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NORTHERN TERRITORY OF AUSTRALIA

WORK HEALTH COURT

E X T R A C T

No: 21806726

WORK HEALTH AUTHORITY

and

BARGE EXPRESS OPERATIONS  
PTY LTD

(Sentencing Remarks Extract)

JUDGE MORRIS

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON 13 DECEMBER 2018

Transcribed by:  
EPIQ

HER HONOUR: No. Okay. Daniel Bradshaw commenced work at Barge Express, and I'll perhaps use that term 'Barge Express' and the business name Conlon Murphy Proprietary Limited alternatively, but I mean the company. He commenced work for them on 25 May 2016 as a deckhand. He worked what's commonly known as four-on, four-off. That is four weeks working and a swing of four weeks off.

On 7 January 2017, he had been in the company's employ for about six and a half months and he was returning on one of their vessels from Port Keats. The vessel came in and berthed at around 10:58. There was no gangway placed between the vessel and the wharf.

It was a jump step, or step from the vessel to the wharf at around the time that they berthed. The fender that they stepped onto was a tyre which was tied to the wall. Darwin of course, has enormous tides and when a vessel docks or is tied to a wharf, account must be had of the vessel moving up and down, sometimes as much as 30 feet.

They berthed on a rising tide and it was not too difficult at that point in time to get off the vessel. At about 3:30 the engineer and two of the deckhands, including Mr Bradshaw, left and went to the pub. They dropped one of the deckhands at the ferry terminal and then two of them returned to the area where the barge was.

The deceased stayed at the shed in the yard and had a few more drinks. The engineer at that time, it would appear from the coronial findings, fashioned a rope as a form of assist to get down to the tyre to then walk off onto the boat. He then got back on board. It would appear from all of the evidence that the deceased got on and off at least one or more occasions during the night because of various things that were found on the barge.

But it is clear also from his blood alcohol level of .28 that he continued to consume alcohol during the evening. His body was found at around 7:16 am on the next morning, in the water, deceased. A coronial inquiry found – and I'm quoting from par 37:

It is likely that Dan was climbing from the barge at or about 6:00 am in the morning. He climbed from the barge bridge wing onto the tyre and threw his hat and phone onto the wall, however, either in completing that manoeuvre or shortly after he lost his grip on the rope or wall and fell back.

As he fell, he hit the back of his neck at the base of his skull on the protruding end of the bridge wing grated tread and then fell right side first heavily on the gunwale below before falling face down into the water. The forensic pathologist was of the opinion that he may well have been rendered unconscious by the strike to the back of the neck. The low level of the water at the time, about 30 centimetres, would indicate that was probable.

I continue to quote:

The fact that his body was found in the water below the place where the crew climbed on and off the barge at low tide, the laceration to the back of Dan's neck likely caused by the bridge wing protrusion and the presence of the hat and phone on top of the wall make it most likely that Dan was getting off the barge and negotiating a climb to the top of the wall when he fell. Why he was doing so at about 6:00 am when he was due to start work at 7:30 am is less certain.

That's the end of the quote. The shipboard safety manual for the vessel instructs that a gangway must be rigged in order to secure safe access when a vessel is alongside. It would appear from all of the evidence that there was a gangway available in the yard at the time but it wasn't used.

The company has a fitness for work policy and the fitness for work policy says that it will strive to ensure that its workers are in a fit condition to carry out their work and that all workers are not impaired in any way by the effects of alcohol, drugs, fatigue or stress.

It is clear in this case that there may well have been issues of fatigue, given all of the evidence that he had not slept for a considerable period of time. He was clearly intoxicated and he was due to commence work that morning at 7:30. He would, of course, have still been intoxicated at that time. It appears that while there were practices and procedures, there were no processes in place to manage those particular issues.

It is clear that other members of staff were aware that alcohol was consumed in the shed on the yards. The company, Conlon Murphy Proprietary Limited, has pleaded guilty in front of me today to an offence of failing to comply with its duty contrary to s 32 of the *Work Health and Safety Act*.

The particulars in relation to that contravention include (1) failing to ensure safe access, and I'm paraphrasing here, (2) failing to ensure regular safety meetings, and (3) failing to ensure workers are not impaired due to fatigue or alcohol consumption. It is clear, as I said, that they had these policies and procedures, but they were not complied with.

Of course, a sentence in relation to this offence is not a sentence for the death that resulted. Death or serious injury is not an element of the charge. You can be guilty without having such a tragic event. It is that the failure to comply with such a duty exposes an individual to a risk of death or serious injury or illness. However, that such a death actually occurred highlights the level of risk.

This death of course has affected many people. His workmates, no doubt, who found him, the first responders who then attended and, of course, his family. Two victim impact statements have been presented to the court in relation to this matter. His mother speaks of her grief and the devastating effect on herself and her wider family, including on his older brother.

