observed it and the hydraulics when the *Jean Bryant* was on the slipway and the spool removed from the deck. He agreed that if he were to design a system he would need a fundamental understanding of conditions and needs. The environment was different from a "normal" workplace on land because of the conditions: rolling, weather etc and these would need to be taken into account.

112 I accept this but I consider that these qualifications upon the evidence of Mr Ridge also miss the point that the function of Mr Ridge was not to design a system suitable to the industry but to look at the system aboard the vessel with a view to safety improvements. In that context the qualifications upon his evidence are of no or little consequence. His evidence was important because he was able to describe and understand the system in use on the *Jean Bryant*. In particular he was able to address what was necessary to stop the hydraulic system in times of emergency. He showed and indeed no point was taken with his understanding of the *Jean Bryant* hydraulics. Nor was there criticism of his general findings.

113 The objections made in evidence by witnesses to the fitment of a safety bar took the form of the abovementioned height of a bar above the spreader and the possibility of false stoppages caused by net snagging or other unintended actuation which could result in an even more dangerous situation such as the above mentioned propeller snagging if the net is overrun. As I understand the witnesses, although neither of them had actually seen such a bar or considered one in any depth, it was thought that if the bar was too low unintended actuation or snagging might occur and if was too high, a deckhand might pass beneath it without engaging the safety mechanism. There is some validity in these objections. I do not doubt that the bar installation might require some trial and error. I think that the bar height might well need some form of adjustment as might the sensitivity of the device but neither seems to me to be beyond reasonable practicability. I repeat what I have said above with respect to the principal object of the bar being to prevent injury and to save life. Mr Gilbert, as well as Mr Ridge, also acknowledged that it would be necessary to fully consider the steps to be taken, that consultation would be necessary and that there was to be no negative effect.

114 It is my view accordingly that the installation of a safety bar would tend to ensure safety. That is not to say that it would prevent injury or death in all circumstances but that is not the test. It would make the operation of the spool safer. It might not have saved Mr Salvemini but it also might have done and, depending on the speed of the rotation of the spool which should have been at a slow or crawling speed, served to reduce the risk to him. I do have doubts about triggering the braking device at a time when the spool was running at maximum speed, was fully loaded and had its greatest circumference inasmuch as it would appear that even after the stopping forces were applied the spool would continue to rotate for at least another quarter turn. However at the slow speeds which should have been mandatory, at the point of tucking-in, it might have been sufficient. These factors were recognised by Mr Ridge and Mr Harrold.

115 The first defendant maintained that the prosecution had failed to prove beyond reasonable doubt that such a safety bar was reasonably practicable as at November 2005. That is not my view. The prosecution has shown that the measure was considerably more than a "speculative theory" and that it was reasonably practicable. Whilst it might be said that some detailed design was lacking, the concept and basic design is quite clear. Whilst the first defendant might maintain that there has been no proof beyond a reasonable doubt I am of the view that although there might be areas of imprecision there has been no evidence of anything that amounts to a tangible doubt let alone a reasonable one. The first defendant called no opposing expert evidence. Without attempting to reverse the onus of proof, the objections foreseen by other skippers were to a degree realistic but based upon a lack of experience and knowledge of such bars. In fact it seems to me that none of the witnesses with the exception of Mr McWhirter had any direct hands-on experience with shark spool safety bars.

116 There is one further safety measure which seems to me to also have been reasonably practicable in this application and again it utilises existing equipment and triggering devices and that is the possible installation of an emergency stop wire or rope along the length of and above the spreader which could serve the same purpose as a number of emergency stop devices, of the nature illustrated in the Australian Standard AS 4024.1-1996 (and I note the date of origin) figure 6.5 'Emergency Stopping Of Long Machines' (Exhibit C67). The spool was quite wide and any single stop button could be out of the reach of a deckhand so a trip wire which required only a pull in any direction could also have provided a satisfactory means of halting the spool with no more technical advance or difficulty than a stop button.

117 Overall, it is my view that all of these methods, or a combination of them were reasonably practicable in the installation on the *Jean Bryant* and should have been provided by the first defendant. Although I think it

possible that such devices would not provide complete protection in all circumstances - and the entrapment of a deckhand close to a fully laden spool which is travelling at maximum rpm is a prime example - I am of the view that they or a combination of them would at least serve to substantially reduce the risk to deckhands.

**(ii) the controls for the plant within the wheelhouse could be set to operate without the requirement to apply sustained manual pressure**

118 This particular relates to the capacity or otherwise of the joystick in the wheelhouse to spring back to the neutral/central/vertical position when released. I do not think that I need to spend much time on this. Whilst it is clearly desirable that the spool revert to the stopped or detent position when it is not required, in this case, to retrieve the net, the evidence is overwhelming that upon release of the lever it did exactly that. I note that even the evidence of Inspector Dolphin was to that effect and that the evidence of Mr Maczkowiak who had skippered the vessel was similar. In fact the only apparently contradictory evidence was that relating to when the vessel was on the slipway when the joystick was photographed fully forward and back without being held in either position. At that time 29 October 2007, almost two years after November 2005 the hydraulics had been disconnected and the spool removed from the vessel. It seems to me that not only was the observation removed in time from 1 November 2005 but the interference with the hydraulics renders the evidence unreliable. In other words the particular is made out; the joystick had a friction device by means of which it could operate without manual pressure, but was not set to operate that way and even if it was, my view is that it does not amount to a failure to provide plant in a safe condition and does not prove the charge.

