

Public Service Association of NSW – Provision of additional relevant Information

The more things change, the more they stay the same.

“In 1833, Lord Ashley introduced a bill into parliament which required the fencing of machinery in factories and mills. The bill provided that if an operative was killed owing to an accident from unfenced machinery, the coroner should be required to summon a jury to examine the machine. If it appeared that there had been negligence in fencing, then the mill owner responsible would be committed for trial on a charge of manslaughter. If the worker had suffered a non fatal injury, they were allowed to apply to the magistrate for an enquiry to be held at the petty sessions, which might impose a penalty of between 50 pounds and 200 pounds.

The bill was heatedly debated in parliament. One outraged Scottish spinning master declared:

I shall scarcely be able to speak of Sections 29 and 30 [the proposed amendments]. Indeed, I have no hesitation in saying that, if passed into law, it would be utterly impracticable for any man to conduct an establishment where machinery is used. To think that the proprietor or occupier of a mill, for an accident over which he has not control should be at the mercy of a jury who would be utterly incompetent to determine which of the machinery should or should not have been fenced in is altogether an invidious, harsh and unwarrantable proposition....

Every practical man knows the absolute impossibility of fencing in all machinery in a spinning mill which may come under the denomination of “dangerous”: In fact, work could not be carried on if every part were fenced in.

The 29th and 30th clauses must therefore be expunged or the title of the Bill had better be altered at once to “A Bill for Annihilating the Manufacturers of Great Britain” (from Tooma, M, Safety, Security, health and Environment law, The Federation Press, 2008, page 10)

Please find a submission of additional information with regard to the following issues.

This submission includes the case that is referred to in our original submission at length. **Cahill v State of New South Wales (Department of Community Services) (No 3) [2008] NSWIRComm 123**

The case is provided for your reference, as the matters in the decision are important to the formation of any recommendations that the review panel can make.

In particular the decision in the paragraphs 149 to 291 discuss the development of and definitions of absolute liability, strict liability and their applications different types of law in the United Kingdom, Hong Kong, Canada, Commonwealth and New South Wales.

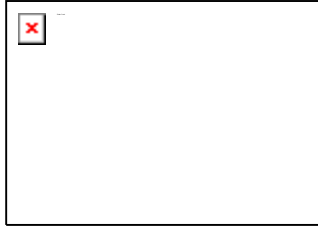
The decision also discusses the difference between strict criminal offences and regulatory offences aimed at public safety and some of the history of their development.

Part of the discussion details the issue of mens rea and the position of a prosecutor and their burden, in terms of a safety matter where corporation sole controls all information and systems.

Additionally Boland J. President, describes the development of fines and penalties in the NSW law as safety has become a more serious focus of our legislators.

I attach and recommend the decision at least in these parts for the benefit of the panel's understanding of the NSW system and an endorsement of the highest level of safety currently available through legal processes through the Westminster systems.

Shay Deguara
PSA OHS Industrial officer



Industrial Court of New South Wales

CITATION: **Cahill v State of New South Wales (Department of Community Services) (No 3) [2008] NSWIRComm 123**

PARTIES:

PROSECUTOR:
John Joseph Cahill

DEFENDANT:
State of New South Wales (Department of Community Services)

FILE NUMBER(S): IRC 2387 of 2006

CORAM: Boland J President

CATCHWORDS: Occupational health and safety - Prosecution by Public Service Association and Professional Officers Association Amalgamated Union of New South Wales ("PSA") of State of New South Wales in its emanation as the Department of Community Services ("DOCS") - Section 8(1) of Occupational Health and Safety Act 2000 - Not guilty plea - Allegations that employees of the defendant placed at risk to their health and safety - Stabbing incident - Physical and psychological injuries - Allegations that defendant failed to ensure safety of employees - Consideration of elements of the offence - Consideration of statutory defences under s 28 of Occupational Health and Safety Act 2000 - Guilty finding - Defences not made out.

Statutory interpretation - Sections 8(1) and 12 of Occupational Health and Safety Act 2000 - Whether offence was an absolute liability offence - Consideration of the tests in *He Kaw Teh v The Queen* (1985) 157 CLR 523 as to which category the statutory offence fell into - Regulatory offences - Meaning of word "ensure" - History of legislation - Legislative intention - Consideration of defence of honest and reasonable mistake of fact if wrong about

absolute nature of offence - Held that offence under s 8(1) of the Occupational Health and Safety Act 2000 is an absolute liability offence.

LEGISLATION CITED:

Buildings Ordinance (Laws of Hong Kong, 1981 rev., c. 123) ss 40(2A)(b) and 40(2B)(b)
Clean Waters Act 1970 s 16
Crimes (Sentencing Procedure) Act 1999 s 17
Customs Act 1901 (Cth) ss 233B(1)(b), 233B(1)(c)
Dangerous Drugs Act 1965 (UK)
Defence Force Discipline Act 1982 (Cth) s 44(2)
Environment Protection Act 1970 (Vic) s 39(1)
Evidence Act 1995 s 79
Factories and Shops Act 1960 (Qld)
Health and Safety at Work etc Act 1974 (UK) ss 2(1), 3(1), 4(2), 6(1)(a)
Indecent Articles and Classified Publications Act 1975 s 6(1)
Interpretation Act 1987 ss 33, 34(1), 34(2)(b), 34(2)(c), 34(2)(f)
Mental Health Act 1990
Occupational Health and Safety Act 1983 ss 15, 15(1), 47, 51A, 53(a), 53(b)
Occupational Health and Safety Act 2000 ss 8(1), 12, 28(a), 28(b), 32A
Occupational Health and Safety Legislation (Amendment) Act 1990
Ontario Water Resources Act 1970 (Ont. Stat) s 32(1)
Protection of the Environment Administration Act 1991 ss 5(1), 7
Pure Food Act 1908 s 10
WorkCover Legislation Amendment Act 1995

CASES CITED:

Allen v United Carpet Mills Pty. Ltd. and Another [1989] VR 323
Austin Rover Group Ltd v Her Majesty's Inspector of Factories [1989] 3 WLR 520
Beacham v Interface Manufacturing Pty Ltd (2005) 141 IR 416
Bull and Others v The Attorney-General for New South Wales (1913) 17 CLR 370
Butler and Another v Fife Coal Company Limited (1912) AC 149
CA Henschke & Co and Another v Rosemount Estates Pty Ltd (1999) 47 IPR 63
Cahill v State of New South Wales (Department of Community Services) (2007) 161 IR 124
Carrington Slipways Pty Limited v Callaghan (1985) 11 IR 467
Chief of the General Staff v Stuart (1995) 58 FCR 299

Cooper Brookes (Wollongong) Proprietary Limited v
The Commissioner of Taxation of the Commonwealth
of Australia (1981) 147 CLR 297
Daly Smith Corporation (Aust) Pty Ltd v WorkCover
Authority (NSW) (Inspector Mansell) (2006) 151 IR
173
Dawson v State Rail Authority of NSW (1988) 26 IR
359
Doval v Anka Builders Pty Ltd (1992) 28 NSWLR 1
Drake Personnel Ltd t/a Drake Industrial v WorkCover
Authority of New South Wales (Inspector Ch'ng)
(1999) 90 IR 432
Environment Protection Authority v N (1992) 26
NSWLR 352
Environment Protection Authority v Sydney Water
Corporation Limited (1997) 98 A Crim R 481
Ford v North West County Council (1987) 23 IR 155
Gammon (Hong Kong) Ltd v Attorney-General of
Hong Kong [1985] 1 AC 1
Grunwick Processing Laboratories Ltd and Others v
Advisory, Conciliation and Arbitration Service and
Another [1978] AC 655
Hardy v St Vincent's Hospital Toowoomba Ltd [2000]
2 Qd R 19
Hawthorne (Department of Health) v Morcam Pty Ltd
(1992) 29 NSWLR 120
Haynes v CI & D Manufacturing Pty Limited (1994) 60
IR 149
He Kaw Teh v The Queen (1985) 157 CLR 523
HG v The Queen (1999) 197 CLR 414
Hunter Water Board v State Rail Authority of New
South Wales (No 1) (1992) 75 LGRA 15
Inspector Schultz v Hoffman's Kundabung Sawmilling
Pty Ltd [2006] NSWIRComm 277
Jiminez v The Queen (1992) 173 CLR 572
John Cahill v State of New South Wales (Department
of Community Services) (No 2) [2007] NSWIRComm
187
K & S Lake City Freighters Proprietary Limited v
Gordon & Gotch Limited (1985) 157 CLR 309
Kirk Group Holdings Pty Ltd & Another v WorkCover
Authority of New South Wales and Another (2006) 66
NSWLR 151
Kirkby v A & M I Hanson Pty Ltd (1994) 55 IR 40
Lim Chin Aik v The Queen [1963] AC 160
Mainbrace Constructions Pty Ltd v WorkCover
Authority of New South Wales (Inspector Charles)
(2000) 102 IR 84
Makita (Australia) Pty Ltd v Sprowles (2001) 52
NSWLR 705

McMartin v The Broken Hill Proprietary Company Limited (1988) 100 IR 241
Morrison v Powercoal Pty Ltd and Another (2004) 137 IR 253
Mount Isa Mines Ltd v Peachey (Unreported, Queensland Court of Appeal, McMurdo P, McPherson JA and Muir J, 1 December 1998)
Neindorf v Junkovic (2005) 80 ALJR 341
Newcastle Wallsend Coal Company Pty Ltd v WorkCover Authority (NSW) (Inspector McMartin) (2006) 159 IR 121
Powercoal Pty Ltd and Another v Industrial Relations Commission Of NSW and Another (2005) 64 NSWLR 406
Project Blue Sky Inc and Others v Australian Broadcasting Authority (1998) 194 CLR 355
Proudman v Dayman (1941) 67 CLR 536
R v Associated Octel Co Ltd (1985) ICR 285
R v Board of Trustees of the Science Museum (1993) ICR 867
R v British Steel Plc [1995] ICR 586
R v Davies [2003] ICR 586
R v Ewart (1905) 25 NZLR 709
R v Gateway Foodmarkets Ltd [1997] ICR 382
R v Lavender (2005) 222 CLR 67
R v Sault Ste Marie (1978) 2 SCR 1299
R v Wampfler (1987) 11 NSWLR 541
R. v. Cancoil Thermal Corp. (1986) 27 C. C. C. (3rd) 295
Ref. re S. 94(2) of Motor Vehicle Act [1985] 2 S.C.R. 486.
Regina v Jung [2006] NSWSC 658
Ridge Consolidated Pty Ltd v WorkCover Authority of New South Wales (Inspector Mauger) (2002) 115 IR 78
Saraswati v The Queen (1991) 172 CLR 1
Shannon v Comalco Aluminium Ltd (1986) 19 IR 358
Sherras v De Rutzen [1895] 1 QB 918
St Hilliers Contracting Pty Ltd v WorkCover Authority (NSW) (2007) 162 IR 241
State of New South Wales (NSW Police) v Inspector Covi [2005] NSWIRComm 303
State Rail Authority of New South Wales v Dawson (1990) 37 IR 110
State Rail Authority of NSW v Hunter Water Board (1992) 28 NSWLR 721
Sweet v Parsley [1970] AC 132
T and M Industries (Aust) Pty Ltd v WorkCover Authority (NSW) (Inspector Sequeira) (2006) 151 IR 130

Tesco Supermarkets Ltd v Natrass [1972] AC 153
The Crown in Right of the State of New South Wales
(Department of Education and Training) v O'Sullivan
(2005) 143 IR 57
Von Lieven v Stewart Kemish v Godfrey and Another
(1990) 21 NSWLR 52
Waugh v Kippen and Another (1986) 160 CLR 156
William and Margaret Adamson t/a John Adamson &
Sons v Procurator Fiscal, Lanark [2000] ScotHC 102
WorkCover Authority (NSW) (Inspector Wolf) v
Rockdale Beef Pty Ltd (2006) 155 IR 366
WorkCover Authority (NSW) v T & Y Pty Ltd (2005)
146 IR 458
WorkCover Authority of New South Wales (Inspector
Buggy) v Weathertex Pty Ltd (2003) 127 IR 60
WorkCover Authority of New South Wales (Inspector
Bultitude) v Grice Constructions Pty Limited (2002)
115 IR 59
WorkCover Authority of New South Wales (Inspector
Byer) v Cleary Bros (Bombo) Pty Ltd (2001) 110 IR
182
WorkCover Authority of New South Wales (Inspector
Franke) v Amer Kanaway [2005] NSWIRComm 361
WorkCover Authority of New South Wales (Inspector
Glass) v Flexible Packaging (Australia) Pty Ltd (2005)
144 IR 385
WorkCover Authority of New South Wales (Inspector
Glass) v Kellogg (Aust) Pty Ltd (No 1) (1999) 101 IR
239
WorkCover Authority of New South Wales (Inspector
Legge) v Coffey Engineering Pty Limited (No 2)
(2001) 110 IR 447

HEARING DATES: 27/08/07-31/08/07; 08/10/07; 17/10/07; 18/10/07;
29/10/07-02/11/07; 21/11/07; 30/11/07; 27/02/08;
28/02/08; 31/03/08; 04/04/08; 05/05/08

DATE OF JUDGMENT: 27 June 2008

LEGAL REPRESENTATIVES: **PROSECUTOR:**
Mr B G Docking of counsel
Solicitors:
W G McNally Jones Staff, Lawyers
Ms A McRobert

DEFENDANT:
Mr P M Skinner of counsel and Ms B Obradovic of
counsel
Solicitors:
Crown Solicitor's Office

JUDGMENT:

INDUSTRIAL COURT OF NEW SOUTH WALES

CORAM: BOLAND J, President

Friday 27 June 2008

Matter No IRC 2387 of 2006

**JOHN JOSEPH CAHILL v STATE OF NEW SOUTH WALES (DEPARTMENT OF
COMMUNITY SERVICES)**

**Prosecution under section 8(1) of the Occupational Health and Safety Act
2000**

JUDGMENT

[2008] NSWIRComm 123

[INTRODUCTION](#)

The incident giving rise to the charge

The charge

Interlocutory judgments

Dramatis Personae

Physical Layout of the Ballina CSC

[FACTUAL BACKGROUND](#)

[EVIDENCE OF MS THOMAS](#)

[WHETHER OFFENCE CHARGED IS ONE OF ABSOLUTE LIABILITY](#)

Case for the defendant

Prosecutor's case

[CONSIDERATION OF ABSOLUTE LIABILITY ISSUE](#)

Relevant statutory provisions

Carrington Slipways

Regulatory offences

The words of the statute and the subject matter with which it deals

Statutory construction

Objects of 2000 OHS Act

Meaning of word "ensure"
OHS Act is a remedial statute
Defendant's reliance on Kirk Group
History of the legislation
Legislative intention
Whether imposition of absolute liability would assist in the enforcement of the relevant statutory duty
Penalties
Difficulty of proof
Honest and reasonable mistake of fact

LIABILITY OF THE DEFENDANT

Failing to prevent the client, Ms Cheryl Cooper, from attending the place of work for an interview

Failing to undertake an adequate risk assessment of the client

Failing to undertake a Protection Planning Meeting in respect of the client

Failing to ensure that there were a security guard(s) or police officers(s) present or then attended at the place of work whenever the client attended the place of work

Failing to provide an alert in respect of the client or to warn employees that the client was to attend the place of work, or both

Failing to have in place adequate interview facilities at the place of work

Failing to have in place an adequate emergency system

OFFENCE MADE OUT

STATUTORY DEFENCES

Section 28(a) defence

Section 28(b) defence

GUILTY FINDING

INTRODUCTION

1 These proceedings involve a criminal prosecution under s 8(1) of the *Occupational Health and Safety Act 2000* ("the 2000 OHS Act"). The defendant, the State of New South Wales in its emanation as the Department of Community Services ("DOCS"), has pleaded not guilty.

2 In addition to a complex factual setting that will require extensive explanation, the defendant has challenged whether the relevant offence is an absolute liability offence. The defendant relies on the decision of the High Court in *He Kaw Teh v The Queen* (1985) 157 CLR 523 to contend that the offence with which the defendant was charged was one in which there was an original obligation on the prosecution to prove *mens rea*. Alternatively, it was put that the offence was one in which the defence of honest and reasonable mistake of fact was available and, therefore, that the prosecution must undertake the burden of negating the relevant belief beyond reasonable doubt.

The incident giving rise to the charge

3 On 24 May 2004, a client of the defendant, Ms Cheryl Cooper, attended the defendant's Ballina Community Service Centre ("CSC") for the purpose of an access visit to her three children, who had been removed from her care the week

prior. An interview was conducted between the client and two of the defendant's employees employed as caseworkers, namely Ms Kylie Philps and Ms Linda Williams. During the interview the client stabbed one of the employees, Ms Philps, and threatened other staff present at the Ballina CSC. Ms Cooper was arrested, subsequently found guilty of intent to maliciously wound and sentenced to a term of imprisonment.

The charge

4 As a consequence of the incident, Mr John Joseph Cahill, General Secretary of the Public Service Association and Professional Officers Association Amalgamated Union of New South Wales ("PSA"), empowered by s 106(1)(d) of the 2000 OHS Act, filed an application for order on 23 May 2006 that the defendant answer a charge under s 8(1) of the 2000 OHS Act. That provision requires that an employer "must ensure the health, safety and welfare at work of all the employees of the employer."

