

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

OATEN, Lynette

v

DIEMOULD TOOLING SERVICES PTY LTD

**JURISDICTION:** Prosecution

**FILE NO/S:** 2768 of 2006

**HEARING DATES:** 23 April 2009

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

**DELIVERED ON:** 26 June 2009

**CATCHWORDS:**

*Prosecution – Guilty Plea – One charge – Failure to ensure safety of employee so far as was reasonably practicable – 18 year old apprentice sustained extensive and fatal injuries when loose fitting dust coat, issued by defendant, became ensnared in rotating parts of horizontal boring machine – Machine completely unguarded – Employee inadequately trained and supervised and shown how to use machine by other apprentice - Comparative sentencing – Co-defendant convicted and fined four years beforehand – **Held:** Defendant substantially more culpable – Penalty of \$80,000 reduced to \$72,000 on account of guilty plea – No discount for early plea or contrition – S 19(1) Occupational Health, Safety and Welfare Act 1986.*

**REPRESENTATION:**

Counsel:

Complainant: Mr K W Soetratma with Mr C Jacobi

Defendant: Mr A J Crocker

Solicitors:

Complainant: Crown Solicitor's Office

Defendant: Rosey Batt & Associates

- 1 The defendant, Diemould Tooling Services Pty Ltd is charged with and has pleaded guilty to the following offence:

“On 5 June 2004 at Edwardstown in the state of South Australia, the first defendant, being an employer, failed to ensure so far as reasonably practicable that its employee Daniel Madeley was while at work safe from injury and risks to health.

(Contrary to section 19 Occupational Health Safety and Welfare Act 1986)

This is a summary offence.

**Particulars:**

1. The first defendant was, at all material times, an employer of Daniel Madeley.
2. On 5 June 2004 Daniel Madeley was while at work exposed to risk of injury, and was fatally injured while operating a horizontal borer.
3. **Plant:** the first defendant failed to provide and maintain so far as was reasonably practicable plant (namely the horizontal borer) in a safe condition in that:
  - ~~(1) it failed to guard or fence the machine so as to prevent employees from coming into contact with its dangerous moving parts during continuous-run drilling operations; (DELETED)~~
  - (2) it failed to equip the machine with interlock devices to prevent employees from coming into contact with its dangerous moving parts during continuous-run drilling operations;
  - (3) it failed to relocate or shroud the machine’s continuous-run button, or otherwise prevent any possibility of accidental use of that button when attempting to use the machine in hold-to-run mode;
  - ~~(4) it failed to equip the machine with sufficient or adequate emergency stop devices. (DELETED)~~
4. **Safe Systems of Work:** the first defendant failed to provide and maintain so far as was reasonably practicable a safe system of work for employees using the horizontal borer in that:
  - (1) it failed to carry out an adequate hazard identification and risk assessment in order to develop appropriate risk

control measures and in particular safe operating procedures;

~~(2) it failed to provide written safe operating procedures to employees using the horizontal borer –~~

~~(a) in the form of a sign displayed prominently by the machine; or~~

~~(b) in the form of documents supplied to employees using the horizontal borer.~~

~~(3) it failed to prescribe a safe distance from which the horizontal borer should be operated –~~

~~(a) during continuous run drilling operations; or~~

~~(b) during setup operations. (DELETED)~~

(4) it failed to provide a system to ensure that the employees' operation of the horizontal borer at close proximity was restricted to hold-to-run mode;

(5) it failed to prohibit the wearing of loose-fitting dust coats by employees using the horizontal borer.

