Court of Queen's Bench of Alberta

Citation: R. v. Rose's Well Services Ltd. (Dial Oilfield Services), 2009 ABQB 1

Date: 02012009
Docket: 050294784S1
Registry: Edmonton

Between:

Her Majesty the Queen

- and -

Rose's Well Services Ltd., L.V. Trucking Ltd., Keori Trucking Ltd., Thesen's Trucking Ltd. And 315378 Alberta Ltd., Carrying on Business Under the Firm Name and Style of "Dial Oilfield Services"

Appellants

Corrected judgment: A corrigendum was issued on May 4, 2009; the corrections have been made to the text and the corrigendum is appended to this judgment.

Corrected judgment: A corrigendum was issued on April 29, 2009; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of the
Honourable Mr. Justice Robert A. Graesser

Introduction

[1] Rose's Well Services Ltd., operating as Dial Oilfield Services, was convicted of failing to ensure the health and safety of its workers, contrary to section 2(1)(a)(i) of the *Occupational Health and Safety Act,* R.S.A. 2000, chapter O-2 (the "general duty" clause), and of breaching section 185(2)(a) of the *General Safety Regulation* Alta. Reg. 448/1983, under the *Act*.

[2] The learned trial judge had dismissed count 2, that of breaching s.9(1) of the *Chemical Hazards Regulation*, Alta. Reg. 393/88 for failing to establish a code of practice governing the storage, handling, use and disposal of Benzene, at the close of the Crown's case.

[3] Dial appeals the convictions on the remaining counts, as well as from the sentence imposed. These reasons deal only with the appeal against the convictions.

[4] The charges arose out of an explosion and resulting injuries to two of Dial's workers while they were engaged in Dial's work. They were unloading a highly flammable petroleum product from their service truck into a metal storage tank. The trial judge found that the explosion occurred because the truck was not grounded and bonded to the metal tank, or because the truck was parked too close to the metal tank, with its engine running while filling the tank.

[5] As the workers were unloading the petroleum product, the truck engine began to rev and flammable vapours from the metal tank exploded. The two workers were seriously injured.

[6] The learned Provincial Court Judge found:

1. That Dial's management failed to establish clear safety rules;

2. That Dial's management failed to train its workers; and

3. That Dial's management failed to supervise its workers.

[7] Dial argues that the trial was unfair because the trial judge failed to clearly identify the *actus reus* of the offences and that he had declined to order the Crown to provide particulars of count 1 before the trial.

[8] Dial further argues that the trial judge's verdict was unreasonable because:

1. He failed to consider or reconcile contradictory evidence;

2. He came to conclusions that were speculative and unsupported in the evidence; and

3. He demonstrated preferential treatment to prosecution witnesses.

[9] As a result, it is argued that the prosecution failed to satisfy the burden of proof, rendering the verdict unreasonable and unsupported by the evidence.

[10] The Crown argues that the trial judge correctly knew and applied the law concerning proof of strict liability offences such as these, including proof of the *actus reus* and the due diligence defence, that the verdict was a reasonable verdict, and that the trial judge properly exercised his discretion in denying Dial's application for further particulars.

Issues

1. What is the appropriate standard of review?

2. Did the trial judge err with respect to declining to order that particulars of count 1 be provided, thus rendering the trial unfair?

3. What is the correct test for proving the *actus reus*, and did the trial judge properly apply it?

4. What is the correct test for proving due diligence, and did the trial judge properly apply it?

5. Is the verdict unreasonable on the evidence before the trial judge?

Facts

[11] Dial has been in the oilfield service business since 1984. Part of its business involves the handling of flammable petroleum products.

[12] Dial hired Scott Richardson in November, 2002. Richardson had some 11 years of previous experience as an oilfield worker. His previous experience included loading and unloading petroleum products at oilfield well sites.

[13] Richardson testified that he had attended at least 50 safety orientations before he started working for Dial, and that he had training and tickets for WHMIS (Workplace Hazardous Materials Information Systems), First Aid, H_2S (Hydrogen Sulfide), TDG (Transportation of Dangerous Goods) and GODI (General Oilfield Driving Instruction). He had also taken a professional drivers instructor's course.

[14] After he started working for Dial, he received safety orientation and training. He was given a copy of Dial's Hazard Assessment Manual and Dial's Safety Manual. During his first week of work, he was closely supervised by more senior Dial employees. He was then allowed to work on his own.

[15] The explosion occurred on March 16, 2003, about 4 ½ months after Richardson started working for Dial. At the time, Richardson was training Jason Chamberlain, a new Dial employee. They 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.

[16] Under Dial's safety and operating procedures, and the General Safety Regulations under the *Act*, 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 Dial 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 Dial's standard procedures.

[17] Chock blocks were not used by Richardson to prevent the truck from moving, although that failure played no part in the accident or the workers' injuries.

[18] 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.

[19] 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.

[20] Dial's position on the evidence was that it had established that it had appropriate safety procedures in place, that Richardson and Chamberlain had been appropriately trained, and that Dial had properly supervised Richardson and Chamberlain.

[21] Essentially, Dial places the blame for the accident entirely on Richardson, whom they say ignored his safety training by parking three feet from the metal tank, failing to ground the truck, failing to bond the truck to the tank, failing to use the chock blocks, and not properly supervising Chamberlain.

1. Standard of Review

[22] ***Housen v. Nikolaisen***, 2002 SCC 33 (***Housen***) concludes that the standard of review for a question of law is correctness. Dial argues that issues relating to the standard of proof for the a*ctus reus* of the offences, as well as the test for due diligence, should be determined on the basis of correctness.

[23] As to the reasonableness of the verdict, Dial cites ***R. v. Yebes***, [1987] 2 S.C.R. 168 ***Yebes***), ***R. v. Corbett***, [1975] 2 S.C.R. 275 (***Corbett***) and ***R. v. Beaudry***, 2007 SCC 5 (***Beaudry***) and argues that the test is "whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered" (***Yebes*** at para. 16).

[24] The Crown agrees that the appeal involves issues of law, which are to be determined on the basis of correctness, but argues that there are also issues of mixed fact and law which are to be determined on the basis of palpable and overriding error (***Housen*** at para. 9).

[25] The Crown also relies on ***Beaudry*** and the general test referred to above, but notes that the Supreme Court discussed unreasonableness in the context of the verdict, and all of the evidence:

> ...errors or a faulty thought process in a judge's reasons can sometimes explain an unreasonable conclusion reached by the judge. But a verdict is not necessarily unreasonable because the judge has made errors in his or her analysis. The review must go further than that. In every case, the court must determine whether the v*erdict* is unreasonable and, to do so, it must consider all the evidence." (at para. 58.)

[26] Further, the Crown points out that the appellate court is entitled to re-examine and re-weigh to some extent the evidence in its reasonableness analysis: ***R. v. Burke***,[1996] 1 S.C.R. 474, and that an unreasonable verdict is one that is "illogical or speculative or inconsistent with the main body of evidence": ***R. v. Francois***, [1994] 2 S.C.R. 827 at para. 23.

[27] In ***R. v. Dorfer***, (1996), 104 C.C.C. (3d) 528 (B.C.C.A.), leave to S.C.C. refused, (1996), 112 C.C.C. (3d) vi, Macfarlane J.A. rejected the argument that the verdict was unreasonable holding that "no error in the judge's appreciation of the evidence has been demonstrated much less the "clear and manifest error" required by law" (at para. 50).

[28] The Crown also reiterated the principle of appellate deference for the trial judge's findings of fact: ***Schwartz v. Canada***, [1996] 1 S.C.R. 254.

[29] In the context of this case, there is no real disagreement between the parties as to the standards of review. Instead, the issues relate to the characterization of the errors alleged by Dial. As such, I will have to deal with each issue individually, first as to its characterization and then as to the applicable standard.

2. Did the Trial Judge Err With Respect to Declining to Order Particulars?

[30] Dial sought particulars in a pre-trial motion. Pahl P.C.J. declined to order particulars of count 1: ***R. v. Rose's Well Services Ltd. (c.o.b. Dial Oilfield Servies)***, 2006 ABPC 136.

[31] He noted that the Crown had already disclosed a Workplace Health and Safety Report, which stated:

> Dial Oilfield Services did not ensure the health and safety of their workers. The work process of loading condensate into the 1892 litre tank was not evaluated for hazards. Hydrocarbon awareness of the condensate was never discussed with the Workers. Hydrocarbon detection equipment was not supplied of the workers. Safe handling procedures were not implemented. (Para. 11)

> The high benzene content was not identified by Dial Oilfield Services and they did not have a code of practice governing the handling of the benzene.
>
> Dial Oilfield Services did not have procedures established to minimize the workers' exposure to the benzene content in the condensate. There was no training or instruction regarding the health hazards associated with exposure.
>
> The Dial Oilfield Services Workers were not trained in the hazards of hydrocarbon handling and hydrocarbon detection. The workers were not trained on the contents of the M.S.D.S. The Truck Driver was working for Dial Oilfield Service for 3 months and was training the Trainee. The Truck Driver drove the truck within 90 cm of the condensate tank. The Truck Driver did not recognize the hazard of hydrocarbon vapors coming off the top of the tank as a potential for creating an explosive atmosphere.
>
> The Dial Oilfield Services workers did not receive training on the volatility of the product they were offloading. The workers were not aware that hydrocarbon detection was required in an area where there were hydrocarbon vapors from the tank being off loaded and an ignition source from the running combustion engine. The workers were not given hydrocarbon detection equipment to use for detection of an explosive atmosphere.
>
> Dial Oilfield Services did not ensure that the hot work involved in offloading condensate had proper procedures and precautionary measures to prevent and safely handle the explosion hazard created.

[32] Pahl P.C.J. noted at paragraph 12 that the disclosure of the report identified six specific categories of alleged regulatory breaches. He noted in paragraph 13 that count 1 itself referred to the date, location, workers involved and the legislation engaged, and that it refers to the work of the employer, Dial. He stated that "it must be abundantly clear to all that, at the least, the work of that employer was the handling and delivery of oilfield condensates".(At para. 13)

[33] When he stated in paragraph 14 "[a]s I read them, distilled to their essentials, they amount to this," he was referring to the details provided in the report. The essentials he gleaned from the report were that:

1. Dial had no procedures, or inadequate procedures, for the handling of condensates,

2. Dial had no training for, or did not adequately train, its staff in the handling of condensates, and

3. Dial did not provide its workers with hydrocarbon detection equipment.

[34] He continued at paragraph 15:

> These amount, in their practical effect, to an allegation Dial failed to ensure the health and safety of named workers who were working with a hydrocarbon concentrate on a specific date, at a specific locale and were injured. This is Count 1 of the Information.

[35] On the arguments before him, he held that the absence of particulars as sought by Dial would not impair the efficient conduct of the trial (at para. 18) and that "the defence has sufficient information so as to not be prejudiced in the preparation of its case" (at para. 19).

[36] He distinguished ***R. v. Ledcor Industries Ltd.***, 2004 ABPC 141 largely on the basis that the charges were different, and that the nature of the disclosure given to the accused by the Crown in this case contrasted with the disclosure given to Ledcor.

[37] As matters unfolded, the trial extended over a period of some six weeks. Twenty-one witnesses were called. Whether particulars might have shortened the trial, or focused the trial, as was argued by Dial, is moot. The trial was held and was completed.