5 The particulars of the Application for Order alleged that:

On 24 May 2004, at the Ballina Community Services Centre in New South Wales, the State of New South Wales (Department of Community Services) whose address is 4-6 Cavill Avenue Ashfield 2131 Sydney, New South Wales, being an employer, failed to ensure the health, safety and welfare at work of all of its employees, and in particular, Gwen Balchin, Robin Kelly, Natjsia (sic) Lopic, Lynn Meehan-Frost, Kylie Philps, Theresa Pisanos, Rhonda Sherrington, Linda Williams and Raymond Hendrikas Wilton in that the defendant did not ensure systems of work and the working environment of the employees were safe and without risks to health contrary to section 8(1) of the Occupational Health and Safety Act 2000

The further particulars of the charge are:

a) From time to time clients attended the place of work of the Department of Community Services ("DOCS") for the purpose of being interviewed by DOCS employees.

b) There was an actual risk of a DOCS employee suffering trauma, namely, a psychic or physical phenomena, or both, which may occur when an employee is exposed to a violent event involving a client that threatens danger or anxiety, or both, and can be created by being the victim or a witness to an event or restraining any client.

c) Aspects of the defendant's unsafe systems of work were any of the following:

i) Failing to prevent the client, Ms Cheryl Cooper ("the client") from attending the place of work for an interview.

ii) Failing to undertake an adequate risk assessment of the client that had a focus on the safety of the employees at the place of work, assessed the risk and assessed what preventative or control measures needed to be in place to prevent or reduce an incident arising or escalating to a more serious stage.

iii) Failing to undertake a Protection Planning

Meeting in respect of the client.

iv) Failing to ensure that there were a security guard(s) or police officers(s) present or then attended at the place of work whenever the client attended the place of work.

v) Failing to provide an alert in respect of the client or to warn employees that the client was to attend the place of work, or both.

vi) Failing to have in place adequate interview facilities at the place of work.

vii) Failing to have in place an adequate emergency system.

d) Manifestations of the risk were the stab wounds to Ms Philps and the psychological injuries to Mr Wilton.

6 Mr Cahill, in his affidavit in support of the application for order, described the incident that was the subject of the charge. The affidavit provides a general picture of what occurred on 24 May 2004 at the Ballina CSC.

I have been informed by Mr Wilson and the PSA's instructing solicitor and verily believe the following:

At all material times the defendant:

Was an employer;

Employed Child Protection Caseworkers, Child Protection Casework Specialists, Managers Casework, Managers Client Services, Senior Customer Services Officers and Administration Officers;

Operated the Ballina CSC.

At all material times, the defendant employed Mr Wilton and Ms Sherrington at Ballina CSC.

At all material times, clients attended the place of work of the Department of Community Services ("DOCS") for the purpose of being interviewed by DOCS employees.

On 24 May 2004 Mr Wilton and Ms Sherrington were working at Ballina CSC when at approximately 1.30 pm, excited and raised voices could be heard from the direction of the interview room. At this time Ms Sherrington was walking to the printer, which was adjacent to the interview room. Ms Sherrington observed a client, Ms Cheryl Cooper attacking Ms Kylie Philps, a Child Protection Caseworker. Another Caseworker, Ms Linda Williams attempted to intervene. Ms Williams stumbled out of the interview room, followed quickly by Ms Philps. Ms Sherrington observed this occurring, and noticed a tuft of Ms Philps hair on the floor of the interview room. Ms

Sherrington observed that Ms Philps was bleeding and was visibly distressed. Ms Williams was attempting to talk to Ms Cooper. Ms Sherrington then moved between Ms Philps and Ms Cooper. The acting Manager, Client Services at the Ballina CSC, Ms Gwen Balchin moved towards Ms Cooper, and grabbed hold of her wrists.

At this time Mr Wilton walked out of his office and into the open plan office area at Ballina CSC, walking in the direction of the switchboard. Mr Wilton then observed Ms Philps, on her knees and elbows with both hands covering her face. Mr Wilton noticed droplets of blood coming from the left side of her face.

At the same time Mr Wilton saw Ms Balchin, struggling with Ms Cooper. The struggle took place up against the main entrance door to the open plan office area. Ms Balchin and Ms Cooper were facing each other. Mr Wilton observed that Ms Balchin was holding Ms Cooper by the forearms in an apparent attempt to restrain her. Ms Cooper was holding a knife in her right hand. Mr Wilton heard several workers in the area encouraging Ms Cooper to drop the knife. The struggle ended with Ms Balchin being pushed backwards by Ms Cooper. This was also observed by Ms Sherrington.

Around this time Ms Sherrington said words to the effect of:

“I am taking Kylie out of this”.

Ms Sherrington then took Ms Philps through into the area office, which is located immediately next to the Ballina CSC. At this time Ms Philps was bleeding and sobbing.

Ms Cooper then stared at Mr Wilton for a couple of seconds, and then started to walk towards him. As Ms Cooper advanced towards Mr Wilton she had the blade of the knife pointed towards him and was chanting incoherently. The only word that Mr Wilton could understand was “*Satan*”. Ms Cooper looked very angry and determined.

Mr Wilton then picked up a beanbag that was sitting beside him on the floor and held it out in front of him to discourage Ms Cooper from attacking him, or anyone else in the room. Ms Cooper then slowly backed into interview room 2. Mr Wilton entered the room after her. When Mr Wilton entered interview room 2, Ms Cooper was standing on the other side of a table that partially divided the room. Ms Cooper then threw the knife at Mr Wilton. The knife made contact with Mr Wilton’s left forearm and bounced into the bean bag that he had dropped at the entrance of interview room 2. The blade of the knife that Ms

Cooper threw at Mr Wilton was approximately four inches, or about 10 cm long.

Mr Wilton picked up the knife and threw it towards the switchboard desk to remove it. At the same time Ms Cooper backed into the foyer area and walked out the front door of the building. Mr Wilton then walked back into the office area. Once Mr Wilton was in the office area he told staff to call an ambulance.

Mr Wilton then walked out of the office and stood on the front steps of the building. Ms Cooper was sitting in her car, which was parked outside the office. Mr Wilton watched Ms Cooper for about 5 minutes, as he was concerned she may attempt to re-renter (sic) the building, at that time two police officers approached Ms Cooper.

One of the Police Officers then approached Mr Wilton, he pointed to Ms Cooper and said words to the effect of:

“She has assaulted someone with a knife”.

The Police Officer then walked back over to Ms Cooper, and the two Police officers each grabbed one of her arms to arrest her.

Some time later, Ms Philps was wheeled out of the building on a stretcher by ambulance officers. At that time Ms Philps had bandages on the left side of her face.

Ms Cooper was subsequently charged with this incident and convicted and is currently still in gaol.

As a result of a series of prior incidents and the incident on 24 May 2004, Mr Wilton was diagnosed with psychological injuries which manifested in both physical and psychological symptoms.

Arising from his psychological injuries, Mr Wilton receives on going treatment in the form of weekly counselling sessions and taking daily anti-depressant medication. Mr Wilton lodged a workers compensation claim which was accepted. From May 2005 until February 2006 Mr Wilton was absent from work two days a week to aid in his recovery. In February 2006 this was reduced to one day per week.

Interlocutory judgments

7 Two interlocutory judgments have been handed down in this matter: *Cahill v State of New South Wales (Department of Community Services)* (2007) 161 IR 124 and *John Cahill v State of New South Wales (Department of Community Services) (No 2)* [2007] NSWIRComm 187. The judgments concerned strike out motions by

the defendant. The motions were refused.

Dramatis Personae

8 There were 21 witnesses called to give evidence in the proceedings. It is helpful for the purposes of this judgment to set out the positions and relationships that these witnesses held as at 24 May 2004.

9 As at 24 May 2004, two departments operated out of the Ballina CSC, the defendant and the Department of Aged Care, Disability and Home Care ("DADHC"). The majority of witnesses that gave evidence in proceedings were employed by the defendant.

10 Within the defendant's organisational structure were two main teams. The first, the Child Protection Team, dealt mainly with cases where there were concerns of risk of harm to children. As at 24 May 2004 this Team was managed by Ms Glenda Christopher who held the position of Acting Manager Casework Child Protection. Working within this Team and reporting directly to Ms Christopher were Ms Kylie Philips and Ms Linda Williams who held the position of caseworkers; Ms Teresa Pisanos, a part time acting caseworker and Ms Natajsia Lopic, an intake caseworker who dealt with reports made to the DOCS helpline.

11 The second Team, the Out of Home Care Team, dealt primarily with children that were already in foster care. As at 24 May 2004 this team was managed by Mr Raymond Wilton, who held the position of Manager Casework Out of Home Care. This Team included Ms Carol Garcia, Ms Valerie Britton and Mr William Palmer who were all employed as caseworkers and reported directly to Mr Wilton.

12 Outside of these two Teams, but also employed by the defendant were Ms Rhonda Sherrington, Mr Malcolm Barrett, Ms Leeanne Purdey and Ms Lynn Meehan-Frost. As at 24 May 2004 Ms Sherrington held the position of Child Protection Casework Specialist. Her role was to work on complex cases and to assist caseworkers of either Team if so required. Mr Barrett was employed as a Project Officer - Regional Data Co-Ordinator, although he had previously been a caseworker and had had experience managing Out of Home and Child Protection Teams. Ms Purdey held the position of Client Support Worker. This role included facilitating contact between parents and children in care. Ms Meehan-Frost held the position of Senior Customer Service Officer. This was primarily an administrative role and involved answering the phones, attending the front counter and providing general administrative support for the office.

13 The overall manager of the Ballina DOCS office was Ms Gweneth Balchin who as at 24 May 2004 held the position of Acting Manager Client Services. She reported to the Regional Manager, who as at 24 May 2004 was Mr Denis Myers. Mr Myers was not called as a witness in proceedings.

14 As at 24 May 2004 Ms Susan Marsh, Ms Teresa Mitchell-Smith and Mr Wayne Foye were employed by DADHC. They worked at the Ballina CSC in an area allocated for DADHC staff.

15 Mr Andrew Wilson was an industrial officer for the PSA, and was part of the

team that investigated the incident on 24 May 2004.

16 Sergeant Steve Martin, who as at 24 May 2004 was a Senior Constable and Custody Manager and Constable Richard Hayden, of the Ballina Highway Patrol also gave evidence in proceedings. The police statement of Senior Constable Stuart Turner was tendered in the proceedings, but he was not called as a witness.

17 Ms Denise Thomas, the only witness called for the defence, was the Manager Client Services for the Mount Druitt office of DOCS.

18 I have already referred to Ms Cheryl Cooper.

Physical Layout of the Ballina CSC

19 The Ballina CSC is located on Tamar Street, Ballina. Tamar Street is a divided road with a nature strip and trees in the centre of the carriageway. On 24 May 2004, the Ballina CSC housed the Ballina offices of DOCS and DADHC. Entry to the CSC was gained via an electric sliding front door that automatically operated between the working hours of 8.30 am and 4.30 pm, Monday to Friday. Clients would enter these doors, cross the foyer and present at the reception desk. At the reception desk there was a perspex screen that extended to the ceiling. The perspex had a small gap to enable clients to talk to the receptionist.

20 In the foyer area there were doors into interview rooms, although these doors had no handles on the foyer side. A client, or any one entering from the street, could not access any area other than the foyer, unless a DOCS worker opened the internal door to an interview room for them. Behind the reception desk was the general office area. The DADHC staff were located to the left of the office area, and the DOCS employees were located in the rest of the office area.

21 The same interview room was used for all interviews with Ms Cooper in the week leading up to and on the day of the stabbing. It was located on the right hand side of the foyer as one entered from the street. There was a discrepancy in the evidence as to whether the room was known as Interview Room 1 or 2, but this appears to have been due to witnesses using different names when referring to the same room. The interview room contained two doors. One door, the internal door, was used by caseworkers to enter the room from the general office area. The other door was the external door. It had no handles on the outside, and required a caseworker to open the door from the inside to allow the client into the room. On 24 May 2004, the internal door leading to the general office area was left open whilst the interview was being conducted.

22 Inside the interview room was a rectangular table that did not cover the full width of the room, some chairs, a sink and a window with Venetian blinds, which faced into the general office area. On 24 May 2004 there was a refrigerator up against the window on which the blinds were attached. Neither of the two doors leading into the interview room had an observation window nor was there closed circuit television in the interview room.

FACTUAL BACKGROUND

23 Ms Cheryl Cooper was admitted into Ballina Hospital on Sunday 16 May 2004. She had been living in her car with her three children for the past few months and

had no fixed address. Following Ms Cooper's admission to the Hospital, DOCS was contacted and two on-call caseworkers from the Ballina CSC, Ms Garcia and Ms Britton, attended the Hospital. With the agreement of Ms Cooper, the children were placed in temporary custody until 19 May 2004.

24 On Tuesday, 18 May 2004, Ms Glenda Christopher, Acting Manager Casework Child Protection, formally allocated the case to Ms Philps, a caseworker within the Child Protection Team of the defendant. Ms Garcia explained in her evidence, it was normal practice that when children did not have any legal status and there were concerns about risk of harm, the case was referred to the Child Protection Team. Ms Garcia was herself a caseworker within the Out of Home Care Team, and normally worked with children already living in foster care. The only reason that Ms Garcia and Ms Britton had attended the Hospital on the weekend was because they were on-call.

25 Ms Christopher originally intended to allocate the case to Ms Williams, another Child Protection Team caseworker. However, Ms Williams' workload was considered to be excessive. As Ms Philps had less of a workload, Ms Christopher allocated her the role of primary caseworker, with Ms Williams as the secondary caseworker. It was departmental policy to have two caseworkers for initial contact with clients, although the primary caseworker had main carriage of the case and held the responsibility of liaising with the client and other relevant agencies. The secondary caseworker acted as support. It was the evidence of both Ms Philps and Ms Williams that there was no discussion regarding the experience of either caseworker to work with Ms Cooper.

26 After being allocated the case, Ms Philps' evidence was that there was no formal handover meeting between herself and Ms Garcia. However, there was clearly a handing over of the case from the Out of Home Care Team to the Child Protection Team because that is how Ms Philps and Ms Williams came to be the caseworkers on the case. Ms Philps said she could not recall receiving any running notes made by Ms Garcia or Ms Britton in relation to the Sunday interview with Ms Cooper. However, Ms Philps did not access the DOCS internal computerised information system known as "KIDS" prior to her first interview with Ms Cooper. The KIDS system recorded case files and the history of clients and their children, including case notes and any other relevant information. Ms Garcia said in her evidence that she posted the information from the interview with Ms Cooper on to KIDS.

27 Later in the day on Tuesday, 18 May 2004, Ms Philps and Ms Williams attended Ballina Hospital to interview Ms Cooper. During the three hour interview Ms Cooper signed an agreement for temporary care of her children for a further three months. During the interview Ms Cooper behaved in a manner that was clearly abnormal and made a death threat against Ms Garcia. Ms Philps stated in her police statement tendered in proceedings:

During this interview I noticed the following behaviours. Cheryl was rocking backwards and forwards on her chairs (sic). She was extremely aggressive one minute and calm the next. Cheryl spoke in a different language, which I can only describe as gibberish.

Cheryl was emotional to the point that she was crying one

minute and the next minute she was laughing. A number of times she took her hat off her head and (sic) threw it across the lounge that she was sitting on. She would then retrieve her hat and jam it down on her head with such force that I felt it could have hurt her. Through out the interview Cheryl yelled obscenities, which were directed at both Linda and myself. Cheryl laughed when describing past incidents of abuse to herself and her children.

During this interview whilst talking about the original care order that was arranged by Carol GARCIA, Cheryl COOPER said, "If I see her in the street I will kill her. I will discharge myself from hospital right now and go down to the DOCS office and sort her out." Cheryl also said, "you are all a pack of fucking cunts." When she said this I believed she was referring to DOCS in general and did not take it as a direct assault on me.

28 In relation to the death threat, Ms Williams said in her police statement: At the beginning of the interview Cheryl was extremely agitated. She said, "Carol Garcia lied to me. She told me I would see my children on Monday." She made further comment about the fact that Carol in her eyes is an American. This seemed to upset her. Cheryl was angry towards Carol Garcia and at one point she said words similar to, "If I see Carol down the street I will kill her. I'm not joking, I'm serious I will kill her." At this time Cheryl was basically frothing at the mouth.

29 Both Ms Williams and Ms Philps said that after their interview with Ms Cooper at the Hospital they recognised that it was a complex case. Ms Cooper had told them during the interview that she had been exposed to domestic violence in the past, that her ex-husband had drugged and assaulted her, and an ex-boyfriend had attempted to stab her. The two caseworkers said that Ms Cooper displayed a range of emotions, being extremely aggressive one minute and calm the next; she at times spoke gibberish. It was Ms Philps' evidence that after the interview Ms Williams and herself had rated Ms Cooper as a high risk client:

... Because of her behaviour and the behaviours that she was displaying to us both in interviews and interactions that we were having with her, we assessed her as being a high risk client in terms of the things that she was displaying to us.

