**23/99; [1999] VSC 496**

**SUPREME COURT OF VICTORIA**

# *PORT MARINE SERVICES – HULTEN ENGINEERS PTY LTD v MERREY*

**Ashley J**

**22 July, 7 December 1999 — (1999) 154 FLR 234; 94 IR 45**

**OCCUPATIONAL HEALTH AND SAFETY – EMPLOYEE INJURED WHEN LIFT ROSE WHILST WEATHERPROOF DOOR WAS BEING FITTED TO LIFT WELL – EMPLOYER CONVICTED OF FAILING TO ENSURE STRUCTURE WAS MODIFIED IN A SAFE MANNER – "IT IS UNSAFE" – MEANING OF "IT" – WHETHER THE WORD "IT" REFERS TO THE "STRUCTURE" OR THE PROCESS OF CONSTRUCTION: *OCCUPATIONAL HEALTH & SAFETY (MARITIME INDUSTRY) ACT* 1993 (CTH), S24.**

Section 24 of the *Occupational Health & Safety (Maritime Industry) Act* 1993 (No 10/1994) (Cth) ("Act") provides:

> "A person who constructs, modifies or repairs a structure on a prescribed ship or prescribed unit must take all reasonable steps to ensure the structure is not constructed, modified or repaired in such a way that it is unsafe for employees, contractors or other persons or constitutes a risk to their health."

PMS employed 3 men to fit a weatherproof door to a lift on a ship. In order to avoid the outbreak of fire from the welding, one of the men entered the lift well on fire watch duty. As the lift had not been effectively isolated, the lift rose in the lift well causing the employee serious injuries. PMS was subsequently charged with a breach of s24 of the Act in that whilst modifying or repairing a structure namely, the fitting of a weatherproof door to lifts on a ship, it failed to take all reasonable steps to ensure that the structure was modified or repaired so that it was safe for contractors. In convicting PMS, the magistrate appeared to focus upon the safety or otherwise of the process of modification. Upon appeal—

**HELD: Appeal allowed. Remitted for re-hearing.**
**1. The pronoun "it" in s24 of the Act refers to the structure to which s24 adverts and not the process of construction. Whilst s24 is not wholly silent with respect to the period of construction, modification or repair, an offence is only created, so far as that period is concerned, if the relevant person fails to take all reasonable steps to ensure that the construction, modification or repair of the structure itself is not rendered unsafe for, or constitutes a risk to, the health of employees, contractors or others.**

**2. The magistrate was in error in appearing to focus upon the safety or otherwise of the process of modification. The magistrate was required first to identify the structure which was undergoing construction, modification or repair and second, to determine whether the prosecution had proved that the employer had failed to take all reasonable steps to ensure that the structure was not constructed, modified or repaired in such a way that the structure was rendered unsafe or a risk to the health of employees, contractors or other persons.**

## ASHLEY J:

### The Appeal

1. This appeal from a final order of the Magistrates' Court raises for consideration the meaning of s24 of the *Occupational Health & Safety (Maritime Industry) Act* 1993 ("the Maritime Act"). The appellant, Port Marine Services – Hulten Engineers Pty Ltd, was found guilty of an offence against the section, convicted and fined.

### The statutory offence

2. The section reads:

> "A person who constructs, modifies or repairs a structure on a prescribed ship or prescribed unit must take all reasonable steps to ensure the structure is not constructed, modified or repaired in such a way that it is unsafe for employees, contractors or other persons or constitutes a risk to their health."

