CITATION: *Townsville Gymnastics Association Inc AND Dean Allan Coggins (C/2010/67) - Decision* <*http://www.qirc.qld.gov.au*>

INDUSTRIAL COURT OF QUEENSLAND

Workplace Health and Safety Act 1995 - s. 164(3) - appeal against decision of industrial magistrate

Townsville Gymnastics Association Inc AND Dean Allan Coggins (C/2010/67)

PRESIDENT HALL 22 March 2011

DECISION

[1] On 9 February 2010, Townsville Gymnastics Association Inc (the Appellant) was charged with a breach of s. 24 of the *Workplace Health and Safety Act 1995* (the Act). The obligation which the Appellant was said not to have discharged was that imposed by s. 28(1) of the Act. The breach was said to have taken place on 18 June 2009, at the corner of Wotton and Ann Streets, Aitkenvale in the Magistrates Court District of Townsville. A circumstance of aggravation was pleaded, *viz.*, that the breach caused the death of Michelle Maitland.

[2] Particulars were provided. As amended, the particulars were:

"**Particulars**

It is alleged that the defendant's workers or other persons were not free from risk to their health and safety arising out of its business or undertaking [s. 28(2)].

Other Person:	Michelle MAITLAND
Workplace:	The corner of Wotton and Ann Streets, Aitkenvale Qld 4814
Business or undertaking:	Recreation/Gymnastics
Risk:	The risk is the risk of injury, including the risk of death or grievous bodily harm to Michelle MAITLAND
Hazard:	The source of the risk emanates from: (1) Concrete flooring and/or (2) The failure to provide adequate protective covering to the landing area for gymnastic apparatus, namely a tumble tramp/tumble track.

Contrary to the Act in such case made and provided.".

Predictably, the use of the expression "and/or" in particularising the "Hazard(s)" has given rise to difficulty. Both at first instance and on the Appeal, the Appellant has contended that the case which the Appellant was called upon to meet was limited to the protective covering for concrete floor at the landing area for the tumble tramp/tumble track. By the decision of 1 October 2010, the Industrial Magistrate expressly rejected that submission. Materially, His Honour concluded:

> "However the hazard(s) identified in the particulars should not be interpreted in such a narrow fashion and the defendant has an obligation to ensure that a person who successfully negotiates the tumble track is not injured elsewhere in the workplace. The workplace in this instance clearly includes the rest of the gymnasium and particularly includes the area of concrete floor commencing at the end of the landing area of the tumble track apparatus.".

[3] The Industrial Magistrate's conclusion gave effect to the literal and grammatical meaning of the language used. Further, the Industrial Magistrate's conclusion was consistent with an earlier exchange between the Industrial Magistrate and Counsel who appeared for the Complainant at first instance. No objection pursuant to the *Justices Act 1886* was taken to the form of the particulars. Much of the evidence and cross-examination went to the workplace beyond the landing area. Such a focus was unsurprising. The place at which Ms Maitland's head came into contact with the concrete floor, causing her injuries and her death, was outside the mat covered landing area. In my view, the Industrial Magistrate properly construed and applied the particulars pleaded and the Appellant was not misled.

[4] At the commencement of the hearing before the Industrial Magistrate, Counsel for the Appellant formally admitted (Exhibit One) the following matters:

> "1. On the 18th June 2009, Townsville Gymnastics Association Inc. (the defendant) conducted a business or undertaking within the meaning of the *Workplace Health and Safety Act 1995* (the Act)
> 2. On the 18th June 2009, Michelle Maitland was an 'other' within the meaning of the Act
>
> 3. On the 18th June 2009, the undertaking of the defendant at the workplace included recreation and gymnastics
>
> 4. On the 18th June 2009, Michelle Maitland's activities included recreational gymnastics (*the workplace activity*)
>
> 5. On the 18th June 2009, Michelle Maitland sustained fatal injuries in the course of her activity (*the injury*)
>
> 6. On the 18th June 2009, the injury was sustained whilst undertaking the workplace activity.
>
> 7. The injuries aforesaid amounted in law to death.".