Ms Tanya Louth, the mother of Mr Bradshaw's two young children, has also provided a statement detailing their tears and incomprehension of a life without their father. Some of the matters raised in her statement appear inconsistent with other information before the court and some go beyond the scope of a victim impact statement.

For example, the decisions and/or attitude of an insurance company. However, I accept that she too grieves a future that might have been and that she has been deeply affected by Mr Bradshaw's untimely death.

The company immediately did an investigation and in their very first report which was given to the Work Health Authority on the day highlighted three areas of concern: alcohol, fatigue and the gangway. So they have immediately recognised those particular areas where there may have been some responsibility. It is a medium-sized company. Some 68 people are in its employ.

As a result of the death, the local workplace organised a small ceremony for staff in the immediate aftermath. They paid for the funeral, travel costs of family and travel costs of staff to attend the funeral and they have assisted in the erection of a memorial at the seafarers memorial at East Point. All of these, of course, are appropriate actions and actions one would expect from a workplace in these circumstances.

Their counsel has informed the court that since then their policies are now strictly in force. They have, in fact, terminated three staff for intoxication as a result of the enforcement of that policy. And gangways are now closely watched. They have cooperated with the investigation.

This is not the earliest of pleas of guilty, but the matter was never contested in the court and they entitled to a discount and I give them a discount on their sentence of 20 percent because of the plea of guilty. I accept the company is remorseful in relation to their actions, which led to the death of their staff member.

There is, of course, weighing and balancing of all the different factors that I have to take into account under the *Sentencing Act* including, and I'm assisted by the factors described as the Madgwick factors, which clearly and sensibly set out many of the competing aspects.

General deterrence and bringing attention to these sort of duties are very important in the Northern Territory. We have a large coastline. We have a large seafaring and maritime industry that has existed since the history of settlement of all peoples in the Northern Territory and, indeed, many of our remote communities rely solely on the sea to bring the staples of their existence.

There are, as I previously mentioned, high tides, but particularly in Darwin Harbour. Falls, and I accept the evidence, are a prominent risk in relation to workplace deaths and injuries. It appears to me from all of the evidence that this particular fall was foreseeable.

The fashioning of the rope with the knots in it, an indication that egress was not easy between the wharf and the vessel without a gangway. In my view, it was in fact a foreseen incident. I accept that policies and procedures were in place, but they were not acted on. Therefore, in my view, the risk was a high one.

The deceased, of course, was intoxicated. This is – and was self-induced. There's no suggestion of anything else and as adults, we must all be responsible for our own actions. However, again, the policy in relation to the safety of the workplace was not followed and there was tacit permission to consume alcohol in the vicinity of the workplace and here, of course, it would appear that that consumption was in excess.

In relation to the need to encourage diligence in the future, one would hope, and I infer, of course, that a death such as this; that of Mr Bradshaw, would be sufficient in itself to encourage diligence in the future for any company. This was, in my view, a case where a simple well-known precaution to deal with an event and a great risk of injury was not taken.

Gangways, tides, fatigue, alcohol. Separately they all present very serious risks that were known to those who deal with this kind of business. Together and a combination of all of those factors was obvious and evident that a serious risk would befall someone and sadly, it did in relation to the deceased.

Having considered all of those factors and being assisted by both counsel in relation to the other matters before the court and different courts, both in the Northern Territory and around Australia, I have considered that the appropriate penalty is a conviction in relation to the company and I issue a fine of \$190,000 and the mandatory victim's levy for a company is \$1000 under the victim's levy.

MR O'LOUGHLIN: As the court pleases.

HER HONOUR: Are there any other - - -

MR O'LOUGHLIN: I've discussed this with my friend. The defendant seeks six months to pay and I understand there is no objection to that.

MS BLUNDELL: That's correct, your Honour.

HER HONOUR: Thank you. I don't normally – it's normally up to the Fines Recovery Unit. I'm not sure, I probably need to – but you want to, I guess, stop them doing something, so I'll just have a look at the *Fines and Penalties Recovery Act*. First of all I'll just check the *Sentencing Act* about fines.

Section 19 says, "A fine imposed by court is to be paid within 28 days after it is imposed."

MR O'LOUGHLIN: Section 12A apparently deals with extensions for further time to pay. 12A.

HER HONOUR: Of the fines - - -

MR O'LOUGHLIN: Penalty under an infringement notice, sorry.

MS BLUNDELL: Your Honour, I think if the fine was to - - -

HER HONOUR: I'm quite happy to do that, but I just need my power in order to - - -

MS BLUNDELL: I think, though, if what the company is seeking – what the defendant is seeking is time to pay, then the *Fines Recovery Act* in the normal process would actually facilitate that because what usually occurs is that as long as the person has contact with the Fines Recovery Unit and made an arrangement to pay, penalty action is not taken. I mean that is standard in most matters.

MR O'LOUGHLIN: Yes, I'm happy to leave it at that. Section 25(1) applies where it says, quote: “An application for further time to pay a fine may be made to the Fines Recovery Unit by or on behalf of the person to whom the court has imposed the fine.” So 28 days will be sufficient and then the defendant can take that up with the Fines Recovery Unit.

