Wilson Bateman

Due Diligence Case Law

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Due Diligence Case Details

R. v. Della Valle, 2011 Provincial Court of Nova Scotia
Details: Safety Coordinator knew asbestos was in attics and told foreman to warn crews. Foreman said he would, but did not. Coordinator did not follow-up. Coordinator did not take all reasonable steps.
Decision: Guilty
Quotes:

> It is not necessary that the Crown prove, by expert medical evidence, actual risk to health, nor any actual resulting harm.
>
> It is true that he was not engaged "hands-on" with repairs and maintenance. He might only rarely attend at one of the housing units. But while this distances him from the responsibility to supervise particular jobs at specific sites and times, it does not diminish his responsibility for health and safety matters in the broader sense.
>
> Persons at a worksite are expected to act in timely fashion on reliable information about possible dangers. Such risks may not materialize but nevertheless be real (nobody may actually get caught up in an exposed moving machine part) or a perceived risk may later turn out to be no actual risk at all (subsequent medical research debunks earlier beliefs about health effects of a particular substance). For the purposes of s.17 of the OHS Act, however, these are one and the same with a case where a known risk materializes into actual harm. The duty to act arises when there is a "potential health hazard" identified by an individual at a worksite, or known as a result of advice from a reliable source. Where someone in the position of the defendant has knowledge of a possible danger from a credible source, this alone may precipitate a duty to take positive preventive measures. Whether this perceived risk is subsequently shown to be an actual, real risk – either in Court or in the broader scientific or public arena – is immaterial.
>
> If "precautions" may be equated with "steps" and "every" to "all", then "every reasonable precaution" equates to "all reasonable steps". Being equivalent terms, if the Crown proves the absence of such beyond a reasonable doubt, it is logically impossible for the Defense to establish the same proposition, on the same evidence. In other words, if the Crown succeeds in proving the *actus reus* in a general duty provision such as s.17, which a court must first determine, any analysis of the "all reasonable steps" defense becomes moot and it should be unnecessary for a court to consider it.

R. v. Lonkar Well Testing Limited, 2009 Court of Queen's Bench — Alberta
Details: The employees were engaged in a sweet well operation. Lonkar provided a horizontal pressure vessel to measure the service flow rate of the well. The vessel included a separator and a Meter Run. When the Meter Run malfunctioned, Lonkar contacted the manufacturer and made arrangements to have it replaced. Audit, a Lonkar worker, was told not to carry out any work beyond minor preparatory work until the supervisor returned. Upon the supervisor's return, Audit was found dead and the Meter Run had been removed. The major contributing factor to his death was suffocation due to the low level of oxygen.
Decision: Not guilty
Quotes:

> Logically, an employer who has breached a specific positive obligation mandated by regulation must provide a compelling rationale to support a finding that it, nonetheless, took all reasonable care to ensure the safety of workers.
>
> There is no duty imposed on an employer by health and safety laws to anticipate every possible failure. . . Furthermore, the wisdom gained by hindsight is not necessarily reflective of reasonableness prior to the incident:
>
> . . . due diligence entails "communicating adequate instructions of safety precautions to employees, either verbally, or in writing, and following up to ensure that the instructions are carried out".

> In law, "foreseeable" does not mean "imaginable". The human mind is capable of imagining all sorts of fantastic and bizarre situations, but that does not make them "foreseeable" in law. The legal concept of foreseeability incorporates the idea that the event is not only imaginable, but that there is some reasonable prospect or expectation that it will arise...
>
> For a potential danger to be foreseeable, there must be at least a reasonable prospect or expectation that it will arise. "Foreseeable" is not the equivalent of "imaginable". If s-s. 2(1)(a)(i) required not only foreseeing and addressing a potential danger so as to ensure the health and safety of workers, but imagining all the bizarre and unforeseeable situations which might create a further danger, then the employer's liability under this provision would be absolute. This approach would essentially render meaningless the phrase "as far as is reasonably practicable".
>
> The . . . test in the occupational health and safety context is not whether the defendant in fact foresaw the accident but whether a reasonable man would have foreseen a potential source of danger. This approach is in keeping with the high onus placed on employers by legislation to reasonably ensure a safe and healthy working environment.
>
> The further safety precautions identified by the learned Trial Judge may be entirely reasonable with the benefit of hindsight. An employer may well be negligent in failing to take steps to avoid even an extremely unlikely scenario where that very scenario has actually occurred in the past. However, in assessing on a balance of probabilities whether Lonkar took all reasonably practicable steps in this case to ensure the safety of Audit, one must approach the problem on the basis of the facts which existed prior to the occurrence.

R. v. Rose's Well Services Ltd. (Dial Oilfield Services), 2009 Court of Queen's Bench — Alberta
Details: Mr. Richardson and Mr. Chamberlain were unloading a product known as debuts, which they knew to be a flammable petroleum product. It was a cold day. Chamberlain was standing at the metal tank which was being filled from the service truck. Richardson was with the truck. Under company safety and operating procedures, and the General Safety Regulations, Chamberlain should have been at the truck, not standing by the metal tank while it was being filled. As well, the truck had been parked about 3 feet from the metal tank, instead of the 15 metres the company alleged was its universal distance rule, or the 7 metres indicated by industry standards and the site owner's safe work permit. Further, the truck had not been grounded and it had not been bonded to the metal tank, which were also contrary to company standard procedures. The explosion occurred during the filling procedure. Fumes from the metal tank were ignited by the revving truck engine. Both Richardson and Chamberlain were badly injured by the explosion. Expert evidence at the trial established that the explosion would not likely have occurred had the truck been parked at least 7 metres away from the metal tank, or if the truck had been grounded to the metal tank. It is likely that Chamberlain's injuries would not have been as severe if he had been at the truck instead of at the metal tank.
Decision: Guilty
Quotes:

> . . . it is up to the employer to set clear safety rules for its workers. If there is systemic confusion in an industry, it is the responsibility of the employer to deal with that confusion, and resolve it for its workers. Surely the default should be the most onerous standard applicable to the work. If industry sets a safe standard and the employer sets a safer standard, the worker should adhere to the employer's standard (although a failure to follow the employer's safer standard may not be an offence under the *Act*). If some of the employer's clients set lower standards for their work sites, the workers should nonetheless be following their employer's standard, not some lesser standard (again subject to the proviso that if the client's standard is in itself a reasonable one, following it and not the employer's safer standard may not be an offence under the *Act*). But if the employer's standard is less than industry standards, one must seriously question whether the employer's standard meets the employer's statutory obligations under section 2 of the *Occupational Health and Safety Act*

There is no obligation at law that appropriate safety training must include significant details as to "why" rules are in effect and must be followed. An employer is entitled to make rules and expect that they be obeyed, whether or not the employee fully appreciates why the rule is there and why it should be obeyed.