Q. What things?

A. Her behaviour, what she was saying, the threats that she made against other departmental staff.

30 Ms Philps accepted that this assessment of Cheryl Cooper was done in relation to only those behaviours, and not by utilising any formal method of risk assessment such as a risk matrix.

31 After the interview, Ms Williams and Ms Philps decided to continue to be both present for all contact with Ms Cooper due to the behaviour she had exhibited in the initial interview. Ms Philps' evidence was that this was not the standard practice, and required approval by Ms Christopher, approval that was subsequently given.

32 When they returned to the CSC, Ms Philps and Ms Williams briefed their manager, Ms Christopher, about the case, including the death threat made against Ms Garcia. Ms Christopher advised Ms Garcia's manager, Mr Wilton of the threat and Ms Philps, Ms Williams and Ms Christopher advised Ms Garcia personally. Ms Garcia said in her police statement:

I took Cheryl's threat seriously and if I had seen her outside of our building I would have avoided her. I certainly had no plans to speak with her again.

33 Mr Wilton, said in his statement that he had a discussion with Ms Garcia in relation to the threat:

On or about 19 May 2004 I was informed by Glenda Christopher, A/Manager Casework for the Child Protection Team, that Ms Cooper's children were to be removed from her car and control and that an Emergency Care Order would be sought from the Children's Court. During that meeting Ms Christopher also told me that Ms Cooper had threatened to kill Carol Garcia.

Subsequent to being informed about the death threat, I discussed it with Carol Garcia. I (sic) particular I discussed with her the possibility of seeking an Apprehended Violence Order (AVO) against Cheryl Cooper. Under the direction of the then Regional Director for the Northern Region of the Department of Community Services, Dennis (sic) Myers, it was policy for staff not to seek an Apprehended Violence Order (AVO) without his approval. I reminded Carol of this regional policy in my discussions with her. Carol decided not to proceed with an AVO.

34 Ms Christopher gave evidence that she also informed her manager, Ms Balchin, Acting Manager Client Services, of Ms Cooper's death threat against Ms Garcia. The following exchange occurred in examination in chief:

Q. So did you become aware that there had been a threat made by, as is set out, on Cheryl Cooper, a threat to one of the staff?

A. Did I become aware, yes.

Q. How did you become aware of that?

A. I believe that Linda Williams told me of that the first time.

Q. Do you know why Linda told you that?

A. If I recall correctly Linda had a visit to the hospital and that's where the threat was made.

Q. Why would she make that report to you?

A. Because at that time I was her supervisor.

Q. Did you tell anyone else about that threat?

A. Yes.

Q. Who?

A. My supervisor.

Q. Who was that?

A. Gwen Balchin.

Q. Anybody else?

A. I think a whole lot of people were aware of it, including perhaps - no, I don't know, I don't know, I am sorry.

35 However in her evidence, Ms Balchin, denied that she had been told of Ms Cooper's threat to Ms Garcia prior to the stabbing attack:

Q. So in the Acting Manager's position at the time you held, no-one had told you that Cheryl Cooper had threatened to kill Carol Garcia and repeated that twice?

A. Not before the stabbing, no.

Q. Is there any reason you know of, given that the Acting Manager position you had at the time you were not told?

A. No, you have to ask the people that, why they didn't bring it to my attention.

Q. Are you able to say, based on how the system worked at the time, whether you should have been told?

A. I should have been told, yes.

36 It was Ms Balchin's belief that if this information had been brought to her attention she would have had a discussion regarding whether there were other issues to be concerned about. There was some evidence led in the proceedings in relation to personal conflict between various staff members and breakdowns in communication between staff, specifically between Ms Balchin and Mr Wilton. However, Ms Sherrington agreed that this was related more to personality clashes rather than any systemic breakdown within the office.

37 During the briefing by the two caseworkers of Ms Christopher, Ms Philps was instructed by Ms Christopher to request the paper or hard copy file on Ms Cooper. Ms Philps' evidence was that at that point she was aware that Ms Cooper had had some involvement previously with a different DOCS office. She thought Lismore was the likely office, as Ms Cooper had been residing in Casino. It was the normal procedure for the caseworker to request the file and for the file to be transferred through the Document Exchange or by courier. Mr Wilton gave evidence that he had in the past used a Ballina DOCS worker who lived in Lismore to collect the file from Lismore and bring it into work with them the following morning.

38 The responsibility for obtaining a paper file was essentially that of the caseworker, although if there was a delay or any problems, Mr Wilton said the caseworker could approach their manager who, if necessary, would approach the Regional Director, who at that time was Mr Myers. Ms Philps requested the file, however it appears she did not go to her manager to hasten its delivery, nor did the manager inquire as to its status. Ms Christopher, in fact, did not know whether the file had arrived before 24 May 2004.

39 On Wednesday 19 May 2004, Ms Philps arrived at work early, and saw Ms Cooper sitting in her car outside the Ballina CSC, hitting the steering wheel with her hands and head, and "revving" the car. Ms Philps gave evidence that when

she approached Ms Cooper in the car, Ms Cooper did not appear to recognise her. Ms Christopher also witnessed Ms Cooper's behaviour and rang the police. During their attendance, the police removed three to five knives and scissors from Ms Cooper's car. The knives were described as kitchen knives. Ms Philps and Ms Marsh, another witness, gave evidence that they thought the knives were in the car because Ms Cooper had been living in her car.

41 The police spoke to Ms Cooper and an interview was arranged for her with Ms Philps and Ms Williams at 1.00 pm that afternoon. Ms Cooper left shortly after.

42 Ms Christopher sent out an alert email at 8.46 am on 19 May 2004 to staff at the Ballina CSC and flagged it as high importance. The email is set out below:

From: Christopher, Glenda
Sent: Wednesday, 19 May 2004 8:46
To: Binge, Angus; Blackman, Aviva; Val; Brown, Patricia; Coldwell, Kylie; Donaldson, Tony; Folland, Hazel; Garcia, Carol; Hooker, Peta; Huber, Betina; Kelly, Robin; Lopic, Nat; Lee, Marie; Meehan-Frost, Lynn; Orr, John; Palmer, William; Philps, Kylie; Pisanos, Teresa; Purdey, Leeanne; Sherrington, Rhonda; Williams, Linda; Wilton, Ray
Cc: Myers, Denis; Kelly, Patricia
Subject: Threat to harm Caseworker
Importance: High

Dear all,

Over the weekend of 15/16/17th May the On Call worker attended the Ballina hospital responding to a call from the hospital to interview a female who was accompanied by her 3 children. Following an interview with the n/m the 3 children were placed in TFC for 3 days. The mother remained in the hospital. On the 18th May the mother was interviewed by CP staff and during that interview the mother made threats to track the On Call worker and kill her. The natural mother extended the TFC for 3 months.

On 19th May at approx 0745 I observed this women (sic) to be sitting in her car outside the DoCs office. The engine was running and the women (sic) was speaking incoherently to herself in a loud (sic) voice. I phoned the police to advise them of the situation. The hospital staff advised the caseworker that the natural mother did not have and (sic) mental health concerns.

Please be advised that this person is very aggressive and threatening.

The female is known as Cheryl Cooper of no fixed abode - Cheryl and her children have been sleeping in her vehicle for the past 3 months.

Vehicle dark blue/black - hood tied down with red rope - black

electrical tape from the boot to the left rear passenger door holding the back panel on. The inside roof of the car is falling down.

Registration Number ...

Glenda Christopher
AMCW

43 Later in the morning of 19 May 2004, Ms Christopher sent the email to Ms Balchin. In her evidence, Ms Christopher explained that she had selected high importance so that the email would go through as a high alert and people would open it up and read it. She said that she sent the email:

So when there is threats to anybody in the department that - or any CSC I make it my business to send out an alert to people to advise them.

44 In preparation for the Wednesday (19 May) afternoon interview, Ms Philps and Ms Williams set up the interview room. Ms Williams stated that:

Prior to this meeting we prepared the room by positioning the chairs for everyone's safety. Cheryl's chair was positioned near the exit door to the foyer, and Kylie and my chair were positioned near the exit to the main office. There was a table between us, and all unnecessary objects were removed from the room.

45 Ms Cooper arrived back at the CSC later on Wednesday 19 May. In her police statement, Ms Williams said:

About 12.15pm that same day I saw that Cheryl's car was back out the front of our building. I saw that Cheryl was sitting in the front seat of the car. I saw that she was wearing her hat, and was smoking. She was reading the bible and she was jabbering to herself. The radio was again going full boar (sic). I went out to Cheryl and tapped her gently on the shoulder. I said, "Darling can you please turn down the radio, we have a meeting with you at 1pm. I really want you to be at the meeting and I don't want the Police to be called so that you miss the meeting." Cheryl turned the radio down and started thumping herself on the chest. She said, "I am going to die. When I die you will smell my rotting flesh up your nose until the day you die." When Cheryl did this she was spitting and continued to thump her chest.

Ms Cooper remained in her car until she entered the CSC for her interview at 1.00 pm.

46 Prior to commencing the interview, Ms Christopher instructed the caseworkers not to allow Ms Cooper to take her bag into the interview room with her. In her statement Ms Christopher stated she said this for safety reasons. In her evidence she explained:

A. That's something that I would normally do. I would request, if there was any concerns that perhaps the client would become aggressive or threatening. Then I would ask that their bags be left outside.

47 After presenting at the front reception desk, the external door to the interview room was opened by a caseworker and Ms Cooper entered. During the interview Ms Cooper agreed to take part in a mental health assessment, which Ms Philps had arranged for 3.30 pm the following day. Ms Cooper indicated that she had undertaken such assessments in the past and that no one had found anything wrong with her. Ms Cooper then repeated the earlier threat she had made in the car. Ms Philps said in her police statement:

During this interview Cheryl said, "I was spoken to by the Police about the threats I made to the other DOCS worker. Kylie you should know I don't make threats, I make promises. If I drop dead before I get to see my kids again, every breath that you take before you die you will smell my rotting corpse up your nose."

During this interview Cheryl leaned across the table and hit herself hard in the chest with her hand. When she did this she said, "I feel like I am dead inside." Through out this interview Cheryl again slipped into speaking a different language, which I describe as gibberish. She also made mention to Jehovah.

48 After the interview, Ms Cooper did not leave the Ballina CSC immediately and lingered in the foyer. Witnesses described her as "speaking in tongue or tongues". She also wrote over posters on the walls with comments including: "Where's God law" and "Spineless bastards, soulless heathens". Witnesses gave evidence that "speaking in tongue or tongues" was a way to describe someone not speaking in English or any other decipherable language. Ms Philps described it as gibberish. Mr Palmer gave evidence that it was not a language and was something a person with a mental health issue would use.

49 Whilst Ms Cooper was still in the foyer Ms Christopher called the police who, pursuant to their powers under the *Mental Health Act* 1990, took Ms Cooper to Ballina Hospital. She returned to the Ballina CSC between 20 and 40 minutes later. Ms Philps and Ms Christopher spoke with Ms Cooper at the front counter, as Ms Cooper wanted to confirm her appointment time for a mental health assessment the following day.

50 On Thursday 20 May 2004, Ms Cooper arrived for her mental health assessment at 3.30 pm. Due to a failure by Mental Health to attend, the assessment did not go ahead and was re-scheduled for Friday, 21 May 2004. Ms Cooper was interviewed by Ms Philps and Ms Williams, during which Ms Philps advised Ms Cooper that a decision to keep her children had been made. Ms Philps handed to Ms Cooper "assumption of care" papers. Ms Cooper was told, however, that she could have access to her children at the Ballina CSC on the following Monday, 24 May 2004.

51 The interview concluded at 4.15 pm and Ms Cooper left the Ballina CSC. Ms Christopher said in her police statement that:

At 4.20pm I was looking though (sic) the front window of the building to ensure that Cheryl left the building. As soon as I looked out I observed Cheryl laying face down over the bonnet of her car, rocking her body backwards and forwards. I walked out to Cheryl and said, "Cheryl, I'm Glenda. I'm the manager. I can see that your not well, can I call an Ambulance for you, or could I call your doctor." Cheryl didn't answer and vomited on

the ground. Cheryl moved to get into her vehicle. I was so concern (sic) that Cheryl was going to drive and was in no fit state to do so that I walked back into the office and phoned the Ballina Police.

52 It was the evidence of Ms Christopher and Ms Williams that they believed on this occasion that Ms Cooper was under the influence of "something like valium". They held this belief because of Ms Cooper's demeanour of being demure and almost sluggish.

53 Before the police arrived, Ms Cooper was involved in an incident outside the Ballina CSC. Ms Cooper rolled back her vehicle with the door slightly open, started the engine and commenced to drive east up the wrong way of the divided street. She then proceeded to reverse back into the space she had departed. Another vehicle coming down the street in a westerly direction on the correct side of the carriageway and made a gesture to Ms Cooper. Ms Cooper then sped off after the driver of the other vehicle and rammed her vehicle into the rear of the other vehicle as it stopped at a roundabout. Ms Cooper rammed the other vehicle twice more. The other driver alighted from her vehicle. Ms Cooper steered her vehicle around the other driver and drove off. Ms Williams gave evidence that had Ms Cooper wanted to hit the other driver, she could have. The police arrived shortly thereafter, but Ms Cooper had left the scene.

54 On the Thursday evening, Ms Philps had a discussion with Ms Christopher and Ms Balchin. It was decided that due to the recent events the mental health assessment of Ms Cooper scheduled for the following day should be cancelled. Further, that if Ms Cooper arrived at the CSC the police should be called, as they expected Ms Cooper to be arrested and charged. On the same evening Ms Balchin also had a discussion with Ms Williams as to whether Ms Cooper was potentially violent. Ms Williams stated that Ms Cooper had never posed a threat to Ms Philps or herself.

55 On Friday 21 May 2004, Ms Philps cancelled the mental health assessment and advised the police that if Ms Cooper arrived for her interview, the police should attend. Ms Cooper did not arrive, but the police attended at 10.45 am. In light of Ms Cooper's failure to attend, Ms Philps cancelled the following Monday's access visit for Ms Cooper to see her children. Ms Philps attempted to contact Ms Cooper on her mobile phone a number of times on the Friday to advise of the cancelled access but had no success. Ms Cooper's mobile phone was turned off.

56 On Sunday 23 May 2004, Sergeant Martin of the Ballina Police saw Ms Cooper double-parked in her car in front of the Ballina police station. She had the music playing very loudly, was reading from the Bible and crying. He attempted to talk to her to obtain her name, but she did not respond. Sergeant Martin became concerned for her welfare. He asked another police officer to call an ambulance, which subsequently conveyed Ms Cooper to the Ballina Hospital.

57 At the Hospital Ms Cooper was assessed by Mental Health. She returned to the police station at 12.30 pm and was spoken to in relation to Thursday's car ramming incident. Sergeant Martin said in his evidence that he decided not to take any action in relation to the incident at that time and considered the incident to be a relatively minor traffic matter. He had told Ms Cooper that the police officer dealing with the matter would contact her when next on duty.

58 On Monday, 24 May 2004 Ms Philps arrived at work at 8.00 am. Mr Hurley, who Ms Philps understood to be a Mental Health worker, rang Ms Philps at approximately 8.15 am. He advised that Ms Cooper had attended the hospital on

Sunday 23 May 2004 and had been assessed by Mental Health. He advised that Ms Cooper did not have a mental illness, and mentioned a number of other matters including that Ms Cooper had said she did not have a criminal record. Ms Philips, in light of her knowledge of the car ramming incident, queried the accuracy of that statement and advised Mr Hurley to speak to the police. In her evidence Ms Philips stated that she said this because she felt it was important for Mental Health to have accurate information. At the conclusion of the phone conversation, Mr Hurley faxed the Mental Health Assessment report to Ms Philips.

59 It was Ms Philips' evidence that as at 24 May 2004 she had not previously seen that particular type of health assessment form sent by Mr Hurley. Ms Philips' evidence was that at the time she received the report she had a quick look over it but she had not read certain parts of the document. Prior to the interview with Ms Cooper on 24 May 2004 Ms Philips had not read that Ms Cooper had been assessed as a medium risk in relation to harm to others. Neither had she read the section of the report stating that the client should be reassessed in 24 hours, and that the report had been completed at 11.00 am on the Sunday. Ms Philips acknowledged that this 24 hour period expired at 11.00am on Monday 24 May 2004. Ms Philips said, however, that she had noticed on the morning of 24 May 2004, that Ms Cooper had a low overall risk rating, although the report did not identify what this meant.

60 After perusing the report, Ms Philips showed it to her manager, Ms Christopher. Ms Christopher acknowledged in her evidence that she had seen the report prior to the stabbing and, in particular, that she had read the section on 'Assessment of Current Risk', which rated Ms Cooper as a medium risk with regard to harm to others. Ms Philips' evidence was that she did not see the report again prior to the stabbing and that it had been left on her desk.

61 Ms Philips also had a discussion with Ms Williams regarding the mental health assessment. The conversation was relayed by Ms Williams in her evidence in chief:

The main thing I would have remembered would have been something like Kylie saying to me, "Can you believe it?", and me saying, "No. They've put down low." And us both looking at it over and over and saying, "They have got to be joking." That's all I can remember that was said between ourselves.

