

## **Working Paper 40:**

### **An Evaluation of Certain Criticisms of the NSW OHS Act**

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#### **ABSTRACT:**

This working paper is part of a proposed larger work on individual culpability for corporate OHS offences. It is therefore not fully self-contained. It may be useful to read first the companion working paper, “The Gretley Coal Mine Disaster: Reflections on the Finding that Mine Managers were to Blame.” The present paper deals with some of the arguments mounted by business groups following the Gretley convictions. Comments and corrections are invited.

*November 2005*



## About the Centre

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- produce regular reports on national and international developments in OHS regulation;
- develop the research skills of young OHS researchers; and
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## Introduction

The Gretley defendants were found guilty in August 2004. They were sentenced in March 2005. In an unrelated case another mining company, Powercoal, and one of its managers, were found guilty in November 2004. The companies concerned mounted appeals to the NSW Court of Appeal court, arguing that the NSW OHS Act was unconstitutional and a radical departure from established legal rights and principles. At the time of writing, one of these appeals has been dismissed<sup>1</sup>.

The convictions also triggered a far more widespread response. An organisation calling itself Employers First mounted a campaign specifically against the NSW legislation<sup>2</sup>. It claimed that

“There is no doubt that employers/directors/managers who have failed to provide perfectly safe workplaces with zero risk, will be sent to gaol – after having been deemed guilty before they even go to court, denied the presumption of innocence and the right to a jury trial, suffered the reverse onus of proof and the suicidal job of trying to prove the impossible defences under the Act”<sup>3</sup>

The Institute of Public Affairs, which describes itself as Australia’s leading free market think tank, also weighed into the fray, complaining that under existing NSW law, managers “are presumed guilty until proved otherwise. Incredibly, they have to prove they are innocent”<sup>4</sup>.

The Australian Chamber of Commerce and Industry (ACCI) released a major policy statement profoundly critical of occupational health and safety legislation in Australia, both the way in was drafted and the way it was being interpreted. The Chamber’s statement did not refer specifically to Gretley, but the text emphasized the situation in the state of NSW. ACCI’s statement was described as a blueprint for the next ten years and among the reasons it gave for releasing its blueprint at this time was the following:

“There is a lack of balance in some existing legislation and court decisions. The trend across jurisdictions has been to broaden legal duties beyond reasonable limits, increase penalties, extend liability to individuals in the management and supply chain and to seek to punish rather than prevent”<sup>5</sup>.

The ACCI’s statement is the most detailed criticism to have been made in the campaign and this chapter will seek to evaluate some of its arguments. I address in particular its claims about:

- reasonableness
- the reverse onus of proof in criminal matters.
- absolute duties

## Reasonableness

It will be recalled that the standard of reasonable foreseeability that was applied in the Gretley case was such that most ordinary mine managers would not qualify as reasonable. The ACCI took up this theme:

“The concepts of ‘reasonably practicable, ‘foreseeable’ and ‘control’ have been significantly distorted in several Australian jurisdictions, to the point where they no longer reflect what is reasonable, practicable and achievable”<sup>6</sup>

It continued: “To foresee the unforeseeable, to know the unknowable and to control the uncontrollable is simply not reasonable”.

These statements were obviously inspired by the situation in NSW and specifically the findings in the Gretley prosecution. ACCI is implicitly arguing that the Gretley judge was expecting the managers and surveyor to foresee the unforeseeable, or perhaps, more precisely to foresee what was not reasonably foreseeable.

It is important to note that this issue goes beyond the Gretley case, indeed beyond OHS law. The law of negligence has moved well away from the idea of the reasonable person as simply an ordinary person. The point was made very dramatically in the high court some decades ago<sup>7</sup>.

“There has been a tendency in cases of this type to forget the legal standard of reasonable care, and to regard the standard employer as a person possessing super-human qualities of imagination and foresight.... it is wrong to take as the standard of comparison a person of infinite-resource-and-sagacity.”

According to another judge, the hypothetical reasonable person has been “attributed with the agility of an acrobat and the foresight of a Hebrew prophet”<sup>8</sup>.