[5] It is useful to supplement the admissions with the findings of fact made by the Industrial Magistrate at paragraphs [3] and [4] of His Honour's reasons for the decision:

> "[3] There is no controversy as to the facts in this complaint. Ms Maitland was at the defendant's centre on the 18th June 2009 and was participating in an activity on the tumble tramp. She had successfully completed one routine and completed another, landing safely on crash mats positioned at the end of the tumble track. Immediately after that she pushed off or rebounded from the mats which propelled her toward the edge of the crash mats. Tragically her head and torso went over the edge of the mats and her head struck the concrete floor. She suffered a fatal injury at that point.
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> [4] It is important to note that the term '*rebounded*' is a technical term. In this context it is the act of pushing with the feet and ankles of a gymnast as distinct from bouncing off an object after hitting it with force.".

Save for the optimism of the conclusion that there was "no controversy", the findings seem to me to have been open.

[6] Before moving to the matters argued on the Appeal (pleading of "Hazard(s)" apart) it must be stressed that the mats at the end of the tumble tramp/tumble track did work in that Ms Maitland's momentum was arrested. Had Ms Maitland chosen to crumble into the mats she would have suffered no ill. It was Ms Maitland's voluntary and (I think) unconventional attempt to rebound into another routine which was her undoing. I accept, the Industrial Magistrate's findings at paragraph [16] of His Honour's reasons:

> "[16] The evidence with respect to the events on the 18th June 2009 is that once she landed on the mats, instead of crumpling into them thus dissipating the energy from her body into the crash mats, Ms. Maitland *rebounded* from the mats in that she pushed with her feet and ankles, adopted a 'dish' shape and was propelled toward the edge of the mat. She came to rest with her hips on the edge of the crash mats and her head on the floor. This second effort of *rebounding* and adopting the *dish* body shape/position is contrary to the training that is adopted by the defendant and as Mr. Collins puts it - 'contrary to training and contrary to practice' and as such it is said to be the cause over which the defendant had no control.".

[7] The Appellant's first contention is that the construction of the Act adopted by the Industrial Magistrate led to His Honour fettering His Honour's discretion. Particular complaint is made of paragraph [7] of His Honour's reasons for decision and of the reference to the Appellant's obligation as "strict" at paragraph [6] thereof. To give context to the Industrial Magistrate's observations, I reproduce paragraphs [5] to [7] of the Industrial Magistrate's reasons for the decision:

> "[5] The charge is laid pursuant to the *Workplace Health and Safety Act 1995* ('the Act') Section 24 outlines the penalties for breaches of obligations imposed on persons under the act. Section 28 of the act provides for the obligations imposed on persons conducting an undertaking. Relevantly it provides that a person who conducts a business or undertaking has an obligation to ensure workplace health and safety. Section 22 of the Act provides relevantly that workplace health and safety is ensured when persons are free from death.

[6] The obligation is strict and the law settled - for example in *Watson v A.J.C Electrical Service Pty Ltd* [2004] QIC 3; 175 QGIG 574 (2 February 2004) President Hall indicated (at paragraph 2)

'The objective of the Workplace Health and Safety Act 1995 is to prevent death, injury or illness being caused to a person by a workplace, by workplace activities or by specified high risk plant, s. 7(1). That objective is achieved by preventing or minimising a person's exposure to the risk of death, injury or illness attributable to a workplace, workplace activities or specified high risk plant, s. 7(2). As part of the framework for preventing or minimising exposure to risk (compare s. 7(3)) the Act imposes workplace health and safety obligations on a variety of person. Obligations are created and imposed upon employers (s. 28), self-employed persons (s. 29), persons in control of workplaces (s. 30), principal contractors (s. 31), designers, manufacturers, importers, suppliers, erectors and installers of plant (ss. 32 to 34), owners (s. 35), workers and others (s. 36). The obligations verge on absolute. To take a simple example, by s. 28(1) an employer has an obligation to ensure the workplace health and safety of each of the employer's workers at work. By s. 22(1) workplace health and safety is ensured when persons are free from -

"(a) death, injury or illness caused by any workplace, workplace activities or specified high risk plant; and

(b) risk of death, injury or illness created by any workplace, workplace activities or specified high risk plant.".