119 In addition I note the evidence of Mr Harrold who regarded a friction adjustment of the joystick as desirable when he had his hands full with other things. Mr Harrold provided sensible evidence about a number of relevant issues and this was one. He said that there was contention about a friction lock device within the industry but because the skipper is a very busy man with throttle, gear and steering responsibilities, a friction device permitted him to maintain a steady spool speed especially in rough conditions when it was difficult to hold the lever steady. I accept this evidence also bearing in mind that the rewinding process might take two hours over four kilometres of net when a steady rewind might also be desirable. He said that a joystick of the nature fitted to the *Jean Bryant* had a friction lock device installed which could be engaged but disengaged quickly with a knock of a hand.

120 Thus I am of the view that although the particular is proven, it does not support the charge.

**(iii) the controls for the plant were not situated such that their operator at all times had a full view of the area in front of the spool**

121 There can be no question that this was the case and that it was highly desirable that the skipper be able to see the activities and the deckhands themselves at all times. I accept the prosecution submission that in an industrial context it would be expected that the operator of moving plant would have a full view of any employees that are required to work in and around that plant, particularly where operation was conducted from a remote location. I agree that it is a fundamental elementary precondition to safety. Nevertheless there was a distinct blind area on the *Jean Bryant* and further visibility was desirable. This was reflected in the defendant's requirement that there be full visibility of crewmembers during net retrieval and that they not step into the blind triangular area.

122 I have already expressed the view that the positioning of the spool on the deck of the *Jean Bryant* has not been shown to be anything less than the best of several compromises. There is no evidence that even a purpose-built shark fishing vessel would offer a safer or more efficient working environment but nevertheless the *Jean Bryant* layout involved a most significant inherent danger. In my view the prosecution was correct to maintain that it was essential to engineer out this risk so far as reasonably practicable. It was not sufficient for the defendant to rely upon administrative controls such as prohibiting deckhands from entering the region where they could not be seen. In theory the protocols maintained by the defendant ought to have been sufficient but do not take into account human factors such as distraction, inadvertence, mistake and the unforseen and the unusual. Neither do they take into account the environmental factors previously listed, wind, movement etc which could cause a deckhand to overbalance, trip or slip or which otherwise might cause a deckhand to lurch towards the spool.

123 A number of solutions to the visibility deficiency were offered in evidence. One was the installation of a video camera with a screen in the wheelhouse. The defendant maintained that such a camera would be subject to harsh environmental conditions so that it could prove to be unreliable. It was further submitted that it would be a further distraction for an already busy skipper.

124 However, I note that Mr McWhirter had installed four cameras on his vessel to deal with areas that he was unable to see fully from his wheelhouse, that Mr Harrold knew of another operator who had installed a video camera, albeit behind the reel on a forward wheelhouse vessel to observe shooting out and that Mr Terry Toumazos had been more recently 'trialling' a $2,000 camera system without much success. Mr Toumazos admitted that a video camera system had some advantages

but also some deficiencies. He was uncertain about an outdoor use of a camera at sea and of a system which he said made people complacent and was a distraction. He accepted that the camera might be useful as an aid but said that it was no substitute for full visibility and communication.

125 In my view the installation of a camera was reasonably practicable. There was no question about the commercial availability and reasonable affordability of such equipment. Surveillance cameras have been readily commercially available for years. The price and benefit of such items must be measured against the risk to life. I know nothing about the durability of such items in a harsh marine environment but plainly some have been developed for outdoor usage. In my view it is an option that ought to have been considered by the first defendant and it is not enough to suppose shortcomings. The intended application would go a long way to overcoming the sight line deficiencies of the spool and I do not consider that the distraction argument has any validity in as much as it would only be necessary to look at the screen when the deckhand was out of sight. The suggestion of Mr Toumazos that it would lead to complacency deserves no further comment. This particular is made out.

126 Another alternative is the installation of mirrors which would permit a view of the blind spot. Mirrors are a cheap and simple option but in the application in question I am not satisfied that they would be reasonably practicable. It seems to me that the available field of view from a necessarily distant mirror and the difficulty involved in maintaining a usefully reflective surface in an exposed maritime environment could militate against their use in a reasonably practicable form.

127 Yet another suggestion was the relocation or duplication of the wheelhouse controls to another site on the foredeck where a good view of the blind area could be attained. In my view this is not a reasonably practicable alternative. I consider, as was suggested in evidence that an exposed helm position on a deck pedestal with all fully duplicated and necessary controls would be quite expensive and would present another set of potential problems in that it would expose the skipper to the elements and remove him from the protection of the wheelhouse and from those facilities which were available to him therein which in turn contributed to the general safety of the vessel, including navigation and radio equipment. The latter was the evidence of Mr Harrold (tr 987.30) which I accept.

128 Whilst a further variation of this alternative might serve to overcome these difficulties it has not been demonstrated to me on the state of the evidence that it was a reasonably practicable measure. I consider this to be the case even taking into account that I accept that the installation of a set of duplicate controls on a pedestal or pillar is technically possible.