Most recently, in 2005, a High Court judge again bemoaned the state of Australian law in this area. An earlier judgement by three justices of the High court had “held that any risk, however remote or even extremely unlikely its realisation may be, that is not far-fetched or fanciful, is foreseeable”.<sup>9</sup> Reluctantly, he said, he was bound by this rule, and he went on:

“With enough imagination and pessimism it is possible to foresee that practically any misadventure, from mishap to catastrophe is just around the corner... The line between a risk that is remote or extremely unlikely to be realised and one that is far-fetched and fanciful is very difficult to draw. The propounding of the rule relating to foreseeability in the terms (above)... requires everyone to be a Jeremiah (the Judean prophet of doom)”

Given that there has been no shortage of judicial critics of the way in which the reasonable person test has been interpreted, the question is: why has this happened? Why have the reasonable and the ordinary person diverged to such an extent?

One of the purposes of the law of negligence is to ensure that when a person is harmed as a result of someone else’s negligence, the person who is harmed receives

compensation from the negligent party. Those who run the risk of being sued for damages in this way are very often insured. Actions for damages can thus be seen as distributing the loss by shifting it to the ensured party, and thence to all those in the insurance pool. It has been argued that this has become the primary purpose of the law in this area<sup>10</sup>. The higher the standard of care that the courts require, the greater the chance that the defendant will be found negligent and hence the greater the chance that the victim will receive compensation. There is therefore a tendency over time for courts to impose higher standards of care in order to achieve this outcome. Judges have acknowledged that this is what they are doing and have argued this is “ a convenient and desirable means of achieving this policy objective”<sup>11</sup>. But , as Luntz and Hambly note<sup>12</sup>, when used as a justification to achieve this end, the test becomes “an idealised ethical standard, rather than the behaviour of the actual ‘man in the street’”.

### **An aside on the litigious society**

The preceding discussion helps account for the “culture of litigation” which has arisen in contemporary society. The former chief justice of the High Court, Sir Harry Gibbs, has written critically about this culture and his views are worth quoting at some length<sup>13</sup>.

“Until after the first half of the twentieth century, people were disposed to accept mischance as part of life... There has been a steady development in the community of the belief that if someone suffers an injury someone else must be responsible and must be liable to pay compensation... The intoxicated customer of a club who goes outside and is struck by a motor vehicle sues the club; the worker who is mugged while leaving his place of employment sues the employer; the person injured while playing sport sues the organiser of the game or the person who devised the rules; the youth who sustains injury by diving into shallow water sues the local Council or the owner of the land from which he dived. The injured person does not put it down to bad luck, or blame himself, but blames someone who can be sued.”

There is he says, an “unhealthy culture of blame, with (an) emphasis on rights rather than responsibilities”.

Gibbs goes on to deride a section of the legal fraternity which has exploited this situation:

“The culture of litigation has been fostered by some lawyers who, whenever a mishap occurs, advertise for potential claimants and encourage them to sue or to join in a class action. These activities would once have been regarded as unprofessional... It would, however, be too much to hope that any ban on advertising or touting for work by lawyers would change the culture of blame which is now well established in society. The lawyers jumped on the bandwagon; they did not start it.”

Gibbs’ comments suggest that the problem is one of moral decline on the part of the citizenry, a refusal to accept responsibility for our own part in misfortune that befalls us, even an unwillingness to accept that life is inherently risky.

He is not alone in making these points. Social anthropologist Mary Douglas observes: “we are ... almost ready to treat every death as chargeable to someone’s account, every accident as caused by someone’s criminal negligence, every sickness a threatened prosecution. Whose fault? is the first question”<sup>14</sup>

Gibbs is no doubt right when he talks of the rise of a culture of litigation, but his suggestion, and that of Douglas, that this represents a moral decline, misses an important point. When people suffer accidents they may incur substantial financial loss. Were there a universal accident compensation scheme, they could apply to this scheme to make good the loss. There is no such scheme in this country, so the only way in which they can make good the loss is if a court finds that some other party, preferably an insured party, is responsible. In short, however imperfectly, the law of negligence is filling a gap in the welfare system. The so called litigious nature of modern society is better explained by these institutional arrangements than it is by the moral failings of modern individuals.