### The circumstances

3. The factual circumstances, as agreed between the parties, were relevantly these:

4. The appellant company sent three men on board a ship berthed at Melbourne. Their job was to fit a weatherproof door to the outer face of the wall of a lift shaft. The door, when fitted, could have been closed across the entry point to the lift on the particular deck. The job involved a welding operation. There was a potential risk that a welding spark might cause a fire in the lift well. So one of the men was assigned fire watch duties. He had to be within the lift well when the welding work was done from outside. The plan was that the lift car itself be stopped at the deck below, that it be immobilised, and that the worker use the roof of the lift car for his footing. The lift car was in fact stopped at the deck below. Steps were initiated that should have led to its being immobilised by action on the part of the ship's electrical officer. The worker on fire watch entered the lift well and used the roof of the lift car to get to a point where he could stand on a ledge on the interior wall of the lift shaft so as to make necessary observations. The lift car was called to travel to some higher floor. It had not been effectively isolated. It rose, and this led to the worker suffering serious injuries.

**The charge and particulars**

5. The charge laid against the appellant was this:

> "On or about the 5th day of November 1997 at Port Melbourne in the State of Victoria, the defendant company was guilty of an offence in that being a person who modified or repaired a structure on a prescribed ship, namely the fitting of weatherproof doors to lifts on the 'Spirit of Tasmania', it failed to take all reasonable steps to ensure that the structure was modified or repaired in such a way that it was safe for contractors, contrary to section 24 of the *Occupational Health and Safety (Maritime Industry) Act* 1993."

6. I doubt that the charge identified the structure. At the very least it did not clearly do so.

7. The particulars of the charge were relevantly these:

> "(i) The defendant company failed to provide formal instruction and training to in relation to safety procedures for work in and around lifts.
>
> (ii) Defendant company's Repair Supervisor Harris failed to read and pass on the information contained in the "ASP Requirements for Shore Contractors" document to the contractors Assopardi and Hocking prior to the work on the aft centre lift well commencing.
>
> (iii) The defendant company failed to adequately supervise the work performed by contractors Assopardi and Hocking to the aft centre lift well on the "Spirit of Tasmania" on 5 November 1997, in that:
>
> * The defendant company failed to ensure that Repair Supervisor Harris knew the safety procedures relating to work in or around lifts, particularly the isolation of lifts prior to and during the work;
>
> * Repair Supervisor Harris failed to require ASP employee de Oleveira to explain safety requirements for work in or around lifts to Hocking and Assopardi prior to the work commencing.
>
> * Repair Supervisor Harris failed to carry out correct Tag/Lock Out procedures prior to work commencing: that is witness the isolation of the power by de Oleveira, make sure it was the correct switch that was being isolated and attach a tag of his own, containing his name, date, contact number, etc as set out in the "ASP Safety Requirements for Shore Contractors".
>
> * Repair Supervisor Harris failed to ensure that no work began until confirmation had been received, that the lift had been effectively isolated.
>
> * Repair Supervisor Harris failed to communicate directly with de Oleveira to ascertain that the lift had been effectively isolated;
>
> * Repair Supervisor Harris failed to make Hocking aware of the emergency stop button on the top of the lift."

8. In short, it was alleged that the appellant failed to give any or any adequate instruction or training to its men, failed to supervise the performance of the job adequately, and that the supervisor failed to ensure that the lift car was isolated before work began. Reliance was thus placed on matters pertinent to the process of modification or repair; but they could have been such as resulted in "the structure" becoming unsafe or a risk to health.

**The magistrate's reasons for convicting the appellant**

9. The appellant was, as I said earlier, convicted. The learned magistrate did not give written reasons, but the affidavit of Michael Hammond sworn 15 April 1999 for the appellant and the affidavit of Margaret Ruth Duncan sworn 17 May 1999 for the respondent generally are in accord as to what his Worship relevantly said. According to paragraph 9 of Mr Hammond's affidavit the learned magistrate said that s24 refers to the "manner of modification" of the structure in question; and that the repair or modification was done so in an unsafe manner thereby breaching s24. According to paragraph 6(e) of Ms Duncan's affidavit his Worship said —

> "(i) That s24 does relate to a structure in accordance with the Defendant's submission, but ... the structure must be modified in such a way that it did not create a risk to those in the process of carrying out the modification or repair.
>
> (ii) The act of having a fire watch is an example of carrying out a modification or repair in a safe way. Isolation of the lift falls into the same category."