**(iv) the plant was not fitted with an adequate braking mechanism**

129 There is no question that this was the case. I have discussed the various controls. The only means of braking the spool remained that of moving the joystick to its central position in the wheelhouse so that the spool was quickly brought to a halt. The particular in question refers to adequacy. There was, arguably, a form of braking mechanism available to crewmembers in the form of the bypass valve but any use of that valve meant that the major form of braking became unusable and that the spool was left to its own unpredictable and variable responses due to other external forces such as its inertia and pressure of the net. The valve could be used to deprive the spool of driving force but was not a braking mechanism – yet it was described in Exhibit C24 as a brake for shooting off and for use in cases of emergency. In that exhibit it was also referred to as an emergency/isolating valve. It was also correctly described therein as a means of disengagement of the hydraulic system but it still did not operate as a brake. It was also described as being within reach of crew at all times due to its proximity to the spreader control but in fact it was well out of reach of crewmembers in front of the spool and as I will deal with shortly its function was anything but clear. According to Mr Terry Toumazos it was to be used as a stopping device but it was clearly not one. This particular is bound up with the previous particular relating to an adequate emergency stop device and I refer to my comments in relation to particular (e)(i) inasmuch as there was a device but it was not adequate. There was no issue that anything other than a hydraulic means of braking the spool was adequate or appropriate in this application. Mr Ridge explained that the over-centre valve hydraulic braking system was the most appropriate braking system for the spool and his evidence was that by correct adjustment of the over-centre valve the stopping distance could best be set to suit the mechanical structure and safety requirements of the system.

130 My view is that Mr Ridge is quite correct but a braking system encompasses the comprehensive usage of the system overall. In other words in the operation of the spool, was the braking system of a nature that was adequate. The answer has to be no. There was no adequate system for deckhands to bring the spool to a halt. There was a system for the skipper but that could be defeated. The particular is made out.

**(v) the plant was designed such that the counterbalance was not connected directly to the hydraulic motor and was connected to it by a rubber hose**

131 In my view this particular has not been made out. I think the essence of the usage of hydraulic hoses rather than a hard or solid connection lies only in the burst pressure which each is able to sustain. According to Mr Ridge the hydraulic hose was able to withstand the likely pressures

encountered and for that reason should be regarded as suitable for that use. Mr Ridge was of the view that there was a sufficient safety factor. The hoses had a burst pressure of 1400 bar which was well in excess of the pressures likely to be encountered even under braking which pressure were in turn adjustable to a safe level and unlikely to exceed the burst pressure of the hoses. I also understand and accept because of his evidence that rigid connections were less capable of absorbing movement and vibration from the hydraulic motor, which resulted in cracking and leakage.

132 Mr Harrold gave similar evidence although he used different hydraulic pressure values. He thought the hoses had at least four times the burst pressure over the system pressure. He also preferred a flexible hose system and said that rigid tubing was more subject to corrosion, cracking and vibration. Hoses were just as good.

133 Again I find this particular proven but it does not support the charge.

**(vi) the plant could be configured (by adjustment of a valve on the hydraulic system) such that the controls for the plant within the wheelhouse were either entirely overridden, or had diminished operation, such that the plant could not be stopped either at all, or with diminished effect**

134 There is no issue with the fact that the isolation valve was able to render the joystick and hence the forward, reverse and stopping functions of the spool entirely ineffective. The effect was to simply disengage the spool and permit it to freewheel. I have dealt with this. One danger of that function was that inadvertent or mistaken operation of the valve resulted in a complete lack of control of the spool. The evidence refers to the dangers of sudden disengagement of the spool from a false triggering of a safety mechanism such as the bar or a button which I was told could result in the vessel overrunning the net and it becoming wound around the propeller, shaft and rudder. It seems to me that a similar danger is attendant upon an unexpected disengagement of the spool. Further, the skipper was unable to actually stop the spool and that might put a deckhand in danger if the lever was thrown over. Thus the spool might continue to rotate under its own inertia when it might have been otherwise properly braked. I accept that the lever has a proper use, which must be observed, to the effect that it is necessary to have a free wheel configuration when it comes time to shoot the net. Inasmuch as the lever removes control from the wheelhouse I am satisfied that the particular is made out but it appears to me that danger lies in an inadvertent or mistaken operation of the valve at a time when it was not required or even in circumstances when a deckhand thought it was operating as a brake. There should be some safeguard against such a sudden loss of

control. Additionally the lever positions were not marked and the function misdescribed in Exhibit C24.