Despite the analysis which Gibbs offers of the culture of litigation in terms of moral failure, he recognises that this culture could be combatted by replacing negligence law with a no fault injury compensation scheme<sup>15</sup>. This would be fairer than the current system, he says, for at present, an injured person who can find some one to blame is compensated while the person who can’t, receives nothing.

There is, then, an irony here. The real reason for the culture of litigation is not the moral decline of the citizenry. Nor is it the ambulance chasing lawyers. It is the judges themselves who have created this culture. Their purpose has been to compensate people for injury in circumstances where they would otherwise receive nothing, and to achieve this end they have developed the fiction of the reasonable person who is considerably wiser than the ordinary traveller on the London underground or, as one Australian judge put it, “the hypothetical person on the hypothetical Bondi tram”<sup>16</sup>. By finding that duty holders have failed to comply with an idealised standard, judges have been able to ensure that the financial losses associated with injury are distributed and do not fall disproportionately on the injured party. The culture of litigation is an unintended consequence of this policy.

### **The reasonable person in OHS law**

Whereas a major aim of the law of negligence discussed above is to ensure that injured parties are compensated, occupational health and safety law uses the concept of negligence to determine liability for punishment. Organisations must do what is reasonably practicable. Failure to do so is negligent, and is punishable. Senior managers must exercise due diligence. Failure to do so is negligent, and punishable. In short the civil law concept of negligence has become a basis for criminal liability<sup>17</sup>.

Consider now the consequences of this transfer from the civil to the criminal arena. In civil actions for damages, to say that one party is at fault for failure to exhibit exceptional foresight achieves the policy purpose of spreading the loss. It does not result in any social condemnation or stigma of the party said to be at fault. The idea of fault here is somewhat artificial. But where such a finding of fault can result in

punishment, particularly the punishment of an individual, as in the case of OHS law, matters are different. To say that a person is at fault for failure to exhibit exceptional foresight, does indeed smack of injustice. To punish senior managers in these circumstances does seem unfair.

To put this in the context of the Gretley case, the reasonable manager and the reasonable surveyor, whom the judge in the Gretley prosecution had in mind, were people of unusual foresight. Ordinary managers and surveyors in the circumstances would probably have behaved the same way that the Gretley managers and surveyors behaved when initially provided with the plans by the department, that is, they would have accepted them as accurate. To punish the individual Gretley defendants for behaving in this way seems unfair. However, the situation was quite different in the days immediately prior to the accident when the indicators of danger began to emerge. At this point the risk was not only reasonably foreseeable, it was foreseen. Had the prosecution focused on this, in the way that the earlier inquiry did, the divergence between the reasonable and the ordinary mine official would not have become the issue that it was. Individuals might then have been convicted, without the sense of injustice that surrounded the judgments actually made.

To summarise, the comments made by the Australian Chamber of Commerce about holding individuals culpable for failure to live up to an idealized reasonable person standard have merit. There is indeed a need for some modification in the law in this respect. Later chapters will take up this question and propose an alternative.

### **The reverse onus of proof**

The campaign by the ACCI and other parties expressed great concern about the so called reversal of the onus of proof in the NSW OHS Act. As noted earlier, the Institute of Public Affairs expressed outrage about this. Under the Act, it said, managers “are presumed guilty until proved otherwise. Incredibly, they have to prove they are innocent”. This, it was suggested, was contrary to the basic principles of criminal law. The ACCI policy paper included the following comment:

“Nor should there be a deemed guilt or reverse onus of proof in any civil or criminal proceedings for OHS breaches, nor any other basis on which employers, directors, management personnel or employees are treated less favourably than the defendants in prosecutions under any other equivalent law or legislation... All parties charged with OHS offences should be accorded natural justice and, in criminal cases, the standard presumptions and protections of the general criminal law”<sup>18</sup>

There are two ways in which the NSW Act reverses the onus of proof. The first is in relation to major duty holders, such as employers. These will normally be corporations. The second is in relation to individual senior officers of the corporation. I deal, first, with the corporate level.