Dial's approach was to train a new worker in the field by having him work with a senior driver until the senior driver was satisfied that the new worker knew his job and how to perform it safely. That approach may well be effective in some circumstances, but such a system must be predicated on the basis that the senior driver is an appropriate person to provide safety training, and that the training provided will be sufficient to cover all situations that might reasonably arise. Applying that concept to the evidence before the trial judge, there was evidence that Griffiths was the person primarily responsible for training Richardson. Yet Griffiths did not have an adequate understanding of Dial's distance rule and its application, as evidenced by his evidence in chief, cross-examination and re-examination. And Richardson was tasked with training Chamberlain, without any apparent assessment of Richardson's fitness as a trainer.

R. v. Brant Corrosion Control Inc., 2008 Ontario Court of Justice
Details: A large cylindrical tank was being shot blasted by Michael Keen. Mr. Keen was required to use a platform to stand above the cylindrical floor to do his work. There was no guardrail in place and no fall protection equipment was being used. Mr. Keen's opinion at trial was that a guardrail would interfere with the blasting process. Mr. Keen supported and balanced himself and his equipment weight as he worked on the blasting of flanges from his platform. In order to keep his balance he had to take into account the thrust created by the actual use of the blasting gun. Mr. Keen fell from a plank platform while blasting with steel shot inside a large vessel while working alone, suffering serious fractures to the tibia and fibula in the shin area of his right leg resulting from a fall from a platform while performing his job.
Decision: Guilty
Quotes:

. . . the various defendants must individually demonstrate on the balance of probabilities that each took all reasonable precautions to prevent the commission of the offence and therefore statutory liability should not attach. That due diligence must attach to a particular workplace, the particular work carried on and the particular individuals who carried on the work giving rise to any accident event or infraction.

Due diligence cannot be proved or disproved by Corporate or individual reputation for a dangerous or safe workplace environment generally. The diligence of the corporate employer and the employee's supervisors relate to the background or history of appropriate training, the nature of the work to be done, the required platforms for at height work, and checks and balances put in place to make sure the work was done safely.

. . . the defence of officially induced error can be summarized as having 6 essential components as follows:

1. An error of law was made resulting in the offence committed;
2. The error was committed with consequences considered;
3. The error resulted from action of the offender based upon advice or instruction from an appropriate official.
4. The advice was reasonable in the circumstances;
5. The advice was erroneous;
6. The erroneous advice was relied upon in the commission of the offending Act.

R. v. Petro-Canada, 2008 Ontario Court of Justice — Ontario Details:
Details: Two workers were working in the vicinity of an overflow valve located by an overflow pipe which leads from a lime softener tank. When the locking pin was removed from the control valve, steam and water was discharged and one of the workers sustained first, second and third degree burns to various parts of his body.
Decision: Guilty
Quotes:

There are two distinct and independent means by which reasonable care can be established. First, if the defendant took all reasonable steps to avoid a particular event. Second, if the defendant reasonably believed in a mistaken set of facts which if true, would render the fact or omission innocent.

. . . due diligence must be established with respect to the particular violation with which the defendant is charged: "The due diligence which must be shown is with respect to the specific default charged."

An employer cannot rely on compliance with industry standards to establish that it took every precaution reasonable in the circumstances. The *OHSA* imposes a strict duty on employers which requires them to be proactive in ensuring compliance with the Act. In the context of a due diligence defence, the court in *R. v. Taggart Construction Ltd* held that "an employer cannot simply rely on a strong record of compliance, industry standards, past practice, or general requirements that employees comply with the Act."

"It would be repugnant to the rule of law to convict in a situation where the accused could not have complied with the law."

There is no doubt that if "appropriate PPE" exists and it is reasonable that it be worn, then the fact an industry does not use it will not be sufficient. Similarly, as in the cases cited by the Crown, where there is a specific procedure or piece of equipment specifically mandated by the statute or regulations, it is of course no defence to say that the entire industry does not comply with that requirement.

. . . the plain meaning of the word "provide" . . . does not include the concept of "developing" or "inventing", and presupposes that such "appropriate PPE" in fact exists.

The defendant did not take any steps toward designing a procedure, or otherwise protecting workers from steam burns when removing the locking pin from the overflow valve. The company relied on general training courses, but aside from implementing the Dupuis email, there is no evidence that the workers were trained post 2004 on those specific gauges attached to the control valve on the lime softener, "bleeding" the pipe, or safe removal of the lock pin. The defendant simply relied on its overall training record and safety procedures. Such reliance does not constitute due diligence. The company has to take the responsibility to train those who work with a specific piece of equipment, following any design change, with respect to any potential hazard.

This is not a small operation with untrained personnel. Petro-Canada has at the ready engineers and scientists, as well as a management infrastructure capable of dealing with far more complex problems than the simple scientific premise of pressurized steam turning to condensate in a pinned off pipe. The company knew or ought to have known of the danger of extended blockage of the control valve in question, and it is not a valid defence to say that Mr. Dupuis and others did not turn their mind to that.

R. v. Kal Tire Ltd., 2008 Court of Queen's Bench — Alberta
Details: Kal Tire's operates a Kobe Mill consisting of two large metal cylinders or rollers, positioned parallel to each other, which rotate in opposite directions like washing machine wringers. Beckstrom was trained in using the mill by Mr. Martin – an experienced operator. One time Beckstrom operated the mill, a malfunction occurred – rubber became attached to the back roller which it should not. When trying to deal with the issue, Mr. Beckstrom's hands got caught in the pinch point between the rollers. Mr. Beckstrom was able to hit the emergency shut off switch. However it was necessary to amputate his right hand and right lower arm and some of the fingers of his left hand. He also suffered burns to his lower body.
Decision: Guilty
Quotes:

> . . . there was ample evidence . . . to support the conclusion that it was not reasonable for upper management of Kal Tire to believe that Mr. Martin's efforts to train Mr. Beckstrom were sufficient. Upper management made no effort to ascertain whether Mr. Beckstrom had been adequately trained. It did not administer any test to him or require anyone other than Mr. Martin to check that the training was complete and exhaustive. It did not require Mr. Martin or Mr. Beckstrom to certify to it that Mr. Martin had advised Mr. Beckstrom of the policy, the breach of which lead to the accident, and that Mr. Beckstrom understood it. It did not remove the ambiguity in the safety notice posted by the mill. In my view the conclusion that it did not exercise due diligence was entirely reasonable.