Q. Why were you of the personal opinion "they have to be joking"?

A. Because of her behaviour demonstrated over past weeks had to either say she was mad or bad.

Q. Can you explain each of those terms as you mean each to be understood - "mad or bad"?

A. Because we had not taken Cheryl's children she had such a behaviour she wanted us to put her children in care. We spent hours on the first day straining every detail to the point she was actually smiling and seemed fine, her behaviour. She turned up having a car revving up, screaming, yelling out and carrying on the way she did not make sense to us and we believed she must have had some sort of mental health disorder, as a layman, just her actions.

62 Under cross-examination, when asked whether she relied on the report, Ms Williams said:

A. We are not mental health professionals, we have to rely on the documents given to us by mental health professionals to a certain extent.

63 Ms Balchin stated in her evidence that as at 24 May 2004, and before Ms Philps was stabbed, she had not seen the mental health assessment of Ms Cooper, nor had anybody talked to her about its contents.

64 On the morning of Monday 24 May, after talking with Mental Health, Ms Philps also spoke to Sergeant Martin, who advised her of the events of the previous day. Sergeant Martin in his evidence said:

I dealt with Ms Cooper or Mrs Cooper the day before or 23 May when Kylie rang the custody manager. The conversation was in relation to that and I gave her certain advice in relation to what I thought was, as a police officer, that I should not tell her how to do her work as a DOCs worker but more a safety aspect. My dealings with that lady - I had not never (sic) met her until 24 hours before - except that the peculiar circumstances in which I met her indicated to me there were some mental health circumstances. They are always an unknown quantify (sic). It was more that I had spoken to her and these were the circumstances I found her. I got her help, she was an unknown quantity. Then, again, I just said if she needed any help to give us a ring at the police station, which I had done before, given advice like that. Basically along those lines.

65 Ms Philps' evidence was that she understood Sergeant Martin to say that Mental Health had got it wrong and that he believed Ms Cooper did have a mental illness. Sergeant Martin then advised Ms Philps to call if she had any problems with Ms Cooper. In relation to this advice Mr Philps said in her evidence:

My understanding of their offer was that if Cheryl Cooper decided to hang around after the interview, as she had done previously, or if we had any trouble with her, that we could contact them and they would attend, not that they were willing to come and sit in on the interview.

66 Ms Philps' evidence was that she relayed to Ms Christopher what Sergeant Martin had said regarding Ms Cooper having a mental illness.

67 Shortly before midday on Monday 24 May, Ms Cooper attended the Ballina Police Station and thanked Sergeant Martin for his help. Sergeant Martin gave evidence that she was well dressed and groomed. He stated he almost did not recognise her, as she presented neat and tidy. Ms Cooper thanked him for what he did the day before, advised him that she was attending DOCS regarding access to her children and then left.

68 At approximately 12.50 pm, Ms Cooper was pulled over by the police and questioned about the significant amount of damage to her car. Whilst the police were talking to her she turned her car radio up and down. Constable Hayden's evidence was that it was very difficult to communicate with her. Senior Constable Turner, arrived soon after, and informed Constable Hayden of the car ramming incident involving Ms Cooper on Tamar Street.

69 During the discussion, Ms Cooper exited her car, squatted in the gutter and

urinated. She asked how much longer they would be as she was attending DOCS for an interview at 1.00 pm. Constable Hayden wrote out a defect notice for her car and Ms Cooper was allowed to leave. Constable Hayden gave evidence that he did not arrest Ms Cooper in relation to her urinating in the gutter as he considered it a very minor offence that warranted the use of his discretion and something that was not that unusual for police to see. When questioned why he did not arrest her for the car ramming incident his evidence was that he thought the very fact that someone was aware of the situation meant that it had been dealt with. In his evidence he stated that he did not think Ms Cooper was affected by alcohol, and did not think it was something he missed. In cross-examination he said that although it was not impossible to rule out, he thought it unlikely that she had consumed half a bottle of bourbon. There was some suggestion by the defendant that on 24 May 2004 Ms Cooper was suffering the effects of drinking half a bottle of bourbon. There is no credible evidence supporting that suggestion and I reject it. 70 After Ms Cooper left, Constable Hayden and Senior Constable Turner did not notify DOCS or the Ballina Police Station of their encounter with Ms Cooper. According to Ms Philps, when she entered the interview room with Ms Cooper on 24 May 2004, she did not know about the police pulling Ms Cooper over. Her evidence in the witness box was that given the events of the past week it was information she should have had and had she had it, would have taken it to her manager who would have decided whether to conduct the interview.

71 No alert email was sent to staff at the Ballina CSC warning them that Ms Cooper would, or might, be attending the CSC on Monday 24 May. The evidence of the majority of CSC staff was that they were not even aware Ms Cooper was in the building until the attack occurred. Ms Balchin stated that she had been advised that Ms Cooper was supposed to attend the office at a certain time but the caseworkers did not expect Ms Cooper to show up. Ms Balchin could not recall who had told her, but believed she had been told on the Monday morning.

72 Mr Wilton had no knowledge Ms Cooper would be attending the Ballina CSC on Monday 24 May 2004. He had not participated in any meetings with managers regarding Ms Cooper's attendance nor had he had any discussions about what, if any, procedures or controls should be put in place.

73 Some staff members were aware that Ms Cooper might be attending the Ballina CSC on 24 May. Ms Philps knew that it was possible that Ms Cooper might attend expecting a contact visit with her children, but she did not expect Ms Cooper to actually appear. Although the contact visit had been cancelled on the Friday before, Ms Philps had been unsuccessful in notifying Ms Cooper that the contact visit would not proceed. As to why it was not her responsibility to send an alert email advising of Ms Cooper's possible attendance, Ms Philps stated:

I go to my manager, so, after interviews I brief my manager of what took place during the interview and unless instructed by them to send out an e-mail, usually that is the role of the manager, the manager usually takes that role on.

74 It was Ms Philp's evidence that she had informed Ms Christopher of the events, including that Ms Cooper would possibly be attending. In her evidence, Ms Christopher agreed that Ms Philps had frequently briefed her regarding the Cooper case and that she felt fully informed of the situation. Indeed, Ms Christopher was herself aware that Ms Cooper might attend on Monday 24 May, as she was advised of the possibility by Ms Philps on the morning of the stabbing attack.

75 Ms Williams stated in her evidence that she did not know that Ms Cooper was going to attend the CSC on the 24 May and, therefore, did not notify anyone. Ms Williams was the secondary caseworker, and it was Ms Philps who had made the arrangements. The following question was put to Ms Williams by Mr B G *Docking* of counsel for the prosecutor:

Q. You have already indicated as best you know you had not sent an e-mail on 24 May 2004 nor did anyone else. I want to find out whether you orally told any of these persons that Cheryl Cooper might or was going to attend on that day: Gwen Balchin?

A. To go back, remembering we had not seen her since the Thursday when she rammed the car; we had no notice that she was coming in, given that anybody who would have spoken to anybody about the proposal, if she was proposing to come in that day it would have been Kylie; I was the secondary so I was not part of organising or speaking to a Manager, so I didn't speak to anybody about Cheryl coming on that day.

76 Ms Philps stated in her evidence that in the past she or Ms Williams had advised administrative staff of the interview with Ms Cooper, as they sat closest to the interview room. She could not recall, however, whether she or Ms Williams had advised them on 24 May 2004.

77 The police statement of Ms Lynn Meehan-Frost, Senior Customer Service Officer, was tendered in proceedings. In her statement she said:

On Monday 24 May, 2004, Marie LEE told me that Cheryl COOPER was coming in again. About 1.10pm the bell at the front counter rang. I went to the counter and saw Cheryl standing there.

78 The police statement of Ms Natajsia Lopic, duty officer on the Child Protection Intake Team, was tendered in proceedings. In her statement Ms Lopic said:

I had been informed by Lyn (sic) MEEHAN-FROST on Saturday the 22nd of May, 2004 that Cheryl COOPER would be attending the Ballina Community Service Center (sic) this week sometime, to discuss Child Protection issues involving her children.

79 Despite there being some inconsistency about when they were told, it does appear that some staff of the Ballina CSC were aware of Ms Cooper's possible attendance on Monday 24 May. In addition to Ms Philps, Ms Christopher and Ms Balchin, both managers, knew of the possibility that Ms Cooper might attend, even though they had both been informed it was unlikely. It was Ms Balchin's evidence, however, that she was not fully informed of the situation, including that there had been a death threat made. Ms Balchin explained in her oral testimony that although she had been out of the office on the morning of 24 May, she was in the office from 11.30 am and at no time thereafter was anything raised with her regarding Ms Cooper or her attendance at the CSC. The following exchange occurred between Mr *Docking* and Ms Balchin:

Q. When you got back at about 11.30, were you at the Ballina office until the stabbing incident occurred?

A. Yes I was here at a management meeting; 11.30 to 12.30; that would have been with the managers case workers so they had the opportunity to talk to me about issues of concern.

Q. You referred to managers, plural, to whom are you referring?

A. That would have been Ray Wilton and it would have been Glenda Christopher and it would have been the child protection specialist and the clerical manager.

Q. Can you give the last two people by name?

A. That would have been Ms Frost and the child protection specialist was Rhonda Sherrington at that time.

Q. Are you able to recall whether Glenda Christopher was present at that meeting as opposed to being out of the office?

A. I can't remember, I haven't got anybody's names down.

Q. Can you remember if any Cheryl Cooper issue was raised with you at that meeting?

A. Not that I recall.

80 However, in her evidence Ms Christopher stated that although she attended the Ballina CSC on the morning of 24 May 2004 and had a discussion with Ms Philps, which included Ms Philps showing her the mental health assessment and advising of the possibility of Ms Cooper attending, Ms Christopher was out of the office from the morning onward. She was not present at the CSC at the time the stabbing occurred.

81 Ms Cooper arrived at the Ballina CSC at 1.20 pm. In her evidence, Ms Sherrington, whose role it was to work on complex cases, stated that at this point, in light of threats to staff and the car ramming incident she would not have conducted the interview. Instead, from behind the perspex at the front desk, she would have re-scheduled the appointment for a later time. It was also Ms Sherrington's evidence that although she was aware of the Cooper case, no one specifically came to her for advice in relation to it.

82 Ms Philps stated in her evidence that on the previous Wednesday, Ms Cooper had looked dishevelled but on Monday 24 May, she was looking neater, and appeared the most calm that she had seen her. Ms Cooper was wearing a singlet top, short mini skirt, hat and a pair of laced up boots, which went halfway up her shin.

83 When Ms Cooper arrived, Ms Williams set up the room in preparation for the interview. This included moving the table to act as a barrier between Ms Cooper and the caseworkers and removing any objects that could have been used as a weapon. It was the evidence of Mr Wilson, who was an officer with the PSA at the time and had attended the Ballina CSC after the stabbing for the purpose of investigating the incident, that the table in question was not fixed to anything and did not go the full length of the room.

84 At the time Ms Cooper attended at 1.20 pm, Ms Philps and Ms Williams had not seen the paper file on Ms Cooper. In addition, neither of the caseworkers checked

the DOCS' internal computer system, KIDS. The file requested from Lismore CSC did not arrive at the Ballina CSC until the evening of 24 May, after the stabbing incident had occurred. It was the evidence of Linda Williams that she read the file that evening and found it to be very interesting as it gave her a history and background of a person that she knew nothing about.

85 In his evidence, Mr Wilton explained the necessity of a caseworker receiving the paper file on a client:

Q. From your experience, what do you say about the need to obtain such a file from Lismore CSC?

A. It is the department's practice and we are encouraged routinely to make sure we review all available information as part of our risk assessment process; by risk assessment I mean that which relates to determining the immediacy of any risk of harm to the child or children we are working with but certainly in today's world any risk assessment that might impact a worker or agency worker.

Q. And from your experience, on or before 24 May 2004, what type of information would you expect on such a paper file?

A. Just about everything that you could imagine. For example, it might be that the client's circumstances were different. There might be information indicating the nature of the relationship between the partner and the children; there might be information indicating what difficulty or crisis or challenges there might be; there are also other things; threats to harm; if that happened previously you expect that to be on the file; threat to harm self or others, again we would be just as concerned about whether or not the client had ideation of suicide as opposed to say threats to harm a child or another person. So all that stuff you could not know until you looked at the file, what would be on this, but ordinarily case workers who are doing their job well record that information.

86 Ms Philps had not checked the DOCS' internal information system, known as KIDS before her first interview with Ms Cooper at the Ballina Hospital or at any stage thereafter. She had not accessed the KIDS system at all in connection with the Cooper case prior to the stabbing attack on 24 May. It was Ms Philps' evidence that she did not have time to check the system, and as secondary caseworker it was not the responsibility of Ms Williams to do so either. Ms Philps explained that once children are taken out of the custody of their parents there are certain procedures to be followed and documents that needed to be prepared for Children Court proceedings. She was preparing these documents.

87 In his evidence, Mr Wilton thought it was dangerous not to access the KIDS system, as it was part of gathering all the necessary information on a client.

88 On 24 May 2004, there were no security guards or police present at the Ballina CSC. Ms Philps had not heard of police or security attending the CSC for an interview between a caseworker and a client. She had been told that some interviews had been conducted at police stations in the past, but her understanding was that they were extremely violent cases. The following exchange occurred in examination in chief:

Q. Given your explanation of the circumstances in which interviews had taken place at police stations previously, how does that fit in with the examples you knew of?

A. In circumstances of Cheryl Cooper making that threat against another case worker, she explained it as being she had overheard another case worker talking on the phone about her psychological state and calling her crazy, so she made those threats because of that, that was how she explained it to myself and Linda Williams. All of that information was replayed back to my manager and they instructed me on where they would like the interviews held, they instructed me on what they would like me to do and I carried out that.

Q. What manager or managers are you referring to?

A. Glenda Christopher.

89 Ms Christopher's evidence was that, as at 24 May 2004, she had not heard of police being present for a caseworker's interview with a client. Evidence was given from other witnesses, however, that the defendant had used police and security guards before 24 May 2004. Mr Wilton had personal knowledge that security guards had been used in the past. In his evidence he explained why having a security guard present at the CSC on 24 May would have been beneficial. This included that:

- a security guard could have acted as a deterrent;
- caseworkers could have taken advice of the guard how best to prepare and set up for the interview;
- if the client had attacked, the DOCS worker would have to consider whether to continue their interview;
- a security guard could have intervened;
- a security guard could have searched a bag to make sure nothing hostile was in it;
- the guard probably would not have let the client sit on the table, which may have reduced the opportunity and speed of the attack.

90 Ms Williams had conducted interviews with clients where police and security guards were present. Although she stated that on Monday 24 May, she did not organise to have police on standby, as she did not know Ms Cooper would be attending.

91 Ms Britton gave evidence that she had heard of a security guard being used at the Lismore CSC when there was a concern about a potentially violent client. She had, in fact, interviewed a client at a police station because there was concern of violence. This had happened many years before 24 May 2004, but that it was only the police premises that were utilised and that the police had not actually sat in on the interview.

92 Mr Barrett gave evidence that he was aware that DOCS would use security guards and that the security guards would either be in the interview room or directly outside. He had personally conducted an interview with a client at a police station and had also interviewed a client at the CSC with two police officers present in the interview room. He said that he had used police where there was a

"clear history of violence".

93 Ms Balchin had personal experience with organising police to be present at an interview with a client prior to 24 May 2004, although she had only organised them in respect of adolescent clients. She stated the procedure involved calling the Police Station, and if they had available officers they would send them. She had not organised to have police attend for an adult client and had not heard of arranging a DOCS interview at a police station.

94 Ms Williams took a duress alarm into the interview room. Ms Williams gave the following evidence:

Q. And did you have that with you on 24 May 2004?

A. Kylie had it in her hand. I said, "Give it to me" and I put it in my left hand because I write with my left hand and had it in my hand the whole time.

Q. The what?

A. The little handheld alarm.

Q. Did it get activated at all?

A. I don't know. I only know after because of the way things went down I snapped my nails off which I noticed later on. I don't even know what happened to it.

95 Ms Philps and Ms Williams were unable to recall whether the alarm was activated in the interview. Ms Williams, in her evidence, stated that she had only heard the alarm go off once previously during a demonstration that had occurred months prior to 24 May 2004. Ms Philps and Ms Williams had not been part of a practice drill as to where employees should go when an alarm was activated, nor had they seen a written procedure about what to do if a client was violent in an interview room and the alarm went off.

96 It was not mandatory to take duress alarms into interviews with clients before 24 May 2004. In her evidence Ms Balchin said:

A. I would not guarantee it was mandatory; all I can say, if I was the manager case worker discussing the case with a case worker and there was risk in the report or history and/or we were in an interview, we didn't know the people, I would be saying to them they must go and get a watch, wrist band thing, and take it in.

97 Mr Barrett, in his evidence, said that he had only one conversation regarding the use of duress alarms prior to 24 May 2004. It had been an unplanned conversation with the person testing the alarm and involved the person simply describing how the system worked. Ms Christopher knew that duress alarms were available for employees, as she had used them in interviews that she had conducted as a caseworker and had been instructed on how to use them. She did not, however, participate in any practice drills on what to do if one was activated. Most of the witnesses had a very limited understanding of the procedure surrounding duress alarms, indeed not one witness recalled seeing any written procedures or participating in any practice drills as to what to do if a duress alarm was activated.