5. **Information Instruction Training and supervision:** the first defendant failed to provide such information, instruction, training and supervision as was reasonably necessary to ensure that Daniel Madeley was, while using the horizontal borer at work, safe from injury and risks to health in that:

(1) **training:** the first defendant failed to ensure that any training given by the first defendant to its apprentice employee Daniel Madeley was delivered by a qualified trades person experienced in the use of the horizontal borer;

~~(2) **training:** the first defendant failed to ensure that Daniel Madeley had received adequate formal off-site training prior to commencing duties on the horizontal borer, and in particular failed to ensure that Daniel Madeley had received formal training in the unit of competency entitled MEM7.13A *Perform machining operations using the horizontal borer and/or vertical boring machines.*~~

~~(3) **training:** the first defendant failed to ensure that adequate assessment was provided in respect of Daniel Madeley's use of the horizontal borer in that:~~

- ~~(a) it failed to ensure that Daniel Madeley's work on the horizontal borer was assessed by a qualified workplace assessor;~~
    - ~~(b) Daniel Madeley's safety practices were not assessed by the first defendant by reference to his knowledge of or compliance with published safe operating procedures.~~
  - ~~(4) training: the first defendant failed to provide adequate training in health and safety matters to its safety officer Mitchell;(DELETED)~~
  - (5) **supervision:** the first defendant failed to ensure that any employee (and in particular Daniel Madeley) who was inexperienced in the performance of work the hazardous nature, namely the use of the horizontal borer, received such supervision as was reasonably necessary to ensure his safety;
  - ~~(6) supervision: the first defendant failed to ensure that any supervisor of Daniel Madeley was provided with such information, instruction and training as was necessary to ensure that Daniel Madeley was, while at work, so far as reasonably practicable, safe from injury and risks to health.(DELETED)"~~
- 2 This charge arises out of the death Mr Madeley on 5 June 2004 at the defendant's factory premises. Mr Madeley was an 18-year-old first-year apprentice who became entangled in the rotating parts of the machine known as a horizontal borer.
- 3 A second defendant to the charge the Engineering Employers Association South Australia Group Training Scheme Inc has already been dealt with by this Court. It was the second defendant who employed Mr Madeley under a contract of service as an apprentice. It organised work placements for him and other apprentices at factories and workplaces of its members around the state. The first defendant is by reason of the Act also deemed to be an employer.
- 4 Mr Madeley had been working at the defendant's premises as a first-year apprentice for approximately 10½ months. In basic terms he was operating the horizontal borer for the purpose of boring holes into what has been described as a die or a metal block for utilisation in a machine in the course of construction. He had used the borer for about five months. His training had not come from a fully qualified tradesman but from another, more senior, apprentice who in turn had been trained by another apprentice before him. It would appear that the defendant's practice was to train apprentices on the borer early in their apprenticeship

as they progressed through training and so one apprentice replaced another on that machine and the new apprentice was trained by one they were about to replace. I am told that neither the man in charge of apprentices nor the person specifically in charge of first-year apprentices had ever used the borer themselves. Neither of these were present at the time of the incident which was a Saturday overtime shift. In fact there was no one watching Mr Madeley's use of the horizontal borer at the time of the incident. The person alleged to be Mr Madeley's supervisor expressly stated that Mr Madeley was not supervised and that he, Madeley, was more experienced on the machine than he was. At the time of the incident the supervisor was working in a completely separate workshop.

- 5 Whilst there were other persons working in the workshop on the day in question none could see what Mr Madeley was doing.
- 6 The horizontal borer can be briefly described as a very large drill in which the axis is horizontal and at about waist level but can be adjusted manually, either vertically, towards or away from the operator, or laterally. It can also be adjusted for penetration and speed. I am told that these days such operations are computer-controlled but the machine in question was comparatively old. It had been manufactured in the old Soviet Union and transported to Australia some years ago. It was completely unguarded and neither was it protected by any device that might automatically prevent operator contact with the rotating spindle.
- 7 Whilst operating the machine Mr Madeley was wearing a loose fitting dust coat which had been issued to him by the defendant. There were no witnesses to the incident because no one was watching Mr Madeley at the time. The closest person would appear to have been a man named Remfry who was separated from the operational area of the horizontal borer by a fence and who was working a different machine in a different area. Mr Remfry was first on the scene. There were two more apprentices nearby but neither saw how the incident occurred.
- 8 Mr Remfry was alerted to the incident by loud banging sounds coming from Mr Madeley's work area. He rushed to turn off the borer. It did not have an effective emergency stop device and came to rest after several further revolutions before Mr Madeley could be released.
- 9 There is no doubt that for an unknown reason, Mr Madeley, whilst wearing his dust coat, came within close proximity to the rotating spindle whilst it was still being powered, his dust coat became caught and he was flung bodily around the spindle for an unknown number of revolutions, striking the machine and its surrounds with great force sufficient to sever both his feet. He sustained multiple serious injuries. The spindle was revolving at at least 125 rpm at the time. Although he was briefly

conscious after being removed from the spindle, Mr Madeley died the following day. His injuries were catastrophic and overwhelming. The post-mortem report details horrific injuries to most if not all of his body which I see no point in repeating. He was shockingly injured.