R. v. Dofasco Inc., 2007 Court of Appeal for Ontario — Ontario
Details: Defendant operated a steel mill where steel had to be fed into a roller, where it was compressed between 2 large rollers. There were no guards in the traditional sense that would prevent a person from contacting the two rollers while they were in operation. The defendant had procedures that specified that steel was to be fed into the roller with a 20 foot long push rod. When a difficulty arose with a coil of steel, there were other procedures to assist in feeding the free or lead end of the coil into the mill. The procedures put the employee, at the very least, at arm's length from any pinch points. It was known that the work procedure did not readily accomplish its task with certain light gauges of steel stock. In such case, the employees could have pulled the roll of steel off of the mill. That was the specified procedure but it would have meant delays and curtailed production. The incident occurred when a worker disobeyed procedures and tried to free the steel.
Decision: Guilty
Quotes:

> On a plain reading of the Regulation, employee misconduct does not go to the *actus reus* of the offence. Rather, at least in relation to employees carrying out their work, an employer is strictly liable if it fails to comply with its obligations and there is no suggestion that employee misconduct constitutes any form of defence.
>
> In our opinion, Dofasco's argument ignores common sense. Employees do not deliberately injure themselves. The requirement for guarding of machinery is to protect employees in the workplace from injuries due to both inadvertent and advertent acts. This is the reason for the requirement for physical guards. Employees encounter all variations of workplace hazards. Some are inadvertent – for example, employees may slip, misjudge distances, lose their balance, their timing or dexterity may be off, lose concentration or simply be careless. Physical guards or their equivalent are obviously required to prevent against injury in these situations. Physical guards or the equivalent are also required to prevent injury from advertent acts by employees exposing themselves to risk of injury. In this regard there seems to be some confusion as to what meaning ought to be attributed to deliberate acts. This does not mean an act by an employee to intentionally injure oneself. That stretches credulity. It does mean, however, that on occasion an employee may make a conscious decision to disobey an instruction or work practice in order to get his or her work done. Indeed, that is what occurred in the present instance. . . The injury he suffered was as a result of his deliberate act, but it was an act done in furtherance of productivity in the work undertaken for the employer and not for any other reason. To suggest that the responsibility for the injury, pain and suffering rests squarely on his shoulders would be unfair because defects in the process for performing the work in question and the absence of a physical guard contributed significantly to the accident.
>
> Dofasco did not lead evidence that it had taken any steps to place a guard or other device at the pinch point as required. In these circumstances, Dofasco cannot show that it took all reasonable steps to avoid the incident.
>
> As for the second branch of the test, Dofasco does not assert that it believed, mistakenly, that it had taken steps to place a guard or other device at the pinch point as required by the Regulation. Instead, it advances a strained interpretation of s. 25 of the Regulation to support a contention in law rather than fact that it complied with the Regulation. This does not meet the second branch of

the test in that it is not a mistake of fact but rather a mistaken apprehension as to the requirements of the Regulation and the statutory regime.

R. v. Keough, 2006 Supreme Court of Newfoundland and Labrador, Trial Division
Details: Cecil Keough was charged for fishing crab when the season was closed.
Decision: Guilty
Quotes:

> The burden of proving due diligence is on a balance of probabilities. It is a positive onus and the accused will be convicted if he does not meet it.
>
> In **R.** v. **Wholesale Travel Group Inc.**[xi] the Supreme Court of Canada considered whether placing a persuasive burden of proving due diligence on the accused, as opposed to the less onerous evidentiary burden of raising a reasonable doubt, violated the presumption of innocence in section 11(d) of the Charter. The Supreme Court decided by a margin of 5-4 that there is nothing unconstitutional with reversing the onus of proof in regulatory offences. Cory, J. said that requiring the accused to prove due diligence in the regulatory context does not violate the presumption of innocence, even though shifting the onus would have that effect in a criminal matter.
>
> In effect, the trial judge was saying that Mr. Keough and his brother were not telling the truth. Mr. Keough could not possibly have proved that he exercised due diligence unless the trial judge was satisfied that Mr. Keough and his brother were telling the truth. Mr. Keough's positive duty to prove due diligence and the trial judge's disbelief of their testimony are irreconcilable. They cannot co-exist.

Ontario (Ministry of Labour) v. Pioneer Construction Inc., 2006 Court of Appeal for Ontario
Details: See below case
Decision: Guilty
Quotes:

> There was no dispute that Pioneer had contracted for Mr. Carr's services through his immediate employer, P.D. Brooks. Just as a contractor who hires the services of a tradesperson through another employer (a sub-contractor) assumes responsibilities as an employer for that tradesperson while that person is working in a workplace under the control of the contractor, so Pioneer became the employer of Mr. Carr when he was working in a workplace controlled by Pioneer providing services to Pioneer. The narrow definition of "employer" advanced by Pioneer is inconsistent with a purposive interpretation of the statute.

Ontario (Ministry of Labour) v. Hershey Canada Inc., 2006 Ontario Court of Justice
Details: Worker assigned to clean out bin using a certain procedure, including unplugging the auger. Procedure was not followed and worker lost finger to auger at bottom of bin.
Decision: Guilty
Quotes:

> . . . a due diligence defence is available to these particular charges if the defence can establish on a balance of probabilities that every precaution reasonable in the circumstance was taken
>
> The fact that all the safety audits did not reveal any prior difficulties with the Accurate Feeder and the lack of any previous problems with the cleaning of the Accurate Feeder does not mean that Hershey was exercising due diligence on the day in question with this particular Accurate Feeder.

Ontario (Ministry of Labour) v. Pioneer Construction Inc., 2005 Superior Court of Justice — Ontario
Details: Rob Carr was hired as a Belly Dump Truck Driver by P.D. Brooks. P.D. Brooks and Pioneer had a contractual relationship wherein P.D. Brooks delivered a mixture of sand and salt to Pioneer's work site. Pioneer had purchased and installed a Low-level Unloader with conveyor to move the sand mixture from the Belly Dump Truck to the Sand Domes. Mr. Carr delivered a load to the site. He positioned the dump portion of the truck over the conveyor belt and exited his truck. Hugo Lafreniere, Pioneer's Site Foreman/Supervisor, was the operator of the Unloader at that time. Mr. Carr was not told to remain in the

truck. Mr. Lafreniere then started the Unloader and left the area to make a phone call. Mr. Lafreniere was not present at the time of the accident. Mr. Carr soon noticed that the flow of sand from the dump truck to the conveyor belt had ceased. Accordingly, he picked up a sledgehammer that was kept beside the Unloader by Pioneer and started to bang the dump box to loosen the sand. Mr. Carr did not shut the machine off as he felt that it was not his place to do so. Mr. Carr used the sledgehammer because he had seen others, including Mr. Lafreniere, use it. While banging on the side of the truck, a large portion of sand fell onto the conveyor belt and caught Mr. Carr's left foot, causing him to lose his balance. Mr. Carr fell on the conveyor belt and screamed. The Unloader was shut off by another Pioneer employee, Stephane Girouard. In the result, Mr. Carr's legs had to be amputated below the knee. Mr. Carr was not given any specific training on how to use the equipment and never received safety training. He was told that Pioneer would show him how to use the equipment. Kenneth Edwards, Pioneer's Vice-President of Operations, candidly stated that had the guarding been in place prior to the accident the accident would not have happened.
Decision: Guilty
Quotes:

> If this is applied to our facts and prosecution, the remedial application of guards is very probative of the fact the Appellant was in control of all aspects of the machine its operation and its supervision and was therefore the perpetrator if there was a contravention. Buts its value in determination of "due diligence" is very small because such actions taken by themselves may be equally consistent with not taking prior precaution as with the incident not being reasonably foreseeable but in hindsight, having seen this incident occur, having been undertaken to prevent reoccurrence.
>
> Pioneer has raised its contract with P.D. Brooks Ltd. to show that it had expected and relied upon that company to give the required safety instruction and was mistaken in thinking that had been done when it had not. That P.D. Brooks did not do so does not excuse Pioneer from doing so. It is not permitted to contract out of responsibility created by the *Act* and *Regulations* . . As I have indicated above, the Appellant had control of the machine, its operation, and its supervision. Though it may have recourse under contract for indemnification or contribution to some degree in a civil action, it does not allow for a defence of mistake of fact even with the written undertaking and sign off by P.D. Brooks.

R. v. National Wrecking Company, 2005 Ontario Court of Justice
Details: Workers told to demolish steel building by cutting into many small pieces. One piece was a 2500 lb door that was cut off its hinges but did not immediately fall, possibly held in place by other scrap. After loose scrap was removed, door fell crushing a worker. Cause of fall was unknown.
Decision: Guilty
Quotes:

> On a philosophical level the idea of what the average person might think is contrary to the common sense principles of workplace safety in an industrial setting. It is also contrary to the basic concepts of the *Occupational Health and Safety Act*. It is not the purpose of safety principles to primarily cater to the average. Aside from the problem of trying to define what and who is average, there are many in the workplace who are not average. If workplace safety primarily focuses on the average, there will be many in the workplace who would be vulnerable.
>
> The target of workplace safety is the widest and lowest common denominator of people. Safety principles are designed to cut across the differences in people. As much as possible, rules are designed to cater, not to the so-called average, but to everyone.
> In considering what is foreseeable in the workplace, we must take into account behaviour that is beyond average.
>
> The lack of foreseeability cannot be a defence for a supervisor, if the supervisor had not properly supervised in the first place.

It is foolish overconfidence to say the door is such an obvious hazard that you don't have to put up a caution sign or tape it or tell your supervisor. Why take the chance? If you are wrong – the consequences are catastrophic.

The concept of the 'average' is a useless exercise, for it is impossible to assess who is average. The logical extension of his own theory has put Sosa into a legal straightjacket. The simple bottom line of all this, is he, as a supervisor, must supervise everyone (average or not). He failed as a supervisor to inform himself of critical information that he ought to have passed on to Taillefer. He cannot mask and exonerate his own failure by shifting the burden to Taillefer and blaming an unforeseen act. Ironically, it is his very failure as supervisor – by depriving Taillefer of crucial information – that makes Taillefer's conduct entirely foreseeeable.

One of the purposes of the Act is to protect workers in this very hazardous industry from their own negligence. No one in any occupation can work 100 percent of the time without occasional carelessness.

Careless or negligent acts are reasonably foreseeable. That is a function of human nature. The purpose of safety rules is to take reasonable steps to prevent or reduce negligence before it happens.

If Taillefer had observed a caution sign or tape and then proceeded to do what he did, then such conduct would go beyond carelessness or negligence, and it could constitute wanton or reckless conduct to dismantle the steel pile without first removing the door. In those circumstances such conduct would not be foreseeable.

There is nothing wrong with what Mr. Della Valle did. The question is whether what he did was sufficient compliance with s.17 of the OHS Act.

R. v. Altapro Cleaning and Disaster Restoration Ltd., 2004 Provincial Court — Alberta
Details: Workers were assigned to remove a veneer brick wall, which was separating from an adjacent to a brick bearing wall. The work was done by hammer and chisel with workers using a scaffold. During the work, the veneer wall collapsed seriously injuring a worker.
Decision: Guilty
Quotes:

Due diligence entails communicating adequate instructions of safety precautions to employees, either verbally, or in writing, and following up to ensure that the instructions are carried out.

It is important to note that Altapro does not need to establish steps which if taken would have **prevented** the collapse, but rather that it took all reasonably practicable steps to address the risk of collapse. The standard is not an absolute. If what Altapro did satisfies me that it took all reasonable steps, then the fact of the collapse and resulting unfortunate injury would not ground a conviction.

In my opinion, telling workers to "be careful" was not any kind of safety expression specific to this project, but rather a restatement of general corporate policy which is really not saying anything.

R. v. Timminco Limited, 2004 Ontario Court of Justice
Details: See case below
Decision: Not guilty
Quotes:

Although the primary responsibility for worker safety is appropriately placed on the employer by the Occupational Health and Safety Act, it is clear that the Act envisions shared responsibility between all parties. Just as any employee has the right to expect compliance by the employer, so

does the employer expect that any individual employee will govern his or herself appropriately and by their conduct make the workplace safe and secure for all.

R. v. Timminco Ltd., 2001 Court of Appeal for Ontario
Details: Timminco operated a plant that processing dolomite and other raw materials to produce magnesium metal and alloys. David Roesler died from injuries he sustained in a workplace accident. Roesler was found at the back of the press between an index beam carriage and the stationery frame of the press. At the time of the accident, there was no guard or fence to block access to the moving index beam from the back of the press. Nor was there any requirement by the employer that press operators work behind the press while performing any job-related functions, including maintenance of the press. However, the evidence shows that press operators often went behind the press for specific maintenance- related purposes. The press has an "index beam arm" connected to an index beam carriage. The video tape reveals that two chains located at each end of the press are strung between the press frame and the wall behind the press. A press operator, or other person, would have to pass over or under one of these chains in order to get into the area immediately behind the press. The chains do not appear to present a problem to anyone who wants to gain access to that area. Rather than rely on maintenance personnel, some operators went behind the press to perform various maintenance-related tasks.
Decision: Send to trial
Quotes:

> The legislation has already identified a moving part as a potential danger, and requires it be guarded. … The respondent was aware that employees had access to an unguarded machine from the rear, whether or not it was part of their assigned work duties
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> The burden of proof is on the Crown to establish the *actus reus* of a strict liability regulatory offence, beyond a reasonable doubt. The burden of proving a defence is on the defendant in the proceedings. This is in part because. . . it is the defendant who is in the best position to know what actions, if any, were taken to avoid a statutory breach.
>
> As a policy consideration, where the hazard in question is caused by equipment that the employer has a special knowledge and control over, it is appropriate that the employer bear the burden of proving a defence.
>
> To impose an obligation on the Crown to prove a mental element on a strict liability offence would impede the adequate enforcement of public welfare legislation. . . Furthermore, this would convert a strict liability regulatory offence into a *mens rea* offence. In my opinion, clear language is required to create a *mens rea* offence in a public welfare statute. Yet words like "wilfully", "with intent", "knowingly" and "intentionally" are conspicuously absent from s. 25(1)(c) of the *Occupational Health and Safety Act*. Section 25(1)(c) simply requires that an employer "shall ensure that … the measures and procedures prescribed are carried out in the workplace." In fact, use of the word "ensure" suggests that the Legislature intended to impose a strict duty on the employer to make certain that the prescribed safety standards were complied with at all material times.
>
> Where an exposed moving part "may endanger" a worker, the regulation requires that a guard or fence be provided to prevent access to the moving part. Admittedly, the Crown must establish that the exposed moving part may endanger a worker before there can be a conviction. However, in my view, there is no requirement that the Crown show that the employer in fact knew of the danger. . . The words "may endanger" clearly suggest that there can be violation of s. 185(1) of the Regulations where there is *potential* endangerment of a person by an exposed moving part, even if it is not established that any particular person was *actually* endangered by the exposed moving part.

R. v. General Scrap Iron & Metals Ltd., 2003 Court of Appeal — Alberta
Details: See below.
Decision: Not guilty

Quotes:

> The summary conviction appeal justice agreed with the trial judge that common practice does not equate to proper standard of care. Among other things, the trial judge cited the applicant's lack of an overall safety policy, the clear impression that safety at the workplace was delegated to the employees, the known instability of the bales, and failure to keep employees a safe distance from them. The summary conviction appeal justice found that reducing the bale height to four did not abolish safety concerns, stating "whether or not the bales were generally four high in the industry was ... not decisive as to whether it was hazardous to work next to them":

R. v. Bruin's Plumbing & Heating Ltd., 2003 Court of Appeal — Alberta
Details: An employee was blinded when exposed to an explosion of sulfuric acid and caustic soda during a procedure to neutralize the acid.
Decision: Guilty
Quotes:

> The proper comparator for an employer in the position of Bruin's Plumbing is not to a businessman, but to a manufacturer using an inherently dangerous chemical.
>
> We would express the due diligence test this way. What should an employer in the position of this employer do to ensure as far as reasonably practicable the health and safety of a worker engaged in a neutralization process involving an inherently dangerous chemical? First, at a minimum the employer would be required to seek the advice of a qualified expert on the use of a safe procedure. Two, the employer would be required to take the advice received to its safety committee or otherwise develop an appropriate system or protocol to protect its workers in a manner consistent with that advice. Three, the employer would be required to monitor the system implemented for compliance.

R. v. Canadian National Railway Company, 2003 Provincial Court of Manitoba
Details: Employees of CNR working the midnight shift were engaged in switching railway. David Kowalyk was the Switch Foreman. Prior to the accident, the switch crew had successfully completed seven switches of rail cars. At about 12:20 a.m. the switch crew was involved in moving three container flat cars from one track to another. The intention was to spot or park these cars on track 32 so that they would be out of the way. The trackmobile was connected to the three flat cars and was pushing the cars down track 32. In the process of this switch being made Kowalyk fell off the lead flat car and was run over by one of the wheels on the car and was killed.
Decision: Not guilty
Quotes:

> Adequate and reasonable supervision does not in all cases require that a supervisor be physically present on site. The nature of the supervision that will be required will depend on the particular situation and the training, experience and knowledge of the employees. I agree with defence counsel that it is not practical or reasonable to require that employers in all cases have supervisors physically present on site to oversee the work of their employees.
>
> Notwithstanding his training and knowledge, for some unknown reason he disregarded his own advice and ignored a number of other elementary safety rules at the time of the accident. In doing so he acted contrary to his training and contrary to common sense. This led to his fall and to his death. Having regard to the safety training, safety manuals and courses provided to its employees by CNR, it is difficult to know what more could reasonably have been done by an employer to emphasize safety in the workplace. I am satisfied that . . . CNR had taken all reasonable precautions to ensure the safety of its employees.

R. v. Petro-Canada, 2003 Court of Appeal for Ontario
Details: A spill of gasoline had occurred at Petro-Canada's premises. The spill resulted from the failure of a pipe at the point where it was passing through an earthen berm. The cause of the pipe failure could not be determined.
Decision: New trial directed

Quotes:

> There is no suggestion in the language of Dickson J [Supreme Court of Canada justice] that the accused must first prove the precise cause of the discharge before it can engage the defence of due diligence. . . Moreover, such a requirement would be inconsistent with the fairness described by Dickson J. While the accused will know what it has done to avoid the discharge and can fairly be asked to say so, the accused may well not know precisely how the discharge came about. In my view, to require the accused to prove something that may well be beyond its knowledge to trigger this defence moves this category of offence closer to absolute liability than Dickson J. intended.
>
> For these reasons I do not think that the law requires the accused to prove precisely how the discharge came about – in this case precisely why the pipe failed – in order to avail itself of the due diligence defence. On the other hand, in a case where the accused can do this, it may be able to narrow the range of preventative steps that it must show to establish that it took all reasonable care. However where, as here, the accused cannot prove the precise cause of the pipe failure the due diligence defence is not rendered unavailable as a result. That being said, it must be emphasized that to invoke the defence successfully in such circumstances, the accused must show that it took all reasonable care to avoid any foreseeable cause.
>
> . . . the defendant must go beyond the purchase and installation of the best equipment to show what steps were taken to prevent the discharge on that day and that these steps constitute reasonable care, something which may be more easily demonstrated if it can be shown how the discharge occurred.
>
> More importantly, however, the appeal judge said that the due diligence defence is made out unless it is patently obvious that reasonable care amounting to due diligence was not met or that it violated industry standards and/or statutory commitments. This clearly appears to place the onus of disproving due diligence on the Crown. As well it suggests that only where the care taken falls so much short of the "all reasonable steps" requirement that this shortcoming is "patently obvious" will the defence fail. In both these respects the appeal judge departs from the law as set out in *R. v. Sault Ste. Marie . . .* where it is made clear that the onus is on the defendant to establish, on a balance of probabilities, that it took all reasonable steps to avoid the particular event.