98 On 24 May, Ms Cooper entered the interview room through the external door, which was opened by either Ms Philps or Ms Williams. The internal door was left ajar and enabled other caseworkers to see into the interview room. Ms Purdey, a

DOCS worker, attended the Ballina CSC whilst the interview was being conducted, and witnessed through the doorway the interview going on between Ms Philps and Ms Williams. She also saw Ms Cooper sitting on the table. Ms Purdey had attended the CSC with a baby from another case and for the purpose of collecting baby supplies. She also had a conversation with Ms Balchin which was related in examination in chief by Mr *Docking*:

Q. You then saw another person, employee Gwen Balchin at that time?

A. Yes, that's right.

Q. You saw Gwen Balchin had her handbag and an apple?

A. That's right.

Q. You assumed she was going to lunch?

A. I did.

Q. You had a conversation with words said to the following effect. Gwen said to you, "What are you doing here?"

A. Yes.

Q. You said words to the effect, "Getting some nappies"?

A. Yes.

Q. Gwen Balchin said words to the effect, "You should be out of the building. You shouldn't be here."

A. That's correct.

Q. You can't recall Gwen saying anything else to you?

A. No.

99 Ms Purdey then left the CSC. It was her evidence that she was not at the CSC any longer than two to three minutes.

100 Ms Cooper had taken a small black bag with her into the room. Ms Williams stated that Ms Philps and herself had kept an eye on the bag throughout the interview. Ms Philps explained why she allowed Ms Cooper to take her bag into the interview room despite being instructed by Ms Christopher not to allow this to occur. The following exchange occurred:

Q. Why on 24 May 2004 did Cheryl Cooper have a bag in the interview room?

A. After the 19th, as that same paragraph that you were referring to goes on to say, that - more particularly, myself did not want to cause the natural mother any anxiety by asking her to leave her handbag outside and we didn't want to make her more upset or angry than she already was. We explained this to Glenda Christopher after that assessment and, well, I believe she understood why we hadn't asked mum to leave her bag outside and were not requested again to do so.

Q. Were you said anything that she could take her handbag in in the future?

A. Sorry?

Q. Were you told you could allow her to take her handbag in the future in an interview at Ballina CSC?

A. I wasn't told she could take her handbag in, no.

101 At one point in the interview Ms Cooper removed a deodorant bottle from her bag and sprayed it under her arms. She did not direct the spray toward the caseworkers. Ms Philps was asked in her evidence whether she was worried during the interview that Ms Cooper was concealing a weapon. She responded that if she were worried about that sort of thing she would not be able to do her job.

102 Ms Cooper sat on the table, with her legs hanging off the side, after complaining of a sore back from sitting in the chair. Ms Williams said in her evidence that when Ms Cooper sat on the table she was two to three feet away from the caseworkers. It was Ms Williams' evidence that:

... there was a time when we allowed her to sit there rather than make an issue of it; when we finally had her actually talking to us and not going off was a time not to push buttons, that for me was the area as a skill of not pushing her buttons at that point of time.

103 Further, Ms Williams refrained from handing to Ms Cooper an alternate chair as it would have required her to lift it over the table and Ms Williams did not want to give Ms Cooper any ideas.

104 The prosecution repeatedly raised with witnesses the appropriateness of allowing a client to sit on a table during an interview. The consistent response was that it would be inappropriate. Mr Barrett, who had six years' experience as a caseworker as at 2004, stated he would be concerned about a client sitting on a desk. He would have asked the client to remove himself or herself from the position, and if they did not, he would terminate the interview. He explained why he took that view:

A. I think having a client that you are not in control of the interview situation, if their client sitting on the desk it is also putting the client in a position above you so it is much easier for them to strike you and you are also limiting the distance between yourself and the client if you don't have a desk in between or a table.

105 Mr Palmer also thought it inappropriate. The following exchange occurred during his evidence:

Q. I want to put to you a factual scenario, I want you to assume that Ms Cooper was permitted to sit on the table in the interview room during the interview. What do you say about that?

A. That would be inappropriate.

Q. Why?

A. I would consider that a person who sat on the table while I was interviewing her would have some difficulty, would not be taking me seriously, would be having mental health problems. Yes, in the form of, it is just not a thing a person that is dealing

with reality would do.

Q. If you were confronted with a client wanting to sit on the table in the interview room, what would you do?

A. I would certainly question it and tell the person to sit down, to start off with, you know.

Q. And if they would not?

A. I think I would terminate the interview.

106 Ms Garcia gave evidence that it was not a good idea for a client to sit on a table during an interview, as they could more quickly and easily reach across the table. Putting aside her knowledge that the stabbing had occurred, Ms Garcia gave the following explanation as to why she would not have allowed Ms Cooper to sit on the table:

A. Well, her behaviour at hospital, her threat against me, her and the car ramming incident and, yeah, I think just based on those things I probably would have requested, I mean I was not in a position of a manager at that time but as a case worker I think I would have said to my manager I didn't feel comfortable.

107 Ms Pisanos, who was a part time caseworker, said that she would feel vulnerable with someone sitting on a table during an interview.

108 Although not a DOCS worker, the question of the appropriateness of allowing someone to sit on a table during an interview was put to Sergeant Martin. His response was:

A. As a police officer with 20 years experience as a general duties police officer interviewing a number of different situations, being roadside, there is no way I would sit one side of a table, regardless of what the person is being interviewed for, and allow them to sit on a table.

Q. Why?

A. Number one, safety is paramount. Number two, they are sitting on a desk, you are interviewing them, you are in control of an interview situation. With them sitting on a desk and you sitting down gives the appearance of domination over you. That's my professional opinion as a senior police officer. I can't answer for what happened on that day. There is no way that I would conduct an interview in that way.

109 During the interview on 24 May 2004 Ms Cooper was advised that because she had failed to attend on the previous Friday for a mental health assessment, the planned access visit with her children had been cancelled and re-scheduled for Wednesday and Friday that week. She was informed that she could contact her children by mobile phone instead. It was the evidence of both Ms Philips and Ms Williams that Ms Cooper was not aggressive and seemed to understand what was being said.

110 The interview concluded. The following description of the events was then given by Ms Philips in her police statement:

Linda then got up to leave the room. I turned in my seat and I saw Cheryl turn. I saw Cheryl's left hand go down past her

right hip. I then turned to get up thinking that Cheryl was going. Cheryl then came across the table and felt Cheryl hit me in the face. I do not know which hand Cheryl hit me with but she hit me on the left hand side of my face. Cheryl then grabbed the front of my shirt with her left hand pulled me over to the corner of the room. Cheryl then swung her right arm at me from above her head down towards my face again. I grabbed hold of Cheryl's left breast and put my head down under it.

I then felt Cheryl hit me on the right hand side of my back. I then started throwing punches at Cheryl. I felt Cheryl hit my back a second time. I then yelled, "Somebody help me." Cheryl hit me again on the left hand side. I then pushed Cheryl up against the wall. Cheryl let me go and I ran out of the room. Cheryl was not saying anything.

111 Ms Williams' evidence regarding what occurred in the interview room was contained in her statement to police:

Cheryl then let out a scream and I saw her coming across the table towards Kylie. She contacted with Kylie and I ran to the door and yelled out "ring the police, ring the coppers, she is attacking Kylie". When I turned back round Kylie was on the other side of the table ... I grabbed Kylie who basically ran into my arms. Cheryl was basically still on top of her and was punching in to her back ...

I then turned towards Cheryl again and saw Cheryl punching and pulling at Gwen [Balchin]. I could see Gwen going backwards and forwards. Gwen and Cheryl then separated and I saw Cheryl holding her hands up in the air. She had a knife in her right hand. The knife was about 3 - 4 inches long and seemed to be pointed at the end ...

Cheryl then started to roll her eyes back in her head ... I said, 'Remember your children.' ... I repeated this a few times and Cheryl started to retreat. Cheryl then ran forward towards me before stopping in front of Ray WILTON ... Cheryl then walked towards the door and I saw a knife drop on to the ground. I then ran to Kylie.

As I walked past reception I saw Cheryl walking out the front door with the palms of her hands turned out. She appeared very calm. Shortly after the ambulance and the Police arrived.

112 Mr Wilton described what happened. He saw Ms Balchin and Ms Cooper facing each other and Ms Balchin was holding Ms Cooper by the forearms trying to restrain her. He noticed Ms Cooper was holding a knife about four inches long. He said the struggle between Ms Balchin and Ms Cooper seemed to end and that Ms Cooper started to walk towards him. Ms Cooper was pointing the knife at him and was saying something about Satan. Mr Wilton said Ms Cooper looked angry and determined. Mr Wilton said he picked up a beanbag and held it in front of himself to

discourage Ms Cooper from attacking him and anyone else in the room. Mr Wilton said Ms Cooper started backing out of the room and threw the knife at him. Ms Cooper left the building and sat in her car. The police came and arrested Ms Cooper.

113 As a result of a series of prior incidents and the incident on 24 May 2004, Mr Wilton was diagnosed with psychological injuries, which manifested in both physical and psychological symptoms. Arising from his psychological injuries, Mr Wilton receives on going treatment in the form of weekly counselling sessions and taking daily anti-depressant medication. Mr Wilton lodged a workers' compensation claim that was accepted.

114 Ms Sherrington observed Ms Cooper attacking Ms Philps. Ms Sherrington saw Ms Williams attempting to intervene. Ms Sherrington noticed a tuft of Ms Philps' hair on the floor of the interview room. Ms Sherrington observed that Ms Philps was bleeding and was visibly distressed. She noticed Ms Williams attempting to talk to Ms Cooper. Ms Sherrington then moved between Ms Philps and Ms Cooper. Ms Sherrington saw Ms Balchin move towards Ms Cooper, and grabbed hold of her wrists. Ms Sherrington said "I am taking Kylie out of this" and proceeded to take Ms Philps into the area office, which is located immediately adjacent to the Ballina CSC. At this time Ms Philps was bleeding and sobbing.

115 Ms Philps sustained a number of stab wounds to her face and back and required stitches. She was required to return to work the week of the 24 May 2004 to undertake counselling, and then had six months off work.

EVIDENCE OF MS THOMAS

116 Ms Denise Thomas was the only witness called for the defence. Because I have decided that Ms Thomas' evidence in the proceedings does not carry any weight I consider it necessary to explain fully my reasons for taking this view and it is convenient to do so at this point.

117 Ms Thomas prepared a statement and gave oral evidence in proceedings. She was cross-examined on her evidence. It was submitted by the defence that Ms Thomas' evidence should be considered by the court pursuant to s 79 of the *Evidence Act 1995*. Section 79 states:

If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

118 The basis for this submission was that Ms Thomas had over 24 years' experience with DOCS initially by providing front line services as a caseworker, and then moving up to hold a number of managerial roles including her current position as Manager Client Services at Mount Druitt CSC, which she has held since 2001. It was the defendant's submission that no one could be more experienced on the matter than an experienced DOCS worker such as Ms Thomas.

119 Ms Thomas held the following qualifications, a Bachelor Degree in Social Science obtained from Mitchell College in 1979; a Graduate Diploma in Drug and Alcohol Studies; a Graduate Certificate in Public Sector Management and Master Business Administration (Public Sector Management), the latter being obtained in approximately 2000.

120 Prior to her employment with the defendant she worked for the Salvation Army

in the role of Director for the Household in Distress Programme, which involved training volunteers and working with volunteers and families in stress.

121 During her 24 years of employment with the defendant Ms Thomas has held various positions including, caseworker, manager of a community service centre in Wellington, assistant manager at Mount Druitt CSC, and a manager (Out of Home Care) for the Cumberland Prospect Area. This last position involved supervision of Parramatta, Blacktown and Auburn CSC's for Out of Home Care programmes, as well as the supervision of 'Minali', a residential establishment for approximately 25 children. During her last position she also supervised a state-wide intervention service where caseworkers worked intensively with families in their homes.

122 In her position of Client Services Manager at the Mt Druitt office, Ms Thomas was responsible for the management and supervision of the Manager Casework (Intake), three managers Casework (Child Protection), and the Manager Casework (Family Violence Service).

123 It is apparent that Ms Thomas is a very experienced DOCS worker with a great deal of knowledge and experience in working with families and children in crisis. But the relevant question for the purpose of determining how much weight to give her evidence is whether she possesses specialised knowledge on the subjects of which she seeks to make opinions on, and if she does have specialised knowledge, does she make her opinions wholly or substantially based on that specialised knowledge.

124 I note that Ms Thomas had never given evidence as an expert witness before, nor had she read, or agreed to comply with, any expert codes of conduct such as the Supreme Court Experts Code of Conduct prior to preparing her statement or giving oral evidence.

125 Throughout her evidence Ms Thomas commented on risk assessment practices of the defendant. In order for her opinion on the topic of risk assessment to be considered by the court, it must be established that she does in fact have specialised knowledge on risk assessments: See *CA Henschke & Co and Another v Rosemount Estates Pty Ltd* (1999) 47 IPR 63. There must be specific evidence before the court as to the specialised knowledge of the person in relation to the specific subject matter and the training, study or experience upon which that specialised knowledge is based: *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 744 and *Regina v Jung* [2006] NSWSC 658 at [60](m).

126 The following exchange occurred when Ms Thomas was asked by Mr *Docking* about her training regarding risk assessments:

Q. Going back to risk assessment, what course, if any, had you been given in relation to conducting a risk assessment on a client who could be violent to a DOCS worker? The time period I am asking you about is on or before 24 May 2004?

A. What course had we been given?

Q. Had you personally ever attended?

A. In terms of training or - courses?

Q. I am talking limited to how to do a risk assessment on a client who could be violent to an employee of DOCS?

A. I can't remember any formal courses prior to 2004.

Q. And the fact of the matter is, you were never given such

training on or before May 2004?

A. I can't remember any courses prior to that.

Q. What about after May 2004? There have been some courses rolled out?

A. There has.

Q. Have you now been given training on how to do a risk assessment specifically about a client being violent to a DOCS employee?

A. Yes.

Q. When did you first get the training?

A. I did my training in December 2007.

Q. What was the name of that training?

A. I can tell you - "Preventing and Managing Client Initiated Violence".

127 The topic was again raised later on in the cross-examination of Ms Thomas:

Q. And you are still not able to even overnight provide any details apart from the half day course you personally had risk assessment, not about children but the type I am asking, but that you personally attending, you can't provide any other detail?

A. No.

Q. It might have been the only time the risk assessment I am talking about, the only time you had that training was half a day in December 2007?

A. Yes.

Q. And that is the truth, isn't it, it is the only training you had about a specific type of risk assessment, about a violent client at work?

A. Yesterday when you were talking about risk assessment you were involving Occupational Health & Safety legislation and policy, I've had training in those types of things as well.

128 Whilst Ms Thomas may have had training regarding occupational health and safety legislation and policy generally, it is apparent on the evidence that the only specialised training she had in relation to risk assessments for the purposes of assessing a potentially violent client was a half day course at the end of 2007. I do not accept that this is someone who can be regarded as having "specialised knowledge" on risks assessments. Ms Thomas' evidence regarding risk assessments must be given no weight.

129 The authorities establish that if opinion evidence is given, it must be based wholly or substantially on the opinion maker's specialised knowledge, and should not involve opinions formulated outside of the relevant specialised knowledge: *HG v The Queen* (1999) 197 CLR 414 and *Makita v Sprowles*. In *HG v The Queen*, when discussing the opinion sought to be adduced in that particular case, Gleeson CJ said at [41] and [44]:

[41] ... That opinion was not shown to have been based, either wholly or substantially, on Mr McCombie's specialised knowledge as a psychologist. On the contrary, a reading of his report, and his evidence at the committal, reveals that it was based on a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise of a psychologist.

...

[44] This was not a trial by jury, but in trials before judges alone, as well as in trials by jury, it is important that the opinions of expert witnesses be confined, in accordance with s 79, to opinions which are wholly or substantially based on their specialised knowledge. Experts who venture "opinions" (sometimes merely their own inference of fact), outside their field of specialised knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding may be subverted.

130 Ms Thomas' specialised knowledge was her extensive experience as a DOCS employee. However, throughout her evidence Ms Thomas formed opinions that were not based wholly or substantially on this knowledge but instead on speculation, inference and second hand views.

131 In her statement Ms Thomas provided an explanation as to why Ms Cooper might have had her car running outside the CSC. Ms Thomas said:

In relation to the incident involving the mother parking her car outside the CSC with her motor running between 6pm and 8pm in May it is probable this was to operate the car heater.

132 Ms Thomas' experience as a DOCS employee does not enable her to form such an opinion, and can only be considered to be speculative. No one other than Ms Cooper herself would be able to explain why the car was running. Ms Thomas' opinion on this subject should be given no weight by the Court.

133 In her statement Ms Thomas commented on the mental behaviour of Ms Cooper and stated that:

Some of the behaviours which are reported in Philps' notes indicate that the presence of a security guard might be warranted for any interview with a caseworker, while other behaviours indicate that the client is quite harmless and just 'mad'.