**(vii) the plant was fitted such that the levers (sic) operating a ball valve were configured in a manner opposite to the accepted practice of the design and fitment of such valves**

135 I think that this particular ought to be considered along with the next as well as with respect to (vi) above.

**(viii) the levers on the plant that operated the valves were not clearly marked to indicate their position of operation**

136 I assume that this particular refers to the ball valve particularly, even though, for safe and efficient operation it would be desirable for the spreader bar control also to be marked. It appears to me, that whilst in some circumstances it might be important for operators to understand whether a 90 degree lever ball valve is open or closed, in the circumstances of the installation on the *Jean Bryant* it is only of importance if the operator has an understanding of the hydraulics that will be brought into operation by moving the lever. In this application therefore I think it far more important that the two arm positions be labelled clearly and they were not. Marking the positions was a cheap and simply achieved process and would have gone a long way towards preventing a mistake of the nature discussed in (vi) above. It is not of relevance that it has nothing to do with the Salvemini incident. Had it been marked it would have been safer for all deckhands including Mr Salvemini so I am of the view that particular (viii) is made out. I can accept that there might well be circumstances when it might be more practicable to relocate the handle on the shaft when, for instance, the risk of snagging the net is reduced if the handle has a different orientation. There might well be a convention involved here that the handle is to point along the piping or direction of flow but there is no evidence of hard and fast rules to that effect. I am not satisfied that particular (vii) has been established.

137 So far as it was submitted that there was a necessity for the spool to be set to revolve freely by means of the ball valve and the prosecution had ignored that necessity, I do not agree. In my view these particulars refer to the capacity of the valve to override the wheelhouse control in circumstances other than shooting the net but do not ignore the need to free-spool at such times. It seems to me that proper marking of the positions would make the use of the lever more obvious – including to free-spool.

**(ix) there were not in existence a set of overall clear and comprehensive drawings describing the plant**

and

**(x) there were not design records for the plant**

138 The spool was constructed by Mr Clark for Mr Steel in 1996. He gave evidence that he did not have design records or plans when he built the spool. He said that it was the fourth such spool he had constructed and his instructions for this one from Mr Steel, were to make it larger and heavier than another he had previously built for him with a half hydraulic spread, for installation on his vessel *Susan's Pride*. The second defendant purchased the spool for subsequent installation on the *Jean Bryant* from Mr Steel in 2001. He said that he made no design drawings "as a complete drawing" and that "It sort of evolves as we go along". There were some other specifications. It was to be made from stainless steel and was to have plain (as opposed to ball or roller) bearings. MrSteel also asked for the spreader bar to be "fairly close" and for a four inch central shaft. It was Mr Clark who installed the hydraulic motor to the spool as well as the spreader controls and the ball valve.

139 Through Mr Terry Toumazos, the first defendant admitted that there were no design drawings that clearly and comprehensively described the winch on 1 November 2005.

140 The prosecution submitted that comprehensive drawings were essential for planning the safe use of the winch and for avoiding misunderstandings about the function of plant to ensure that it could be used in a way that it was intended. An example of this was the apparent misunderstanding about the effect of the ball valve that was held out to crewmembers to be a means of stopping the spool. Exhibit C24 makes it clear that it was intended that deckhands use it in emergencies and as a brake. Mr Ridge in evidence warned against the use of that lever as a safety mechanism (and so did Mr Harrold). It was submitted that design records and plans would have told the company, or those engaged to enquire into such matters, that the system was apparently flawed and inherently posed a risk to workers. I think that that is correct. Design drawings are the first step towards an understanding of the nature of plant and are essential when it comes to instructing others as to its use or modification. This particular is also made out.

141 I now move to the charge against the second defendant, Mr Arthur Markellos, who is charged that, being a self-employed person, failed to ensure so far as reasonably practicable that Mr Salvemini, who was not

an employee engaged or employed by him, was safe from injury and risks to health.

142 It is alleged in the particulars that he, whilst operating the spool failed to ensure as far as reasonably practicable that Mr Salvemini, whilst he was in a situation where he could be adversely affected by an act or omission of Mr Markellos, was safe from injury and risks to health. These failures were particularised but first it is necessary to deal with the allegation that Mr Markellos was a self-employed person. It is an essential element of the offence charged.

143 I ruled on 25 June 2009, that there was sufficient evidence adduced by the prosecution, upon which, if accepted, I would be able to find that Mr Markellos was a contractor to the first defendant. I accept that the record of interview of the second defendant and comments he made regarding his engagement as contained in Exhibit C30 p4 line 83 and p31 line 761 in which he describes himself as "contractor" and "basically sub contracted", cannot go to the truth of the actual relationship but only to his belief at the time. I accept that it is only if, on a proper application of legal principle, the primary facts are capable of establishing the ultimate fact beyond a reasonable doubt that the accused has a case to answer. The interview evidence relied upon by the complainant goes to proof of the relevant element of the offence namely that Mr Markellos was an independent contractor but only to his belief. I further accept that the "label" given by the parties to the accused in the crew agreement is merely a primary fact as discussed by King CJ in *Lenzoot Haulage v Sinclair*[6] when he said that the status of the person concerned is to be determined upon an analysis of the rights and obligations of the parties as ascertained from the agreement between them considered as a whole. This is not to be determined by the label the parties choose to place upon it. He said:

> "If the status is ambiguous, the parties understanding of it as declared in their written agreement may have an influence on the final decision, but if the status can be ascertained by means of an analysis of the agreed rights and obligations, the label, if inconsistent with the status thus ascertained, must be disregarded."

144 I think this is the correct approach inasmuch as the accused is not qualified to express a definitive legal opinion as to the true nature of his relationship with the first defendant. It is an element requiring proof beyond reasonable doubt. Nevertheless there is other direct evidence of the nature of the engagement of the defendant Markellos.