Alberta v. General Scrap Iron & Metals Ltd., 2002 Court of Queen's Bench — Alberta
Details: An employeedied as a result of a very heavy bale of scrap tech wire falling upon him from a four high stack of such bales, while he was working nearby the stack.
Decision: Guilty
Quotes:

> The Appellant's quasi-statistical approach to the odds of a bale falling on a person arising from no known instances of that happening lethally did not provide a form of logic which reduced the risk to the vanishing point. Without proof that in fact pedestrian employees regularly worked for extended time periods around such stacked bales in the instances where the falls were alleged to have not been known to happen, the absence of lethal impacts is not proof of low chance.
>
> Reasonable practicability refers to a set of circumstances where the employer does everything that could be reasonably expected to be done to avoid harm under the limits of those circumstances. It is not a test of business efficiency or profitability. Reasonable steps refers to steps which the employer could perform to avoid harm if the employer thought through the issues reasonably. It is not a test as to whether the steps were rational, but whether a reasonable person could do them and they would be reasonably sufficient for the objective.
>
> Taken to its logical extent, an approach which focussed on likelihood of danger rather than on exclusion of danger where possible could encourage employers to engage in a chillingly brutal calculus of the odds of harm against the cost of its avoidance.

It is important not to confuse issues of reasonable foreseeability with reasonable likelihood, nor to confuse either of those with reasonable care to avoid harm. The duty of the Appellant under Count 1 was to “ensure” that the harm did not occur to the extent it is reasonably practicable to do so. This connotes more than thinking it is not a problem and doing little about it

The common law contemplated taking “all” reasonable steps, not “some” reasonable steps.

R. v. MacMillan Bloedel Ltd., 2002 Court of Appeal — British Columbia
Details: MacMillan Bloedel deposited or permitted to be deposited a deleterious substance in water frequented by fish. This occurred as a result of a fuel leakage from pipes at its facility
Decision: Not guilty
Quotes:

. . . the focus of the due diligence test must be on the conduct which was, or was not, exercised in relation to the "particular event" or incident giving rise to the charge, and not on a more general standard of care. . . . it was not an answer for the accused to say that it had, in general, a good safety system**,** that it tested more frequently than necessary, and that it had a program which would likely have detected the hazard within the near future.

In my view, the focus of the inquiry must be the foreseeability of the *actus reus* of the offence charged, not "the general foreseeability of environmental contamination" or "the foreseeability of the specific cause". In the circumstances of this case, the fact that the leak occurred as a result of an unforeseeable cause is determinative of the issue in favour of MacMillan Bloedel.

Thus, there are two alternative branches of the due- diligence defence. The first applies when the accused can establish that he did not know and could not reasonably have known of the existence of the hazard. The second applies when the accused knew or ought to have known of the hazard. In that case, the accused may escape liability by establishing that he took reasonable care to avoid the "particular event".

Foreseeability of a risk of harm is central to the concept of negligence. To quote the famous *dictum* of Lord Atkin . . . "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour." In the context of the defence of due diligence in relation to strict liability offences, the harm is not injury to a neighbour, but the contravention of the relevant statute. That proposition may be demonstrated by reference to the ***Imperial Oil*** case. . . In that case, Imperial had, by its carelessness, created the relevant hazard within its plant. As it should have known of the existence of the hazard, it was liable to conviction unless it could bring itself within the second branch of the due diligence defence. This Court held that the fact that Imperial had in place a comprehensive plan to detect leaks in general was irrelevant to the defence of due diligence because, as Finch J.A. . . said, speaking for the majority, at para. 23:
“The focus of the due diligence test is the conduct which was or was not exercised in relation to the "particular event" giving rise to the charge, and not a more general standard of care.”

R. v. Imperial Oil 2000 Court of Appeal — British Columbia
Details: Imperial Oil’s permit for discharge of effluent required that it pass a toxicity test. Imperial Oil tested more frequently than required by the permit. Expert tests showed that permissible toxicity levels had been exceeded.
Decision: Guilty
Quotes:

The focus of the due diligence test is the conduct which was or was not exercised in relation to the "particular event" giving rise to the charge, and not a more general standard of care

It is not an answer for the appellant to say that it had in general a good safety system, that it tested more frequently than necessary, and that it had a program which would likely have detected the hazard within the near future. Because the appellant did not identify the substance as toxic, it was not a priority within the risk assessment program.

> Given the nature and size of the defendant, the sensitivity of the local environment, the information that the defendant possessed concerning the risks of MMT, the simplicity of testing to determine toxicity, and the defendant's access to a broad range of expert advice, the learned trial judge did not, in my view, err in finding that the defendant had failed in its obligation to exercise reasonable care when it failed to obtain and to act upon information that it reasonably ought to have known. As the trial judge said, "Acting on an assumption about a hazardous chemical without a reasonable basis for the assumption does not display the standard of care required by the nature of the company's operations". Those findings are completely inconsistent with any suggestion that Imperial exercised due diligence with respect to the events constituting the *actus reus*.

R. v. Shell Canada Limited, 1999 Provincial Court — Alberta
Details: Company conducted bio-assay tests using a different test method than they were supposed to use.
Decision: Guilty
Quotes:

> I agree entirely with the position put forward that the standard of reasonable care in assessing the defence of due diligence must involve a proportionality test. It must be looked at in context. What is the activity being regulated? What are the risks involved? What is the potential harm? What is the potential benefit? These are some of the questions that should be addressed in determining what level of care is reasonable. Put in the language urged by the Crown, “What level or sophistication of system and its continual monitoring should reasonably be expected, given the activity sought to be regulated.”

R. v. London Excavators & Trucking Ltd., 1998 Court of Appeal for Ontario
Details: London Excavators & Trucking was an excavating subcontractor on a large construction project at a hospital site. It was performing site grading near a catch basin on the project. The general contractor (Cooper) advised that the area to be excavated by the appellant was clear of any services. In the course of the excavation, the appellant's backhoe operator struck concrete. He stopped his machine. The general contractor's assistant supervisor was notified. He came to the place where the concrete had been found and advised that it was part of the footing of an old nursing station that had previously been exposed on the site. He directed the appellant's backhoe operator to remove the concrete. In fact, the concrete encased a hydro duct and, when the backhoe cut through it, there was an explosion. Fortunately, no one was injured.
Decision: Guilty
Quotes:

> One of the factors to be considered in assessing the reasonableness of reliance on advice is the gravity of the potential harm should that advice prove to be wrong . . . It was not objectively reasonable for the appellant to continue to rely, without further inquiry, upon the direction of the general contractor once an unexpected concrete obstacle had been encountered in a location the general contractor had pronounced safe to excavate. At that point, it was incumbent upon the appellant, in the interest of the safety of its employees and others who might be exposed to risk of harm, to ensure that the prescribed measures and procedures designed to protect their safety had been carried out in the workplace.
>
> . . .it was not reasonable for the appellant to continue to rely upon Cooper once Cooper’s initial information proved to be wrong.