134 In cross-examination she described what she meant by the term "mad":

Erratic behaviour, unusual behaviour, behaviour other people might not determine normal or a normal reaction.

135 Whilst I accept in her experience at DOCS Ms Thomas would be able to recognise someone with these sorts of behaviour, I am unable to give any weight to the opinion that the client was "just mad". This opinion was based on the case notes of Ms Philps, without any personal interaction between Ms Thomas and Ms Cooper, and on the evidence before me, without Ms Thomas possessing any specialised knowledge on mental health issues. It is a second hand, personal view and must be given no weight.

136 In her statement Ms Thomas also commented on what Ms Cooper would have felt after her dealings with the case workers:

Mum not treated fairly, no wonder she has reacted (doesn't sound like real temporary care, but rather a manipulation of mum to sign the papers – unless you sign, we will take you to court).
From mother's point of view the caseworkers are misleading.

137 Ms Thomas' experience as a DOCS employee does not enable her to form an opinion on what Ms Cooper thought about the caseworkers. That evidence could only come from Ms Cooper. What Ms Thomas said regarding how Ms Cooper felt was speculative, based on inference, and not based on her specialised knowledge as a DOCS employee.

138 Further, by her own admission Ms Thomas conceded that some of her evidence was speculative. In her statement Ms Thomas said:

Contact supervisor – who was supposed to supervise contact?
If it was someone without qualifications (an ordinary 'off the street' person) that might indicate a low assessment of risk to workers by Philps.

139 In cross-examination, Ms Thomas acknowledged the following:

Q. Going to subparagraph F, you don't know what qualifications any contact supervisors had or didn't have?
A. That's why the comment is there because I didn't know.

Q. And it is pure speculation without knowing the fact?
A. That's right.

Q. You haven't a clue whether anyone made a low, medium high assessment of the risk to workers by, you say Philps?
A. That was the point of the comment.

Q. You don't know if she made any such assessment as low, medium or high?
A. No.

140 The above examples demonstrate that in preparing her statement Ms Thomas has ventured outside the scope of her specialised knowledge, and has formed opinions based on a combination of speculation, inference, personal and second hand views: *HG v The Queen*. Ms Thomas' evidence on those topics should be given no weight.

141 In addition to her opinions not being made wholly or substantially on the basis of her specialised knowledge as an experienced DOCS worker, Ms Thomas' evidence is inconsistent with the weight of the evidence.

142 For example, in her statement, Ms Thomas said:

The fact that the Police have not been called in to be present for any interview, notwithstanding all of the behaviours reported, indicates that the caseworkers did not consider the client to be of a high risk (of violence to employees). If the caseworkers had thought that the client was high risk they would have put the police on alert or called them in for the interview.

143 This is in contrast to the direct evidence of Ms Philps that both Ms Williams

and herself had identified Ms Cooper to be high risk after their first interview with her at the Ballina Hospital. Ms Williams stated that after this first interview she recognised it was a complex case and a potentially violent client.

144 Another example was in Ms Thomas' oral evidence when she said:

The office was well aware that the woman was coming into the office, the case workers had had good communication with their managers and with mental health authorities and with the police, and a decision had been made that, I would say that everybody was aware that that interview was going to happen and they would have talked about possibilities, about the mother being in rehab and how I would handle that.

145 I have already found that no email was sent to the office on 24 May 2004 alerting staff that Ms Cooper might attend on that particular day. I note that Mr Wilton, a manager, did not know that Ms Cooper was to attend on 24 May 2004 and had not participated in any discussion regarding what procedures or controls should be put in place for the interview. Ms Balchin gave evidence that although she had been advised that Ms Cooper might attend, she had been told it was unlikely that she would show up. Further, Ms Balchin had not been approached by any manager regarding Ms Cooper attending on 24 May 2004.

146 In her statement Ms Thomas also commented on the knowledge and actions of managers at Ballina CSC:

The caseworkers' managers would not have allowed the meeting to go ahead on 24 May 2004 if they considered there would be a real risk to the caseworkers' physical safety. The managers were briefed about the matter. You would expect the mother to be upset and shout and be angry but if physical safety was at risk a manager wouldn't allow a meeting to go ahead

147 Not only is this speculation as to what the managers would or would not have done, it states that the managers were briefed about the matter. The evidence before the Court, however, was that with the exception of Ms Christopher, who was not present at the CSC at the time of the interview and attack, no other manager was fully briefed on the matter. I note that Ms Balchin had been advised it was unlikely that Ms Cooper would attend on 24 May 2004, and that she did not know of the death threat against Ms Garcia, nor of the mental health assessment or its contents. Mr Wilton did not know that Ms Cooper would even be attending on 24 May 2004. The weight of the evidence was against Ms Thomas in this regard, and accordingly her evidence on the topic should be given no weight.

148 Ms Thomas' evidence contained opinions formed on the basis of speculation and inference and also contained opinions on subjects that she did not have the requisite specialised knowledge. Further, her evidence was inconsistent with the weight of the evidence in proceedings. For these reasons I am unable to place any weight on Ms Thomas' evidence.

WHETHER OFFENCE CHARGED IS ONE OF ABSOLUTE LIABILITY

Case for the defendant

149 Mr P M *Skinner* of counsel with Ms B *Obradovic* of counsel for the defendant

submitted that the 2000 OHS Act did not create absolute liability offences. It was submitted that the offence with which the defendant was charged was one in which there was an original obligation on the prosecution to prove *mens rea*. Alternatively, it was put that the offence was one in which *mens rea* would be presumed to be present unless and until material was advanced by the defence of the existence of honest and reasonable belief that the conduct in question was not criminal, in which case the prosecution must undertake the burden of negating such belief beyond reasonable doubt: *R v Wampfler* (1987) 11 NSWLR 541 at 545 per *Street CJ*.

150 The observations of *Street CJ* in *Wampfler* were made in the context of explaining that *He Kaw Teh* was authority for the proposition that for the purpose of considering criminal intent, statutory offences fell into three categories. The first two categories are described in the previous paragraph. The third category is absolute liability or, as *Street CJ* expressed it, those offences "in which *mens rea* plays no part and guilt is established by proof of the objective ingredients of the offence".

151 The three categories were described by *Dawson J* in *He Kaw Teh* in the following passage at 590:

In relation to the offence of importing narcotic goods into Australia, the question which arises is whether the prosecution has to prove any mental state accompanying the importation. In other words, the question is whether *mens rea* is an ingredient of the offence to be proved by the prosecution. If it is not, the further question arises whether the offence is one of strict liability which, whilst not requiring the prosecution to prove *mens rea* in order to make out a case, allows the accused to raise honest and reasonable mistake by way of exculpation. To that extent a mental element is imported into an offence of strict liability short of requiring proof of *mens rea* by the prosecution. The mistake must involve a belief in a state of affairs which, if true, would make the act of the accused innocent. If the statute in neither of these ways requires any mental state to accompany the importation, then the offence is an absolute one and is complete once the prohibited act of importation is proved. Offences of strict or absolute liability are creatures of statute. The terms "strict liability" and "absolute liability" are not always used precisely and sometimes interchangeably, but used as I have used them, they are a convenient way of drawing the distinction to which I have referred.

152 Thus, it was submitted, it was clear that the presumption was not confined to a narrow conception of *mens rea*; it also applied when the question was whether a statute allowed for a ground of exculpation based on honest and reasonable mistake. Reference was made to what *Black CJ* said in *Chief of the General Staff v Stuart* (1995) 58 FCR 299 at 303:

It is natural that the presumption that *mens rea* is required should apply when the question is whether it was intended that an honest and reasonable mistake should be a ground for

exculpation since the absence of an exculpatory belief is now seen as a form of mens rea: see *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645 at 659, per *Wilson, Dawson and Toohey JJ*, referring to the observations of *Brennan J* in *He Kaw Teh* at CLR 580.

The defendant also referred to *Hawthorne (Department of Health) v Morcam Pty Ltd* (1992) 29 NSWLR 120, where *Mahoney JA* said at 127:

What is in issue essentially is the nature of the mens rea or mental element involved in the offence created by or under [the statute]: see generally *He Kaw Teh* (at 530, 568, 590). It is, as pointed out in *He Kaw Teh*, convenient to employ for this purpose descriptions such as “absolute liability” and “strict liability” (at 590, per *Dawson J*). But, in principle, what must be determined is that of which the defendant must be aware in order that the offence be committed. In the end, that can be stated only in terms formulated by reference to the precise acts or omissions which constitute the offence.

153 That a breach of the general duties under Div 1 of Pt 2 of the 2000 OHS Act is to be regarded as an absolute liability offence has been the accepted wisdom of this Court since the Act came into force. The predecessor provision to s 8(1) of the 2000 OHS Act, which was s 15 of the *Occupational Health and Safety Act 1983* (“the 1983 OHS Act”), has also been regarded as an absolute liability offence ever since the decision of *Watson J* in *Carrington Slipways Pty Limited v Callaghan* (1985) 11 IR 467, a decision the correctness of which has been repeatedly affirmed by Full Benches of this Court. That this is so, is evident from the majority judgment (*Walton J*, Vice-President, *Boland J*) in *Newcastle Wallsend Coal Company Pty Ltd v WorkCover Authority (NSW) (Inspector McMartin)* (2006) 159 IR 121 at [214]:

Although the issue was not raised by either party in these proceedings, it is pertinent at this juncture to comment briefly upon one other matter of principle: the absolute nature of liability under ss 15 and 16, referred to in remarks by *Basten JA* in *Kirk Group Holdings Pty Ltd & Anor v WorkCover Authority of New South Wales & Anor* [2006] NSWCA 172 at [146]. While there has been, at times, variance in the language used, the settled authority of this court plainly establishes that liability is absolute as the Full Bench observed recently in *Kirk Group Holdings Pty Ltd and Anor v WorkCover Authority of New South Wales (Inspector Childs)* [2006] NSWIRComm 355 at [49]. (See also *Carrington Slipways Pty Ltd v Callaghan* (1985) 11 IR 467; *Drake Personnel Ltd t/as Drake Industrial v WorkCover Authority (NSW) (Inspector Ch'ng)* (1999) 90 IR 432 at 449; *WorkCover v Coffey Engineering* (2001) 110 IR 447 at [16]-[17]; *Ridge Consolidated v WorkCover* (2002) 115 IR 78 at [32]; *WorkCover Authority of New South Wales (Inspector Buggy) v Weathertex Pty Ltd* (2003) 127 IR 60 at [58]; *Morrison v Powercoal Pty Ltd & Anor* (2004) 137 IR 253 at [97]; *WorkCover Authority of New South Wales (Inspector Franke) v Amer Kanawaty* [2005] NSWIRComm 361 at [45];

Daly Smith Corporation (Aust) Pty Limited and Anor v WorkCover Authority of New South Wales (Inspector Mansell) (2006) 151 IR 173 at [33]; *Inspector Schultz v Hoffman's Kundabung Sawmilling Pty Ltd* [2006] NSWIRComm 277 at [54]; and *Inspector Wolf v Rockdale Beef Pty Ltd* [2006] NSWIRComm 280 at [148]). This stems from the unconditional, objective nature of the liability (see *Shannon v Comalco Aluminium Pty Ltd* (1986) 19 IR 358 at 470; *State Rail Authority of New South Wales v Dawson* (1990) 37 IR 110 at 120 - 121; *Kirkby v A & M I Hanson Pty Ltd* (1994) 55 IR 40 at 50; *ABB Power Transmission Pty Ltd v WorkCover Authority of New South Wales (Inspector Wilson)* [1997] NSWIRComm 60; *Ferguson v Nelmac Pty Limited* (1999) 92 IR 188; *WorkCover Authority (NSW) v State Police (NSW) (No 2)* (2001) 104 IR 268 at [20]; and *McMartin v Broken Hill Pty Co Ltd* (1988) 100 IR 241); the exclusive nature of the defences available under s 53 (allowing no countervailing defence of honest and reasonable mistake of fact - see, for example *Kelloggs (No 1)* at 259 and *Inspector Wolf v Rockdale Beef Pty Ltd* at [147]); and the important social purposes of the *Occupational Health and Safety Act* and its successor, discussed by the Full Bench in *WorkCover v T V & Y Pty Ltd* (2005) 146 IR 458 at [7]; *Beacham v Interface Manufacturing Pty Ltd* (2005) 141 IR 416 at [27]; *Glass v Flexible Packaging (Australia) Pty Limited* (2005) 144 IR 385 at [2]; and *T and M Industries (Aust) Pty Ltd v WorkCover Authority (NSW) (Inspector Sequeira)* (2006) 151 IR 130 at [77]).

154 Counsel for the defendant submitted, however, that there may not have been the fullest assistance possible provided to the variously constituted Courts when construing the 2000 OHS Act and its predecessor, in the sense of detailed submissions regarding the applicable principles of criminal responsibility as decided by the common law. Further, that the leading High Court authority, *He Kaw Teh*, had not been the subject of any extensive submissions to the Court. Counsel noted that the foundational authority - the judgment of *Watson J* in *Carrington Slipways v Callaghan* - was decided before *He Kaw Teh*. It may be noted, though, that the common law presumption that an essential ingredient of every offence is that the defendant knew of the wrongfulness of his or her act and that such a presumption could be displaced expressly or by implication, was not a new proposition derived from *He Kaw Teh*: see *Sherras v De Rutzen* [1895] 1 QB 918 at 921; *Proudman v Dayman* (1941) 67 CLR 536 at 540 per *Dixon J*.

155 The defendant's starting point in contending that a contravention of s 8(1) of the 2000 OHS Act did not constitute an absolute liability offence was that s 12 of the 2000 OHS Act created criminal offences with severe penalties and that s 8(1) had to be interpreted in the light of the general principles of the common law which govern criminal responsibility: see *Gibbs CJ* (with whom *Mason J* agreed) in *He Kaw Teh* at 528. One of those principles is the presumption that *mens rea* is an essential ingredient in every offence, but "that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with

which it deals, and both must be considered": *Gibbs* CJ in *He Kaw Teh* at 528, quoting from the decision in *Sherras v De Rutzen* at 921.

156 Again, referring to the judgment of *Gibbs* CJ in *He Kaw Teh*, Mr *Skinner* noted that the Chief Justice identified not two, but three circumstances that may lead to that presumption (that *mens rea* is an essential ingredient in every offence) being displaced in a particular statute, and identified them as including not only the words of the statute creating the offence and the subject matter with which the statute deals but also:

... that there must be something [the defendant] can do, directly or indirectly... which will promote... observance.... Unless this is so, there is no reason in penalizing him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim: *Gibbs* CJ at 530, citing *Lim Chin Aik v The Queen* [1963] AC 160 at 174.

157 The defendant noted that the other judges in *He Kaw Teh* (*Mason*, *Wilson*, *Brennan* and *Dawson* JJ) essentially agreed with the approach of *Gibbs* CJ, *Wilson* J only really disagreeing on its application in that case.

158 Mr *Skinner* then proceeded to apply the three principles identified from *He Kaw Teh* to s 8(1) of the 2000 OHS Act. As to the first of these - the words of the statute creating the offence - the defendant placed considerable reliance on what may only be regarded as *obiter* by *Basten* JA in *Kirk Group Holdings Pty Ltd & Another v WorkCover Authority of New South Wales and Another* [2006] NSWCA 172; 154 IR 310; 66 NSWLR 151 at [146] where his Honour was commenting on s 15 of the 1983 OHS Act:

Taken literally, s 15 requires an employer to ensure that workers do not fall sick, suffer strokes or heart attacks or die at work, even for reasons entirely unrelated to the work environment. That construction is not adopted, because it would not be sensible in the statutory context. Similarly, it appears that the obligation does not extend to the removal of risks which are so remote as to be speculative. That exclusion might extend to the risk of events which, though remote, are statistically predictable. But if the obligation is not taken to include its full literal extent, by what principle is that construction achieved?

159 The defendant submitted that looked at in the context of the other relevant provisions of the 2000 OHS Act, the wording of s 8(1) inferred that absolute liability was not imposed. This legislation was unlike any other of the many statutory provisions that do create absolute liability, where what should be done, or not done, was clearly expressed and eminently knowable and achievable. It was submitted that the mandatory words "must ensure" and the "standard of perfection expressed in the objects of that command have been said by some to create an absolute duty." Whether the statute as a whole then created absolute liability for a failure to achieve that state was quite a different thing, it was submitted.

160 Reference was made to the rhetorical question asked by *Basten* JA towards the end of his judgment in *Kirk Group* quoted above: "... if the obligation is not taken to include its full literal extent, by what principle is that construction achieved?". It

was submitted that the answer must be: 'By the application of the principle of construction outlined as long ago as 1895 in *Sherras v De Rutzen*, as quoted by the judges in *He Kaw Teh*, namely:

There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence...'