10. It appears to me that the thrust of sub-paragraph (ii) is compatible with the account deposed to by Mr Hammond. There is no conflict to be resolved by application of the general rule that an affidavit which supports the decision of the Magistrates' Court should be accepted in the absence of any fair and practical method of resolving a conflict.

**The questions of law**

11. According to the Master's Order made 23 April 1999, two questions of law were shown to be raised by the appeal:

> "(a) whilst carrying out modifications to a structure of a ship, can a person be guilty of an offence within section 24 of the *Occupational Health and Safety (Maritime Industry) Act (C'th)* 1993?
>
> (b) Does the employer of an employee who is injured, whilst "modifying" water tight doors to a lift shaft of a ship, by the movement of an associated part of the ship, be guilty of an offence pursuant to section 24 of the said Act?"

12. Implicit in question (a) is the contention, not advanced for the appellant in the Magistrates' Court, that s24 does not apply to a want of safety or risk to health posed by a structure which eventuates in the course of the process of construction, modification or repair of a structure; but only to a want of safety or risk to health of the structure as modified.

13. Question (b), on the other hand, appears to assume that s24 can apply to a want of safety or risk to health posed by a structure which eventuates in the course of what I shall call "the process". It raises the issue of classification of the structure in the particular case. The question is not quite grammatical. It attempts, I think, to answer the very issue it raises by connecting the process with the watertight doors; or at broadest the lift shaft.

14. Those distractions aside, the question in substance raises two questions of law. First, whether the pronoun "it" in s24 refers to "the structure" or to the process of construction, modification or repair referred to in the section. Second, whether there was any evidence upon which the learned magistrate could have concluded that the structure was modified in such a way that the structure was rendered unsafe for employees, contractors or other persons, or such as to constitute a risk to their health.

**Question (a)**

15. It was the common position of the parties before me that s24 could be infringed by a want of safety or risk to health occurring during the course of the process as well as by a want of safety or risk to health consequential upon the end result of that process. Taking the present case as an example, counsel for the appellant conceded that if, in the course of work, the door that was being welded to the wall of the lift well had fallen through the opening into the lift well and had injured the man on fire watch, s24 would *prima facie* have been infringed.

16. There would have been infringement in the course of the process if all reasonable steps had not been taken to ensure that the structure was kept safe and did not become a risk to the health of employees, contractors or other persons.

17. It is a corollary of the appellant's position that if, after completion of work, the weld had failed and the door had fallen onto some person, there would similarly have been a prima facie infringement of the section.

18. The way in which the case was argued for the appellant before me involved the concession that the answer to question (a) must be "yes". I do not doubt that the concession was correctly made. A structure may be rendered unsafe or a risk to health in the course of work just as it may be left unsafe or a risk to health when work is at an end.

**Question (b)**

19. I go to the second of the questions.

20. Central to the appellant's reading of s24 was the proposition that it must be the structure, not the process which is the source of want of safety or risk to health. The process, by implication, includes not only the immediate performance of work, but matters of training, instruction and supervision of the workers. In the present case, according to the appellant's argument, "the structure" was no more than the wall of the lift well and the door which was being affixed to it. Any want of safety, it was said, arose from the failure to isolate the lift car during the course of the work. So the appellant did not contravene the section. It would be the same, according to the appellant's argument, if the worker on fire watch had been struck by a welding spark in the course of the work. The structure should not then be considered the source of the want of safety made manifest by what occurred.

21. Counsel for the appellant submitted, in support of this reading of s24, that the pronoun "it" must mean "the structure".

22. According to the respondent's argument before me, s24 should be read to include any want of safety or risk to health of employees, contractors or other persons created in the course of the process of construction, modification or repair. Counsel argued that the time when the process was carried out should be considered the time of greatest risk. It would not be sensible, he submitted, to construe s24 as having nothing to say about some of the dangers created in carrying out the process. He contended that the pronoun "it" refers to the process of construction, modification or repair; not to the structure the subject of the process. He argued that the form of each of ss22, 23 and 25 is similar, and should be read to refer in the particular cases to the processes of erection, installation, repair or maintenance of plant, and to the loading or unloading of a ship.