- 10 There were a number of possible reasons why Mr Madeley approached so closely to the rotating spindle including the need to reach above it to obtain a squirt bottle of coolant or even to apply coolant precisely. He might also have been involved in adjusting the workpiece or spindle for alignment.
- 11 It is beyond dispute that it was possible for Mr Madeley to get close to the spindle whilst running under full power. There was nothing to prevent him doing so. There is also no doubt that his dustcoat had become caught. It was necessary for the investigating inspectors to unwind the remains of the dustcoat from the spindle at a later juncture.
- 12 The defendant's failures are many. There was a single glaring risk that of contact with the dangerous rotating parts of the borer and the defendant failed to protect Mr Madeley from them in many ways.
- 13 Taking them in turn as particularised in the complaint:
- 14 It failed to equip the machine with devices designed to prevent employees coming into contact with its dangerous moving parts especially during its continuous run operations.
- 15 I am informed by the prosecution that in order to precisely set up the borer it is necessary to have the spindle rotating and for the operator to be quite close in order for the operator to make final fine adjustments, although the actual boring operation with the machine set to "continuous-run" might not require such proximity. The prosecution maintained that the defendant should have equipped the machine with devices to prevent an operator coming into contact with the rotating spindle during those continuous-run operations such as guards and fences or interlocking devices.
- 16 It was further submitted that proximity or trip switches were also available and could have been fitted so that if the worker engaged or bumped and moved an antenna like wand having moved in too close it would trigger a braking mechanism.
- 17 However, I note that in the case of this particular horizontal borer, apart from cutting power to the borer by such means or by releasing the hold-to-run button or pressing the stop button or even the emergency stop button little would be achieved because there was no emergency stop mechanism fitted. As is demonstrated by the DVD exhibit any of those measures results in a gradual slowdown of the borer which then requires

many revolutions and several seconds to come to a standstill. I am informed by the prosecution and readily accept that it was possible to fit an emergency stop system which electrically switched DC current into the AC motor powering the borer and brought it quickly to a halt. Whether in this case it would have been sufficient to save Mr Madeley from injury is a moot point but it would have at least lessened the risk posed to him and might have been the difference between life and death by reducing the number of revolutions involved. The defendant is not charged with a failure to equip the borer with emergency stop devices.

- 18 Further, the continuous-run button had clearly been engaged by Mr Madeley although it cannot be stated with absolute certainty whether he had done so deliberately. It remains a possibility that he did so accidentally when attempting to do so in hold-to-run mode. He might not have, but in any event the continuous run button ought to have been guarded against any such accidental activation and in this case was mounted alongside the hold-to-run button in an indistinguishable configuration. Mistaken activation was a possibility. The pendant controls were able to be activated whilst the employee was in close proximity to the working parts of the borer. It is not known where they were when Mr Madeley became entangled. They might well have been moved during the rescue phase. Whatever, it remained possible for the machine to operate at full power whilst the operator was in dangerous proximity. The prosecution maintains that the continuous button should only have been operable at a safe distance leaving the hold-to-run button for use in close proximity for fine centring adjustment. That would not have eliminated the risk but it would have served to reduce it. Further, a continuous-run button might have been installed of a type tendered which had a plastic shroud over the button itself so that it could not be activated without a positive action of lifting the shroud.
- 19 The prosecution also alleges that putting aside issues relating to the plant, the defendant has failed to provide safe systems of work. Even if it was not prepared to employ engineering solutions it ought to have made sure that its employees knew exactly what was required of them in terms of procedures to keep themselves safe.
- 20 In that context the defendant had not carried out an adequate hazard identification and risk assessment with respect to all the tasks that were required of an employee. The first series of controls are to be engineering based which make it impossible (or as much so as is possible) and after that, and only then, reliance can be made upon rules and procedures and then as a last resort, upon personal protective equipment.
- 21 In this case the hazard identification was flawed at the outset. Individual tasks and dangers of the borer were not identified. It is not enough to say that the borer carried “general machining risks” and “safety to be