145 His contract establishes that the first defendant would make no provision for workers compensation, would not retain PAYE income tax

[6] (1986)42 SASR at p514.

instalments, would not confer leave entitlements, and would not make superannuation contributions – all indicative that he was not an employee. Clause 22 of the contract makes provision for Mr Markellos to indemnify the first defendant for any financial loss claim or damage or demand *howsoever* arising. This is unusual for a contract of employment. The contract also makes provision for GST which would have no application to income in an employment relationship. The only payments arising under the agreement are for payment for the catch share of 22%. The returns to Mr Markellos as skipper could vary significantly.

146 Further, Mr Markellos was a relieving skipper. He says as much in his own statement but that is confirmed by the regular skipper Mr Maczkowiak. Mr Markellos provided his own wet weather gear and personal flotation device. He had only signed his contract of engagement on 1 October 2005 and had only performed the one prior trip on the *Jean Bryant*. Following this particular trip Mr Maczkowiak was to resume control. In fact Mr Markellos owned his own boat and usually operated it and had done so for about 25 years. It therefore appeared that he operated his own business.

147 He had the autonomy and control commonly associated with the operation of a fishing vessel. He held specific qualifications relating to the task and accordingly brought skill and judgment to bear on the performance of its functions. He had control as to the crewing numbers and authority to give commands to the crew that they were required to obey by virtue of their own contracts of employment. He was to deal with misconduct and was able to counsel, reprimand and eject crewmembers. He exercised a certain specialised skill on behalf of the employer. There was indeed an element of the first defendant being able to direct Mr Markellos as to the objective to which he was to address his skills but the first defendant was not able to control the manner in which the skills to pursue the objective were to be exercised.

148 It was submitted by Mr Algie who appeared on behalf of the second defendant that there was a reasonable hypothesis consistent with innocence in this matter in that Mr Markellos' status as a self-employed person had not been proved beyond a reasonable doubt. The reasonable hypothesis was that he was an employee and that the evidence presented could not exclude that. As indicated above I was and am not of that view. It was necessary at the no case to answer stage only for the prosecution to point to evidence which if accepted was capable of proving that he was a self-employed person.

149 Nevertheless, there were certain indicia that Mr Markellos was an employee. It was submitted that there was a certain level of control exercised by the first defendant. Directions were given to Mr Markellos as to where the vessel was to go, when it would fish, and when it was to

be handed over to Mr Maczkowiak. Mr Markellos had been directed to go to a certain national park area near Eucla when that fishing ground was re-opened on 1 November. It was therefore said that there was clear evidence of a capacity to control. The first defendant, and not Mr Markellos, provided the vessel concerned and all of the fishing equipment required including the spool, the nets and the safety equipment. It also provided all fuel and provisions which was said to have accorded more naturally with a contract of service than one for services. I have taken into account these and other factors. I do not consider that it makes much difference whether property in fish caught was vested and remained in the company or whether the crew or skipper were entitled to insist on retention of the fish *per se*. The agreement C6 would appear to confirm that, but the fact remains that the skipper was reimbursed on the basis of a percentage of the value of the catch. Mr Algie submitted that the operator had retained control over the vessel and over Mr Markellos and Mr Markellos was restricted in the work he was to undertake and the manner in which he was to do it. There is some validity in this, however when all factors are considered my view is that the indicia are strongly in favour of the fact that Mr Markellos was a self-employed person. The element of control is a significant one but apart from some directions about some fishing, the fishing activities were determined and conducted by Mr Markellos. Even though there was a direction to fish in a certain area the decision itself as to the deployment of the net was up to Mr Markellos. The incident involving Mr Salvemini occurred on the eighth shot retrieval and Mr Markellos had conducted all of these. Only the seventh or previous shot was directed by the first defendant. The first defendant also said through Mr Toumazos in relation to the conduct of the vessel, that the skipper was automatically responsible after the boat left port and in particular as to how exactly he wanted the crew to operate.

150 I am satisfied that it has been proved to the requisite level that Mr Markellos was a self employed person.

151 I accept, as was submitted by Mr Algie that the onus cast upon Mr Markellos was to do what was reasonably practicable to reduce or eliminate risk to Mr Salvemini at the time and in the circumstances specified in charge. I also accept that Mr Markellos was not responsible for the setup of the vessel in terms of plant or equipment. He was also subject to directions given to him as skipper of the vessel by the first defendant. Mr Markellos, in terms of undertaking his work, did not provide any plant or equipment or other machinery but only his skill or ability as a skipper.

152 The status of Mr Salvemini is not relevant to the charge except for the fact that he is to be shown not to be an employee of Mr Markellos. Parallels might be drawn between their contracts of engagement and they

are indeed similar but there are differences which I do not think it relevant to explore.

153 I consider that Mr Salvemini did something that he should not have done in that he left the designated work area and moved towards the spool, into an area of danger, which was a no-go area and one into which he had been instructed not to go. I do not accept however that his movement into that area was one that could not be anticipated or foreseen.