[38] The purpose of particulars is to give an accused exact and reasonable information to enable it to fully establish its defence, and to define the issues to assist the trial judge in rulings on the admissibility of evidence: ***R. v. Canadian General Electric Co. (No. 1)***, (1974), 17 C.C.C. (2nd) 433 (Ont. H.C.J.).

[39] The Crown argues that Dial has not demonstrated that the particulars it sought were necessary to ensure a fair trial, or that it was in any way prejudiced in its ability to make full answer and defence, citing ***R. v. McGavin Bakeries et. al (No. 2)***, (1950), 99 C.C.C. 330 (Alta. S.C.) And ***R. v. Daemore***, [1990] B.C.J. No. 2919 (B.C.C.A.).

[40] Defining the issues to assist the trial judge relates to trial efficiency. Generally, trial efficiency is to be contrasted with trial fairness. While the trial was lengthy, there is no indication that the trial judge was not alive to the issues.

[41] Trial fairness centres around prejudice. When a trial has been conducted in a way that unfairly prejudices a party, appellate review may be engaged. The issue, therefore, is whether Dial suffered prejudice in its ability to defend itself, or to meet the case advanced by the Crown, because of the absence of particulars.

[42] While alleging that the trial was unfair because of the absence of particulars, Dial gave no specifics or details about what prejudice it suffered as a result. From a review of the evidence, it does not appear that Dial was caught by surprise by any of the evidence of the witnesses for the Crown. There is no indication that Dial sought any adjournments as a result of surprise. Nor did

Dial suggest that they did not understand the case they had to meet. There is nothing in the record to indicate that Dial was unable to call any of its planned witnesses, or was unable to respond to anything raised by the Crown, at least on account of surprise.

[43] Dial points to nothing it would have done differently, had it been provided with the particulars it sought.

[44] As a result, I am unable to conclude that there has been any unfairness or prejudice to Dial because particulars were not ordered.

[45] The decision as to whether or not to order particulars is a discretionary ruling. As such, the trial judge is entitled to significant deference on review. The trial judge's ruling is to be interfered with only where the ruling is shown to be patently incorrect, rooted in an error in principle or in the non-judicious exercise of the discretion: ***R. v. Thibodeau***, [1955] S.C.R. 646, ***Elsom v. Elsom***, [1989] 1 S.C.R. 1367.

[46] Dial has established no basis for me to interfere with the trial judge's exercise of discretion. This ground of appeal is without merit in this case.

[47] These findings make it unnecessary for me to deal with the standard of review on the particulars application, or the correctness of Pahl P.C.J.s ruling in ***Dial Oilfield Services*** (the pre-trial ruling in this case). Nevertheless, I consider it appropriate to comment on the effect of the three decisions in this area: Pahl P.C.J.'s ruling in this case, the decision of Lefever P.C.J. in ***Ledcor***, and the decision of Lefever A.C.J. Prov. Ct. (as he then was) in ***R. v. IGL Canada (Western) Ltd.***, 2007 ABPC 268.

[48] ***Dial Oilfield Services*** deals with the charge under s. 2(1)(a)(i) of the *Act*. That clause is the general duty clause. Pahl P.C.J. noted the particulars which had been provided by way of disclosure of the Occupational Health and Safety Officer's report, and concluded that in the context of the general duty clause, and in the face of an accident which caused injuries to its workers, Dial did not need further particulars for defence purposes. Pahl P.C.J. found in essence that particulars of the offence charged had been provided through disclosure.

[49] In ***Ledcor***, the employer had been charged with "failing to ensure that machinery known as a caterpillar pipe layer was used, operated, serviced, adjusted or maintained in accordance with the manufacturer's specifications". There, in addition to charging the employer under the general duty clause, the Crown charged the employer with a breach of a specified duty under the *Act.* The employer sought particulars of the specific offence charged. The Crown had accepted that the general duty charge could only be proven if the Crown were able to prove the other counts.

[50] Because of the Crown's admission in that case, no issue arose as to particulars under the general duty clause. There, Lefever P.C.J. (as he then was) held that the Crown had to provide particulars of the specified breach. Simply producing the entire manufacturer's specifications for

the machine did not give sufficient details for the purposes of the defence. The accused was entitled to know which specification had not been followed.

[51] In ***IGL Canada,*** the employer was charged with 9 counts under the *Act* and various of its Regulations. One of the counts was under section 2((1)(a)(i) of the *Act.* The employer sought particulars of that count, plus 4 others.

[52] There, Lefever, A.C.J. Prov. Ct. (as he then was) cited the "golden rule" articulated in ***R. v. Côté***, [1978] 1 S.C.R. 8:

> ...the golden rule is for the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial.

[53] He expressly disagreed with the result in ***Dial Oilfield Services***, holding that the golden rule requires that the *count*, standing alone, provide sufficient information for an accused to understand the "transaction alleged against" that accused (at para. 44). He noted that the count, as presently drafted, would allow the Crown to "fix on any event that might emerge in the evidence" (at para. 45).

[54] He stated, however, that "should the Crown respond that the specific failure or failures are articulated in Counts 2-9, no further particulars need be provided" (at para. 46).

[55] In that case, Lefever A.C.J. Prov. Ct. was satisfied that the accused was entitled to formal particulars - essentially a formal position from the Crown, as had been the case in ***Ledcor*** - rather than requiring the accused to assume, from other counts and disclosure, what the case under the general duty clause was all about.

[56] With respect, I find myself in agreement with Lefever A.C.J. Prov. Ct. ***R. v. Côté*** and the cases cited in ***IGL Canada*** require a count in an information to inform the accused as to the transaction alleged against it. Pahl P.C.J. should, in my view, have directed that particulars be provided. That could have been accomplished by having the Crown adopt the failures in the other counts, or adopt the allegations contained in the report, or provide particulars of the incident leading to the charge. But the Crown should have been committed to a position.

[57] Each case will turn on its own facts. And of course each case will turn on the particular provision of the *Act* or the Regulations under the *Act*, forming the basis for the charge.

[58] As noted above, despite my comments concerning particulars, Dial has not demonstrated that it has suffered any prejudice as a result of any lack of particulars, and this ground of appeal cannot thus succeed.

3. What is the Correct Test for Proving the *Actus Reus*, and Did the Trial Judge Properly Apply It?

[59] Dial argues that the trial judge failed to clearly identify the *actus reus* of the general duty offence charge. In his decision on particulars, Pahl P.C.J. characterized certain things as the "essentials" of the offence. Dial alleges that the "essentials" discussed in the particulars motion and what the trial judge ultimately concluded constituted the *actus reus* were different.

[60] Dial alleges that the failure of the trial judge to identify the *actus reus* "earlier and much more definitively" caused confusion and unfairness.

[61] At para. 118 of ***R. v. Rose's Well Services Ltd.*** 2007 ABPC 16,(referred to throughout as the trial decision) the trial judge stated:

> I am satisfied beyond a reasonable doubt that the facts of this incident, and all the precursors to it, essentially the failure, or negligence, of Dial's management to establish clear, explicable rules and to adequately train and supervise its staff in the interest of staff safety, establishes the *actus reus* of this offence.

[62] Dial and the Crown had expressed differing view on whether the *actus reus* had been proven, but the trial judge did not reconcile the differences.

[63] The main difference between the parties is as to the components of the *actus reus* for the general duty charge. Dial argues that the specific wording of the *Act* requires that the Crown prove, as part of the *actus reus* and thus beyond a reasonable doubt, that Dial failed to take all reasonable steps to ensure the safety of its workers. It says section 2(1)(a)(ii) essentially requires the Crown to prove negligence.

[64] Because of the manner in which the trial judge dealt with the particulars application, he had stated before the trial commenced what he considered to be the "essentials" of the general duty count:

1. Dial had no procedures, or inadequate procedures, for the handling of condensates,

2. Dial had no training for, or did not adequately train, its staff in the handling of condensates, and

3. Dial did not provide its workers with hydrocarbon detection equipment.

[65] Dial complains that the trial judge found that Dial had failed to establish clear, explicable rules, which was something that had not previously been identified as a particular of the offence. Further, the trial judge found that Dial had failed to adequately supervise its staff, which again was something that had not previously been identified as a particular of the offence.

[66] The Crown responds that while the trial judge characterized the "essentials" or "precursors" as part of the *actus reus*, the facts of the incident itself were sufficient to establish the *actus reus*. The Crown notes that the trial judge concluded that "*the facts of this incident*, and all the precursors to it...establishes the *actus reus* of this offence" (at para. 118, emphasis added).

[67] The Crown argues that the trial judge could have stopped at the "facts of the incident" and not dealt with the "precursors" (or "essentials, as he had previously characterized them).

[68] In this regard, I am in general agreement with the position taken by the Crown: that to establish the *actus reus* of the general duty offence, the Crown may in some cases stop at the facts of the incident - the accident itself - as proof of the *actus reus.*

[69] This position adopts the "accident as *prima facie* breach" concept, which I endorse.

[70] The consequence of a framework that places an employer in the role of someone who is responsible for ensuring statutory and regulatory compliance is that it offers a clear pathway for delineating the *actus reus*, especially in cases involving the breach of a general duty provision. This approach is a mechanism relied upon in accordance with the regime of strict liability that aims to hold an employer strictly responsible for complying with public interest legislation. Therefore, once a breach has been established, *prima facie*, by virtue of an accident in the workplace despite a statutory regime designed to prevent such occurrences, then it is up to the employer to prove that it complied with the regulations and did all that it reasonably could to prevent the accident from happening.

[71] Spence P.C.J. agreed with Pahl P.C.J.'s analysis of ***Wyssen*** and ***General Scrap*** in ***R. v. Lonkar Well Testing Ltd.***, (unreported, 18 April 2008, Grande Prairie P.C. (at para. 26)). This approach was also endorsed in ***R. v. Moran Mining and Tunneling Ltd.***, (2006), 70 W.C.B. (2d) 422 (Ont. Sup. Ct.), where the trial judge found that "the fall itself" established the *actus reus* of the offence. (At para. 46)

[72] In ***R. v. Seeley & Arnill Aggregates Ltd.***, (1993), 9 C.O.H.S.C. 1 (Ont. Ct. (Gen. Div.), the court stated:

> The prohibited act mentioned in the regulations, in my view, is exposing a worker in a hazardous situation to falling more than three metres...If the Crown proves a fall by a worker of more than three metres took place while doing work required by the employer, it prima facie imports the offence. It does not matter if it was caused by accident, negligence, recklessness or wilful neglect. If it occurred in a place where one might reasonably expect it not to take place, such a fact would be considered in a defence of due diligence or even mistake...The company must show that it took all reasonable steps at the time and place to avoid the particular event. (at paras. 14, 15, and 17)

[73] The "accident as *prima facie* breach" approach has also been adopted in ***R. v. Saskatchewan Wheat Pool***, (1999), 185 Sask. R. 114 (Sask. Q.B.).

[74] However, this approach was criticized and not followed in ***R. v. Canadian National Railway***, (2003), 172 Man. R. (2d) 1, (Man. P.C.). There, Giesbrecht P.C.J. expressed doubts as to whether the standard of care imposed on employers was as high as suggested in the ***Saskatchewan Wheat Pool*** case, stating:

> In my view, when the death or injury of an employee is the direct result of the employee's own negligence and deliberate breach of the safety rules and procedures the employer has put in place, then something more should be required in order to prove the *actus reus* of the offence charged against the employer. (at para. 106)

[75] However, he had noted in the previous paragraph that:

> I certainly agree that the fact that Kowalyk died while at work is some evidence of a failure by his employer to ensure that his safety and health at work was protected. In many situations, depending on the nature and circumstances of the incident that led to the death or injury, such evidence might be sufficient to prove the *actus reus* of the offence beyond a reasonable doubt. (at para. 105)

[76] What can be taken from these cases is that proof of an accident or incident may be sufficient to establish the *actus reus* of an offence so long as the necessary elements are proven beyond a reasonable doubt. The effect of that is to then place the burden on the accused to establish a due diligence defence.