23. The submission to which I have just referred does not coincide with the written submission for the respondent in the Magistrates' Court. There, counsel for the respondent submitted that the pronoun "it" referred to "the structure". So, for example, in his written submission below counsel for the respondent contended that "The section covers dangers posed by the structure both in the course of and after modification ... The adverbial phrase 'in such a way', and the coverage offered to contractors indicates an intention to cover dangers posed by the structure in the course of repair as well as subsequently." On the other hand, according to paragraph 6(d)(iv) of Ms Duncan's affidavit, the learned magistrate summarised the prosecution's argument as being, in part, that the word 'it' in the context of s24 refers to the manner of repair or construction.

24. It is, I think, doubtful what submission counsel for the respondent did pursue in the Magistrates' Court concerning the meaning of the crucial pronoun in s24. That would not, however, determine the limits of the Respondent's argument before me. Moreover, the issue of construction raised by this appeal is one of general importance, it arises within the second of the questions now before me, and it should be resolved.

25. In my opinion the pronoun clearly refers to the structure to which s24 adverts. That is the natural reading of the section.

26. Contrary to the submission advanced on the respondent's behalf before me, the phrase "in such a way" does not tell in favour of the pronoun being read as a reference to the process of construction, modification or repair. To read the section in the way contended for by the respondent would create at least a risk that a danger created by a structure rendered unsafe at the end of the process would not fall within the ambit of the provision.

27. It does not follow from reading the pronoun as referring to the structure that at least some dangers created in the course of the process will not fall within the section.

28. I do not consider that the language of ss22, 23 and 25 assists the respondent's argument; rather the contrary. In ss22 and 23 the words "use the plant" make the relationship in those sections between "it" and "the plant" clearer still. Neither ss24 or 25 contain equivalent words. But the natural reading of s25 is that "it" refers to the prescribed ship or unit. Sections 22 - 25, as both counsel pointed out, form a discrete portion of the *Maritime Act*. In a group of sections with a generally common structure one would expect the pronoun in question to have the same type of application.

29. Counsel for the respondent relied upon s31 in aid of his preferred construction. I do not think it assists him. All it means is that if a structure is rendered unsafe by work, the person undertaking the work will not have infringed s24 if he has ensured, so far as practicable, that the work – though rendering the structure unsafe – was done in accordance with manufacturer's or supplier's instructions.

30. Counsel for the respondent submitted that to read "it" as referring to the "structure" and not to the work process would mean that the obligations of persons carrying out work falling within s24 would be less than the obligations imposed upon an employer at common law. The situation would be the same in respect of work failing within ss22, 23 and 25. He pointed out that, according to the *Explanatory Memorandum* which accompanied the bill, ss22 - 25 were a codification of the common law.

31. There is no doubt that the *Explanatory Memorandum* said just what counsel attributed to it. But it did so in language that is entirely consistent with the duties imposed by those sections being duties of the kind which the plain sense of the language conveys. The duties of operators of ships *vis-à-vis* their employees are cast in wider language than the duties imposed by ss22 - 25; see s11. Those duties, to an extent, are extended to protect contractors; see s13.

32. The duties cast upon operators are similar, if not identical in substance, to the duties imposed upon employers by s16 of the *Occupational Health and Safety (Commonwealth Employment) Act* 1991. See also s16(4) of that Act in respect of the obligations owed to contractors. Note, in the context of that Act, the difference between the duties imposed upon employers and the duty imposed by s20(1) upon a person directing or installing plant in a workplace. Section 20(1) closely mirrors s22 of the *Maritime Act*. According to the Second Reading Speech (*Hansard*, Senate, 29 September 1993, p1410) the *Maritime Act* was based on the 1991 Act. There was a pattern to that Act which is repeated in the *Maritime Act*. It does not assist the respondent's argument.