observed at all times". I accept as was submitted that each machine and process was to be assessed individually and that at best this was a general global approach and assessment. Had an appropriate specific approach been taken it would have identified that the vast majority of workers using the horizontal borer were in fact apprentices who in fact required the most intensive levels of training and supervision to ensure their safety in performing hazardous work on the borer. The borer had specific risks which were different from other machines and in particular it was one where at some stage it was necessary to get close to the machine while it was running and close proximity could at least have been minimised. It should also have been found that there was the prospect of misuse of the continuous run button, the lack of a braking system, and interlock or trip switch. The wearing of loose apparel ought also to have been detected.

- 22 Accordingly there was no proper hazard identification and accordingly it was not possible to deal with the specific hazards of the borer.
- 23 There was certainly no written safe operating procedure, only a work procedure.
- 24 The defendant did not ensure that operation of the borer at close proximity was restricted to hold-to-run mode and did not ensure that continuous operation occurred only when the operator was fenced off or separated from the machine by placement of the relevant button.
- 25 Of greater significance was the lack of safe operating procedure which prohibited the wearing of loose fitting dustcoats, a major factor in Mr Madeley's death.
- 26 As was submitted to me by the prosecution, not only should Diemould have never supplied dust coats but also should have banned wearing them or anything other than tight-fitting clothes in order to reduce the risk of entanglement.
- 27 Finally, with respect to training and supervision it was submitted that having not made the borer safe it was imperative to comprehensively train and supervise him through qualified tradesmen experienced in the use of the borer. However, the actual training that Mr Madeley received came from another apprentice who had in turn been taught by an apprentice before him. The defendant therefore abdicated its training responsibilities and had no way of knowing whether Mr Madeley had reached the level of skill and safety expected of a qualified tradesman which was the minimum level upon which he should be permitted to operate unsupervised on the borer. However, and in terms of supervision, there was no qualified tradesman present in the area where he was working and in particular there was no one trained in the use of the borer

or OHS principles let alone one who was supervising. As previously indicated neither the person in charge of first-year apprentices or the person in charge of the apprentice program had operated the borer. In fact there was no genuine, clear and objective form of assessment of Mr Madeley's work at all.

- 28 Overall the prosecution takes the view that the total circumstances amount to a severe and comprehensive breach of Diemould's responsibilities to Mr Madeley.
- 29 I have re-read the statement tendered to the court by Mrs Madeley. The death of her son in such horrific and avoidable circumstances has had a profound effect on her. I do not doubt that all she has expressed in her statement represents genuine circumstances and feelings. I am required to consider the effects of an offence upon victims. In this case it was devastating not only upon Mrs Madeley but also upon Daniel Madeley who initially survived the incident and was at one point conscious but doubtless with little awareness of what had happened to him.
- 30 The statement of Mrs Madeley contains certain references concerning the attitude of the defendant and the legal effect of the death, that were referred to by Mr Crocker who appeared for the defendant. I agree with his comments thereupon and disregard them.
- 31 I agree with the prosecution that this breach was comprehensive and extreme.
- 32 I was informed by Mr Crocker that the defendant is a family company founded nearly 30 years ago. It is a leading toolmaker in this state and its major business is the making of moulds for the automotive industry for headlights and plastics. The defendant company has been very successful in recent years having a turnover of the order of \$10 million but at the present time expectations are much lower and the workforce has been more than halved due to the economic downturn. I am told that the defendant is well regarded within its industry and a reference was provided to that effect.
- 33 I am told that the apprentice who had been responsible for teaching Mr Madeley, namely Mr Remfrey, was in fact only months away from full qualification having nearly completed his fourth year of apprenticeship. Nevertheless he was still an apprentice.
- 34 Although the supervisor for Mr Madeley, namely, Mr Sandeep was physically in another part of the premises and did not have direct line of sight to Mr Madeley, Mr Remfrey said that from time to time he saw Mr Madeley consulting Mr Sandeep on the day of the incident. Mr Madeley was in fact working for Mr Sandeep on a particular job that day. Mr Crocker said that it was not the case that Mr Madeley had been

cast adrift to work on the borer. Further there was one other qualified toolmaker in the workshop that day. I accept these statements.