154 It was submitted that there was no reason to approach (or stay at) the spool because the net had been retrieved and there was no issue of entanglement. Further, the most dangerous part of the operation, that of the cutting in of the bridle had also been completed at a time when it had been required for a crewmember to approach the spool. All that remained was retrieval of the buoy line and this had been partially achieved. It was submitted that there was no reason for Mr Salvemini to be where he was as the next point of concern was the retrieval of the buoy.

155 I do not completely agree with this submission. The evidence is clear from all the other skippers that it was the practice for the deckhand to remain at the spool whilst a number of slow revolutions took place, in order not only for the initial tucking-in of the bridle, but also for the lanyard and any loose net. Nowhere in evidence is it suggested that this function was to occupy a fixed or finite number of revolutions. The next step was for the deckhand, satisfied that tucking-in was complete, to step back so that the speed of the spool could be increased and the rest of the buoy line wound on. Prior to that time it was the practice for the spool to be turned slowly. The evidence does not permit me to say whether at the time of the incident, spool speed had been increased but it at least ought not to have been until the deckhand, Mr Salvemini, had stepped back and was in plain view.

156 Even if I were to accept that there was no reason for Mr Salvemini to go forward towards the spool and that it was contrary to directions given to him, it is evident from both the evidence of Mr Toumazos and from Mr Markellos' admissions that Mr Salvemini was not standing on the mat and that he was out of sight of the skipper at the time when he was caught in the loop of rope.

157 Mr Markellos said that he thought that the two crewmembers were talking somewhere out of his sight. In reality there was no basis for this supposition. It is my view that he ought to have stopped the spool as soon as Mr Salvemini disappeared from view. In fact Mr Toumazos was also out of sight and standing near the gutting box; a factor which made it doubly necessary to stop the spool. Mr Markellos said that he was not concerned that they were both out of his sight at the same time because sometimes crewmembers would talk and he thought that they were just

having a conversation. It might well have been that neither crewman was far out of sight of Mr Markellos but only Mr Markellos could be aware of it. In my view whether or not the length of time over which Mr Salvemini was out of sight was, as Mr Markellos stated, half a minute or something considerably less, becomes immaterial in as much as he failed to stop the spool when Salvemini was out of his view anyway. There is nothing to suggest that Salvemini had only just left his view. In fact Mr Markellos claimed that neither crewmember could be seen at the time that Mr Toumazos called out "stop". He said that their position was incorrect and that they should have remained within his vision but that is only half of the responsibility. He was also required to maintain them in view. Mr Markellos was thus aware that their positioning was incorrect but that gave him no warrant to keep the spool in motion. He ought, as Mr Maczkowiak attested, to have stopped the spool immediately and reprimanded the crewmembers. Mr Maczkowiak had told him to do so. (tr 819)

158 It was the evidence of Mr Nick Toumazos that he had spoken to Mr Salvemini on the previous shot, about his being too close to the spool during tucking-in of the bridle. However he did not tell Mr Markellos about this prior to the accident. It was the evidence of Mr Markellos that Mr Salvemini had never before positioned himself in the manner in which he did on the last, fatal retrieval. He said that:

> "Jack in that first trip never positioned himself like he did on that shot. For some strange reason, on that eighth shot that we done on this particular trip check (Jack) positioned on a complete blindspot on the spool."

159 It is my view that Mr Markellos was therefore only able to say that Mr Salvemini had never before been out of sight on the previous seven shots or the previous trip. He confirmed this by saying that he "had never gone basically out of my sights". It would seem to follow from this that Mr Markellos did not observe the occasion of the previous shot when Mr Salvemini was spoken to by Nick Toumazos.

160 The prosecution maintained that the spool was not turning slowly at the time that Mr Salvemini was trapped. There is some evidence in support of this contention.

(i) Although Mr Nick Toumazos said that the spool speed was slow he also said that it was at net retrieval speed.

(ii) The loop of rope that lassoed Mr Salvemini was, it was said flung out beyond the spool itself by rotation or as I understand it, centrifugal force, (and indeed it was clearly not lying flat on the spool).

(iii) The spool took quite a distance to stop in that the call to stop the spool was given whilst the loop was above Mr Salvemini's head but it only came to a halt when Mr Salvemini had been trapped upside down to his hips.

(iv) Mr Dolphin gave evidence that during the re-creation of events the following day Mr Markellos was unable to maintain a slow spool speed.

161 My view of this evidence is that I cannot make any quantifiable finding about spool speed. It ought to have been as slow as possible until Mr Salvemini stepped back but for various reasons was not dead slow. Had it been crawling I think it unlikely that Mr Salvemini would have been drawn in so far but I do not know with any certainty when the braking force was first applied. The loop might have stood away from the spool for various reasons such as the likely one of centrifugal force, but I do not know how fast the spool would need to rotate for that to occur. It could also have possibly been due to wind or some other factor such as the mere stiffness of the rope. I think it telling that a slow speed could not be maintained, the following day when the spool was full and heavy but it is not quantifiable. In any event, there is nothing to say that the spool was not being operated as slowly as the controls would allow.