[77] In some cases, the Crown may decide to go further than merely proving the accident, and it may attempt to prove the employer's culpability by proving specific failures. In other cases, however, the Crown may be content to prove the accident, and sit back and see what the employer's due diligence defence is (if any).

[78] ***Canadian National Railway*** demonstrates that in some cases, proof of the accident may not be sufficient, although in that case, the trial judge may have been incorrect in considering employee negligence in the context of the *actus reus.*

[79] Ultimately, in the case at bar, the trial judge did not rely only on the fact of the accident as proving the *actus reus*. He went further, and very arguably beyond what was necessary to have the burden switch to Dial to establish a due diligence defence. In doing so, however, I do not see that he committed any errors of law that worked to Dial's disadvantage.

[80] To the extent that Dial argues that the specific wording of the *Act* requires the Crown to negate due diligence, or to prove negligence as part of the *actus reus*, such arguments are not well-founded.

[81] Further, I do not see any significant difference in the legislative intent between safety legislation such as the *Canada Labour Code*, R.S.C. 1985, c. L-2,and the Ontario's *Occupational Health and Safety Act*, R.S.O. 1990 c. O.1which have general duty clauses to the effect "Every employer shall ensure that the safety and health at work of every person employed by the employer is protected" (*Canada Labour Code*) s. 124 and specifically provide for a due diligence defence later in the same *Act,* and legislation such as in Alberta and Saskatchewan which include the availability of a due diligence defence in the general duty clause itself.

[82] The objective of both types of legislation is the same: promote and enhance workplace safety. The legal regime is the same: strict liability offences are created rather than absolute liability offences; the accused is thus able to assert a due diligence/absence of negligence defence.

[83] In my view, whether the due diligence defence is referenced in the general duty clause, or is found later in the legislation, the effect is the same. Both forms of legislation incorporate strict liability offences as described in ***R. v. Sault Ste. Marie (City)***, [1978] 2 S.C.R. 1299. The burden on the Crown should be no greater where the general duty section recognizes the availability of a due diligence defence than where the general duty section is silent on the point, but the due diligence defence is referenced later in the legislation.

[84] I note that even if I am incorrect in my views on the accident as *prima facie* breach theory of the *actus reus*, and the failure of the trial judge to order particulars of Count 1, the trial judge concluded in paragraph 118 that it had been proven to his satisfaction that Dial had failed to adequately train its workers. That finding was in addition to his comments on the facts of the accident itself, and was also one of the "essentials" of the offence that he found in relation to the particulars motion.

[85] It would not have been necessary for the trial judge to find that the Crown had proven *all* of the essentials to convict Dial. A finding of a failure to adequately train would have been sufficient in itself.

[86] As a result of these conclusions, I am of the view that the trial judge made no errors of law adverse to Dial in his understanding and interpretation of the Crown's obligations to prove the *actus reus* of the offence charged. Indeed, he may have imposed a greater burden on the Crown than was necessary, having regard to the nature of the accident in this case.

[87] This ground of appeal fails.

4. What is the Correct Test for Proving Due Diligence, and Did the Trial Judge Properly Apply It?

[88] Dial argues that the trial judge misinterpreted the test for due diligence. The basis for this argument is the alleged conjoining of two quotations from ***R. v. Sault Ste. Marie***. In discussing the onus of proof, Pahl P.C.J. refers to page 1325:

> 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 a balance of probabilities that he had a defence of reasonable care.

[89] He then refers to page 1330:

> ...the test is a factual one, based on an assessment of the defendant's position with respect to the activity which it undertakes...If it can and should control the activity at the point where [the offence] occurs, then it is responsible for the [offence].

[90] Dial correctly points out that the two paragraphs deal with separate concepts: the passage on page 1325 deals with the standard of proof for a due diligence offence, and the passage on page 1330 deals with the Crown's burden of tying the accused to the offence charged as part of the *actus reus*. The passage on page 1330 must be read in the context of the defence being raised by Sault Ste. Marie: that it was not responsible for the acts of a subcontractor. Dickson J. was referring to the control test to determine whether the City should be held liable for its subcontractor's activities and whether the City could be said to have exercised control over the activity.

[91] Dial also correctly points out that when the trial judge referred to the passage on page 1330 of ***Sault Ste. Marie*** as being the test of due diligence, he was in error.

[92] Dial argues that having regard to this and other errors, it is obvious that the trial judge misunderstood the test for due diligence and the burden of proof relating to it. Dial alleges that the trial judge held it to a higher standard of proof than was appropriate.

[93] This position is based largely on paragraph 114 of the trial judge's reasons, where he stated:

> The standard of care is not perfection but I also accept the position established in ***R. v. Wyssen****, supra,* and followed in at least, ***R. v. Alta. Pro Cleaning and***

> ***Disaster Restoration****, supra,* and ***General Scrap Iron 2****, supra,* that an employer is "virtually an insurer" of safety compliance.

[94] Dial takes issue with Blair J.A.'s comment at para. 14 of ***R. v. Wyssen*** (1992), 10 O.R (3d) 193 (C.A.):

> An "employer" is obliged by s. 14(1) [of the Ontario *Occupational Health and Safety Act,* R.S.O. 1980, c. 321] to "ensure" that the "measures and procedures" prescribed by the Regulations are carried out in the "workplace". The relevant definition of "ensure" in the Shorter Oxford English Dictionary, (3rd ed.) is "make certain". Section 14(1), therefore, puts an "employer" virtually in the position of an insurer who must make certain that the prescribed regulations for safety in the workplace have been complied with before work is undertaken by either employees or independent contractors.

[95] Dial argues that the trial judge should not have relied on ***Wyssen***, as the above statement is *obiter dicta*, and that ***Wyssen*** is in any event distinguishable. The relevant Ontario statute obliges the employer to take "every reasonable precaution" to protect its workers, while the Alberta statute obliges the employer to do what is "reasonably practicable"to protect its workers. Dial argues that the difference in wording is significant, with the Ontario provision being more onerous than the Alberta counterpart.

[96] Dial refers to ***R. v. Canadian National Railway***, *supra* where Giesbrecht P.C.J. referred to ***Wyssen*** at para 107:

> While there is a suggestion in that case that this puts an employer virtually in the position of an insurer, I don't read that decision as saying that 'to ensure' means anything in the nature of a guarantee. It makes more sense in my view, to read the work 'ensure' as meaning that all appropriate and reasonable steps are to be taken by an employer to make certain that the health and safety of its employees is protected at work. Notwithstanding the very high standard of care imposed on employers, it does not make sense to me that employers should be required to do more than all that is reasonable to prevent injuries and deaths at work.

[97] Dial also points to the decision of Saddy P.C.J. in ***R. v. Maple Leaf Metal Industries Ltd.***, 2000 ABPC 95, where he held that "the employer is not the insurer of the workman's safety as section 2(2)(a) of the *Occupational Health and Safety Act* requires that every worker shall take reasonable care to protect the health and safety of himself and other workers present while he is working" (at para. 15).

[98] And Dial notes that the Ontario Court of Appeal since ***Wyssen*** has confirmed that the employer's duty is not an absolute one: ***Ontario (Ministry of Labour) v. Dofasco Inc.***, (2007), 87 O.R. (3d) 161 (C.A.).

[99] Dial alleges that the trial judge treated it as a virtual insurer, applying something close to an absolute liability standard, rather than properly considering the test for due diligence.

[100] Dial notes that while Watson J. (as he then was) referred favourably to ***Wyssen*** in ***R. v. General Scrap Iron & Metals Ltd.***, 2002 ABQB 665, he did so in the context of "reasonable foreseeability" and not "reasonable care". His endorsement of ***Wyssen*** is thus limited. Dial submits that Watson J. was alive to the legal duty on an employer being qualified with the phrase "reasonably practicable" while Pahl P.C.J. expressed no such qualification in his decision in this case.

[101] The Crown responds by pointing to other portions of the decision where it says the trial judge clearly demonstrated that he knew the correct test for due diligence, and did not impose a higher standard on Dial. At para. 9, the trial judge stated:

> The prosecution of a strict liability offence requires of the Crown proof beyond a reasonable doubt of the *actus reus* of the offence. If the Crown is successful on this issue, the onus then shifts to the defence. The defence must establish, on a balance of probabilities, that it exercised due diligence. This defence amounts to demonstrating that the defendant exercised all reasonable care or had a mistaken belief in a set of facts, which if true, would have rendered its actions innocent.

[102] At paragraph 10, the trial judge quoted from ***Sault Ste. Marie*** referencing Dickson J.'s statement that it is "open to the accused to avoid liability by proving that he took all reasonable care", and referenced Dickson J. in ***R. v. Chapin***, [1979] 2 S.C.R. 121 that "an accused may absolve himself on proof that he took all the care which a reasonable man might have been expected to take in all the circumstances or, in other words, that he was in no way negligent."

[103] Further, in para. 12, the trial judge referenced ***R. v. Daishowa Canada Co.***, (1991), 118 A.R. 112 (P.C.):

> The *Act* does not call for clairvoyance on the part of the employer. The ensurance of the health and safety of the workers is limited to those things that are reasonably practical.

[104] The Crown notes as well that the trial judge followed ***R. v. Bruin's Plumbing & Heating Ltd.***, (2003), 339 A.R. 191 (C.A.) and quoted Fraser C.J.A.:

> 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? (at para. 23)

[105] Finally, the Crown points out that at para. 117, the trial judge stated:

> ...my assessment, and the outcome of this case, turns on the question which arises from ***R. v. Bruin's Plumbing & Heating Ltd.***, *supra*, restated again as follows: What should Dial do to ensure as far as is reasonably practicable the health and safety of Richardson and Chamberlain while engaged in unloading a liquid petroleum product?

[106] As stated above, the trial judge erred when he adopted the control test as being relevant to the due diligence defence. However, this error does not appear to have manifested itself in the manner in which the trial judge actually dealt with the nature of the due diligence defence, the onus of proof with respect to it, or the standard of proof with respect to it.

[107] As well, the passage quoted from ***Wyssen*** is not an accurate statement of the responsibility of an employer towards its employees: the employer is not an insurer or guarantor of worker safety. Employers are required only to take reasonable care and do only what is reasonably practical. ***Wyssen*** should not be interpreted in Alberta as limiting or lessening an employer's opportunity to raise a due diligence defence and avoid liability because of the absence of negligence.

[108] Having regard to the whole of the decision, there is nothing in the reasons to indicate that the trial judge applied an "insurer" or "guarantor" standard to Dial. Indeed, his reference to ***Bruin's Plumbing and Heating***, *supra* and his own restatement of Dial's obligations as an employer show that the trial judge was alive to the due diligence defence, and did not misunderstand its application or the standard of proof applicable to it.

[109] Reasons for a decision must be read in their entirety. Not all errors in them, even errors of law, will result in reversal or the ordering of a new trial. The trial judge's decision, read as a whole, demonstrates that he made no error of law with respect to his overall understanding and interpretation of the test for due diligence.