- 35 Mr Crocker also informed me that further information might have been forthcoming from a now-deceased director of the defendant, Mr Neville Gross, about measures the defendant took which would have dispelled any impression that the defendant was uncaring, callous or abandoned Mrs Madeley after the incident. It is not known what he would have said but he spoke at Mr Madeley's funeral which was paid for by the defendant.
- 36 After the incident the defendant has put in place a number of important operational changes. It has engaged an expert who has completed a review of the entire operation of the defendant and has made a whole series of recommendations including forward projections. He has, in written form, identified a series of tasks in a timeline indicating steps that were taken and other operational changes. This has involved contact with all employees. That has included new hazard assessments on all machinery and involving 20 people on an OH&S course. It has also involved significant expenditure including the provision of new types of clothing, safety glasses etc. The intention has been to ensure that this problem never arises again. I take this into account.
- 37 I am told that certain documentation was lost along with hazard assessments so that in fact there was more documentation than the two documents which were of general application and generic and which were tendered as the only hazard identification documentation in existence. I am told that these other documents existed but could not be found and were indicative of a more extensive review of hazard identification.
- 38 Mr Crocker said that the impact of the accident and the death of Mr Madeley had a massive impact not only on his mother and their circle of friends but also upon the workplace and particularly the young men who were there at the time. The defendant arranged counselling for the staff but that is a matter of which more is known only by Mr Gross.
- 39 He said that the defendant cares very much about what happened and has tried every day to avoid a recurrence. There is now a much greater emphasis on safety. Prior to the incident the defendant prided itself on its good safety record and in that respect there had been no indication that anything was amiss. The defendant has learned from the accident and has improved utilisation of the representatives and coordinator roles. Reviewing and updating safety operating procedures is now an ongoing organic process. There are now toolbox meetings relating to safety issues, and specific training provided in relation to various pieces of equipment. I accept this.

- 40 I am told that the borer which was seized after the incident by SafeWork SA will be scrapped and never used again, it has been replaced by a computerised machine which the defendant has guarded.
- 41 The defendant is the host employer for the apprentices who were brought to its premises by the second defendant, the Engineering Employers Association. I am told that the training scheme had been in operation for between 15 and 20 years. There was usually an annual intake but unusually Mr Madeley was engaged outside that usual intake. Although training was the responsibility of both defendants there were clear deficiencies. Apprentices were normally given a ten week period of intensive training but that did not occur with respect to Mr Madeley and it is suggested that the reason was the fact that he was not part of a usual annual intake. The defendant was not aware that this had occurred and dealt with him on the basis that he had received the training. I pause to note that properly trained, the accident to Mr Madeley might not have occurred but the physical risk to which he was exposed was unaffected.
- 42 With respect to sentencing I was referred to various principles and authorities. In particular I note that I am not bound by a particular view taken by another judicial officer - in this case the penalty imposed by another Industrial Magistrate upon the Engineering Employers Association. I am not constrained by his view. I am aware however of the need for relativity and parity and in this case am of the view that the defendants culpability is substantially greater than that of the Engineering Employers Association. I say that because the latter's fault lay in its overreliance on assumed safety measures taken by the defendant but in fact it had no physical control over the plant or processes and could not control what occurred on the factory floor as could Diemould. I have formed the view that the penalty imposed upon the Engineering Employers Association of a nominal penalty of \$75,000 reduced by 20% to \$60,000 was high and have not taken it into account in setting the penalty for Diemould. In particular I think a higher penalty is in order not because I must start at \$75,000 but because in all the circumstances I am of the view on the evidence that it is warranted.
- 43 I accept that the maximum penalty of \$100,000 is reserved for the worst of cases. This is not the worst I can envisage which might involve wilful disregard of warnings or near misses but in my view it is not much less culpable in view of the multiple factors discussed above. In my view the defendant's failures put it at a level which demands a particularly high penalty.
- 44 I take into account that the defendant has no prior record but that is not unusual in this jurisdiction and the maximum penalty is that prescribed for a first offence which indicates the seriousness with which the

legislature has regarded breaches of this nature. I take into account the reference provided from a peer competitor in the industry.