If follows that where a worker is injured at a workplace the workplace is not a workplace whereat safety was ensured and the employer is in breach of the obligation. Section 24 makes failure to discharge and obligation imposed by the Act a criminal offence, see s. 24(1).',

[7] The circumstances then of this case would compel me to the conclusion that the offence is committed once it is determined that a person, in this instance Ms. Maitland, suffered and injury that led to her death. However, Section 37 of the act provides for defences to contraventions of obligations imposed under division 2 of Part 3 of the act [sic].".

[8] I quite accept that it follows from sections 26 and 37 of the Act that liability is not strict. However, I continue to adhere to the view that the obligations imposed by the Act verge on absolute and, as to other matters, take the same view as the Industrial Magistrate. It is convenient to reproduce paragraphs [4] to [7] of the decision of this Court in *N.K. Collins Industries Pty Ltd v Peter Vincent Twigg (C/2009/56)*[1]:

"[4] It is convenient to make some prefatory comment about the *Workplace Health and Safety Act 1995* (hereafter the Act) in the form which it took relevant to the alleged contravention. The objective of the Act is set out at s. 7(1) which provides:

'(1) The objective of this Act is to prevent a person's death, injury or illness being caused by a workplace, by a relevant workplace area, by work activities, or by plant or substances for use at a relevant place.'.

Section 7(2) of the Act sets out how the objective is to be achieved. Section 7(2) provides:

'(2) The objective is achieved by preventing or minimising a person's exposure to the risk of death, injury or illness caused by a workplace, by a relevant workplace area, by work activities, or by plant or substances for use at a relevant place.'.

Section 7(3)(a), in sketching the framework established by the Act for preventing or minimising exposure to risk, includes as part of the framework:

'(a) imposing workplace health and safety obligations on certain persons who may affect the health and safety of others by their acts or omissions;'.

The obligations imposed by the Act appear at Part 3, Divisions 2 and 3. A person on whom an obligation is imposed must discharge the obligation, see s. 24(1) of the Act. Quite severe penalties are provided for obligation-holders who fail to discharge an obligation imposed by the Act, see s. 24(1). Whilst s. 24 does not declare failure to discharge an obligation to be an offence, Part 12 of the Act which deals with legal proceedings contemplates that failure to discharge an obligation is an offence

[1] *N.K. Collins Industries Pty Ltd v Peter Vincent Twigg (C/2009/56) - Decision <http://www.qirc.qld.gov.au>*

against the Act. Importantly, s. 164 of the Act, which both parties to the Appeal accept confers the right to appeal now exercised, provides [emphasis added]:

'**164 Proceedings for offences**

(1) A prosecution for an offence against this Act is by way of summary proceedings before an industrial magistrate.

(2) More than 1 contravention of a workplace health and safety obligation under part 3 may be charged as a single charge if the acts or omissions giving rise to the claimed contravention happened within the same period and at the same workplace.

(3) A person dissatisfied with a decision of an industrial magistrate in proceedings brought under subsection (1) who desires to appeal must appeal to the Industrial Court.

(4) The *Industrial Relations Act 1999* applies, with any necessary changes, to a proceeding before an industrial magistrate brought under subsection (1) and to a proceeding on appeal before the Industrial Court brought under subsection (3).

(5) A prosecution for an offence against this Act must be commenced by complaint of an inspector or someone else authorised by the Minister or chief executive.

(6) In this section -
person dissatisfied with a decision in a proceeding means -

(a) a party to the proceeding or; or

(b) a person bound by the decision; or

(c) if an inspector started the proceeding - any inspector.'.

Further, s. 2 of the *Criminal Code* provides:

'**2 Definition of *offence***

An act or omission which renders the person doing the act or making the omission liable to punishment is called an ***offence***.'.

Presumably, it was realisation that breach of an obligation imposed by the Act was an offence within s. 2 of the *Criminal Code* which caused the Legislature to provide that s. 24(1) of the Act applies 'despite' ss. 23 and 24 of the *Criminal Code*, see s. 24(2) of the Act.

[5] As appears at [1] above, the Complaint of 1 May 2008 concerned an alleged failure to discharge the obligation imposed by s. 28(1) of the Act:

'**28 Obligations of persons conducting business or undertaking**

(1) A person (the ***relevant person***) who conducts a business or undertaking has an obligation to ensure the workplace health and safety of the person, each of the person's workers and any other persons is not affected by the conduct of the relevant person's business or undertaking.