[110] A mistake such as that made here is one that should in any event be saved by the application of section 686(1)(b)(iii) of the *Criminal Code*: that the error has not led to any substantial wrong or miscarriage of justice.

[111] This ground of appeal thus fails.

5. Is the verdict unreasonable on the evidence before the trial judge?

[112] With a strict liability offence, all the Crown must prove is that something happened that impacted adversely on the health and safety of an employer's workers while doing the employer's work. As discussed above in the context of the *actus reus*, The Crown may simply elect to prove the employment relationship, that the workers were engaged in the employer's work, and that an incident occurred which adversely affected the workers. To avoid conviction, the accused employer must then establish that it had been duly diligent, notwithstanding the occurrence of the incident.

Unreasonable Verdict

[113] Dial argues that the learned Provincial Court Judge rendered an unreasonable verdict in convicting it of the charge under section 2(1)(a)(i) of the *Occupational Health and Safety Act* (the general duty charge) as well as the charge of breaching section 185(2)(a) of the *General Safety Regulation*.

[114] The general duty clause is as follows:

> Every employer shall ensure, as far as is reasonably practicable for the employer to do so, the health and safety of workers engaged in the work of that employer.

[115] Section 185(2)(a) provides:

> ...an employer shall ensure that hot work is not performed in a location where a flammable substance is or may be (i) in the atmosphere, or (ii) stored, handled, processed or used.

Verdict

[116] The learned trial Judge's verdict on count 1 is essentially found in paragraph 118 of his reasons for judgment:

> 118 I am satisfied beyond a reasonable doubt that the facts of this incident, and all the precursors to it, essentially the failure, or negligence, of Dial's management to establish clear, explicable rules and to adequately train and supervise its staff in the interest of staff safety, establishes the *actus reus* of this offence. I am not persuaded, on the balance of probabilities, that Dial exercised due diligence in the discharge of its obligations under the *Occupational Health and Safety Act*, nor am I persuaded that there was any mistake of fact sufficient to render Dial's failure innocent. As such, I find Dial guilty of Count 1.

[117] He had dismissed Count 2 on a no-evidence motion following the close of the Crown's case. With respect to Count 3, his verdict is found at paragraph 119:

> 119 Finally, I am urged to convict Dial in respect of Count 3 that is, that Dial allowed hot work to be performed on this occasion. I do not intend to analyze the arguments of either the Crown or Defence. Simply put, I see this offence in much the same terms as Count 1. Dial, as a result of its failure to establish clear safety rules, to train the workers effectively and ultimately to enforce the rules, did not ensure that hot work was not performed. The offence is therefore made out. This failure however, arises from the identical circumstances which found conviction on Count 1. Therefore, on the principles of ***R. v. Kienapple*** [1975] 1 S.C.R. 729, I direct a conditional stay in respect of Count 3.

Standard of Review for Unreasonable Verdict

[118] On a summary conviction appeal, section 686(1) of the *Criminal Code* applies. That section provides:

> On the hearing of an appeal against a conviction...the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence;
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice.

[119] Dial refers to ***R. v. Yebes***, *supra*, ***R. v. Corbett***, *supra*, and ***R. v. Beaudry***, *supra* and the standard of review set out in ***Corbet*** and ***Yebes***:

> ...whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered. (***Yebes*** at para. 16)

[120] ***Beaudry*** confirms that the test is applicable to verdicts of judges sitting alone, without a jury.

[121] The Crown urges me to give appropriate appellate deference to the decision below, citing ***Schwartz***, *supra* and in particular the recognition that the trier of fact below "is in a privileged position to assess the credibility of witnesses' testimony at trial" (as per La Forest J. at para. 32).

[122] The Crown refers to ***R. v. Burke***, *supra* where Sopinka J. commented on the role of the appellate court in reviewing the evidence at trial in the context of determining whether the evidence supports the conviction. He stated at para. 4:

> The court reviews the evidence that was before the trier of fact and after re-examining and, to some extent, reweighing the evidence, determines whether it meets the test.

[123] ***R. v. Francois***, *supra*, refers to an unreasonable verdict as being one which is "illogical or speculative or inconsistent with the main body of evidence" (at para. 24).

[124] In ***R. v. Dorfer***, *supra*, McFarlane J.A. referred to the description in ***Francois*** and added "no error in the judge's appreciation of the evidence has been demonstrated much less the clear and manifest error required by law" (at para. 50).

[125] The Alberta Court of Appeal noted in ***R. v. Davis***, (1995), 98 C.C.C. (3d) 98 (Alta. C.A.) "we cannot say a verdict is unreasonable merely because we disagree with it, or because, if we were the judge, we would have come to a different conclusion." (at para. 13)

[126] The Crown points out that in ***Beaudry*** *supra,* it is the *conclusion* of the judge that is to be reviewed:

> ...not the process followed to reach it...A verdict is not necessarily unreasonable because the judge has made errors in his or her analysis. The review must go further than that. In every case, the court must determine whether the *verdict* is unreasonable and, to do so, it must consider all the evidence. (at para. 58)

[127] ***Housen***, *supra* is cited for the basic standard of appellate review of palpable and overriding error: the appeal court is prohibited from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion (at para. 1).

Discussion on Standard of Review

[128] There are, of course, different questions to be reviewed on appeal: questions of law, questions of fact, inferences of fact and questions of mixed fact and law.

[129] The discussion above concerning the tests for proving the *actus reus* and for due diligence are primarily questions of law, with the corresponding standard of review being correctness.

[130] Allegations of an unreasonable verdict generally involves questions of fact, inferences of fact, or questions of mixed fact and law. As described in ***Housen***, a finding of negligence

involves the application of a legal standard to a set of facts, making such a finding a question of mixed fact and law. The standard of review there is palpable and overriding error.

[131] Questions of fact, or inferences of fact, are entitled to the highest level of deference on appeal, that being palpable and overriding error.

[132] Questions of credibility require giving the trier of fact great deference, because of the trial judge's advantage in seeing and hearing the evidence of witnesses: ***R. v. R.W.***, *supra* at para. 21.

[133] Section 822(1) of the *Criminal Code* makes the general provisions for appeals involving indictable offenses applicable to summary conviction appeals.

[134] As a result, a finding of unreasonable verdict can only be made in the context of the standards of review referenced in ***Housen***, *supra*, and the myriad of cases reinforcing the deference to be given to trial judges. In my view, the Court of Queen's Bench is in no different position when reviewing a decision from Provincial Court than is the Court of Appeal when reviewing a decision from the Court of Queen's Bench. A finding of unreasonable verdict can only be made when the trial judge has made some palpable and overriding error in the fact findings or credibility findings, or in applying the facts to the law. Otherwise, where facts are involved, considerable deference is to be given to the trial judge.

[135] I will review the allegations of unreasonable verdict in that context.

Key Findings of Fact

[136] Dial notes that the Learned Provincial Court Judge made three key findings: (1) that management failed to establish clear safety rules; (2) that management failed to train its workers; and (3) that management failed to supervise its workers.

[137] Pahl P.C.J. had previously ruled that the *essentials* of the charge under the general duty clause (s. 2(1)(a)(i) of the *Occupational Health and Safety Act*) were (1) that Dial had no procedures, or inadequate procedures, for the handling of condensates; (2) that Dial had no training for, or did not adequately train, its staff in the handling of condensates; and (3) Dial did not provide its workers with hydrocarbon detection equipment. (***Dial Oilfield Services***, *supra* at para. 14)

[138] At paragraph 15 of that decision, he stated:

> These amount, in their practical effect, to an allegation Dial failed to ensure the health and safety of named workers who were working with a hydrocarbon concentrate on a specific date, at a specific locale and were injured. This is Count 1 of the Information.

[139] It is not up to the trial judge to define, at the commencement of the trial, what the Crown needs to prove. Pahl P.C.J.'s description of the essentials of the offence arose in the context of a particulars application. Pahl P.C.J. refused to order particulars, finding instead that the contents of an Occupational Health and Safety report already provided to Dial gave sufficient particulars of Count 1.

[140] The evidence lead by the Crown included a description of the safety orientation given to both Richardson and Chamberlain, the training of Richardson by other Dial employees Levi Gauss, Merv Cave and Ray Griffiths, the circumstances of the incident as related through Richardson and Chamberlain, and expert opinion evidence concerning the causes of the explosion.

[141] The Crown's position is that it needed only to prove that the explosion happened to Dial's workers while they were performing Dial's work as proof of the a*ctus reus*. Dial maintains that the Crown needed to proved the elements of the offence as defined by Pahl P.C.J. in the pre-trial particulars motion beyond a reasonable doubt.

The Explosion

[142] The Crown's expert on the cause of the explosion was Allan R. Nelson, a mechanical engineer. It was Mr. Nelson's opinion that the most likely cause of the explosion was static electricity igniting flammable vapours in the tank that was being filled from the truck. From a review of the evidence, there is no doubt that the contents of the truck were flammable, that the truck was offloading its contents into the tank, and that something caused the vapours to ignite.

[143] According to Mr. Nelson, the initial site of the explosion was most likely at the tank, where the nozzle from the ungrounded truck touched it. Because neither the tank nor the truck were grounded, and the tank and the truck were not bonded, static electricity ignited the vapours coming from the tank as it was being filled. Janet Hay, an expert called mainly with respect to Count 2, confirmed the flammable nature of benzine, one of the components of the contents of the tank.

[144] Alternatively, Mr. Nelson opined that the over-revving of the truck engine because of the presence of the flammable vapours could have caused the engine to backfire. That, in turn, could have ignited the flammable vapours in the area of the truck and the tank, because of the close proximity of the truck to the tank.

[145] Dial called no evidence to rebut Mr. Nelson's opinion, or the opinion of Ms. Hay as to the flammable nature of the debuts being offloaded from the truck.

[146] The Crown argued that all it needed to prove was the accident, or explosion, as being the *actus reus* of the offence charged under Count 1. Then, following ***Sault Ste. Marie***, *supra* the onus shifted to Dial to establish that it had been duly diligent, despite the accident.

[147] Pahl P.C.J. did not analyse or decide the case entirely on that basis. Instead, he viewed the *actus reus* in the same manner he had characterized it in the preliminary motion in ***R. v. Dial Oilfield Services***. As noted above, he held at para. 118 of the trial decision:

> I am satisfied beyond a reasonable doubt that the facts of this incident, and all the precursors to it, essentially the failure, or negligence, of Dial's management to establish clear, explicable rules and to adequately train and supervise its staff in the interest of staff safety, establishes the *actus reus* of this offence.

[148] I disagree with Dial's characterization of the *actus reus* of the general duty offence. In my view, the Crown was entitled to rely on the "facts of the incident" as proving the necessary *actus reus*. In a strict liability case such as this, the Crown could simply have proven that an unsafe act occurred while workers were engaged in the work of their employer, and left it to the defence to establish a due diligence defence.

[149] This is precisely what was submitted by the Crown in argument:

> 13 Now, with regard to the *actus reus* on the
> 14 2(1)(a)(i) charge - that's count number 1 - there's
> 15 no doubt, sir, I suggest, that an explosion occurred
> 16 on March 16, 2003, and that both Mr. Richardson and
> 17 Chamberlain were seriously injured as a result, and
> 18 that in itself does establish the *actus reus* on count
> 19 1.
>
> (Transcript, page 2411, lines 13 - 19)

[150] In my view, what is required in this regard is that the Crown prove, beyond a reasonable doubt, that something happened within the control of an employer that negatively affected the health or safety of its workers. In other words, the Crown must establish that while the worker was performing the employer's work, an accident or incident took place that affected the worker's health or safety.