- 45 In my view it is appropriate that there be some discount allowed because the defendant has pleaded guilty to the charge without putting the prosecution and relatives of the deceased through the demands of a contested hearing. Nevertheless it is my view that the circumstances were such that after the defendants objections to the form of the complaint were resolved (in both the Full Industrial Relations Court and the Supreme Court and were only concluded by a refusal of the High Court to grant leave to appeal) that the defendant had little option but to plead guilty- so glaringly culpable was it. Nevertheless I apply a discount of 10% for the plea.
- 46 I accept as was submitted by Mr Crocker that the defendant is very sorry and contrite about the death of Mr Madeley but I do not accept that any discount representing an early contrite acceptance of guilt and responsibility is appropriate here. The simple fact is that the defendant chose a course which could have been to its advantage and prolonged the resolution of this matter and which of course was its legal prerogative. Only at the conclusion of those proceedings, was a plea entered. That course was not consistent with immediate contrition. It would have been quite different had the defendant indicated immediately its willingness to accept its wrongdoing with the proviso that it still wished to more accurately define or ascertain the charge. Whilst it is at law entitled to know the precise charge it is to face that is a different matter from acceptance of blame in patently culpable circumstances. I am thus not of the view that the first defendant is to be treated in a similar manner to the second defendant in terms of a discount. The second defendant did in fact plead guilty at the first opportunity.
- 47 The defendant made something of the fact that the charge was laid shortly before the two year period of limitation had been reached with reference to the suggestion that it might have been more amenable to amendment had more time been available. I do not know about that and I do not accept that it can in any way be criticised for not doing so but I do accept that the complainant before issuing the complaint was involved in a comprehensive investigation which involved matters of plant, systems, training and supervision. It therefore might have taken longer than usual to formulate but that is of no consequence. I hold the view that the complaint is within time and is validly instituted. In most cases of this nature it would be expected that most, or a large part of the limitation period would pass before proceedings are instituted anyway. The real reason for the extended delay is the time taken to resolve the issue of the pleadings before three separate courts.

- 48 The prosecution accepted that the usual amount of credit for a plea was 20% and did not speak against that figure. However, it seems to me that even if the prosecution was to accept that such a percentage was applicable, and here it has not, I am not in any way bound by such an acceptance. The decision remains mine to set the percentage of discount applicable in all the circumstances.
- 49 Mr Crocker submitted that in terms of penalty, and that although the circumstances called for a very significant fine, the defendant was in considerable difficulty because of the current economic circumstances. I was told that the defendant was struggling but have not seen any evidence or documentation to justify its inability to meet any penalty that I might impose.
- 50 With respect to compensation I have previously indicated to counsel that I do not intend to make an order within my statutory maximum of \$20,000 pursuant to section 53 of the *Criminal Law (Sentencing) Act*. It is not that I am of the view that Mrs Madeley is in any way undeserving of an order for compensation but that I am aware of the fact that she has instituted similar proceedings in the District Court for compensation. I take the view that there is no limb of compensation upon which I might make an award that is not also available in the District Court and upon which an award might be made upon the basis of full evidence and argument. Accordingly I decline to make an order for compensation.
- 51 In all the above circumstances but with particular reference to the defendant's obvious and multiple failings I consider that a penalty of \$80,000 is appropriate which sum I reduce by 10% on account of the eventual guilty plea.
- 52 There will be a conviction and a penalty of \$72,000.
- 53 The defendant is to pay the following:

Penalty	\$72,000
Court costs	111
Victims of Crime Levy	70
Counsel fee (payable to the Crown)	<u>850</u>
<b>Total</b>	<b>\$73,031</b>

54 I allow 28 days to pay.