HER HONOUR: Yes.

MR O'LOUGHLIN: And that's in Pt 3 titled 'Fines imposed by court.'

HER HONOUR: Yes. I make no further order in relation to that.

MS BLUNDELL: Thank you. Your Honour, I am seeking an order for two days' costs.

HER HONOUR: Can you do that? It wasn't a hearing.

MS BLUNDELL: Your Honour, other matters that have been dealt with in this manner, including *Gibbo's Tyres* and other matters I'm aware of that have proceeded by way of pleas, have had costs - in fact, both the rock case, *Gibbo's Tyres* - - -

HER HONOUR: Where's my power to give costs?

MS BLUNDELL: It's just a standard power of the *Criminal Procedure Act*, your Honour.

MR O'LOUGHLIN: I think they kept the same numbering of the *Justice's Act*, so it ought be around 77C. That's the limit on the amount of.

MS BLUNDELL: Yes. The court's power to order costs has certainly been done in, I think, all of the matters which I've handed – decisions from this court in relation to

these matters which have proceeded by way of plea. I appreciate that's not a legislative basis, but I think it's just a standard provision under their *Criminal Procedure Act*. I'm happy to speak to my - - -

HER HONOUR: 77A, I guess, gives me the power. And, then we go to the regs. It's the regs, I think, that the - - -

MR O'LOUGHLIN: Then restricted to the one day at a rate and then the second day at another rate.

HER HONOUR: Why are you seeking two days?

MS BLUNDELL: Because, your Honour, this matter has been in court. This is the eleventh date it has been in court and, your Honour, today was a lengthy plea and, in my submission, that is a reasonable assessment of the time in terms of costs. I am happy to provide the court with the actual dates if your Honour requires that.

HER HONOUR: One, two, three, four, five, six, seven, eight – I've got eight.

MS BLUNDELL: I have 27/2/18, 29/3/18, 10/4/18, 23/5/18, 28/6/18, 9/8/18, 16/7 - -  
-

HER HONOUR: I don't have 16 - - -

MS BLUNDELL: Sorry, no. I'll withdraw that one. Sorry, 16/10/18 and today.

HER HONOUR: 26/10/18, so that's eight.

MS BLUNDELL: Yes, your Honour. Sorry.

HER HONOUR: However, three weeks was required to finalise the brief. That says it on the first time.

MS BLUNDELL: That's correct.

HER HONOUR: What do you say about costs?

MR O'LOUGHLIN: Section 77A of the Act, and then that refers – 77C puts a cap on that, or as prescribed. So I've got – I could plug it in and put it on the screen if it assists your Honour.

HER HONOUR: No.

MR O'LOUGHLIN: I've got Regulation 5 of the Local Court Criminal Procedure Regulations. But s 77C of the Act, the amount that the court may order for the costs must not exceed for the first day of the hearing, including preparation, 1500 penalty units, then refers to the second or subsequent day of the hearing. So the structure

of this maximum and the scale upon which you are to apply deals with hearings and days of hearings, not numbers of mentions which would go in all matters.

I don't have instructions, but I've got less resistance in argument to a one-day hearing - - -

HER HONOUR: It seems to me that the adjournments are meant to be covered in the first day - - -

MR O'LOUGHLIN: Yes.

HER HONOUR: - - - because that's preparation of the case. But if I order one day's costs, do you want to say anything else, Ms Blundell?

MS BLUNDELL: Your Honour, if the adjournments are considered one day's costs, then my submission the plea today ought be treated as the subsequent day.

HER HONOUR: No. As in they're the preparation for the first day. Today is the first day of the hearing and - - -

MS BLUNDELL: Sorry, your Honour. I misunderstood what your Honour was saying.

HER HONOUR: All right. For the first day of the hearing, including preparation of the case for hearing and counsel fee, 1500. That's what the regs say.

MS BLUNDELL: Yes, I agree with that, your Honour. I don't - - -

HER HONOUR: Yes.

MR O'LOUGHLIN: I think I just got a nod from my client, your Honour, in consent.

HER HONOUR: Defendant to pay costs of \$1500 to whom?

MS BLUNDELL: Your Honour, I actually had this query recently in a matter where costs were ordered.

HER HONOUR: The Work Health Authority?

MS BLUNDELL: No, DPP and it just went to the court. So it was paid to the court.

HER HONOUR: No. Well, normally it goes to the police commissioner if it's a criminal charge because the police commissioner is the one who has brought it, so - - -

MS BLUNDELL: Well, it would be the Work Health Authority then.

HER HONOUR: To the Work Health Authority. Anything else?



MS BLUNDELL: Nothing arising.

HER HONOUR: All right. Thank you.

MR O'LOUGHLIN: Thank you, Your Honour.

HER HONOUR: Thanks for all of your extensive submissions, both of you, they were very helpful. We will adjourn.

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