(2) The obligation is discharged if the person, each of the person's workers and any other persons are not exposed to risks to their health and safety arising out of the conduct of the relevant person's business or undertaking.

(3) The obligation applies -

(a) whether or not the relevant person conducts the business or undertaking as an employer, self-employed person or otherwise; and

(b) whether or not the business or undertaking is conducted for gain or reward; and

(c) whether or not a person works on a voluntary basis.'.

[Note: Many of the decisions of this Court cited on the hearing of the Appeal relate to an earlier version of s. 28 of the Act which imposed obligations on 'employers'.]

[6] 'Ensure' is not defined at s. 28 of the Act nor at Schedule 3 'Dictionary'. However, s. 22 of the Act explains when health and safety is ensured. Section 22 of the Act, which is contained within Division 4 'Interpretation', provides:

'**Ensuring workplace health and safety**

Workplace health and safety is ensured when persons are free from -

(a) death, injury or illness caused by any workplace, relevant workplace area work activities, or plant or substances for use at a relevant place; and

(b) risk of death, injury or illness created by any workplace, relevant workplace area, work activities, or plant or substances for use at a relevant place.'.

If s. 22 of the Act is read literally, a prosecution for breach of s. 24, about failure to discharge the obligation at s. 28, may be (a) a prosecution based on death, injury or illness (s. 22 (a) of the Act), or (b) a prosecution based on the risk of death, injury or illness (s. 22(b) of the Act). Section 26 of the Act deals with how an obligation may be discharged where a Regulation, Ministerial Notice or Code of Practice is in operation. Section 27A of the Act deals with how exposure to risk is managed. Section 27A provides:

'**27A Managing exposure to risks**

(1) To properly manage exposure to risks, a person must -

(a) identify hazards; and

(b) assess risks that may result because of the hazards; and

(c) decide on appropriate control measures to prevent, or minimise the level of, the risks; and

(d) implement control measures; and

(e) monitor and review the effectiveness of the measures.

(2) To properly manage exposure to risks, a person should consider the appropriateness of control measures in the following order -

(a) eliminating the hazard or preventing the risk;

(b) if eliminating the hazard or preventing the risk is not possible, minimising the risk by measures that must be considered in the following order -

(i) substituting the hazard giving rise to the risk with a hazard giving rise to a lesser risk;

(ii) isolating the hazard giving rise to the risk from anyone who may be at risk;

(iii) minimising the risk by engineering means;

(iv) applying administrative measures;

(v) using personal protective equipment.

Examples of subparagraph (iii) -
redesigning work, plant, equipment, components or premises

Examples of subparagraph (iv) -
training, reasonable hours of work

(3) <u>However, this Act also specifies particular ways in which workplace health and safety must be ensured in particular circumstances</u>.

(4) Compliance with subsection (1) does not excuse a person from an obligation to ensure workplace health and safety or a particular obligation imposed on the person under this Act.'. [Emphasis added]

Recognising that one is construing a statute with penal consequences, it seems to follow from s. 27A(3) and (4) that the obligations imposed by the Act are not limited to obligations about risk. Importantly, prior to the commencement of Part 3 of the *Workers' Compensation and Rehabilitation and Other Acts Amendment Act 2005*, which amended the *Workplace Health and Safety Act 1995*, each of subsections (3) and (4) of s. 27A were within s. 22 of the Act. (So also, did a precursor of subsections (1) and (2) of s. 27A appear within s. 22 of the Act.) If one revisits history and reads subsections (3) and (4) of s. 27A as part of s. 22 of the Act - and the subsections plainly continue to apply to the obligations at s. 28 - the language of s. 22 becomes too intractable to be read as imposing only an obligation about the risk of death, injury or illness.

[7] As a matter of language, one has to accept that if the obligation at s. 28(2) of the Act is discharged, so also will the obligation at s. 28(1) be discharged. However, that proposition is of no moment in a case such as this where there was a death and, causation having been argued, an express finding of causation. In such a case, the fact of the fatality was the evidence that there was a risk, compare *R v Chargot Limited (t/a Contract Services) and Ors*[2] at paragraph 7, per Lord Hope of Craighead with whom the other Lords of Appeal agreed. In a case such as this a defendant must rely upon s. 26 of the Act or s. 37(1)(b) of the Act. (As I understand the matter, there is no suggestion that the commission of the offence was due to causes over which the Appellant had no control, see s. 37(2) of the Act.).".