R. v. Jorgensen 1995 Supreme Court of Canada
Details: Jorgensen operated an adult video store. Undercover police agents purchased eight videotapes from that store and, despite the fact that the Ontario Film Review Board had approved all of them, the company was charged with eight counts of "knowingly" selling obscene material.
Decision: Not guilty
Quotes:

As the Ontario Court of Appeal in *Cancoil Thermal* noted, the defence of due diligence is separate from officially induced error. While due diligence in ascertaining the law does not excuse, reasonable reliance on official advice which is erroneous will excuse an accused but will not, in my view, negative culpability. There are two important distinctions between these related provisions. First, due diligence, in appropriate circumstances, is a full defence. If successfully raised, the elements of the offence are not completed. Officially induced error, on the other hand, does not negative culpability. Rather it functions like entrapment, as an excuse for an accused whom the Crown has proven to have committed an offence. Second, diligence may be necessary to obtain the advice which grounds an officially induced error. This is so because an accused who seeks to rely on this excuse must have weighed the potential illegality of her actions and made reasonable inquiries. This standard, however, does not convert officially induced error into due diligence.

Officially induced error of law exists as an exception to the rule that ignorance of the law does not excuse. As several of the cases where this rule has been discussed note, the complexity of contemporary regulation makes the assumption that a responsible citizen will have a comprehensive knowledge of the law unreasonable. This complexity, however, does not justify rejecting a rule which encourages a responsible citizenry, encourages government to publicize enactments, and is an essential foundation to the rule of law. Rather, extensive regulation is one motive for creating a limited exception to the rule that *ignorantia juris neminem excusat*.

The first step in raising an officially induced error of law argument will be to determine that the error was in fact one of law or of mixed law and fact. Of course, if the error is purely one of fact, this argument will be unnecessary. . . Once it is determined that the error was one of law, the next step is to demonstrate that the accused considered the legal consequences of her actions. By requiring that an accused must have considered whether her conduct might be illegal and sought advice as a consequence, we ensure that the incentive for a responsible and informed citizenry is not undermined. It is insufficient for an accused who wishes to benefit from this excuse to simply have assumed that her conduct was permissible. . . The next step in arguing for this excuse will be to demonstrate that the advice obtained came from an appropriate official. . . In general, therefore, government officials who are involved in the administration of the law in question will be considered appropriate officials . . . the official must be one whom a reasonable individual in the position of the accused would normally consider responsible for advice about the particular law in question. . . Once an accused has established that he sought advice from an appropriate official, he must demonstrate that the advice was reasonable in the circumstances. In most instances, this criterion will not be difficult to meet. As an individual relying on advice has less knowledge of the law than the official in question, the individual must not be required to assess reasonableness at a high threshold. It is sufficient, therefore, to say that if an appropriate official is consulted, the advice obtained will be presumed to be reasonable unless it appears on its face to be utterly unreasonable. . . The advice obtained must also have been erroneous. This fact, however, does not need to be demonstrated by the accused. In proving the elements of the offence, the Crown will have already established what the correct law is, from which the existence of error can be deduced. Nonetheless, it is important to note that when no erroneous advice has been given . . . this excuse cannot operate . . . Finally, to benefit from this excuse, the accused must demonstrate reliance on the official advice. This can be shown, for example, by proving that the advice was obtained before the actions in question were commenced and by showing that the questions posed to the official were specifically tailored to the accused's situation. . . In summary, officially induced error of law functions as an excuse rather than a full defence. It can only be raised after the Crown has proven all elements of the offence. In order for an accused to rely on this excuse, she must show, after establishing she made an error of law, that she considered her legal position, consulted an appropriate official, obtained reasonable advice and relied on that advice in her actions. . . The accused, who is the only one capable of bringing this evidence, is solely responsible for it. Ignorance of the law is not encouraged because informing oneself about the law is a necessary element of the excuse . . . Ignorance of the law remains blameworthy in and of itself. In these specific instances, however, the blame is, in a sense, shared with the state official who gave the erroneous advice.

R. v. Wholesale Travel Group Inc. 1991 Supreme Court of Canada
Details: Wholesale Travel Group was charged with false or misleading advertising. The advertisements referred to vacations at "wholesale prices" but the advertised "wholesale price" was not the price at which Wholesale Travel acquired its vacation packages.
Decision: Charter case; no guilt or innocence issue
Quotes:

> The imposition of a reverse persuasive onus on the accused to establish due diligence on a balance of probabilities does not run counter to the presumption of innocence, notwithstanding the fact that the same reversal of onus would violate s. 11(*d*) in the criminal context. The section 11(*d*) standard which has been developed and applied in the criminal context should not be applied to regulatory offences. The importance of regulatory legislation and its enforcement strongly supports the use of a contextual approach in the interpretation of the s. 11(*d*) right as applied to regulatory offences. Quite simply, the enforcement of regulatory offences would be rendered virtually impossible if the Crown were required to prove negligence beyond a reasonable doubt. The means of proof of reasonable care will be peculiarly within the knowledge and ability of the regulated accused. Only the accused will be in a position to bring forward evidence relevant to the question of due diligence. There is a practical difference between requiring the accused to prove due diligence on a balance of probabilities and requiring only that the accused raise a reasonable doubt as to the exercise of due diligence. The presumption of innocence for a regulated accused is not meaningless because the Crown must still prove the *actus reus*. Fault is presumed from the bringing about of the proscribed result and the onus shifts to the defendant to establish reasonable care on a balance of probabilities.

Regina v. Rio Algom Ltd. 1988 Court of Appeal for Ontario
Details: An employee was working between two rail cars on a spur track. For safety, the spur track could be closed with a gate. Over the years, the gate had developed a slight "overswing" that allowed it to open too far, protruding slightly over the adjacent main track. No one worried about it, because the gate still opened and closed and did its job. On this occasion, the gate was all the way open, and its end was struck by a train passing on the main track. The gate banged shut, hitting a parked car that rolled forward and crushed the employee.
Decision: Guilty
Quotes:

> The test which should have been applied was not whether a reasonable man in the circumstances would have foreseen the accident happening in the way that it did happen, but rather whether a reasonable man in the circumstances would have foreseen that an “overswing” of the gate could be dangerous in the circumstances and if so whether the respondent in this case had proven it was not negligent in failing to check the extent of the overswing in order to consider and determine whether it created in any way a potential source of danger to employees and in failing to take corrective action to remove the source of danger. [see Ontario (Ministry of Labour) v. Hershey Canada Inc.]
>
> ... the trial judge appears to have been satisfied that the respondent, in the operation of the mine where the accident took place, has kept safety foremost in its corporate mind at all times and has a good inspection and reporting system in effect to accomplish this purpose. Those are relevant facts to be kept in mind with respect to sentence. They do not, however, assist the respondent to avoid responsibility for the lack of care on its part that resulted in the unfortunate fatal accident. The respondent has failed to prove it was not negligent with respect to the circumstances that caused the accident. [see R. v. Imperial Oil]