A central provision of Section 8 of the Act is the following:

“An employer must ensure the health, safety and welfare at work of all employees of the employer”<sup>19</sup>

This is for the prosecution to prove, and it must do so according to the normal criminal standard, beyond reasonable doubt. Once this is established the Act Section 28 provides the following defence

“It is a defence to any proceeding against a person for an offence against a provision of the Act or the regulations if the person proves that

- (a) it was not reasonably practicable for the person to comply with the provision, or
- (b) the commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision”<sup>20</sup>

It is subsection (a) that is relevant here. The defendant does not need to establish the case with the rigour that is imposed on the prosecution. It must prove its point only to the civil standard, that is, on the balance of probabilities<sup>21</sup>. In other words it must show that its claim is more probable than not. This is not an onerous requirement. If it truly was not reasonably practicable for the defendant company to comply with the section, it should be relatively easy for it to establish the point. Nevertheless, in theory the situation involves a stark reversal of the onus of proof, with defendants required to establish their innocence<sup>22</sup>.

The reason for reversing the onus in NSW appears to be largely a practical one.

“(I)t is more efficient for the holder of the duty of care rather than the prosecution to have to establish what was reasonably practicable. A duty holder could be expected to know more about the costs and benefits of the various alternatives open to him or her at any time, than anyone else.”<sup>23</sup>

The reverse onus also applies in relation to certain personal defendants. Section 26 deems certain individuals to be guilty whenever the corporation is guilty, in the following terms:

- (1) If a corporation contravenes ... any provision of this Act ... each director of the corporation, and each person concerned in the management of the corporation, is taken to have contravened the same provision unless the director or person satisfies the court that:
  - (a) he or she was not in a position to influence the conduct of the corporation in relation to its contravention ..., or
  - (b) he or she, being in such a position, used all due diligence to prevent the contravention...

The fact that individuals are deemed guilty in this way means that there is no need for the prosecution to prove anything, except that the person was concerned in the management of the corporation. This must be proved beyond reasonable doubt. In the Gretley case, managers and surveyors were found to be persons concerned in the management of the corporation, but the prosecution failed to convince the judge that shift managers were such persons.



Section 28 also provides a defence. The relevant element is that the defendant used *all due diligence* to prevent the offence by the corporation, that is, exercised an appropriate level of care. This is for the defendant to prove, but again, he or she needs only do this on the balance of probabilities to avoid conviction. In principle, this should be relatively straight forward, if the defendant did indeed use all due diligence. Certain other Australian jurisdictions reverse the onus of proof in this way so NSW is not unique in this. Again the justification for the reversal would seem to be that it is easier for the defendant than the prosecution to present the necessary information.

It is clear from the above discussion that the phrase reverse onus of proof is somewhat misleading. It suggests a transfer to the defendant of the burden of proof normally carried by the prosecution. The situation is not symmetrical however. The defendant does not have to prove innocence as conclusively as the prosecution must normally prove guilt.

In any case, it can be argued that the matter is of little practical significance, at least it appeared not to be in the Gretley case. This is so because the Gretley trial did not work in the way formally envisaged in the Act. Consider first the corporate defendants. The judge did state formally that “the defendants have failed to discharge the onus placed on them” of proving that it was not reasonably practicable to ensure safety<sup>24</sup>. But the reality was that the prosecution had not simply left it to the defence to establish this point. It had shouldered the onus *itself* and taken very active measures to prove that it *was* reasonably practicable for the companies to avoid the breach. It called two expert witnesses who described what reasonable managers and surveyors would have done. Reasonable surveyors would not have relied on the plans provided by the Department and reasonable managers would have probed their surveyors actions more carefully. The judge accepted this evidence.<sup>25</sup> Furthermore he found that the evidence provided by the prosecution demonstrated that the defendants had not behaved in accordance with this model of reasonable behaviour.<sup>26</sup> In short the prosecution itself established to the satisfaction of the judge that the companies had not done what was reasonably practicable. It did not simply assume reasonable practicability and leave it to the defence to prove otherwise; it actively set out to prove that the companies had not done what was reasonably practicable and the judge found the prosecution evidence to be compelling. It can be concluded that even if the Act had formally placed the onus on the prosecution to establish reasonable practicability, the outcome of the trial would not have been much different, in relation to corporate defendants.