[151] This is the scenario described by Lefever, P.C.J. (as he then was) in ***R. v. Ledcor Industries Ltd.,*** *supra*, at paras. 59 and 60:

> Having reviewed the Prosecution Analysis, the Report, and portions of the 561D Pipelayer Manufacturer's Specifications, one might conclude the Crown reasoning is the following. An incident has occurred in which a worker has been killed. The immediate cause of his death was being struck by a boom brake being operated at the time. Normally a boom brake does not cause such an injury or death.
>
> When either operated properly or having been maintained properly, the boom brake is not supposed to cause the death of a worker. Ergo, the death must be the result of either

> improper operation by an employee or improper or inadequate supervision by the employer, or a failure of maintenance or servicing resulting in a preventable failure of the equipment to operate properly.

[152] The analogy to the case at bar is obvious: an incident occurred in which two workers were injured. They were performing work for their employer. The immediate cause of their injuries was an explosion which occurred while they were transferring the flammable contents of their truck into a storage tank. Normally, that operation does not result in an explosion or injuries to the workers. When the filling operation is conducted safely, there should be no explosions and no injuries to the employees. Ergo, the explosion must be the result of either improper operation by the employees, inadequate supervision by the employer, or a failure of maintenance or servicing resulting in a preventable failure of the equipment to operate properly.

[153] ***R. v. Côté***, *supra* sets out the "golden rule" requiring that the accused be "reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial." (At page 357). Here, having regard to the wording of Count 1 and the expert reports of Mr. Nelson and Ms. Hay, Dial can have been under no misapprehension as to what the "transaction alleged against them" was. It was the explosion, caused either by static electricity from ungrounded and unbonded pieces of equipment, or the ignition of vapours by a backfiring engine because the engine was too close to the source of flammable vapours.

[154] Of course, the mere proof of an injury or accident does not automatically satisfy the *actus reus* for a charge under the general duty clause. That will depend on a number of circumstances, and in particular the nature of the injury or accident.

[155] In this case, Pahl P.C.J. appeared to consider that the *actus reus* of Count 1 was more than just the facts of the accident and injuries. In paragraph 118, he appears to have elevated "Dial's failure to establish clear, explicable rules and to adequately train and supervise its staff in the interest of staff safety" to be part of the *actus reus*. If in doing so he intended to require the Crown to prove beyond a reasonable doubt that there was an incident as well as a failure on Dial's part to establish clear safety rules and to adequately train its workers, he imposed a greater burden on the Crown than was necessary. Having regard to the evidence of Richardson, Chamberlain, Mr. Nelson and Ms. Hay, it was open for the Crown to rely on the fact of the explosion to satisfy its burden of proving the necessary *actus reus* of the general duty offence.

[156] With that evidence, which was essentially uncontroverted, there was a workplace accident. The proximate cause of the accident was either the failure of Richardson and Chamberlain to properly ground the truck and bond it to the tank, or Richardson positioning the truck too close to the tank while the tank was being filled from the truck while its engine was running. The accident caused property damage and injury to the two workers involved in the incident.

[157] The fact that the Crown did not prove the specific cause of the accident beyond a reasonable doubt is, in the circumstances of this case, of no consequence. The only two possible causes put forward were safety related. There was no non-safety related cause put forward. The only evidence before the trial judge was that this accident resulted from human error: not grounding the truck and bonding it to the tank or parking the truck too close to the tank.

[158] Pahl P.C.J. instead appears to have required that the Crown prove what he described as being the "essential elements" of the offence; much more than the fact of the accident.

[159] To determine the *actus reus*, it is necessary to analyze the activities that were underway when the incident which is the subject matter of the charge occurred. The defendant must be shown to have controlled the activities undertaken, and while those activities were being undertaken, workers must have been exposed to a harmful situation. See ***R. v. White***, (1988), 93 A.R. 254 (Q.B.)

[160] As to the role the employee's own negligence plays, ***Ontario (Ministry of Labour) v. Dofasco***, *supra* deals with a charge under the Ontario *Occupational Health and Safety Act* and s. 25 of the Ontario Industrial Establishments Regulations. Section 25(c) of the *Act* provides that an employer shall ensure that "The measures and procedures prescribed are carried out in the workplace..."

[161] Winkler J.A. for the Ontario Court of Appeal noted that 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. There is no suggestion that employee misconduct constitutes any form of defence (at para. 22). He quoted from Laskin J.A. at para. 24:

> ...workplace safety regulations are not designed just for the prudent worker. They are intended to prevent workplace accidents that arise when workers make mistakes, are careless, or are even reckless.

He continued:

> In our view, this principle also extends to deliberate acts of employees while performing their work.
>
> 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. (At paras. 24 and 25)

[162] There, the employee had made a conscious decision to disobey an instruction or work practice in order to get his job done. The injury suffered by the worker was suffered

> "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." (at para. 27)

[163] From a review of the evidence here, it is clear that Richardson and Chamberlain were at all relevant times engaged in the work of their employer. They were employees, not independent contractors. Their activities were in furtherance of their employer's business. Nothing they did was for any reason other than to accomplish the tasks their employer had assigned to them.

[164] It is clear that there was an explosion. It was unexpected and unintended. Two workers were injured as a result of the explosion. They were both engaged in the work of their employer at the time of the explosion. The two potential causes of the explosion were both within the control of the employees. The truck could have easily been parked further away from the tank. And the truck could have been grounded and bonded to the tank. If these steps had been taken the explosion would not have occurred. Normally, explosions like this do not occur.

[165] Having proven these things, the Crown could have rested its case, and left it to Dial to establish a due diligence defence.

Failure to clearly define the *Actus Reus of the Offence*

[166] Dial alleges that the trial judge erred in failing to clearly identify the a*ctus reus* of the offence in question. I take it from that that Dial is referring to the general duty charge. However, Dial notes that the trial judge did identify the *actus reus* in the final paragraphs of the judgment. Dial argues that the trial judge should have identified the *actus reus* earlier in the judgment, which it says would have avoided much of the confusion and unfairness that was ultimately caused by this failure.

[167] However, Dial has not identified any confusion or unfairness during the course of the trial that arose from any misunderstanding on its part as to what the Crown's allegations were, and what the case against Dial was. Dial complains that the trial judge applied somewhat different criteria in his decision than were identified in the particulars motion and what the trial judge described as the "essentials" or "particulars" of the offence.

[168] With respect to the three essentials, Dial argues that instead of finding that Dial had no procedures, or inadequate procedures, for the handling of condensates, the trial judge found that Dial failed to establish clear, explicable rules.

[169] Instead of finding that "Dial had no training for, or did not adequately train, its staff in the handling of condensates", he found that "Dial failed to adequately train."

[170] Instead of finding that "Dial did not provide its workers with hydrocarbon detection equipment", he found that "Dial failed to adequately supervise its staff in the interest of staff safety."

[171] These fact findings were described by the trial judge as constituting the *actus reus* of the general duty offence.

Failure to consider or reconcile contradictory evidence

[172] From his decision, it is clear that the learned trial judge was satisfied, beyond a reasonable doubt, that Dial's management had:

1. Failed to establish clear safety rules;

2. Failed to train its workers; and

3. Failed to supervise its workers.

[173] As to each of these, Dial argues that the trial Judge:

1. Failed to consider or reconcile contradictory evidence;

2. Came to conclusions that were speculative and unsupported in the evidence; and

3. Demonstrated preferential treatment to prosecution witnesses.

[174] I will deal with each of these arguments in the context of each of the three key findings of fact found by the trial judge, that Dial had no clear, explicable safety rules and that Dial failed to adequately train its staff and that Dial failed to adequately supervise its workers.

Clear, Explicable Safety Rules

[175] Dial argues that the trial judge erred in his conclusion that Dial had failed to establish a universal rule as to the distance that should be maintained between the truck and the tank when unloading petroleum products.

[176] From a review of the evidence, it is clear that Dial, through its senior personnel, attempted to prove that it had a safety rule that required the truck to be at least 15 metres away from the tank during an unloading procedure. Each of Thesen, Gunderson and Cave testified to this. Dial pointed to its written safety materials as establishing this rule.

[177] However, the evidence was clear that Richardson was unaware of a 15 metre rule, and Griffiths, who was the person most involved in Richardson's training, believed that the distance rule was 7 metres with respect to the location of the explosion.

[178] It is also clear that industry practice involved a 7 metre safe distance rule, and that the ERCB (then the EUB) legislation required that only 6 metres' distance be observed.

[179] Dial complains that the trial judge did not deal with the evidence of Frank Shewchuk, an expert called by Dial. His field of expertise was electrical engineering. He testified that parking the truck 7 metres from the tank would not be considered to be "hot work", and that Richardson would have been safe if he had followed the 7 metre rule according to industry standards.

[180] With respect, Dial's argument misses the trial Judge's point. The issue is not whether Dial had an appropriate safety rule. It is whether Dial had *clear* safety rules. A 7 metre rule would have satisfied industry standards and EUB regulations. It would, according to Mr. Shewchuk, have been an appropriate, safe rule. What the Crown proved is that Dial's safety materials and training were flawed. Dial expected its workers to observe a 15 metre rule. That would have been a very safe rule.

[181] There is nothing wrong with an employer having safety rules or standards that exceed industry norms. What the evidence showed is that Dial failed to train its workers as to the standard it expected them to observe. Richardson and Griffiths believed the rule to be 7 metres at this site. By parking closer than 15 metres from a tank, they would have been breaching the company's safety rules, although Richardson was unaware of such a rule, and Griffiths was at best confused as to the applicablity of such a rule.

[182] Mr. Gunderson was Dial's manager responsible for safety. He testified extensively for Dial as to its safety policies and practices. His evidence was that Dial had a 15 metre rule, and that Dial intended to exceed the industry recommended practice of 7 metres. He was referred to the industry standard at page 2073 of the transcript:

> Q And it reads:
>
> Tank trucks should be a minimum
> of seven metres from the tank, to
> be filled or unloaded.
>
> Does that apply in this case?
> A Um, that is an IRP or Industry Recommended Practice
> is to be a minimum of seven metres from the tank.
> Um, Dial had chosen to exceed that practice um, and
> I -- I -- that came from a requirement from a
> particular customer that required that we be 15

metres away um, for doing their work.
So, then it was a conscious decision made by
Dial that we needed to have a 15 metre rule
applicable in all our work.

[183] In cross-examination, Mr. Gunderson acknowledged that there were portions of Dial's written safety materials that referred to other distances, and he described those portions as identifying areas where the safety manual needed updating (at page 2110).

[184] Mr. Thesen, the senior officer of Dial, testified at length for Dial. He was asked about Dial's policies regarding distance, grounding and bonding:

Q MR. SABINE: Now, does Dial provide
training to its workers in relation to the distance
rule and the grounding rule that you've mentioned?
A Yes, we do.
Q And how -- how is this training provided?
A Well, it's in their orientation and they should be
getting it when they're riding with the -- their
mentors, I guess.
Q During the in-service training?
A Yes.
Q Okay. Now, does Dial have any rules relating to the
hazard -- any hazard that might be associated with
vapours at the tank that is designed to protect its

page 1207

drivers 1 from those vapours?
A Yeah, keep the hell back.
Q Okay. You --
A Ground your truck, bond your truck. Follow our
rules and hopefully -- and you shouldn't get hurt.
Q Okay. But specifically with respect to the issue
vapours that might be in the atmosphere at the tank
during the unloading process, --
A Okay.
Q -- does Dial have -- what -- what -- which of Dial's
rules, if any, apply to protect the drivers during
the unloading process.
A Stay at the truck.
Q Okay. So they are -- they are to stay at the truck
during the unloading?
A Yes.