[9] Further, at least where death or other injury* follows from the failure to discharge the obligation, a series of Court of Appeal decisions give further support to the approach followed by the Industrial Magistrate. The decisions are *Schiliro v Peppercorn Childcare Centres Pty Ltd* (No 2)[3] (five Member Court); *Calvert v Mayne Nickless Ltd* (No 1)[4]; *Bourk v Power Serve Pty Ltd*[5] (special leave refused); and *Parry v Woolworths Ltd*[6]. Because of differences in drafting, *Kirk v Industrial Relations Commission (NSW)*[7] does not require reconsideration of the Court of Appeal decisions, compare *N.K. Collins Industries Pty Ltd v President of the Industrial Court of Queensland and Anor*[8]. [*Section 24 of the Act contemplates breach in the absence of death or injury. Whether, in such a case, a defendant is required to prove discharge of the obligation at s. 26 (or s. 27) of the Act only where the complainant leads sufficient evidence to put the matter in issue appears not to have been squarely determined.]

[10] *N.K. Collins Industries Pty Ltd v Peter Vincent Twigg*[9] dealt with s. 28 in the form which it took on 4 June 2007. For the Appellant, it is contended that consideration of the changes to the language of s. 28 of the Act which have occurred over the years, indicates a Legislative intention to move from penalising failure to ensure health and safety, to penalising conduct. It is sufficient to go to the form which s. 28 of the Act took on 30 March 2001, 1 January 2004, 1 May 2009* and 22 June 2009. [*The presently relevant formulation.]

30 March 2001:

"**Obligations of employers**

28. (1) An employer has an obligation to ensure the workplace health and safety of each of the employer's workers at work.

(2) Also, an employer has an obligation to ensure his or her own workplace health and safety and the workplace health and safety of others is not affected by the way the employer conducts the employer's undertaking.".

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[2] *R v Chargot Limited (t/a Contract Services) and Ors* (2008) UKHL 73
[3] *Schiliro v Peppercorn Childcare Centres Pty Ltd* (No 2) [2001] 1 QdR 518
[4] *Calvert v Mayne Nickless Ltd* (No 1) [2006] 1 QdR 106
[5] *Bourk v Power Serve Pty Ltd* [2008] QCA 225 (special leave refused [2009] HCA SL 58, 12 March 2009)
[6] *Parry v Woolworths Ltd* [2010] 1 QdR
[7] *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531
[8] *N.K. Collins Industries Pty Ltd v President of the Industrial Court of Queensland and Anor* [2010] QSC 373
[9] *N.K. Collins Industries Pty Ltd v Peter Vincent Twigg (C/2009/56) - Decision <http://www.qirc.qld.gov.au>*

1 January 2004:

"**28 Obligations of employers**

(1) An employer has an obligation to ensure the workplace health and safety of each of the employer's workers in the conduct of the employer's business or undertaking.

(2) An employer has an obligation to ensure the employer's own workplace health and safety in the conduct of the employer's business or undertaking.

(3) An employer has an obligation to ensure other persons are not exposed to risks to their health and safety arising out of the conduct of the employer's business or undertaking.".

1 May 2009:

"**28 Obligations of persons conducting business or undertaking**

(1) A person (the ***relevant person***) who conducts a business or undertaking has an obligation to ensure the workplace health and safety of the person, each of the person's workers and any other persons is not affected by the conduct of the relevant person's business or undertaking.

(2) The obligation is discharged if the person, each of the person's workers and any other persons are not exposed to risks to their health and safety arising out of the conduct of the relevant person's business or undertaking.

(3) The obligation applies -

(a) whether or not the relevant person conducts the business or undertaking as an employer, self-employed person or otherwise; and

(b) whether or not the business or undertaking is conducted for gain or reward; and

(c) whether or not a person works on a voluntary basis.".

22 June 2009:

"**28 Obligations of persons conducting business or Undertaking**

(1) A person (the ***relevant person***) who conducts a business or undertaking has an obligation to ensure the workplace health and safety of the person, each of the person's workers and any other persons is not affected by the conduct of the relevant person's business or undertaking.

