

WorkSafe's brother bother

Recent health and safety prosecutions have kept it in the family. Two health and safety cases involving prosecuting individuals have resulted in vastly different outcomes. In this case round-up we outline the family business affairs that have recently been the subject of WorkSafe's attention.

The Buttle brothers¹

Andrew, James, and Peter Buttle are the directors of Whakaari Management Limited, the entity which manages Whakaari White Island. The Buttles were charged under section 44 of the Health and Safety at Work Act 2015 with failing to exercise necessary due diligence in relation to health and safety matters. The charges alleged the directors of WML should have ensured WML obtained quantitative risk assessments and expert advice.

The Buttles successfully applied to have the charges against them dismissed. The application to dismiss the charges was made following WorkSafe closing its case. The application was made on the basis that a court could not reasonably convict on the evidence WorkSafe had presented.

The court concluded it could not reasonably convict on the evidence presented, even when WorkSafe's evidence was taken at its highest.

The Judge commented to determine whether a director had met their due diligence, the Judge would need to ask:

- a) *what were the relevant circumstances, including those of WML and those of the particular director, including the nature of the*

responsibilities undertaken by that director; and

- b) *given those circumstances, did that director exercise the care, diligence, and skill that a reasonable officer would exercise?*

The court determined WorkSafe had failed to present evidence about the directors' individual actions and responsibilities. WorkSafe had presented its case more generally referring to what the Buttles collectively did or did not do. In order for charges to ever be possible against individual directors, there needed to be evidence as to what those individual directors did or did not do, or were required to do, in terms of due diligence.

WorkSafe had not given evidence of *what happened behind the boardroom door*. WorkSafe had not sought board or management meeting minutes relating to internal decision making. There was no evidence about the directors' individual responsibilities, such as whether the board had agreed that one director would be specifically responsible for looking into whether and what expert advice WML should take.

Each of the charges against the Buttles were dismissed.

Our thoughts

The case provides some insight into what sort of evidence will be required when bringing charges for breach of an officer's due diligence duty, particularly where the officer charged is just one of a number of board members. Directors should also be aware of the liability they may face where their individual responsibilities include specific oversight of health and safety-related matters, such as where the board has agreed that individual director will oversee health and safety governance or management.

¹ *WorkSafe New Zealand v Buttle* [2023] NZDC 18939.

WorkSafe's brother bother (Continued)

The Sullivan brothers²

On another brotherly note, William and Steven Sullivan were recently sentenced to prison for their conduct during a WorkSafe investigation into a workplace health and safety incident.

WorkSafe investigated a workplace incident at Aimex Limited where an employee was overcome with brake cleaner fumes and passed out. As a result, the employee suffered a hypoxic brain injury and continues to suffer the effects.

Five days prior to the incident, another employee had carried out the exact same task, but managed to escape from the enclosed boat hull when they began to feel lightheaded. The employee had made a note of the incident on their timesheet, and completed an incident report for William Sullivan (the Health and Safety Officer). Despite William recording on the incident report that the potential consequences of the incident were "significant", Aimex took no steps to remedy the situation.

WorkSafe was informed of the first incident during the investigation, and requested the incident report on numerous occasions. Aimex denied it existed, stating it had reviewed its records and could not locate the incident report. William similarly denied any knowledge of the incident or the existence of an incident report.

Steven Sullivan (Managing Director) had also become aware of the first incident, and the incident report. Nevertheless, he maintained that he had found no record of the incident ever occurring.

This meant WorkSafe was unable to clearly establish the earlier incident had occurred, or that Aimex was aware of it.

Aimex pleaded guilty to charges under the Health and Safety at Work Act 2015, however at sentencing again rejected the proposition that a previous similar incident had been reported to it in a manner that could reasonably have been followed up on. This resulted in

Aimex receiving discounts to its sentence as it was essentially treated as a first offender with a clean prior record.

After sentencing, a newly appointed Chief Operating Officer discovered the cover-up and made a protected disclosure statement. Police executed a search warrant at the former General Manager's home address and located a copy of the first incident report.

The Sullivans were charged with crimes under the Crimes Act 1961: William for making a false statement, and Steven for perverting the course of justice.

William was initially sentenced to nine months' imprisonment in the District Court, but successfully appealed the sentence to the High Court by establishing it was "manifestly excessive". A sentence of home detention is the likely outcome once a suitable proposed address is put before the court.

The District Court sentenced Steven to 20 months' imprisonment. Steven's appeal of his prison sentence was dismissed by the High Court.

Whilst the charges against the Sullivans were brought under the Crimes Act, individuals can also be sentenced to prison for breaches of the Health and Safety at Work Act 2015 where they have been *reckless* as to the risk to an individual of death or serious injury/illness.

Our thoughts

The Sullivans' cases illustrate where attempting to mislead a WorkSafe investigation may land you. Officers/directors of companies and other entities need to be aware of their health and safety obligations and the potential for personal liability.

Want to know more?

If you have any questions about the case or the topics discussed in this article, please contact our specialist [Employment Team](#).

²*R v Sullivan* [2023] NZDC 15433; *R v Sullivan* [2023] NZDC 15041; *Sullivan v R* [2023] NZHC 2251; *Sullivan v R* [2023] NZHC 2453.