The situation was much the same with respect to the personal defendants. The discussion above treats the behaviour of the surveyors and managers as the behaviour of the companies. This is in accordance with the established principle that “a corporate employer can only conduct its activities through human agents such as managers, supervisors, employees and contractors”<sup>27</sup>. The company was convicted, in part, on the basis of the behaviour of these individuals. In the Gretley case this same behaviour resulted in charges against the individuals as well.

The onus of proof was formally on them to establish that they had exercised all due diligence. The judge found that that they had failed to produce any such evidence. On the contrary the evidence produced by the prosecution established that they had *not* exercised all due diligence<sup>28</sup>. As in the case of the companies, then, even if the onus

had been on the prosecution to prove that these individuals had failed to act with due diligence, the outcome would probably have been little different. In the Gretley case the issue of just where the onus of proof lay turns out to have been a red herring.

### **The reverse onus in the criminal law**

The critics assert that reversing the onus of proof, as is done in occupational health and safety law, is contrary to basic principles of criminal law. The fact is, however, that whatever the principles of the criminal law may be, in practice there are many instances where the onus of proof is reversed in order to achieve policy/regulatory objectives. It is worth outlining some of these instances, so as to put the whole debate about reverse onus in a broader context.

The NSW summary Offences Act make it an offence to live on the earnings of prostitution. How is the prosecution to prove that a person who lives with a prostitute is living on the earnings of prostitution? The issue is resolved by assuming that this is the case, unless the defendant can show that he or she has lawful means of support (See box below). In this way the onus of proof is reversed and the defendant is required to establish his innocence. Notice, moreover, that the offence is a serious one, in that the maximum penalty is 12 months in gaol. Even so, the law is willing to reverse the onus of proof in order to ensure that the provision can be effectively enforced.

#### **NSW SUMMARY OFFENCES ACT 1988 – SECT 15**

##### **Living on earnings of prostitution**

(1) A person shall not knowingly live... on the earnings of prostitution of another person.  
Max penalty: 10 penalty units or 12 months prison.

(2) For the purposes of subsection (1), a person who ...

(a) lives with or is habitually in the company of, a reputed prostitute, and

(b) has no visible lawful means of support,

shall be taken knowingly to live... on the earnings of prostitution...

unless he or she satisfies the court... that he or she has sufficient lawful means of support.

A second example from the same Act concerns the possession of knives in public places, particularly in schools. The provision makes it an offence to carry a knife unless the person concerned can provide a reasonable excuse. Here again the onus is on the accused to prove their innocence. And here again, the offence is not trivial; it can lead to 12 months imprisonment (See box below)

**NSW SUMMARY OFFENCES ACT 1988 - SECT 11C**  
**Custody of knife in public place or school**

(1) A person must not, without reasonable excuse (proof of which lies on the person), have in his or her custody a knife in a public place or a school.

Maximum penalty: 5 penalty units or, in the case of a person dealt with previously for a knife-related offence, 10 penalty units or imprisonment for 12 months, or both.

Consider, next, drug law. The law normally treats possession of a drug for the purposes of sale as a more serious offence than possession for one's own use. But how can the prosecution establish that the accused intended to sell the drugs found in his possession? In the Australian Capital Territory the problem is solved by simply assuming that any quantity of drugs above a certain threshold is intended for sale. The accused is however given the opportunity to rebut this assumption. (See box below). Again, therefore, the onus of proof is reversed.

**ACT DRUGS OF DEPENDENCE ACT 1989 - SECT 160**

(8) For the purposes of this section,  
where a person has more than a traffickable quantity of... Marijuana (100 grams)...  
in his possession,

it shall be presumed that the possession is for the purpose of sale or supply to  
another person,

but that presumption is rebuttable.