17 Q And are they provided with training along these
18 lines?
19 A Yes, they are.
20 Q At what point?
21 A It's -- I believe it's in their or -- in their
22 orientation and when they're doing their ride-along.
23 Q During the in-service training?
24 A Yes.
(Transcript pages 1205, 1206 and 1207)

Contradictory Evidence

[185] Dial did not expressly argue the adequacy of the trial judge's reasons. However, the allegation that the verdict was unreasonable because the trial judge failed to consider or reconcile contradictory evidence must be dealt with in that context.

[186] ***R. v. Morrissey***, (1995), 97 C.C.C. (3d) 193 (Ont. C.A.) states at para. 30:

> A trial judge's reasons cannot be read…like an instruction to a jury [which] provides a road map to direct lay jurors on their journey toward a verdict. Reasons for judgment are given after a trial judge has reached the end of that journey and explain why he or she arrived at a particular conclusion. They are not intended to be, and should not be read as a verbalization of the entire process engaged in by the trial judge in reaching a verdict.

[187] In ***R. v. Ventrella***, [1997] O.J. No. 4715 (Ont. C.A.), the Court noted that the trial judge had not addressed the character evidence until the end of his reasons. He had already reviewed the evidence, made his findings of fact, and indicated why he did not accept the appellant's evidence. The Court held at:

> We do not conclude from the order in which the trial judge formulated his reasons that he did not consider the character evidence until after he had concluded that the appellant was guilty…

[188] However, since ***R. v. Sheppard***, [2002] 1 S.C.R. 869, it is clear that a trial judge has a duty to give adequate reasons. ***Sheppard*** recognizes three duties. The first is the duty to the public to provide transparency in the process and to promote public confidence in the judicial process. The second is to the losing party, so that the accused person is not left in doubt why a conviction has been entered. And the third is to make the right of appeal meaningful.

[189] ***R. v. Stark*** (1984), 64 C.C.C. (2d) 231 (B.C.C.A.) holds that it is not necessary that the trial judge expressly deal with every inconsistency in the evidence as long as the basis for his or her conclusions is apparent from the record. Inconsistencies on key issues, should, however, be

addressed. (see also ***R. v. C.S.***, 2007 ONCJ 502, per Renaud J. at para. 3)

[190] Nevertheless, the adequacy of reasons is not a stand-alone ground of appeal. The need to give reasons is linked to the purposes for requiring reasons.

[191] In upholding the trial decision, the Manitoba Court of Appeal stated in ***R. v. G.K.M.***, 2004 MBCA 96, 190 Man. R. (2d) 17 at para. 13:

> The reasons of the trial judge are clear and transparent. As a whole, it is clear to any reader that the trial judge did not believe the accused or his wife and that their evidence did not raise any reasonable doubt as to the guilt of the accused. He is not required, as the accused seems to suggest, to explain away any and every discrepancy or inconsistency in the evidence…

[192] The Saskatchewan Court of Appeal commented as follows in ***R. v. Galloway***, 2004 SKCA 106, 249 Sask. R. 262 at para. 32:

> We do not read *Sheppard* and *Braich* as mandating a microscopic examination of all of the testimony in a lengthy trial. There is no need to engage in an endless recitation of all the trial testimony that is found in the trial transcript. It follows that a trial judge is not required to discuss every piece of evidence in detail when explaining her reasons for accepting all or only part of the testimony of a particular witness on an essential issue.

[193] It is clear that the basis of the decision must be ascertainable from the record: ***R. v. Zinck***, [2003] 1 S.C.R. 41. This is important so that an appellate court can ascertain and review the basis for the decision made.

[194] In ***R. v. Gagnon***, [2006] 1 S.C.R. 621, the Supreme Court held that the trial judge's verdict was not unreasonable, despite its finding that the reasons given were insufficient.

[195] In ***R. v. Sinclair***,2008 ABCA 443, 376 A.R. 91, an acquittal on four counts of possession of a prohibited weapon was quashed and a new trial was ordered because the trial judge had not made specific fact findings on each count. The Court ruled that the reasons were insufficient to allow for meaningful appellate review, contrary to the ***Sheppard*** standard.

[196] The Nova Scotia Court of Appeal citing ***R. v. Braich***, [2002] 1 S.C.R. 903, described the test for whether reasons are sufficient as being "whether the reasons... allow the appeal court to review the correctness of the trial decision." ***R. v. T.D.***, (2005), 230 N.S.R. (2d) 298 (C.A.) at para. 27.

[197] In ***R. v. D.S.C.***, (2004), 228 N.S.R. (2d) 81 (C.A.), the Nova Scotia Court of Appeal noted that a functional test is to be applied to determine if the reasons provided are deficient, and

if they are deficient, whether they have occasioned prejudice to the exercise of the offender's right to appeal." (at para. 32)

[198] In this case, the trial judge heard some 6 weeks of evidence. He reserved his decision, and handed down a written decision of some 120 paragraphss. He made credibility assessments, fact findings, conducted an analysis of relevant law, and came to his conclusions. His conclusions are brief, but do they prevent meaningful appellate review, or prejudice Dial's right to appeal?

[199] That is the question to be answered in the context of this case. The adequacy of reasons, or the manner in which the trial judge has dealt with contradictory evidence, is not a stand-alone ground of appeal. The question is to be answered in the context of the specific findings or conclusions.

The Safe Distance Rule

[200] Dial went to great lengths in its cross-examination of Crown witnesses and through its own witnesses to prove that it had a universal "safe distance" rule that trucks had to be at least 15 metres from whatever they were filling. Len Gunderson, George Thesen and Merv Cave were all clear and unshaken in their testimony that Dial had established this rule. The evidence in chief of Ray Griffiths, the man who had been principally involved in training Scott Richardson, revealed that he was unaware of a universal 15 metre rule.

[201] Griffiths was cross-examined on that point, and acknowledged that he was aware of the 15 metre rule when loading to an open rig tank, as described in the safety manual. He agreed that the tank being loaded could be considered to be an open tank such that the 15 metre rule may have applied, but that he used a 7 metre rule because that was what was on CNRL's safe work permit for this particular site.

[202] Griffiths' evidence on re-direct further confused the issue as to what he understood, as he appeared to revert to his previous testimony as to having trained Richardson on a 7 metre rule.

[203] Having reviewed the cross-examination of Griffiths, it is correct that the trial judge did not deal with this specific evidence, which contradicted Griffiths' evidence in chief. But the best that can be said for the cross-examination of Griffiths, if indeed he contradicted his earlier testimony that there had been no *universal* 15 metre rule, is that he believed it was all right to depart from Dial's rule even if the site rule was less onerous. That is hardly an endorsement of a universal safety rule.

[204] Richardson's evidence was that he was only aware of a 7 metre rule. Chamberlain's evidence on this point was not helpful, as he was being trained by Richardson at the time and had been given little safety training at that stage of his employment.

[205] The evidence of Gunderson and Thesen was that they knowingly set Dial's rule higher

than industry standards to ensure the safety of their workers. The learned trial judge did not reject this evidence, but noted that if this was the rule, it had not been effectively communicated to at least two of the workers that were expected to follow it: Richardson and Griffiths. Further, there was evidence that Dial's safety materials did not clearly set out this rule. Instead, the materials referred to a number of distances in various circumstances: 15 meters, 8 meters and 50 meters.

[206] Indeed, Gunderson, the company's safety manager, conceded that the materials were deficient in this regard and needed amendment.

[207] When coupled with the evidence of Richardson and Griffiths, it was not unreasonable for the learned trial Judge to conclude that Dial failed to establish clear safety rules.

[208] It is laudable that Dial attempted to set its standards to a high level. And this is certainly a factor to be considered in assessing Dial's due diligence defence, and that may be relevant to sentencing considerations. But there is little point setting high standards if they are not clearly communicated to the workers who are expected to obey them.

[209] It may be that a 7 metre rule would have been sufficient in the circumstances of the work being performed by Richardson and Chamberlain. Richardson understood that there was a 7 metre rule – whether it was a Dial standard or an industry standard. Griffiths understood the same thing. But the point in the learned trial judge's decision is not that Dial failed to prove that they had a rule that was better than industry standards. The point is that the trial judge was satisfied beyond a reasonable doubt that Dial had no clear safe distance rule at all – whether it be 7 or 15 metres. That was clear evidence of deficiencies in Dial's safety program, and a material failing on its part.

[210] Dial worries that the trial judge's decision in this regard may "dampen the willingness of companies to set high standards that are not required by law, industry practice or science." It would be unfortunate if that resulted as a "knee-jerk" reaction to the trial judge's decision. Dial was not convicted because they had been ambitious in their program and had failed in achieving their lofty goal. They were found to have failed to have established clear rules, regardless of what their rules were.

[211] Dial submits that the confusion or ambiguity over the 15 metre rule was a "red herring" because industry standards were less. Again, this misses the point. The trial judge's concern was not that Richardson had failed to follow Dial's rule, it was that there was no clear rule in Dial's materials or in its training of Richardson for him to follow.

[212] Mr. Shewchuk, the electrical engineering expert called by Dial, opined that if Richardson had parked his truck 7 metres or more from the tank, Richarson would have been safe. According to Mr. Shewchuk a seven metre distance would have resulted in the work being performed not being characterized as "hot work" (relevant to the charge under Count 3). Since Richardson was only three metres from the tank, and he knew he should have been at least seven metres from the

tank, Richardson was, according to Shewchuk, safe if he followed what he had been trained to do.

[213] Again, that argument misses the point as to whether Dial had established a clear safe distance rule. It was no thanks to its materials or its training that Richardson was aware of a seven metre rule. This argument is not germane to the issue as to rules; it is relevant to Dial's due diligence defence.

[214] Dial argues that the trial Judge failed to "consider the systemic confusion created by different oil companies who specified a safe distance rule within their safe work permits." With respect, 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.

[215] 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*:

> 2(1) Every employer shall ensure, as far as it is reasonably practicable for the employer to do so,
>
> (a) the health and safety of
>
> (i) workers engaged in the work of that employer, and
>
> (ii) those workers not engaged in the work of that employer but present at the work site at which that work is being carried out, and
>
> (b) that the workers engaged in the work of that employer are aware of their responsibilities and duties under this Act, the regulations and the adopted code.

[216] The fact that there is systemic confusion in the industry is not of itself an answer to a failure on the part of an employer in that industry. It is the employer's responsibility to protect its workers, not the industry's.

[217] In saying this, I do not mean to imply that an employer might be convicted of an offence

under the *Act* in circumstances where a worker has failed to follow the employer's rules or safety program where the rules or programs exceed industry standards. Generally, following industry standards would be evidence of due diligence. Employers who strive to exceed industry standards should not be judged more harshly than those employers who seek to simply comply with industry standards. But there is a difference between setting standards and following them.

[218] In this case, the trial judge was obviously concerned that Dial's 15 metre standard was not effectively communicated to its workers. Dial denied having any rule of 7 metres, or that anyone had been trained to that effect. Having rules is of little use to an employer in establishing due diligence, if those rules are not clear and communicated to those expected to follow them. That was Dial's problem in this case.