162 In any event the second defendant is not charged with operating the spool at an excessive speed.

163 I have had particular regard to the evidence of the other skippers in this matter all of whom impressed me at times and who were quite consistent about certain subjects. Mr Maczkowiak, the regular skipper, who was clearly the best placed to give evidence about the vessel and its equipment, was very clear about his authority to direct crew and his responsibilities. It was he who said that he would stop the spool and give the crew a "bomb" if they were to venture into the no-go zone. However, he also accepted that it was necessary to stand within 300mm to tie in the bridle when the spool was to be wound on very slowly. He also said that he would never increase speed until the crewmember after doing so had stepped back. What remains unclear in this process is whether and how much the crewmember was still visible during tying-in. I refer to my comments above.

164 Mr Steel's evidence was not dissimilar. He was also familiar with this particular spool. He was clear that he was in control of the vessel and that he would stop the spool if a crewmember was in a blind spot. He said that he would go to look for him in case he had fallen over the side. His evidence was that the tying on of the bridle was the most critical point because the spool was "loaded" and (the deckhand) was "close to the reel".

165 He said that the crewmember:

> "(was) trying to weave the lanyard in so it doesn't flap, you know. The net on the top could be a bit loose, like flappy. Like, you know sometimes - when it's hanging, the end of the net gets the most damage and it could be a bit loose, so you've got to watch him while he's getting it on, and once he gets, say, four or five turns on and he steps back, that's when you can put a bit of speed on, but we really used to creep it till they were clear."

166 He said that creeping was at about 15 revolutions per minute and that with this particular spool the deckhand would probably be touching the spreader bar.

167 He said that it was necessary for the skipper working with the lever to be "on the ball".

> "What you do, the bridle comes in - like, you know, the bridle is square but when it comes in at the end it's sort of leaning, and you pull it tight along your buoy line and then the lanyard - you know, the light piece of rope - that sort of flaps around, so he - like, it goes around and he'll flatten - and the (indistinct) flies apart and you try and tie it in so it don't flap."

168 He said in relation to tying-in that deckhands did not stand back and further away from the spreader bar because "they had to be in close and at times it was necessary to grab the lanyard and push it over and then put the buoy line over the top of it".

169 Mr Steel said that he would come back to 10 to 15 revolutions a minute but only for the first four or five turns and then, once the lanyard was tied in and the deckhand had stepped back he would feed in the buoy line at about 20 revolutions per minute which represented 20 to 30 feet of rope on each turn. I note that taking into account the measured circumference of the spool when full it would be closer to 20 feet.

170 Mr Steel, like other skippers, described the tying on of the bridle as the most dangerous or critical part of the operation.

171 Mr.Retsas, another experienced skipper also emphasised his own responsibility to keep an eye on his deckhands. He said that crew had no control but the skipper had control. He said that the crew was doing his job at the speed dictated by the skipper. He agreed that it was necessary for the deckhand to get close to the spool at the time of putting on the bridle and this was done at a "snail's pace". He agreed that it was probably one of the most dangerous times. He said that he would shut down if he could not see his deckhand.

172 In my view the views of the other skippers are matters that I might take into account but, like evidence of industry practice are insufficient to be a measure by themselves. Nevertheless I am of the view that in this case the views of the skippers are rational and called for by the circumstances so that it is a reasonably practicable measure to stop the spool when a deckhand cannot be seen.

173 Mr Markellos is charged that he:

**(i) failed to provide any, or adequate, instruction to Giacomo Salvemini to at all times stand clear of the spool whilst he could become entangled.**

174 It was submitted by Mr Algie that the evidence was incapable of establishing any obligation on the part of Mr Markellos to provide such an instruction. I do not think that is correct. As operator of the deck machinery he had a duty to do all that was reasonably practicable to ensure safety and that included, as skipper and as operator of the deck equipment, to ensure that his deckhands worked safely, and to provide them with adequate safe work procedures. It was submitted that he was aware because he was present, that certain induction procedures had been carried out by the company before the vessel set sail and that on the evidence it had not been established that he had any direct knowledge of any non-compliance with those directions or procedures during the course of the voyage.

175 I think that part is correct. There was no reason for him to fully repeat instructions that he knew and heard were conveyed already to Mr Salvemini and on the evidence there he knew of no previous breaches of those instructions. I would note though that Mr Markellos was well aware of the nature of those instructions as he received the same induction and I note that he knew that the position of the crew was ‘incorrect’.

176 As the skipper and the person in charge, it was his responsibility to give instructions and direct crew where to stand. He controlled the entire operation. His duty was to ensure that he and his deckhand clearly understood each others functions in the manner of the understanding referred to by Mr Maczkowiak. This observation is also relevant to the following particulars.

177 I find that Mr Markellos had a duty to tell Mr Salvemini where he was to stand. I am satisfied that this particular has been made out.

**(ii) failed to ensure that Giacomo Salvemini was at all times standing clear of the spool whilst he could become entangled**

178 For reasons given above I am satisfied that this particular has been made out. Mr Markellos did not ensure that Mr Salvemini stood clear. Apart from the fact that it was common sense not to turn the spool when a crewmember was out of sight he was himself aware of the dangers and the first defendant's procedures and inductions. Mr Markellos was well aware of the risk of the pinch point and the risk was foreseeable and apparent. I refer to the above observations. Mr Markellos was able to instruct Mr Salvemini where to stand but did not.