(2) The obligation is discharged if the person, each of the person's workers and any other persons are not exposed to risks to their health and safety arising out of the conduct of the relevant person's business or undertaking.

(3) The obligation applies

(a) whether or not the relevant person conducts the business or undertaking as an employer, self-employed person or otherwise; and

(b) whether or not the business or undertaking is conducted for gain or reward; and

(c) whether or not a person works on a voluntary basis.".

[11] It may be concluded that a preoccupation with employment has given way to a more general concern about the impact of a business or undertaking on health and safety (though even in March 2001 an employer had an obligation to the health and safety of others). However, "conduct" and its analogies has appeared throughout. Further, there has always been an elaboration of the content of obligation at subsection (1). Materially, as at May 2009, s. 29 provided:

"**29 What obligations under s 28 include**

Without limiting section 28, discharging and obligation under the section includes, having regard to the circumstances of any particular case, doing all of the following -

(a) providing and maintaining a safe and healthy work environment;

(b) providing and maintaining safe plant;

(c) ensuring the safe use, handling, storage and transport of substances;

(d) ensuring safe systems of work;

(e) providing information, instruction, training and supervision to ensure health and safety.".

The elaboration emphasises that subsection (1) is about outcome and ensuring health and safety. Too much should not be made of reading together s. 28(1) and (2). The obligation is asserted at s. 28(1). Section 28 (2) nominates an outcome which, if procured, is to be treated as discharging the obligation at s. 28(1). That legislative scheme sits well with s. 7(1) and (2) of the Act which asserts the objective of the Act and how the objective is to be achieved:

"**Objective of the Act**

(1) The objective of this Act is to prevent a person's death, injury or illness being caused by a workplace, by a relevant workplace area, by work activities, or by plant or substances for use at a relevant place.

(2) The objective is achieved by preventing or minimising a person's exposure to the risk of death, injury or illness caused by a workplace, by a relevant workplace area, by work activities, or by plant or substances for use at a relevant place.".

In my view, the changes in language are an insufficient basis for disturbing the accepted understanding of s. 28 of the Act.

[12] In this matter there is neither a Regulation, nor a Ministerial Notice, nor a Code of Practice. This matter is not about sections 26 and 27 of the Act. This matter is all about s. 37(1)(c) and (2) of the Act. Section 37 of the Act relevantly provides:

"(1) It is a defence in a proceeding against a person for a contravention of an obligation imposed on the person under division 2 or 3 for the person to prove -

…

(c) if no regulation, ministerial notice, or code of practice has been made about exposure to a risk - that the person chose any appropriate way and took reasonable precautions and exercised proper diligence to prevent the contravention.

(2) Also, it is a defence in a proceeding against a person for an offence against division 2 or 3 for the person to prove that the commission of the offence was due to causes over which the person had no control.".

[13] Section 37(2) of the Act is not without its difficulties. The first difficulty is that one is required to determine whether the commission of the offence was due to causes over which a defendant had no control. Yet, if the inquiry be answered in the affirmative, it is the effect of the subsection that there is no offence. In my view, s. 37(2) of the Act is analogous to s. 53(b) of the *Occupational Health and Safety Act 1983 (NSW)* and that the reference to "the offence" is to be read as a reference to the facts which would create an offence unless the circumstances fall within the scope of the defence; compare *McMartin v The Broken Hill Proprietary Company Limited*[10] at 245 per Groves J and *Cahill v State of New South Wales (No 3)*[11] at [381] to [382]. The second difficulty is that, the noun is "causes" not "cause", i.e. the subsection has to be read as contemplating that the "offence" may be attributable to multiple causes and as requiring a defendant to establish that the clutch of causes included only causes over which the defendant had no control. Accepting that cases will arise in which some causes (or a cause) will be of such significance that causes of trivial input must be put to one side, this was not such a case. The industrial Magistrate found, at paragraph [18] of His Honour's reasons for decision that:

"The injury in this instance was suffered because Ms Maitland's head hit a concrete floor and although the defendant may not have been able to control the actions of Ms Maitland in reaching the point where her head was in the vicinity of the concrete floor, it was within the control of the defendant to prevent Ms Maitland's head hitting the concrete floor by, for example, placing a scatter mat over the concrete floor.".