The onus of proof is also reversed for financial offences committed by company directors. Where a company is insolvent, that is, unable to pay its debts, directors have a duty to prevent the company from incurring further debts. If a company does incur a debt while insolvent, its directors are guilty of an offence unless they can prove they had reasonable grounds to think the company was solvent or, if they suspected that it was insolvent, that they took reasonable steps to prevent it trading (see box below).

## **CORPORATIONS ACT 2001- SECT 588H**

### **Defences**

(2) It is a defence if it is proved that, at the time when the debt was incurred, the person had reasonable grounds to expect, and did expect, that the company was solvent at that time ....

(5) It is a defence if it is proved that the person took all reasonable steps to prevent the company from incurring the debt.

These examples could be multiplied<sup>29</sup>. They show that OHS law is not in any way unique in placing the onus of proof on defendants to prove certain things in order to avoid conviction. The critics claim that the reversal of the onus of proof under the OHS Act is unjust. If that is so, then many other statutes are unjust in the same way. The fact is that effective law enforcement relies of placing the onus of proof on defendants in various circumstances. Governments have decided that holding senior officers personally liable for safety offences committed by their companies, unless they can show that they exercised due diligence, is an effective way of encouraging corporate compliance. Whether this is indeed the best way to achieve this outcome will be taken up in subsequent chapters.

### **Absolute liability**

The ACCI policy statement was very critical of the absolute liability imposed on employers by the NSW Act. An absolute duty, it says, is “hostile to the common law intent and to common sense”<sup>30</sup>.

What does absolute liability mean? An offence is one of absolute liability if it is defined independently of any question of fault or blameworthiness.<sup>31</sup> For example, motorists who exceed the speed limit are guilty of an offence regardless of whether they realise that they are doing so<sup>32</sup>. For the prosecution to have to prove that motorists knew what the limit was and knew that they were exceeding it would make the law unenforceable.

Absolute liability is not limited to what might be described as regulatory offences, such as exceeding speed limits. There are absolute liability offences in the traditional criminal law, offences that can result long terms of imprisonment. Suppose a person intentionally inflicts serious harm on another, but without intending to kill the victim or foreseeing that the victim might die. Suppose the victim subsequently dies. The attacker is then absolutely liable for the death and is guilty of murder even though, in a significant sense, the death was accidental.<sup>33</sup> Like it or not, absolute liability is a feature of the criminal law<sup>34</sup>.

To return to the ACCI policy statement, it quotes the following judicial comment on the absolute nature of the NSW OHS Act

“The duties imposed by the Act are not merely duties to act as a reasonable or prudent person would in the same circumstances... Under s15(1) the obligation of the employer is “to ensure” the health, safety and welfare of employees at

work. There is no warrant for limiting the detriments to safety contemplated by that provision, to those of which are reasonably foreseeable... the terms of s15(1) specify that the obligation under that section is a strict or absolute liability to ensure that employees are not exposed to risks to health or safety".<sup>35</sup>

From an employer's point of view, this is a horrifying statement. It creates the very understandable impression that the law will hold employers liable and punishable in the event that an employee is injured or killed, regardless of whether the employer is at fault.

This is an incorrect impression, and it is worth commenting on how this misconception comes about. There is a fundamental distinction in the criminal law between, on one hand, the elements of an offence that the prosecution must prove and, on the other, matters which it is for the defendant to establish. These different components are often widely separated in the legislation, with the elements the prosecution must prove towards the beginning the Act and the defences available to the defendant spelt out in sections towards the end. Nevertheless, these different components need to be read together to understand the nature of the offence. Applying this to the NSW OHS Act, the offence, as a whole, is failure to maintain a safe workplace so far as reasonably practicable. The prosecution's task is to prove that the defendant breached its duty to maintain a safe work place. It does not have to consider whether the defendant is at fault. In this particular sense the duty is absolute. It is then for the defendant to establish, if possible, that it was not reasonably practicable to avoid the breach. In other words, it is for the defendant to establish that it<sup>36</sup> was not at fault, always remembering that this need be done only on the balance of probabilities, not an especially onerous burden. The offence as a whole is thus not one of absolute liability; a defendant will only be found guilty if the breach was indeed its fault. To repeat, the duty to maintain a safe workplace is absolute only in the sense that the prosecution does not need to establish fault in order to find that the duty has been breached, but a conviction is only possible after considerations of fault have been canvassed.<sup>37</sup>