161 The defendant then referred to a number of cases that involved the construction of statutory provisions in the context of whether the presumption that *mens rea* is an essential ingredient in every offence had been displaced. The cases and statutory provisions were *He Kaw Teh* and s 233B(1)(b) of the *Customs Act* 1901 (Cth); *R v Wampfler* and the *Classified Publications Act* 1975; *Environment Protection Authority v N* (1992) 26 NSWLR 352 and the *Protection of the Environment Administration Act* 1991; *Hawthorne v Morcam Pty Ltd* and the *Pure Food Act* 1908; and *Chief of the General Staff v Stuart* and the *Defence Force Discipline Act* 1982 (Cth). The defendant submitted that these cases and the statutory provisions that were the subject of consideration, tended to support the defendant's position that contravention of s 8(1) of the 2000 OHS Act was not an absolute liability offence in that the section, when considered in the context of the statute as a whole, did not displace the *mens rea* presumption. The defendant quoted Hunt CJ at CL in *Hawthorne v Morcam Pty Ltd*, where his Honour stated at 132 - 133 that: "The trend of modern authority is clearly to limit offences of absolute liability..."

162 In relation to the second principle derived from *He Kaw Teh* - the subject-matter with which the statutory provision deals - it is relevant in the manner explained by Dawson J in *He Kaw Teh* at 595:

Resort must then be had to the subject-matter or character of the legislation. Attempts have been made to categorize those offences which have been regarded as absolute, but the result is only helpful in a broad sense and the recognized categories cannot be regarded as exhaustive. It is generally accepted that statutes which create offences for the purpose of regulating social or industrial conditions or to protect the revenue, particularly if the penalty is monetary and not too large, may more easily be regarded as imposing absolute liability. This approach may be displaced if to regard an offence as one of absolute liability could not promote the object of the legislation by making people govern their behaviour accordingly. See *Lim Chin Aik v. The Queen* (1963) AC 160. Conduct prohibited by legislation which is of a regulatory nature is sometimes said not to be criminal in any real sense, the prohibition being imposed in the public interest rather than as a condemnation of individual behaviour. On the other hand, if a prohibition is directed at a grave social evil, the absolute nature of the offence may more readily be seen, particularly if proof of intent would be difficult and would represent a real impediment to the successful prosecution of offenders.

163 Mr *Skinner* accepted the 2000 OHS Act had an important social purpose, but contended that so it was in respect of s 233B(1)(b) of the *Customs Act* considered

in *He Kaw Teh* and in the provisions considered in the other cases referred to above, but in those cases the presumption had not been displaced. The defendant also noted that in *He Kaw Teh*, Brennan J, in his judgment, rejected the proposition of the Judicial Committee in *Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong* [1985] AC 1 at 14 that "the presumption [that *mens rea* is an essential ingredient in every offence] can be displaced where the statute is concerned with an issue of social concern, and public safety is such an issue" as being too categorical an approach (at 567 - 568).

164 The third principle, derived from *Lim Chin Aik v The Queen* [1963] AC 160, concerns whether a defendant could do something that would promote the observance of the relevant statutory provision because unless this was so there would be no reasons to penalise the defendant. In *He Kaw Teh*, Gibbs CJ saw the issue in relation to the *Customs Act* provision as follows at 530:

A person bringing baggage into a country can no doubt take care to ensure that no drugs are contained in it. The public interest demands that such care should be taken. There is thus an argument, the strength of which I shall later consider, in favour of the view that the Parliament may have intended to penalise importation that was no more than careless. Clearly, however, no good purpose would be served by punishing a person who had taken reasonable care and yet had unknowingly been an innocent agent to import narcotics.

165 The defendant submitted that it was undeniable that it is impossible to ensure the health, safety and welfare at work of employees, and in particular that systems of work and the working environment of employees are always safe and without risks to health - just as it is impossible to ensure that all premises are risk free: see *Neindorf v Junkovic* (2005) 80 ALJR 341 at [4] and [8] where the High Court (per Gleeson CJ) stated that no person lives in premises that are risk free.

166 In the present case, Mr *Skinner* accepted that the weight of the evidence was that there was always some risk of client aggression towards caseworkers employed by the defendant doing the work that was being done at Ballina CSC. However, it was submitted that no one had the slightest suspicion that Ms Cooper had a concealed knife that she had brought into the interview room and that, therefore:

[I]t accords with fundamental principles of justice in the criminal law for it to be held that a person should not be liable under the OHAS Act for failing to eliminate risks that it knew nothing of, or at least that it thought did not exist on the basis of an honest and reasonable view of the relevant facts.

167 It was submitted for the defendant that there was nothing in the terms of s 28 of the 2000 OHS Act to compel the conclusion that the prosecution did not have to prove a mental element in defendants to s 8(1) charges. Reference was made to *Environment Protection Authority v N* where the *Protection of the Environment Administration Act* provided a defence under s 7 in identical terms to s 28(b) of the 2000 OHS Act, yet the Court in that case held that honest and reasonable mistake was a defence. Further in *Chief of General Staff v Stuart*, s 44 of the *Defence Force Discipline Act* provided a defence under s 44(2) in very similar terms to s 28(a) of the 2000 OHS Act, yet the Court in that case held that honest and

reasonable mistake was a defence. *Black CJ* said in that case at 305:

As *He Kaw Teh* shows, the existence of a statutory defence does not mean that the presumption that mens rea must be proved is necessarily displaced with respect to the offence for which such a defence is provided. The presence of a statutory defence may give different indications in that regard according to which element of an offence is being considered and in a prosecution under s 44 the defence provided for by s 44(2) would be of no use to a person who did not know that particular property had in fact been entrusted to his care and who had therefore not taken steps for its safekeeping.

168 Adapting the words of *Black CJ*, Mr *Skinner* submitted the defence provided for by s 28(a) of the 2000 OHS Act, as it had been interpreted in this jurisdiction, was of no use to a defendant who did not know of the risk that it was to ensure against or had an honest and reasonable belief that such a risk did not exist.

169 Also in relation to the statutory defences under s 28 of the 2000 OHS Act, the defendant submitted that it had been held that such defences only arise once “the elements of the offence have been established” (*WorkCover Authority of New South Wales (Inspector Byer) v Cleary Bros (Bombo) Pty Ltd* (2001) 110 IR 182) or “liability has been found under the Act” (*St Hilliers Contracting Pty Ltd v WorkCover Authority (NSW)* (2007) 162 IR 241).

170 Thus, it was submitted that *a fortiori* the common law principles as to criminal responsibility must have been intended by Parliament to apply at the stage of preliminary assessment of liability, before consideration of the statutory defences.

171 Mr *Skinner* examined 10 authorities in this Court's occupational health and safety jurisdiction that regarded offences under the Act as absolute liability offences to show that neither *He Kaw Teh* nor the several cases applying it in the criminal jurisdiction were referred to. The authorities were: *Carrington Slipways v Callaghan; Drake Personnel Ltd t/a Drake Industrial v WorkCover Authority of New South Wales (Inspector Ch'ng)* (1999) 90 IR 432 at 449; *WorkCover Authority of New South Wales (Inspector Legge) v Coffey Engineering* (2001) 110 IR 447 at [16] - [17]; *Ridge Consolidated v WorkCover Authority of New South Wales (Inspector Mauger)* (2002) 115 IR 78 at [32]; *WorkCover Authority of New South Wales (Inspector Buggy) v Weathertex Pty Ltd* (2003) 127 IR 60 at [58]; *Morrison v Powercoal Pty Ltd & Another* (2004) 137 IR 253 at [97]; *WorkCover Authority of New South Wales (Inspector Franke) v Amer Kanawaty* [2005] NSWIRComm 361 at [45]; *Daly Smith Corporation (Aust) Pty Ltd v WorkCover Authority (NSW) (Inspector Mansell)* (2006) 151 IR 173 at [33]; *Inspector Schultz v Hoffman's Kundabung Sawmilling Pty Ltd* [2006] NSWIRComm 277 at [54]; and *WorkCover Authority (NSW) (Inspector Wolf) v Rockdale Beef Pty Ltd* (2006) 155 IR 366 at [148].

172 The defendant submitted that if the Court was satisfied that the offence charged did not impose absolute liability on the defendant and that knowledge by the defendant of the risk of a violent attack with a weapon by Ms Cooper was required to be considered, it mattered little whether it is held that the first or the second alternatives identified by *Street CJ* in *R v Wampfler* at 546 applied. That is

to say, in the circumstances of this case, whether: (1) there was an original obligation on the prosecution to prove beyond reasonable doubt knowledge by the defendant of that risk of a violent attack; or (2) the 2000 OHS Act presumes that knowledge to be present unless and until there was evidence of the existence of an honest and reasonable belief that there was no such risk, in which case the prosecution must undertake the burden of negating such belief beyond reasonable doubt.

173 It was submitted that upon the evidence in this trial, the prosecution could not prove beyond reasonable doubt that DOCS, through any of its employees or agents, knew of the risk that Ms Cooper would violently attack the two caseworkers with a weapon. Nor could the prosecution negative beyond reasonable doubt that there was an honest and reasonable belief of the Department through the two caseworkers, and their supervisor Ms Christopher, that there was no such risk posed by Ms Cooper. Accordingly, it was submitted, the defendant should be acquitted.

Prosecutor's case

174 Mr B *Docking* of counsel presented the case for the prosecution, which may be summarised in the following points:

- the statutory offence under ss 8(1) and 12 of the 2000 OHS Act is an absolute liability offence;
- the judgment of *Basten JA in Kirk Group*, which the defendant so heavily relied upon, appears to not have had the benefit of full argument from either party on significant issues. In particular:
 - a. the legislative history, including its derivation from English law, confirms that the offence is one of absolute liability,
 - b. the assistance provided by extrinsic material, including second reading speeches and parliamentary committee reports, which shows it was the legislature's intention to make the offence absolute,
 - c. the assistance provided by the United Kingdom authorities which show that the English Courts at the highest level have regarded an offence under the counterpart English legislation as absolute;
- the words in s 8(1) “must ensure” have a settled meaning following *Carrington Slipways* at 470;
- there is no basis for any interpretation on s 8(1) other than a literal one;
- *Waugh v Kippen and Another* (1986) 160 CLR 156 is against the defendant in relation to what the words of the 2000 OHS Act indicate about the nature of the offence. The present offence does not contain any words like “permitted or allowed” that presuppose an awareness, actual or constructive, on the part of an employer;
- the purposive approach to interpretation suggests that words “must ensure” should not be read down. Nevertheless, the literal interpretation of s 8(1) is ameliorated or has

some flexibility;

- the subject matter is workplace health, safety and welfare. Workers often spend half, or more than half, of their waking hours on workdays at their places of work. Preventing or reducing, to the extent reasonably practicable, workplace fatalities and injuries puts the present legislation in a different category to the other Acts to which the defendant has made reference;
- the subject matter of the legislation is a general duty cast on an employer that is both preventive and remedial in nature. The duty must be interpreted in the sense favourable to making the remedy effective and the protection of workers secure;
- it would drive a juggernaut through the legislative scheme if corporate employers could avoid criminal liability where the potentially harmful event is committed by someone who is not the directing mind of the company. It would emasculate the legislation if the prosecution had to prove a “directing mind”;
- knowledge is not an ingredient of the offence and the organic theory of corporate structure used to impute knowledge on a corporation, as formulated in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, is irrelevant in view of the absolute nature of the offence (*Dawson v State Rail Authority of NSW* (1988) 26 IR 359 at 366 per CIM);
- none of the cases relied upon by the defendant to show that the offence is absolute are of any help because of the different legislation considered in those cases;
- it appears untenable to argue that Parliament by implication retrospectively changed what was an absolute liability offence into a strict liability offence when the 1983 OHS Act was amended after its introduction to increase the maximum available penalties. The same applies when Parliament enacted the 2000 OHS Act and maintained the higher penalty regime;
- when the 1983 OHS Act was enacted the maximum available penalties in all jurisdictions involved fines and not imprisonment. This is an indication supporting absolute liability offences (*R v Davies* [2003] ICR 586 at [18], [19]);
- even where imprisonment is now a sentencing option this does not indicate away from the offence being absolute liability;
- even if the Court finds that the offence is one of strict liability, the prosecution has negated the defence beyond reasonable doubt:
 - a. Just like in *R v Lavender* (2005) 222 CLR 67, any opinion of an employee of the defendant that it was safe to act as she did was not a relevant matter – it is not a mistake of fact. The defendant never turned its mind to the facts and falls far short of the defence. It was more based on faith than facts,
 - b. The defendant has not identified some particular fact or circumstance which the defendant knew, or thought it knew and which contributed to that opinion, that can be considered for the defence,
 - c. If the defendant clarifies (b) above, it was not based on reasonable grounds;
- in addition, it is an arid argument because the belief of witnesses relied upon by

the defendant - an unnamed receptionist, primary Caseworker Ms Philps, secondary Caseworker Ms Williams or Acting Manager Casework Ms Christopher - cannot equate to that of a corporate defendant or corporation sole. See *Hunter Water Board v State Rail Authority of New South Wales (No 1)* (1992) 75 LGRA 15 per Stein J and *State Rail Authority of NSW v Hunter Water Board* (1992) 28 NSWLR 721 at 723 - 724.

CONSIDERATION OF ABSOLUTE LIABILITY ISSUE

Relevant statutory provisions

175 The main provision in question is s 8(1) of the 2000 OHS Act, which is to be found in Div 1 - General duties of Pt 2 - Duties relating to health safety and welfare at work. Section 8(1) is in the following terms:

8 Duties of employers

(1) Employees

An employer must ensure the health, safety and welfare at work of all the employees of the employer.

That duty extends (without limitation) to the following:

(a) ensuring that any premises controlled by the employer where the employees work (and the means of access to or exit from the premises) are safe and without risks to health,

(b) ensuring that any plant or substance provided for use by the employees at work is safe and without risks to health when properly used,

(c) ensuring that systems of work and the working environment of the employees are safe and without risks to health,

(d) providing such information, instruction, training and supervision as may be necessary to ensure the employees' health and safety at work,

(e) providing adequate facilities for the welfare of the employees at work.

176 The other relevant provisions of the 2000 OHS Act are s 12 and s 28. Section 12 creates the offence:

12 Penalty for offence against this Division

A person who contravenes, whether by act or omission, a provision of this Division is guilty of an offence against that provision and is liable to the following maximum penalty:

(a) in the case of a corporation (being a previous offender)—7,500 penalty units, or

(b) in the case of a corporation (not being a previous offender)—5,000 penalty units, or

(c) in the case of an individual (being a previous offender)—750 penalty units or imprisonment for 2 years, or both, or

(d) in the case of an individual (not being a previous offender)—500 penalty units.

177 Section 28 provides the defences to any proceedings against a person for an offence against the 2000 OHS Act and is in the following terms:

28 Defence

It is a defence to any proceedings against a person for an offence against a provision of this 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.

178 The 2000 OHS Act commenced on 1 September 2001. It repealed the 1983 OHS Act, which had commenced on 4 May 1983. Section 8(1) of the 2000 OHS Act was relevantly not materially different from s 15 of the 1983 OHS Act, which provided:

15 Employers to ensure health, safety and welfare of their employees

(1) Every employer shall ensure the health, safety and welfare at work of all the employer's employees.

(2) Without prejudice to the generality of subsection (1), an employer contravenes that subsection if the employer fails:

(a) to provide or maintain plant and systems of work that are safe and without risks to health,

(b) to make arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage or transport of plant and substances,

(c) to provide such information, instruction, training and supervision as may be necessary to ensure the health and safety at work of the employer's employees,

(d) as regards any place of work under the employer's control:

(i) to maintain it in a condition that is safe and without risks to health,

or

(ii) to provide or maintain means of access to and egress from it that are safe and without any such risks,

(e) to provide or maintain a working environment for the employer's employees that is safe and without risks to health and adequate as regards facilities for their welfare at work, or

(f) to take such steps as are necessary to make available in connection with the use of any plant or substance at the place of work adequate information:

(i) about the use for which the plant is designed and about any conditions necessary to ensure that, when put to that use, the plant will be safe and without risks to health, or

(ii) about any research, or the results of any relevant tests which have been carried out, on or in connection with the substance and about any conditions necessary to ensure that the substance will be safe and without risks to health when properly used.

(3) For the purposes of this section, any plant or substance is not to be regarded as properly used by a person where it is used without regard to any relevant information or advice relating to its use which has been made available by the person's employer.

(4) If in proceedings against a person for an offence against this section the court is not satisfied that the person contravened this section but is satisfied that the act or omission concerned constituted a contravention of section 16, the court may convict the person of an offence against that section.

Maximum penalty: 5,000 penalty units in the case of a corporation or 500 penalty units in any other case.

179 The predecessor provisions to s 12 of the 2000 OHS Act were ss 47 and 51A of the 1983 OHS Act. The predecessor provision to s 28 of the 2000 OHS Act was s 53:

53 Defence

It shall be a defence to any proceedings against a person for an offence against this Act or the regulations for the person to prove that:

(a) it was not reasonably practicable for the person to comply with the provision of this Act or the regulations the breach of which constituted the offence, 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.

Carrington Slipways

180 It would appear that the first case to consider the nature of the offence under s 15(1) of the 1983 OHS Act was *Carrington Slipways*, a decision of *Watson J* given on 13 February 1985. This was an appeal from a decision of the Chief Industrial Magistrate who convicted the appellant and imposed a penalty of \$500, with court costs, witness expenses and an agent's fee. It appears there was an accident to a tradesman's assistant that occurred in the course of construction work on a tugboat at the premises of the appellant. The case presented by the prosecution was that employees of the appellant were at risk when working amongst pipe work, which whilst being fitted and tested, was not covered by plates or flooring.