Regina v. Cancoil Thermal Corporation and Parkinson, 1986 Court of Appeal for Ontario
Details: Cancoil manufactures heat transfer equipment; Parkinson was the supervisor and foreman of the factory. In 1983, the company took delivery of a large metal shearing machine. The blade of the machine was operated by means of a "foot pedal" located seven and one-half inches from the floor. When the machine was delivered, it was equipped with a "guard" which had been installed by its manufacturer to prevent access to the blade area of the machine by the operator during its operation. However, Parkinson

felt that the guard created a hazard in that its presence made it more difficult for the operator to clear away pieces of scrap metal. Accordingly, they removed the guard from the machine. No other guard or similar safety device was installed on the machine as a replacement. With the guard removed, there was nothing on the machine to prevent physical access to the blade. An employee, while following what he described as the accepted procedure had used his fingers to push a small piece of scrap metal through the machine and onto the floor. He accidentally cut off the tips of six of his fingers (three fingers of each hand) down to approximately the first joint.
More than two months before the accident, a government Occupational Health and Safety inspector inspected the machine. At the time of the inspection, the guard installed by the manufacturers had been removed. The machine was run while the inspector was present so that he could observe the cycle of operation. The absence of the manufacturer's guard was pointed. The inspector was satisfied apparently that no provision of the Act or regulations was being contravened and he made no order.
Decision: Unstated
Quotes:

> The defence of "officially induced error" is available as a defence to an alleged violation of a regulatory statute where an accused has reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law. In order for the accused to successfully raise this defence, he must show that he relied on the erroneous legal opinion of the official and that his reliance was reasonable. The reasonableness will depend upon several factors including the efforts he made to ascertain the proper law, the complexity or obscurity of the law, the position of the official who gave the advice, and the clarity, definitiveness and reasonableness of the advice given.

R. v. Gulf of Georgia Towing Co. Ltd., 1979 Court of Appeal — British Columbia
Details: A fuel barge was unloading fuel. There were four tanks up on shore. Tank I was filled through the one pipe that led from where the barge was up to the four tanks. Prior to tank 1 being filled, tank 2 had been filled. Subsequently tanks 3 and 4 were filled, in that order. When tank 4 was being filled, the oil overflowed from the top of tank 1. The valve at the base of tank 1 was found to be open.
Decision: Guilty
Quotes:

> . . . that due diligence under the circumstances here might include specific written instructions, maybe locking devices for other valves, possible alarm systems. But in the end I am of the view that the trial judge decided — and rightly decided — that this company did not make adequate provisions in its systems or otherwise to prevent a spill caused by a valve being open that should not have been open. I think that the length that the employer must go to will depend on all the circumstances including the magnitude of the damage that will be done in the event of a mistake and the likelihood of there being a mistake For fuel barges, if one does nothing but hire careful people, train them carefully and tell them not to leave valves open, inevitably a valve will be left open. I am sure they have not hired infallible people. There will inevitably then be a spill. It seems to me that the consequences are so serious that something will have to be devised by the company if it is to be protected here to prevent spills when employees are not as careful as they are told to be.

R. v. Sault Ste. Marie, 1978 Supreme Court of Canada
Details: Sault Ste. Marie entered into an agreement with a company for the disposal of all refuse originating in the City. The company was to furnish a site and adequate labour, material and equipment.. Pollution resulted from the dumping and the City was charged under the law which provides that every municipality or person that discharges, or deposits, or causes, or permits the discharge or deposit of any material of any kind into any water course, or on any shore or bank thereof is guilty of an offence
Decision: New trial directed
Quotes:

> Regarding *mens rea* the distinction between the true criminal offence and the public welfare offence is of prime importance. Where the offence is criminal *mens rea* must be established and mere negligence is excluded from the concept of the mental element required for conviction. In sharp contrast “absolute liability” entails conviction on mere proof of the prohibited act without any relevant mental element. The correct approach in public welfare offences is to relieve the Crown

of the burden of proving *mens rea . . .* and to the virtual impossibility in most regulatory cases of proving wrongful intention, and also, in rejecting absolute liability, admitting the defence of reasonable care. This leaves it open to the defendant to prove that all due care has been taken. Thus while the prosecution must prove beyond reasonable doubt that the defendant committed the prohibited act, the defendant need only establish on the balance of probabilities his defence of reasonable care.

The element of control, particularly by those in charge of business activities which may endanger the public, is vital to promote the observance of regulations designed to avoid that danger. This control may be exercised by "supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control". . . The purpose . . . is to "put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morale."

The correct approach, in my opinion, is to relieve the Crown of the burden of proving *mens rea*, having regard to … the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach it is not proper to expect him to come forward with the evidence of due diligence. …

In this doctrine, it is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. … While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care. …

This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts, which if, true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. (pages 373-374)

The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

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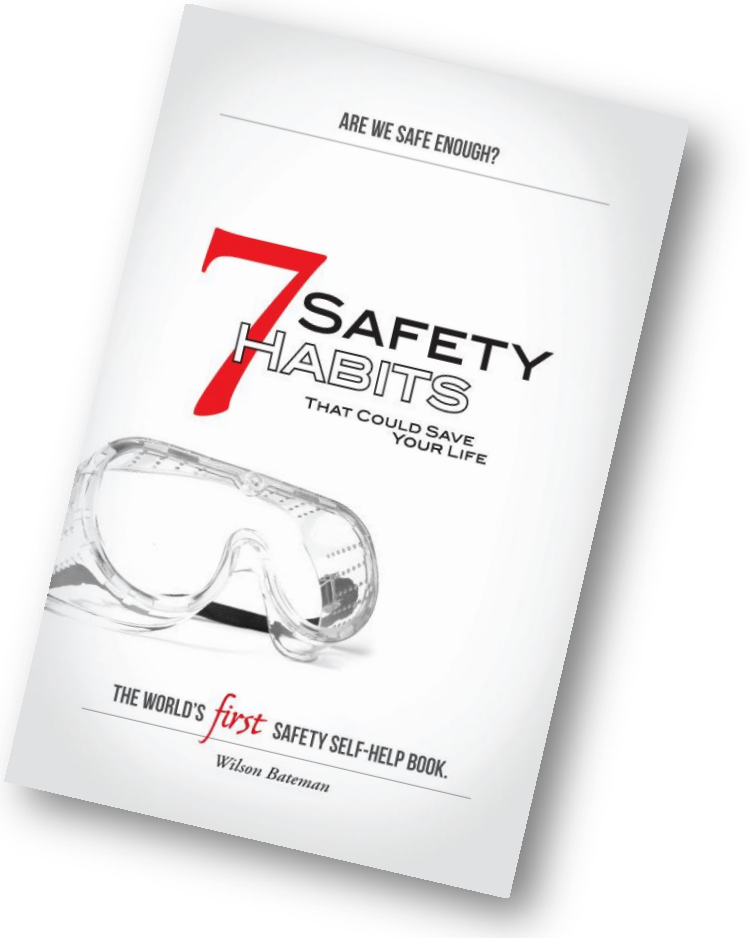

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