It can be seen, then, that the statement quoted above by the ACCI is only half the story. It refers only to section 15(1), which spells out the duty, and says nothing about the defence provided at the end of the Act in section 53<sup>38</sup>. This is not to criticise the ACCI. Its omission is entirely understandable. The architecture of the Act is thoroughly confusing to those who have not studied it closely and judges contribute to the confusion by making statements about the duties imposed on defendants without at the same time making reference to the defences available to them. But the upshot of this discussion is that the concerns of the ACCI and others have expressed about absolute liability in the NSW OHS Act are ill-founded.

## **Conclusion**

The campaign triggered by the Gretley convictions centred on three specific concerns about the way the NSW OHS Act has been formulated and interpreted: the legal concept of reasonableness, the reverse onus of proof and absolute nature of the duty of care. I have argued the critics are right in pointing to the fact that the reasonable person envisaged in the law is not in fact the ordinary person and that to punish people for failing to live up to an ideal can create a sense of injustice. Holding senior

managers accountable for the health and safety performance of their organisation is entirely appropriate, but it is not always appropriate to assume that they are at fault when the organisation fails to manage risk effectively. Later chapters will explore ways of holding senior managers accountable without assuming personal fault.

The other two concerns – the reverse onus and the absolute nature of the duty – have been shown to be of little substance. The offence as a whole does not impose absolute liability and the reverse onus of proof does not constitute a problem, in and of itself. The defendants in the Gretley prosecution were unable to demonstrate that they had acted reasonably, but this was not because they bore the onus of proof. It was because they had not in fact acted reasonably, according to the legal definition of reasonableness. Had the legal notion of reasonableness been more in accordance with common usage, the defendants in the Gretley case would not have had much difficulty establishing that they behaved reasonably in relation to the plans provided by the department. However, even using a common sense meaning of reasonableness, it is far from clear that the response to the warning signs was reasonable. Had the prosecution highlighted these issues, the defendants would have been hard pressed to establish that they had acted reasonably, regardless of which meaning of the term was used.

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<sup>1</sup> POWERCOAL PTY LTD & Peter Lamont FOSTER v INDUSTRIAL RELATIONS COMMISSION OF NSW & Rodney Dale MORRISON H[2005] NSWCA 345H

See also COAL OPERATIONS AUSTRALIA LTD v INDUSTRIAL RELATIONS COMMISSION OF NSW & Rodney Dale MORRISON H[2005] NSWCA 346H

<sup>2</sup> H[www.employersfirst.org.au/MAIN/NEWS\\_campaign\\_challenge.htm](http://www.employersfirst.org.au/MAIN/NEWS_campaign_challenge.htm)H accessed 23/8/05

<sup>3</sup> H[www.employersfirst.org.au/MAIN/NEWS\\_campaign\\_Advise.htm](http://www.employersfirst.org.au/MAIN/NEWS_campaign_Advise.htm)H accessed 23/8/05

<sup>4</sup> K Phillips “Guilty until proved innocent”, *Australian Financial Review*, November 23, 2004, available on IPAV website [www.ipa.org.au/files/news\\_851.html](http://www.ipa.org.au/files/news_851.html)

<sup>5</sup> ACCI (Australian Chamber of Commerce and Industry), April 2005, *Modern Workplace: Safer Workplace. An Australian Industry Blueprint for Improving Occupational Health and Safety 2005-2015*, p11.

<sup>6</sup> Op cit p 21

<sup>7</sup> ,Rae v The Broken Hill Pty Co Ltd [1957] HCA 33; (1957) 97 CLR (3 June 1957)

<sup>8</sup> H Luntz and D Hambly, *Torts: Cases and Commentary, Fifth Edition*, LexisNexis, ?, 2002, 244

<sup>9</sup> Koehler v Cerebos (Australia) Ltd [2005] HCA 15 (6 April 2005), para 54

<sup>10</sup> D Stepinak, “Minority values and the reasonable person of torts” (GET REF), See also J Flemming, “Is there a future for tort?”, *Australian Law Journal*, 1984(March) Vol 58, pp131-142.