[219] The case might have been differently decided had Richardson observed a 7 metre distance. That would have been consistent with the CNRL safe work permit, industry standards, the ERCB requirement, and what Mr. Shewchuk described as a safe distance.

[220] But Richardson, for whatever reason, ignored even that standard, and parked some 3 feet from the tank. The case is not about the appropriateness of a 15 metre rule and Richardson's failure to follow it. The case is about whether Dial failed to ensure as far as reasonably practicable Richardson's and Chamberlain's safety while performing its work.

[221] Dial argues that the trial judge erred in "imposing" a requirement on Dial to explain "why" a safety rule was important. The trial judge's reasons certainly contain his comments on what he viewed as inadequacies in Dial's training of its workers. He was understandably struggling with why an experienced worker like Richardson would have ignored or deliberately breached rules which, if followed, would have kept him and Chamberlain safe: park the truck 7 (or better yet) 15 metres from the tank, and ensure that the truck was properly grounded and bonded to the tank.

[222] Mr. Brent Marchessault, a safety expert called by Dial, testified as to training methods and techniques and warned about overloading workers with too much technical information. Certainly, Richardson's evidence was that he was aware that the condensate he was hauling and loading was explosive and extremely flammable. He was aware that hydrocarbons could explode. He knew that he was required to park the truck a safe distance from the tank. There was no evidence that he had any working understanding of the risks of static electricity in the loading operation, the purpose for grounding the truck and bonding it to the tank, or the extent of the risk of vapours being ignited by a running engine.

[223] I am somewhat in agreement with Dial's argument in this regard. 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.

[224] Undoubtedly, the effectiveness of a particular training program can only be assessed by reviewing the materials used in the training program, and the methods and techniques of delivery of the training program to the employees. But the trial judge was considering the effectiveness of Dial's training of Richardson, not Dial's program generally. Marchessault could only comment on Dial's program and could offer nothing with respect to Richardson's training.

[225] Thus, despite all of Dial's able arguments, I do not find that the trial judge's conclusion as to the establishment of clear safety rules was unreasonable, or unsupported by the evidence.

Failing to Train and Supervise

[226] The trial judge concluded at para. 102:

> I find no evidence to establish what the precise goals and parameters of office orientation training were to be. Likewise, there was no formalized approach to field training and its follow-up. Field training was delegated to senior driver employees and was not conducted, apparently at any time, by senior management. As we have seen, the field training was variable in its breadth of content. Further, while there was a consultative process between management and the senior drivers, the primary decision as to fitness to perform effectively lay with the senior drivers, not management. Finally, and again while there was an informal system of management follow-up, the formal system of Task Observations appears not to have been followed. What informal follow-up there was, I find was inconsistent at best.

[227] Dial complains that the conclusions on training are "intertwined" with the conclusion in respect of a lack of clear explicable rules. There is nothing wrong with that. The fact that there were no clear explicable rules may be evidence of a failure to train. How do you provide adequate training if there are no rules to follow, or no clear rules to follow? This is not a separate charge or count; the learned trial judge characterized these failings as the "essentials" or "precursors" to the single count of failing to ensure the health and safety of Dial's workers. The essence of Dial's argument in this regard is that the trial judge's conclusion that Dial had no clear safety rule was unreasonable and not supported by the evidence. Thus, it would be unreasonable to rely on the finding that there were no clear safety rules as being evidence of a failure to train.

[228] Whether or not there is merit to this argument is moot: I have ruled that the trial judge's finding that there was no clear distance rule was not unreasonable.

[229] At para. 97, the trial judge concluded:

> In light of all of this, I am of the view that had Dial's employees been properly inculcated with clear and inviolate rules and properly supervised, this incident might have been avoided.

[230] Were the trial judge's conclusions on training and supervision unreasonable? His conclusion that there were no precise goals and parameters for the office orientation and subsequent training is supported by the evidence. Richardson, Chamberlain and Griffiths all testified as to the orientation they had received from Levi Gauss. That training differed significantly from the program as described by Gunderson. It was open for the trial judge to make that conclusion on the evidence before him.

[231] Similarly, the trial judge's conclusion that there was no formalized approach to field training and its follow-up is supported by the evidence. There was no program to be followed in the field training. 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.

[232] 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.

[233] In my view, the trial judge's conclusions as to Dial's failure to train were not unreasonable.

[234] There is no doubt that Dial's safety system has a lot to commend itself. That Dial had a skilled person like Gunderson in charge of safety is to its credit. The holding of a Certificate of Recognition (COR) is noteworthy. That Dial had external audits and performed well in those audits demonstrates a commitment to safety. Dial and its senior management, and in particular Mr. Thesen, were aware of their responsibilities, and devoted financial and human resources to these responsibilities.

[235] There is no doubt that Richardson received training, from Gauss, Griffiths and Cave. There is no doubt that Richardson knew of the requirement to ground the truck, bond it to the tank, and keep it at least 7 metres from the tank when he was filling it. There is also no doubt that Richardson failed to follow all of these requirements, and one of those failures, or perhaps both of them, caused the explosion that injured him and Chamberlain.

[236] But the issue here is whether Dial satisfied the onus of proof on it to establish that notwithstanding the explosion and injuries to two of its workers, it had been duly diligent in ensuring the health and safety of its workers.

[237] Dial complains that the trial judge accepted the evidence of Richardson over other

witnesses. This is an area that is in the purview of a trial judge. A trial judge has a significant advantage in assessing credibility over someone who is merely reading a transcript. He is entitled to significant deference in that regard. He made clear findings that Richardson was largely a credible witness.

[238] Dial expended significant energies over the course of the trial to impeach Richardson's credibility. A lot of that related to whether or not Richardson had exaggerated his injuries in an accident he had shortly before the explosion. The trial judge was alive to the challenges to Richardson's credibility, and made unfavourable comments about him in some respects. But he had the opportunity to see and hear Richardson give evidence and be cross-examined, and he basically accepted Richardson's evidence as to his training.

[239] The trial judge also made unfavourable comments about Levi Gauss and the training he provided to Richardson. Again, the trial judge had the advantage of seeing and hearing Gauss testify for both the Crown and for Dial.

[240] These were findings that were open to the trial judge to make. Richardson's evidence as to the orientation he was given by Gauss was not significantly different from Gauss's own description of the orientation as best he could remember it. There were significant similarities between the orientation testified to by Richardson, and the orientations testified to by Griffiths and Chamberlain. There was clearly evidence of inadequate training by Gauss which could be accepted by the trial judge.

[241] The one area where the evidence of Gauss and that of Richardson and Chamberlain differed significantly was as to whether Gauss had been notified of the damaged ground connection, and whether Gauss had failed to see to timely repairs. In this area, the trial judge made no finding as to whether he accepted Gauss's denial as to such knowledge, or Richardson and Chamberlain's evidence that Gauss was aware of the problem.

[242] In my view, it was not necessary for the trial judge to decide this issue one way or the other. There was no doubt that the grounding cable was damaged, and was not working on the day of the explosion. There is no doubt that both Richardson and Chamberlain were aware of that, yet still proceeded to operate the truck pumping system when the truck was neither grounded nor bonded to the tank. Whether Richardson had the skill or knowledge as to how to make the necessary repairs himself is not clear.

[243] But there was also evidence from Richardson that Gauss had trivialized safety issues, including the need to actually ground the truck by suggesting that Richardson could simply make it look like it was grounded. And Richardson testified as to his fears of not being paid if he took time to fix things or his fears as to what might happen to his job if he insisted on his rights to a safe work environment and to refuse to perform what he might consider to be unsafe work.

[244] There was evidence that the trial judge could have accepted in regard to the adequacy of

Gauss's training of Richardson. His unfavourable credibility findings as to Gauss's evidence leads to an inference that he accepted Richardson's evidence as to Gauss's knowledge of the damaged ground connection. His express findings in regard to supervision and training by Gauss in particular cannot be described as unreasonable.

[245] The trial judge was obviously unimpressed by the similarities in the evidence of Gunderson, Thesen, Cave and Gauss as to what the trial judge characterized as the "safety mantra": maintain the distance from the tank (15 metres), ground and bond the units, install the chock blocks and stay at the unit. He clearly felt that this evidence was contrived, at least as it related to Gauss. Having regard to his assessment of Gauss's credibility, it cannot be said that his overall impression of the safety "mantra" was unreasonable, when coupled with the evidence of Richardson and Griffiths that they had not been trained in that fashion.

[246] Finally, Dial complains that the trial judge's assessment of Richardson was unreasonable and speculative.

[247] At paragraph 45, he stated:

> I have no doubt that Richardson was experienced when he was hired by Dial. I believe he certainly would not have projected much doubt about this to Dial. In addition, he was, on his evidence, trained and supervised, to a greater or lesser degree, for about three weeks. I find he was generally aware of many of the dangers inherent in dangerous goods handling. I also find, however, that he was over confident in his knowledge and his abilities and was somewhat lazy in his work habits. Most importantly, I assess Richardson as an individual who is resistant to any suggestion that he lacks knowledge or ability. This became clear on cross-examination where he readily agreed to knowledge and understanding which, on all the evidence, and my assessment of him, I seriously doubt he entirely possessed. I do not believe he had a clear appreciation of how vapours could be created. I do not believe he clearly understood how these vapours could migrate. I do not believe he clearly understood that these vapours were highly volatile and could be ingested and ignited by his truck engine. I do not believe he had any real, in depth understanding of the significance of a grounding system, or how moving fluids create static electricity or again, how highly susceptible to static ignition these vapours are. Had he actually known and understood these matters clearly, his actions on this occasion, which seriously endangered both his and Chamberlain’s lives, would not be characterized, as they are by the Defence, as carelessness or indifference, but rather, could only have been considered suicidal.

[248] Whether these are described as speculations or inferences, I am somewhat in agreement with Dial’s argument in this regard. The trial judge should not have embarked on a psychological assessment of Richardson. There was no evidentiary basis for him to conclude that Richardson

typically took shortcuts, or that Dial should have been aware of such a proclivity.

[249] But these conclusions are, in my view, superfluous to whether or not Dial had been duly diligent. As noted above, the trial judge was trying to understand why Richardson did what he did, in the face of his admitted knowledge of some of the dangers, and his knowledge of the distance and grounding requirements. There was still evidence that Richardson had not been properly trained – the 15 metre rule was not known to him, and Gauss's orientation was ineffective, to say the least. Griffiths, who was training him, followed no particular method in the training process, and there was little if any basis for Dial to conclude that Richardson was an appropriate person to be involved in the training of a new employee such as Chamberlain.

[250] Burrows J. recently dismissed an appeal from summary conviction on occupational health and safety charges. In ***R. v. Kal Tire Ltd.***, 2008 ABQB 551, a worker had been injured when he climbed over a guardrail to dislodge some rubber that had wrapped around a roller. The worker's actions were in violation of the employer's safe work practices, although the worker had not been trained on such practices, and the instructions were dated and had become ambiguous by the time the accident occurred.

[251] ***Kal Tire Ltd.*** had been convicted of failing to ensure that the worker was trained in the safe operation of the equipment the worker was required to operate. Because of that conviction, the charge under the general duty clause was stayed.

[252] In dealing with whether the verdict was unreasonable, Burrows J. held at para. 24:

> 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.

[253] This case has many similarities to the facts in ***Kal Tire***.

Conclusion on Unreasonable Verdict

[254] I do not accept any of Dial's submissions that the learned trial Judge's verdict was unreasonable. As a result, Dial's appeal from conviction on Count 1 must be dismissed.