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[10] *McMartin v The Broken Hill Proprietary Company Limited* (1995) 100 IR 241 at 245
[11] *Cahill v State of New South Wales (No 3)* [2008] NSW IRComm 123 at [381] to [382]

The finding was plainly open. It is implicit in the finding that the collision between Ms Maitland's head and the concrete floor was the penultimate and significant cause.

[14] With respect to the skill with which the Appellant's case has been argued, the failure of the defence based on s. 37(1)(c) of the Act seems to me to have been inevitable. As noted above, it was the contention of the Appellant at trial that the "Hazard(s)" particularised by the complaint confined the case to the area covered by the mats at the end of the tumble tramp/tumble track. The Industrial Magistrate rejected that submission and for reasons previously advanced, I considered His Honour to have been correct. It was an additional aspect of the Appellant's case that the area of exposed concrete flooring whereat Ms Maitland's head came into contact with the flooring did not constitute a hazard, because a gymnast concluding the tumble tramp/tumble track manoeuvres, would not enter the area of unmatted concrete flooring unless, as in Ms Maitland's case, the gymnast rebounded. The Industrial Magistrate rejected that contention (materially) observing:

> "[12] The particulars are framed in the alternative so the hazard relates to either the concrete floor or the matting at the end of the tumble track. The defendant must address the risk relating to both hazards. The discharge of its obligations with respect to the mats at the end of the tumble track does not eliminate its obligation to address the hazard associated with the concrete floor particularly having regard to the admissions that Ms. Maitland's activities included 'recreational gymnastics' that were not limited to the use of the tumble track.
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> [13] In saying that I acknowledge the submissions and the evidence that disclosed that the tumble track had been used by the defendant without incident for over fourteen years. If the undertaking of the defendant was limited to the use of the tumble track and if the use of the tumble track ended upon the gymnast landing safely on the crash mats provided, I would accept that the defendant had taken reasonable precautions and exercised proper diligence with respect to the risks associated with the use of the tumble track. However the hazard(s) identified in the particulars should not be interpreted in such a narrow fashion and the defendant has an obligation to ensure that a person who successfully negotiates the tumble track is not injured elsewhere in the workplace. The workplace in this instance clearly includes the rest of the gymnasium and particularly includes the area of concrete floor commencing at the end of the landing area of the tumble track apparatus.".

In circumstances in which Ms Maitland had rebounded, had entered the unmatted area and had perished, the Industrial Magistrate's conclusion that a risk existed, is unexceptional.

[15] Like s. 37(2) of the Act, s. 37(1)(c) of the Act is not without its difficulties. There is a paucity of authority on the content of the adjective "appropriate". In the context of a defence to a serious criminal charge, it is entirely arguable that "a way" chosen by *bona fide* and prudent application of the directives about management of exposure to risk at s. 27A of the Act, is to be treated as "appropriate" without further analysis of its attributes and prospects of success. However, such issues are of no moment here. The evidence is insufficient to raise compliance with s. 27A of the Act as an issue. There was no evidence of the person or persons who undertook the s. 27A assessment: nor evidence of when the assessment was undertaken. The Appellant, who had the onus of proof did not tender documents relating to the assessment. It cannot be assumed that there is documentation. There was evidence of contact with unspecified gymnastic bodies but no evidence about the "ways" chosen by those bodies to eliminate and/or diminish risk. Finally, there is the fundamental difficulty that the Appellant did not identify the risk to be dealt with in an appropriate way.

[16] As to the Appellant's complaints about the adequacy of the Industrial Magistrate's reasons for rejecting the s. 37(1)(c) defence, the explanation seems to me that the complaints relate to issues which are not raised by the evidence and which were not argued below.

[17] The Order of the Court is that the Appeal is dismissed. I reserve all questions as to costs.

Dated 22 March 2011.

D.R. HALL, President.

Appearances:
Mr A.J. Glynn SC and with him Mr T.W. Collins, instructed by HWL Ebsworth Lawyers, for the Appellant.
Mr R. Douglas SC and with him Ms V. McKenzie of Legal and Prosecution Services, Fair and Safe Work Queensland, instructed for the Respondent.

Released: 22 March 2011