<sup>11</sup> Stepniak, op cit p2

<sup>12</sup> op cit, , p244

<sup>13</sup> The following quotes are taken from the key note address by Sir Harry Gibbs delivered to a symposium entitled , *Living with Risk in Our Society*, organised by the NSW division of the Australia Academy of Technological Sciences and Engineering, (AATSE, Melbourne, 2002)

<sup>14</sup> Douglas, M. (1992). *Risk and Blame: Essays in Cultural Theory*. London: Routledge., pp15-16

<sup>15</sup> Such a scheme is recommended in the NSW Law Reform Commission Report, *Report on a Transport Accidents Scheme for NSW*, LRC 43/1, October 1984 (CHECK)

<sup>16</sup> see Luntz and Hambly, op cit p244

<sup>17</sup> The concept of criminal negligence, which provides a basis of manslaughter prosecutions, is another matter. See S Bronitt and B McSherry , *Principles of Criminal Law, 2<sup>nd</sup> Edition* (Sydney: Lawbook Co,2005), p183-4.

<sup>18</sup> op cit p 46

<sup>19</sup> This is the wording in the Occupational Health and Safety Act , 2000. The Gretley defendants were charged under the Occupational Health and Safety Act , 1983. Section 15(1) of the latter Act states “every employer shall ensure the health, safety and welfare at work of all his employees”. The wording, in short, is virtually the same. For a full discussion of the differences between the two

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sections see W. Thompson, *Understanding NSW Occupational Health and Safety Legislation*. (Sydney:CCH, 2001), pp27ff

<sup>20</sup> This is the same as Section 53 under the earlier Act

<sup>21</sup> Thompson, op cit p91

<sup>22</sup> Queensland also reverses the onus of proof. All other Australian states, have the same basic requirement that employers maintain a safe workplace so far as reasonably practicable , except that it is for the prosecution to prove that it was reasonably practicable for the company to comply with the law. There is, in short, no reversal of the traditional onus of proof. R Johnstone, *Occupational Health and Safety Law and Policy 2<sup>nd</sup> edition* (Sydney: Lawbook Co 2004), p222

<sup>23</sup> Industry Commission Inquiry into OHS, Report No 47, September 1995, p55, quoted in Thompson, op cit p 93.

<sup>24</sup> J para824

<sup>25</sup> J paras 801-4

<sup>26</sup> J para 811

<sup>27</sup> Johnstone, op cit p 229, 206

<sup>28</sup> J para963, 964

<sup>29</sup> eg NSW Protection of the Environment Operations Act 1997, section 118;

ACT Environment Protection Act 1997, section 153;

Commonwealth Trade Practices Act 1974, section 85

<sup>30</sup> op cit page 41, 45

<sup>31</sup> Absolute liability offences take no account of whether the defendant has made an honest and reasonable mistake of fact. Where the defence of honest and reasonable mistake of fact is available, the offence is described as one of strict liability. See Bronitt and McSherry, op cit p 187ff

<sup>32</sup> Bronitt and McSherry op cit p189

<sup>33</sup> Bronitt and McSherry op cit p 469. Fisse describes this as a case of strict liability. B Fisse, *Howard's Criminal Law Fifth Edition*,( Sydney, Lawbook Co, 1990), p56

<sup>34</sup> Various commentators have recommended the abolition of this form of murder, Bronitt and McSherry, op cit, p 470

<sup>35</sup> op cit p 43

<sup>36</sup> For ease of expression here I assume a corporate defendant.

<sup>37</sup> According to Parry, where a due diligence defence is available, liability is "strict" but not "absolute". D Perry, "Judicial approaches to due diligence", *Criminal Law Review* Sept 1995,p695.But see.. W Duncan & S.Traves, *Due Diligence*, Sydney: LBC Information Services, 1995, chap 8

<sup>38</sup> These section numbers are from the OHS Act 1983 . The corresponding section numbers in OHS Act 2000 are 8(1) and 28