Count 3

[255] The learned trial Judge also convicted Dial on Count 3 of the information, that Dial had

failed to ensure that hot work was not performed in a location where a flammable substance is or may be (i) in the atmosphere, or (ii) stored, handled, processed or used.

[256] With respect to that count, he ruled:

> Finally, I am urged to convict Dial in respect of Count 3 that is, that Dial allowed hot work to be performed on this occasion. I do not intend to analyze the arguments of either the Crown or Defence. Simply put, I see this offence in much the same terms as Count 1. Dial, as a result of its failure to establish clear safety rules, to train the workers effectively and ultimately to enforce the rules, did not ensure that hot work was not performed. The offence is therefore made out. This failure however, arises from the identical circumstances which found conviction on Count 1. Therefore, on the principles of ***R. v. Kienapple*** (1975), 1 S.C.R. 729, I direct a conditional stay in respect of Count 3. (at para. 119)

[257] In regard to this count, the evidence of Mr. Marchessault was likely the most helpful. His evidence was to the effect that having a running engine outside 7 metres of a source of flammable vapours would not be considered hot work. On cross-examination, he confirmed that bringing a running engine within an unsafe distance from a source would be hot work:

> 14 Q Let me ask you this, sir. Apart from what's on the
> 15 face of that permit, isn't it the case that bringing a
> 16 combustion engine onto the lease site constituted the
> 17 introduction of hot work to the work process?
> 18 A It depends on where it was supposed to be brought onto
> 19 the work site and the location in reference to the
> 20 materials on the site.
> 21 Q I appreciate the distinction but it is introducing hot
> 22 work. Correct?
> 23 A It could if it's put in a location close enough to the
> 24 -- the flashpoints and the flammable liquids identified
> 25 for the site.
> 26 Q And I guess, rather than dancing around the issue, that
> 27 would depend upon employees bringing that combustion
>
> page 1473
>
> 1 engine onto the site being properly 1 trained and
> 2 instructed about safe distances. Correct?
> 3 A Yes.
> (At page 1473 & 1474 of the transcript)

[258] There was ample evidence for the trial judge to conclude that the truck was too close to the tank. The evidence established that it was only 3 metres from the tank. Richardson's evidence was that he was aware of a 7 metre safe distance rule. He was evasive on the point as to what his actual distance was from the tank and it was clear that he was attempting to minimize his own responsibility for the explosion. Nevertheless, there was no credible evidence to suggest that the truck was parked in a spot which met CNRL's safe work permit, the ERCB's 6 metre rule, or industry's 7 metre rule. It was not unreasonable, therefore, for the trial judge to conclude that hot work had been performed.

[259] That finding would satisfy proof of the *actus reus*, as it was never disputed that Richardson and Chamberlain were engaged in Dial's work at all relevant times.

[260] The issue for the trial judge would therefore turn to whether or not Dial had established on a balance of probabilities that notwithstanding the performance of hot work, it had been duly diligent.

[261] In that regard, there was the same evidence as to Dial's failure to establish clear safety rules, inadequate training and inadequate supervision. The trial judge's decision on Count 3, while brief, is clear that Dial had not proven that it had been duly diligent.

[262] The decision on Count 3 was not argued at length, likely on the basis that if I were to allow Dial's appeal on Count 1 because the learned trial Judge misapplied the law as to due diligence, Count 3 would follow suit. And if I dismissed Dial's appeal on Count 1, having found no overriding error or unreasonable verdict, the same result would apply to Count 3. As it had been *Kienappled*, a dismissal of the appeal on Count 1 would make any appeal on Count 3 moot.

[263] While there may be some circumstances where the Count 1 conviction might be overturned but the Count 3 conviction upheld, as I have dismissed the appeal against conviction on Count 1, such circumstances need not be explored.

[264] As a result, Dial's appeal from conviction on Count 3 is also dismissed.

Summary

[265] With respect to the legal arguments made on Dial's behalf, as to whether the trial judge erred by failing to order particulars of Count 1, I agree with Dial that particulars should have been ordered. However, Dial failed to establish that it was in any way prejudiced by the absence of formal particulars or that the absence of formal particulars impacted on its ability to defend itself against Count 1.

[266] As to the tests for proving the *actus reus* and for proving a due diligence defence, I found that while the learned trial judge made no error adverse to Dial in determining what the *actus reus* of the offence was, and the appropriate burden of proof on the Crown in that regard. I

approved the "accident as *prima facie* breach theory. If anything, the learned trial judge placed too high a burden on the Crown with respect to proving the *actus reus* before turning to Dial for its due diligence defence.

[267] As to the learned trial judge's reasons on the test for due diligence, he clearly misspoke in one instance on the appropriate test. However, it was clear from the whole of his reasons that he was not operating under any mistaken views as to the availability of that defence, or the extent of the burden of proof on Dial. In any event, I found that there had been no miscarriage of justice and that section 686(1)(b)(iii) of the *Criminal Code* would apply. He may have overstated the applicability of ***Wyssen*** in Alberta, but his comments as to the employer being a virtual insurer of workplace safety did not have any material impact on his reasons.

[268] As a result, Dial failed to establish that the learned trial judge made any errors of law sufficient to warrant appellate interference with his decision.

[269] With respect to Dial's argument that the trial judge's verdicts were unreasonable, I have found that Dial failed to establish any errors or unreasonableness which affected the verdict. The learned trial judge may have imposed an unnecessarily high burden on the Crown with respect to proof of the *actus reus*. In this case, in my view, that could have been satisfied by proof of the explosion and the circumstances immediately surrounding it. The trial judge appeared to be of the view that the Crown also needed to prove, beyond a reasonable doubt Dial's "failure, or negligence, of Dial's management to establish clear, explicable rules and to adequately train and supervise its staff in the interest of staff safety"

[270] His reasons show consideration of the relevant evidence on these issues, assessment of credibility issues, and make fact findings which are supported by the evidence. Having made these fact findings, he concluded that Dial had failed to establish a due diligence defence, which was not surprising having regard to the findings of fact he had made. His reasons are sufficient to allow meaningful appellate review, and satisfy any requirements under ***Sheppard***.

[271] Dial was unable on this appeal to demonstrate that the trial judge's reasons were unreasonable.

[272] While there were areas in the reasons that I may disagree with, namely that training was inadequate because the "whys" for certain rules were not adequately explained, and the trial judge's speculation as to Richardson's character and predilections, there was ample other evidence which the trial judge referenced to explain his findings as to Dial's failure to establish clear safety rules, and its failure to properly train and supervise its workers.

[273] I might have addressed the evidence and the issues in a different way than did the trial judge, but that is not the test for review of a summary conviction by this Court. The trial judge is entitled to deference, especially with respect to credibility assessments.

[274] I might not have been as critical of Dial's management. There was strong evidence of Dial's commitment to safety and the significant efforts it had made to fulfil its legal and moral obligations to its workers. A major reason why Dial was convicted was that Richardson was found credible and Levi Gauss was not. Gauss had played a major role in Richardson's training. His evidence displayed a lack of diligence in safety matters, other than getting pieces of paper signed. His orientation of Richardson was inadequate, and his attitude towards the safety materials ("read them when you have time") was inadequate to say the least.

[275] But responsibility did not stop there. Despite the efforts made by Dial and its management, there were obvious flaws in their system. Too much was left to chance, such as the training program of junior personnel by senior drivers. There was inadequate management follow-up on the quality of such training.

[276] Most significant to me was the fact that Richardson was put in the position of training Chamberlain, with no assessment of his ability to train someone else as to safe working practices. Richardson's errors had tragic and devastating consequences for him and for his colleague.

[277] Had only Richardson been injured in the explosion, the result in this case might have been different. But Richardson was entrusted with Chamberlain's safety as they worked together, and was entrusted with Chamberlain's training so that he could eventually work safely on his own. It is obvious from the events which occurred that Dial's trust was unfounded. Dial argued that it had no basis to suspect that Richardson might ignore safe working rules, or cut corners. That may be correct. But in the same vein, there was no evidence put forward that Dial had reason to believe that Richardson would be an appropriate trainer.

[278] Dial cannot sit back and put all of the blame for this incident on Richardson. Richardson did not set out to deliberately cause an explosion and injure himself and Chamberlain. ***Dofasco***, *supra*, recognizes that responsibility is usually shared between the worker and the employer when there has been a failure in the employer's system. Here, Dial failed to prove that it had been duly diligent in its training of Richardson.

Result

[279] Dial's appeals from conviction are dismissed. The parties should make arrangements for the hearing before me of Dial's appeal against the sentence imposed by the trial judge.

[280] I am indebted to counsel for their thorough and able arguments in this matter.

Heard on the 11th and 12th days of June, 2008.
Dated at the City of Edmonton, Alberta this 2nd day of January, 2009.

Robert A. Graesser
J.C.Q.B.A.

Appearances:

Brian M. Caruk & Marshall Hopkins
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for the Crown

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David G. Myrol
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Corrigendum of the Reasons for Judgment

of

The Honourable Mr. Justice Robert A. Graesser

Please note that pages paras. 70 & 71 were changed from:

[70] In ***R. v. Lonkar Well Testing Ltd.***,(18 April 2008), Grande Prairie (Alta. P.C.), Spence P.C.J. held at para. 26:

> The consequence of a framework that places an employer in the role of someone who is responsible for ensuring statutory and regulatory compliance is that it offers a clear pathway for delineating the actus reus, especially in cases involving the breach of a general duty provision. This approach is a mechanism relied upon in accordance with the regime of strict liability that aims to hold an employer strictly responsible for complying with public interest legislation. Therefore, once a breach has been established, prima facie, by virtue of an accident in the workplace despite a statutory regime designed to prevent such occurrences, then it is up to the employer to prove that it complied with the regulations and did all that it reasonably could to prevent the accident from happening.

[71] This approach was endorsed in ***R. v. Moran Mining and Tunneling Ltd.***, (2006), 70 W.C.B. (2d) 422 (Ont. Sup. Ct.), where the trial judge found that "the fall itself" established the actus reus of the offence. (At para. 46)

To now read as follows:

[70] The consequence of a framework that places an employer in the role of someone who is responsible for ensuring statutory and regulatory compliance is that it offers a clear pathway for delineating the *actus reus*, especially in cases involving the breach of a general duty provision. This approach is a mechanism relied upon in accordance with the regime of strict liability that aims to hold an employer strictly responsible for complying with public interest legislation. Therefore, once a breach has been established, *prima facie*, by virtue of an accident in the workplace despite a statutory regime designed to prevent such occurrences, then it is up to the employer to prove that it complied with the regulations and did all that it reasonably could to prevent the accident from happening.

[71] Spence P.C.J. agreed with Pahl P.C.J.'s analysis of ***Wyssen*** and ***General Scrap*** in ***R. v. Lonkar Well Testing Ltd.***, (unreported, 18 April 2008, Grande Prairie P.C. (at para. 26)). This approach was also endorsed in ***R. v. Moran Mining and Tunneling Ltd.***, (2006), 70 W.C.B. (2d) 422 (Ont. Sup. Ct.), where the trial judge found that "the fall itself" established the *actus reus* of the offence. (At para. 46)

Corrigendum of the Reasons for Judgment

of

The Honourable Mr. Justice Robert A. Graesser

Please note the citation line has changed from: **R. v. Rose's Well Services Ltd., 2009 ABQB 1**, to now read: **R. v. Rose's Well Services Ltd. (Dial Oilfield Services), 2009 ABQB 1**.