179 It was submitted that the second defendant might have been briefly inattentive for a very limited period for several possible reasons. He might have been distracted. He might have been concentrating upon the buoy line and in particular the buoy itself. It was suggested, and I do not doubt, that as the buoy approached it was necessary for the skipper to look away from what was happening on deck in order to concentrate upon the possibility of fouling or something similar. I was referred to and accept the evidence of Mr Maczkowiak to the effect that the skipper was unable to maintain a lookout at all times and that he was "multitasking". I have previously dealt with this situation. I was told that perhaps his eyes were continuously moving and he was "patrolling" the spool and the vessel which serves in part to explain why he did not see Mr Salvemini move into the prohibited area.

180 His actions were described by Mr Algie as human error or momentary inattention, distraction or oversight. The argument was that all persons are subject to human error from time to time but the authority to which he referred *R v Mayne*[7] was concerned with the distinction between charges of the serious offence of causing death by dangerous driving and that of driving without due care. The latter involved momentary inattention to which it was said that all drivers were subject and other drivers were to acknowledge and accept. It was said to be one of the ordinary incidents of modern life. The distinction was drawn between a mere lapse of due care and attention and conduct which is plainly blameworthy. The further argument was that people make mistakes and there might have been a human error, a false assumption (about where Mr Salvemini had gone), distraction, inattention or lack of due care so that there was a reasonable possibility of nothing more than human error.

181 Apart from the irrelevance of Mr Salvemini's actual whereabouts; it was plain that he was not within view and neither was Mr Toumazos and the possibility of him being elsewhere was minimal if he had been paying any previous attention because he could see all other areas of the foredeck; the possibility was always there and the protocol was such that the spool be stopped when a deckhand was not visible. Additionally the passage referred to had significance only with respect to whether a lesser

[7] (1975) 11 SASR 583 and especially at 593.

charge had been proven or was more appropriate but not to overall innocence. In the analogy provided there remained the possibility of a conviction on the lesser charge but there was no suggestion of innocence.

182 There is no basis for the proposition of defence based upon human error and the intention of the legislation is not to exonerate or exclude those that exhibit it. The intention is to ensure safety so far as is reasonably practicable and that entails paying attention etc. In this matter the second defendant was aware of all the circumstances and the necessary actions he was expected to take. He has not done so. I see no base for an argument based on error. A lack of due care does not provide a defence – just a different level of culpability. It was argued that there was nothing reasonably practicable that an individual might do to prevent or ensure that they did not fall into human error. Perhaps that is so but there is no such defence in a charge that is aimed at ensuring behaviour so far as is reasonably practicable. It requires positive standards for the benefit of other workers. That is not to deny that such a factor might have application in mitigation but it could not serve as a defence.

183 I think that there is an uncertainty introduced into the first defendant's instructions in that there is no clear direction about how the tucking-in operation is to be performed. Whilst the first defendant has made it clear about line of sight and standing on the mat, as previously indicated there is no procedure about the process that was being performed or just completed by Mr Salvemini.

**(iii) failed to provide any or adequate, instruction to Giacomo Salvemini to at all times maintain a line of sight with the operator of the spool while it was moving**

184 The evidence of Mr Markellos was that he had never given a direction to Mr Salvemini about his work practices. He said at line 455 of his record of interview (Exhibit C30):

> "Well, I never spoke to Jack about his work practices, the previous trip or that trip. I believe Nick spoke to him but I never received information."

185 This particular has been made out. There was no instruction, let alone one which required Mr Salvemini to maintain a line of sight with the skipper.

**(iv) failed to maintain at all times a line of sight with Giacomo Salvemini whilst the spool was moving**

186 As discussed above it is quite clear that Mr Markellos failed to maintain a line of sight to Mr Salvemini. His evidence is clear that he could not

see Mr Salvemini at the time of the incident. This particular is also established.

**(v) failed to stop the spool if Giacomo Salvemini was not within his line of sight**

187 Similarly, Mr Markellos continued to rotate the spool and did not stop it when Mr Salvemini had moved from his sight and he could no longer see him. As soon as Mr Salvemini left his sight it was an obvious possibility that he was near the spool and the second defendant ought to have stopped it from rotating and ascertained his whereabouts. I also note that Mr Maczkowiak had told Mr Markellos about stopping the spool if a deckhand was out sight. (tr 818) This particular is also established.

**(vi) failed to provide any, or any adequate supervision to Giacomo Salvemini in the performance of his duties**

188 I think that this particular is also proven. It is clear from the evidence that during the tucking-in process it is necessary that the crewmember and the skipper have an understanding about the sequence and that includes the point where the spool is to be rotated slowly when the deckhand is closest to it. It is also to be mutually understood and made clear when it is safe again to resume winding on the remainder of the buoy line. However there is no evidence of these procedures at the most dangerous part of the retrieval process being discussed between the two. I consider that it forms part of the supervision required of the second defendant and that he has failed to discharge this responsibility. Mr Salvemini might well have been an experienced and well-instructed deckhand but it was Mr Markellos who ought to have ensured compliance with the established procedures. This particular is also proven.

189 I therefore find both charges proven.

190 I will hear the parties' submissions as to penalties and further adjourn the matter for that purpose.