33. Further according to the argument for the respondent, to read s24 of the *Maritime Act* in the manner contended for by the appellant would be incompatible with the requirements of s15AA of the *Acts Interpretation Act* 1901 (Cth) — a section whose operation was described by Dawson, Toohey and Gaudron JJ in *Chugg v Pacific Dunlop Ltd* [1990] HCA 41; (1990) 170 CLR 249 at 262. Counsel referred me to the Second Reading Speech of the then *Maritime Bill*, which discloses that:

> * "the purpose of this bill is to make the maritime industry a healthier and safer industry to work in";
>
> * "(the bill) sets out the duties of care to be observed by all who work on board ships ... This element, in effect, codifies the common law."
>
> * "The provisions contained in Part 2 of the bill set out in general terms the mutual responsibilities of ship operators, employees and contractors, as well as the responsibilities of manufacturers of plant and substances used on ships.
>
> In essence, all parties must take reasonable steps to ensure that the workplace and the work performed there do not endanger the safety or health of the workers, or of any other person in the vicinity." (*Hansard, Senate*, 29 September 1993 pp1409-1410).

34. Counsel referred also to the *Explanatory Memorandum* in support of his contention that ss22-25 were an intended codification of the common law.

35. According to the argument for the respondent, to read s24 as the appellant contended for would not advance the declared purpose of the Act, would not reflect the common law, and would not ensure that the work carried out on a ship did not endanger the safety or health of workers and others.

36. Section 24 is a penal provision. As in the case of the legislation considered by the High Court in *Chugg*, (see at 170 CLR 260 per Dawson, Toohey and Gaudron JJ) it imposes criminal liability only and does not confer a civil cause of action; see s118. Although the Act is concerned with furthering industrial safety, it does not follow that the conflict of principles referred to by Gibbs CJ and Mason, Wilson and Dawson JJ in *Waugh v Kippen* [1986] HCA 12; (1986) 160 CLR 156 at 164-165; (1986) 64 ALR 195; 60 ALJR 250; [1986] Aust Torts Reports 80-004 arises.

37. But whether s24 be construed in the manner proposed by the joint judgment in *Waugh v Kippen* in the passage just cited, or whether, as a penal statute, it be construed according to the ordinary rules of construction – including the requirements of s15AA of the *Acts Interpretation Act* – any remaining ambiguity or doubt being resolved, as a last resort, in favour of the subject by refusing to extend the category of criminal offences, I consider that there should be no different outcome. In short, the process of construction cannot sensibly yield the result for which the respondent contends.

38. The plain words of s24 and the other considerations to which I have referred tell against such a construction. It does not follow, I add, that the disclosed purpose of the *Maritime Act* is not achieved. Nor does it follow that, speaking generally, the *Maritime Act* fails to achieve the results described by the Minister in the second, third and fourth of the excerpts from his Second Reading Speech to which I referred a few moments ago; or to codify aspects of the common law, albeit in creating criminal offences. It may be the case that each of ss22-25 by imposing a duty "to take all reasonable steps to ensure" a particular outcome do impose a duty akin to that which is imposed by the common law. The judgment of Watson J of the Industrial Commission of New South Wales in *Carrington Slipways Pty Ltd v Callaghan* (1985) 11 IR 467 at 469 is compatible with such a conclusion. Bear in mind, however, that there may be a breach of the statutory duty even in the absence of injury to an employee, contractor or other person (as to which, see the observations of Hansen J in connection with s22 of the *Occupational, Health and Safety Act* 1985 in *Whittaker v Delmina Pty Ltd* (1998) 87 IR 268; [1998] VSC 175 at paragraph 43).

39. Counsel for the respondent submitted, as I noted earlier, that the time of greatest danger was likely to be during the process of construction, modification or repair. It would be an absurd situation, he argued, if s24 said nothing about that period.

40. A partial answer to that submission lies in the circumstance that, as I construe s24, it is not wholly silent with respect to the period of construction, modification or repair. But it is the fact that, as I construe the section, an offence is only created, so far as that period is concerned, if the relevant person fails to take all reasonable steps to ensure that the construction, modification or repair of the structure is carried out in such a way that the structure itself is not rendered unsafe for, or constitutes a risk to, the health of employees, contractors or others. It certainly appears to be possible that a process may be undertaken in such a way that the process itself is unsafe or a risk to health; yet without the structure in respect of which the process is being undertaken itself being rendered unsafe or a risk to health. In that case, as I construe s24, there will be no breach. It may be said that such an outcome is undesirable. It may be the case that the outcome is explained by legislative inadvertence. But that is not to say that the legislation is not clear; nor that it cannot be given a clear area of operation.

41. Counsel for the respondent drew my attention to s8 of the Act. He pointed out that in the circumstances there envisaged there would be a very incomplete statutory regime if ss22-25 were read narrowly. The point was well made. But it cannot lead to the plain words of those sections being given a meaning that they will not bear.

42. I said earlier that within question (b) was the issue whether there was any evidence upon which the learned magistrate could have concluded that the structure was modified in such a way that the structure was rendered unsafe for employees, contractors or other persons, or such as to constitute a risk to their health.

43. Unfortunately, that question, whose determination is critical to the outcome of the prosecution, is not one I should answer. The reason is this: the learned magistrate, as I conclude, accepted the appellant's contention that the pronoun "it" in s24 refers to the structure to which the section adverts, not to the process of construction, modification and repair. That was correct. But then his Worship appears to have been distracted from the necessary task. That task was, first, to identify the structure which was undergoing construction, modification or repair; and, second, to determine whether the respondent had proved that the appellant had failed to take all reasonable steps to ensure that the structure was not constructed, modified or repaired in such a way that the structure was rendered unsafe or a risk to the health of employees, contractors or other persons. His Worship appears to have focussed upon the safety or otherwise of the process of modification. That was, I consider, a faulty approach. It left undetermined key factual issues. It is not my function, those issues not having been determined at first instance, to consider whether there was any evidence of particular matters. That is an enquiry which may be undertaken only when findings have been made.

44. Determination of the question – what was the structure which was being constructed, modified or repaired? – will obviously be of key importance on the necessary re-hearing. In that connection, as I earlier pointed out, the charge probably did not identify what the informant alleged to be the relevant structure; or at the least did not clearly do so. The issue is one of characterisation, and fact. It would not seem to necessarily follow from the fact that the job involved fitting waterproof doors to the outer face of the wall of the lift shaft that the structure for the purposes of s24 which was undergoing modification was confined to the outer wall of the lift shaft and the door that was being fitted. If, upon the facts, it was concluded that the structure embraced to the lift well, the question would then be whether the modification was undertaken in such a way that the lift well was rendered unsafe for or a risk to the health of, employees, contractors or other persons. If that question came to be considered, it appears to me that there should not be excluded from consideration the question whether the lift well was rendered relevantly unsafe for or a risk to the health of an employee of "the person" (here a corporation, see s22(1)(a) of the *Acts Interpretation Act* 1901 (Cth)) undertaking the work. Such an employee may well satisfy the definition of "contractor" in s4 of the *Maritime Act*; or otherwise satisfy the description "other person(s)" in s24.

**The outcome of the appeal**

45. The consequences of what I have said are that the prosecution was determined by a misapplication of the law, and that key issues of fact were left undetermined. The appeal must be allowed and the matter remitted for re-hearing in accordance with my reasons.

**APPEARANCES:** For the appellant Port Marine Services: Mr C O'Neill, counsel. Lander & Rogers Solicitors. For the respondent Merrey: Mr WE Stuart, counsel. Director of Public Prosecutions (Cwth).

---