181 It was contended, *inter alia*, on appeal that the offence created by s 15(1) was not absolute but was a restatement of the common law obligation of an employer to take reasonable precautions for the safety of employees. In his consideration of the competing contentions *Watson J* stated:

The competing contentions depend primarily on the construction to be placed on s.15(1). So far as that provision is concerned, I am satisfied that the legislative intention contained in the new *Occupational Health and Safety Act*, 1983, is quite clear.

Had the legislature intended to restate the common law obligations devolving on an employer to take reasonable care for the safety of his employees, it would have been open for it to have adopted wording such as that which appears in regulations under the *South Australian Industrial Safety, Health and Welfare Act*, 1972, where in reg.4 the phraseology used is "shall take all reasonable precautions to ensure" (see *Smith v. Elliott Bros.* (1980) 26 SASR 138). What intention is to be inferred from the use of the words "shall ensure" which (leaving aside s.53) are without qualification? In *Sweet v. Parsley* [1970] AC 132 at 163 (a case in which the House of Lords was called upon to consider the question of the absolute nature or otherwise of a statutory offence) Lord *Diplock* stated as follows:

Where penal provisions are of general application to the conduct of ordinary citizens in the course of their every day life the presumption

is that the standards of care required of them in informing themselves of facts which would make their conduct unlawful, is that of the familiar common law duty of care. But where the subject matter of a statute is a regulation of a particular activity involving potential danger to public health, safety or morals in which citizens have a choice as to whether they participate or not, the court may feel driven to infer an intention of Parliament to impose by penal sanctions a higher duty of care on those who choose to participate and to place upon them an obligation to take whatever measures may be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfill the ordinary common law duty of care. But such an inference is not lightly to be drawn, nor is there any room for it unless there is something that the person on whom the obligation is imposed can do directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the obligation (see *Lim Chin Aik v The Queen* [1963] A.C. 160, 174). (See also *Proudman v. Dayman* (1941) 67 CLR 536 at 540 per Dixon J (as he then was) and *John Summers & Sons Ltd v. Frost* (1955) 1 All ER 870 at 872).

In their context and purpose, there would appear to be no reason to make any implication that the words "to ensure" are to be construed in any way other than their ordinary meaning of guaranteeing, securing or making certain.

That context includes s.53. That section does not simply reverse any onus which might otherwise fall on the prosecution under s.15[1]. Rather s.53 affirmatively expresses and delimits defences not otherwise open under s.15[1]. It makes clear at the same time that those defences are to be proved by the person against whom the proceedings are instituted.

182 After considering the defence under s 53(a) of the 1983 OHS Act, *Watson J* dismissed the appeal and the orders made by the Chief Industrial Magistrate were confirmed.

183 As I noted earlier, the decision of *Watson J* in *Carrington Slipways* has been consistently followed or approved in a long line of subsequent cases. Because s

8(1) of the 2000 OHS Act was not, in any relevant sense, materially different from s 15 in the 1983 OHS Act, the interpretation of s 8(1) has followed that applied by *Watson J* to s 15(1). That is to say, the words "shall ensure" in s 15(1) (and later, "must ensure" in s 8(1) of the 2000 OHS Act) were words without qualification and reflected Parliament's intention to make the statutory offence an absolute one.

184 The defendant submitted, however, that *Carrington Slipways* and the cases that followed it were wrongly decided and that the relevant offence falls into either the first or second class of offences identified by the High Court in *He Kaw Teh* and conveniently summarised by *Street CJ* in *Wampfler*.

185 As I have earlier explained, the presumption that *mens rea* is an ingredient of a statutory offence is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, or by considering whether the imposition of absolute liability would assist in the enforcement of the relevant statutory duty: *Lim Chin Aik v The Queen* at 174 per Lord *Evershed*. I propose to consider each of these tests in relation to s 8(1) of the 2000 OHS Act but before doing so it is necessary to say something about the class of offences known as regulatory offences.

Regulatory offences

186 As I noted earlier, s 8(1) is to be found in Div 1 of Pt 2 of the 2000 OHS Act, dealing with the general duties imposed on employers and others in respect of occupational health and safety. Division 1 is regulatory in nature. That is to say, it is a provision regulating an important issue of social and industrial concern, namely, safety in the workplace. In this respect, there is a line of English authority to the effect that where the subject matter of the statute is the regulation for the public welfare for a particular activity it has been inferred that the legislature intended that such activities should be carried out under conditions of absolute liability. As the House of Lords stated in *Sweet v Parsley* [1970] AC 132 at 174:

The presumption is that the statute or statutory instrument can be effectively enforced only if those in charge of the relevant activities are made responsible for seeing that they are complied with. When such a presumption is to be inferred, it displaces the ordinary presumption of *mens rea*.

187 In *Gammon v Attorney General of Hong Kong*, Lord *Scarman* at 14, speaking for the Privy Council, went so far as to say that the only situation in which the presumption (of law that *mens rea* is required before a person can be held guilty of a criminal offence) could be displaced was where the statute was concerned with an issue of social concern, and public safety was regarded as such an issue. The imposition of a general duty to ensure safety in the workplace would not appear to be distinguishable from a statute concerned with public safety. *Brennan J* in *He Kaw Teh*, however, considered that Lord *Scarman's* proposition "seems to be too categorical an approach" given what was a question of statutory interpretation. His Honour said that it was not possible to decide that *mens rea* could be excluded only where the subject matter answered a given description without regard to the whole of the statutory context.

188 Nevertheless, *Brennan J* did not dispute the English line of authority regarding "regulatory offences" that such offences, where they may involve contravention of a statute regulating public safety, for example, have been regarded as absolute.

Other members of the Court in *He Kaw Teh* also recognised the existence of regulatory offences: see *Gibbs* CJ (with whom *Mason* J agreed) at 533, 535 and *Dawson* J at 594 - 595 where his Honour stated:

Resort must then be had to the subject-matter or character of the legislation. Attempts have been made to categorize those offences which have been regarded as absolute, but the result is only helpful in a broad sense and the recognized categories cannot be regarded as exhaustive. It is generally accepted that statutes which create offences for the purpose of regulating social or industrial conditions or to protect the revenue, particularly if the penalty is monetary and not too large, may more easily be regarded as imposing absolute liability. This approach may be displaced if to regard an offence as one of absolute liability could not promote the object of the legislation by making people govern their behaviour accordingly. See *Lim Chin Aik v. The Queen* (1963) AC 160. Conduct prohibited by legislation which is of a regulatory nature is sometimes said not to be criminal in any real sense, the prohibition being imposed in the public interest rather than as a condemnation of individual behaviour. On the other hand, if a prohibition is directed at a grave social evil, the absolute nature of the offence may more readily be seen, particularly if proof of intent would be difficult and would represent a real impediment to the successful prosecution of offenders.

189 The question of what constituted a regulatory offence was considered in *R v Davies* at 591 - 593. The UK health and safety laws and the English authorities have a particular relevance here. As I shall later explain, the New South Wales 1983 OHS Act was modelled on the *Health and Safety at Work etc Act* 1974 (UK), which provides in s 3(1):

It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health and safety.

190 In explaining the notion of regulatory offences, and after considering the nature of the *Health and Safety at Work etc Act*, the Court in *Davies* stated:

[15] The first point to be noted about the legislation is that it is regulatory rather than prescriptive. This is important in the balancing exercise. Lord *Clyde* in *R v Lambert* [2002] 2 AC 545, 609, para 154, having said that the statutory provision in question (section 28 of the *Misuse of Drugs Act* 1971) could not be justified because the offence carried a sentence of life imprisonment, continued:

"A strict responsibility may be acceptable in the case of statutory offences which are concerned to regulate the conduct of some particular activity in the public interest. The requirement to have a licence in order to carry on certain kinds of activity is an obvious example. The promotion of

health and safety and the avoidance of pollution are among the purposes to be served by such controls. These kinds of cases may properly be seen as not truly criminal. Many may be relatively trivial and only involve a monetary penalty. Many may carry with them no real social disgrace or infamy."

[16] The reasons for the distinction between truly criminal and regulatory offences were spelt out cogently by Cory J in the Canadian Supreme Court in *R v Wholesale Travel Group Inc* [1991] 3 SCR. He expressed the rationale for the distinction as follows, at p 219:

"The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.

"It follows that regulatory offences and crimes embody different concepts of fault. Since regulatory offences are directed primarily not to conduct itself but to the consequences of conduct, conviction of a regulatory offence may be thought to import a significantly lesser degree of culpability than conviction of a true crime. The concept of fault in regulatory offences is based upon a reasonable care standard and, as such, does not imply moral blameworthiness in the same manner as criminal fault. Conviction for breach of a regulatory offence suggests nothing more than that the defendant has failed to meet a prescribed standard of care."

This distinction could be justified by what he called the licensing argument, at pp 228 - 229:

"while in the criminal context, the essential question to be determined is whether the accused has made the choice to act in the manner alleged in the indictment, the regulated defendant is, by virtue of the licensing argument, assumed to have made the choice to engage in

the regulated activity ... those who choose to participate in regulated activities have, in doing so, placed themselves in a responsible relationship to the public generally and must accept the consequences of that responsibility ... those persons who enter a regulated field are in the best position to control the harm which may result, and that they should therefore be held responsible for it.

and the vulnerability justification, at p 234:

"Regulatory legislation is essential to the operation of our complex industrial society; it plays a legitimate and vital role in protecting those who are most vulnerable and least able to protect themselves. The extent and importance of that role has increased continuously since the outset of the Industrial Revolution. Before effective workplace legislation was enacted, labourers-- including children--worked unconscionably long hours in dangerous and unhealthy surroundings that evoke visions of Dante's Inferno. It was regulatory legislation with its enforcement provisions which brought to an end the shameful situation that existed in mines, factories and workshops in the nineteenth century."

This analysis led him to conclude that the legislation in question which required the defendant to prove that he had exercised due diligence to prevent false and misleading advertising was not incompatible with the presumption of innocence in the Canadian Charter saying, at pp 244-245:

"Criminal offences have always required proof of guilt beyond a reasonable doubt; the accused cannot, therefore, be convicted where there is a reasonable doubt as to guilt. This is not so with regulatory offences, where a conviction will lie if the accused has failed to meet the standard of care required. Thus, the question is not whether the accused has exercised some care, but whether the degree of care exercised was sufficient to meet the standard imposed. If the false advertiser, the corporate polluter and manufacturer of noxious goods are to be effectively controlled, it is necessary to require them to show on a balance of probabilities that they took reasonable precautions to avoid the harm which actually resulted. In the regulatory context, there is nothing unfair about imposing that onus; indeed, it is essential for the protection of our vulnerable society."

[17] We are conscious of the difference of approach by the Canadian Supreme Court to their Charter to that of courts in this and other jurisdictions (see *Attorney General of Hong Kong v Lee Kwong-kut* [1993] AC 951, 970B - 973A), but we find *Cory J's* analysis convincing and extremely helpful.

191 In another significant Canadian case, *R v Sault Ste Marie* (1978) 2 SCR 1299, which concerned the interpretation of s 32(1) of the *Ontario Water Resources Act* 1970, the Supreme Court considered the distinction between what it described as a "true criminal offence" and "the public welfare offence". At [22] - [26] *Dickson J*, delivering the judgment of the Court, stated:

[22] The distinction between the true criminal offence and the public welfare offence is one of prime importance. Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such inquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.

[23] In sharp contrast, "absolute liability" entails conviction on proof merely that the defendant committed the prohibited act constituting the actus reus of the offence. There is no relevant mental element. It is no defence that the accused was entirely without fault. He may be morally innocent in every sense yet be branded as a malefactor and punished as such.

[24] Public welfare offences obviously lie in a field of conflicting values. It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration. On the other hand, there is a generally held revulsion against punishment of the morally innocent.

[25] Public welfare offences evolved in mid-19th century Britain (*R. v. Woodrow* (1846, 15 M. & W. 404, 153 E.R. 907, and *R. v. Stephens* (1866), L.R. 1 Q.B. 702) as a means of doing away with the requirement of mens rea for petty police offences. The concept was a judicial creation, founded on expediency. That concept is now firmly imbedded in the concrete of Anglo-American and Canadian jurisprudence, its importance heightened by the ever increasing complexities of modern society.

[26] Various arguments are advanced in justification of absolute liability in public welfare offences. Two predominate.

Firstly, it is argued that the protection of social interests requires a high standard of care and attention on the part of those who follow certain pursuits and such persons are more likely to be stimulated to maintain those standards if they know that ignorance or mistake will not excuse them. The removal of any possible loophole acts, it is said, as an incentive to take precautionary measures beyond what would otherwise be taken in order that mistakes and mishaps be avoided. The second main argument is one based on administrative efficiency. Having regard to both the difficulty of proving mental culpability and the number of petty cases which daily come before the courts, proof of fault is just too great a burden in time and money to place upon the prosecution. To require proof of each person's individual intent would allow almost every violator to escape. This, together with the glut of work entailed in proving mens rea in every case, would clutter the docket and impede adequate enforcement as virtually to nullify the regulatory statutes. In short, absolute liability, it is contended, is the most efficient and effective way of ensuring compliance with minor regulatory legislation and the social ends to be achieved are of such importance as to override the unfortunate by-product of punishing those who may be free of moral turpitude. In further justification, it is urged that slight penalties are usually imposed and that conviction for breach of a public welfare offence does not carry the stigma associated with conviction for a criminal offence.

192 However, his Honour said there were arguments of greater force advanced against absolute liability at [27] - [28]:

[27] Arguments of greater force are advanced against absolute liability. The most telling is that it violates fundamental principles of penal liability. It also rests upon assumptions which have not been, and cannot be, empirically established. There is no evidence that a higher standard of care results from absolute liability. If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes it will not serve as a defence in the event of breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others? Will the injustice of conviction lead to cynicism and disrespect for the law, on his part and on the part of others? These are among the questions asked. The argument that no stigma attaches does not withstand analysis, for the accused will have suffered loss of time, legal costs, exposure to the processes of the criminal law at trial and, however, one may downplay it, the opprobrium of conviction. It is not sufficient to say that the public interest is engaged and, therefore, liability may be imposed without fault. In serious crimes, the public interest is involved and mens rea must be proven. The administrative argument has little force. In sentencing, evidence of due diligence is admissible and

therefore the evidence might just as well be heard when considering guilt. Additionally, it may be noted that s. 198 of the *Highway Traffic Act* of Alberta, R.S.A. 1970, c. 169, provides that upon a person being charged with an offence under this Act, if the judge trying the case is of the opinion that the offence (a) was committed wholly by accident or misadventure and without negligence and (b) could not by the exercise of reasonable care or precaution have been avoided, the judge may dismiss the case. See also s. 230(2) [am. 1976, c. 62, s. 48] of the *Manitoba Highway Traffic Act*, R.S.M. 1970, c. H60, which has a similar effect. In these instances at least, the legislature has indicated that administrative efficiency does not foreclose inquiry as to fault. It is also worthy of note that historically the penalty for breach of statutes enacted for the regulation of individual conduct in the interests of health and safety was minor -- \$20 or \$25; today, it may amount to thousands of dollars and entail the possibility of imprisonment for a second conviction. The present case is an example.

[28] Public welfare offences involve a shift of emphasis from the protection of individual interests to the protection of public and social interests: see *Sayre, "Public Welfare Offences"* (1933), 33 Colum. L. Rev. 55; *Hall, "Principles of Criminal Law"*, [1947] Ch. 13; *Perkins, "The Civil Offences"* (1952), 100 U. of Pa. L. Rev. 832; *Jobson, "Far From Clear"* (1975-76), 18 Cr. L.Q. 294. The unfortunate tendency in many past cases has been to see the choice as between two stark alternatives: (i) full mens rea; or (ii) absolute liability. In respect of public welfare offences (within which category pollution offences fall) where full mens rea is not required, absolute liability has often been imposed. English jurisprudence has consistently maintained this dichotomy: see 2 Hals. (4th), para. 18, *Criminal Law, Evidence and Procedure*. There has, however, been an attempt in Australia, in many Canadian courts, and indeed in England to seek a middle position, fulfilling the goals of public welfare offences while still not punishing the entirely blameless. There is an increasing and impressive stream of authority which holds that where an offence does not require full mens rea, it is nevertheless a good defence for the defendant to prove that he was not negligent.

193 *Dickson J* went on to conclude at [60] - [61] that:

[60] I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:

1. Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed or by additional evidence.

2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Estey C.J.H.C. so referred to them in Hickey's case.

3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

[61] Offences which are criminal in the true sense fall in the first category. Public welfare offences would prima facie be in the second category. They are not subject to the presumption of full mens rea. An offence of this type would fall in the first category only if such words as "wilfully", "with intent", "knowingly" or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the legislature, the subject matter of the legislation, the importance of the penalty and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.

194 In my opinion, the 2000 OHS Act has as its purpose the regulation of a grave social and industrial concern, namely, workplace safety: see *WorkCover Authority (NSW) v T & Y Pty Ltd* (2005) 146 IR 458 at [7]; *Beacham v Interface Manufacturing Pty Ltd* (2005) 141 IR 416 at [27]; *WorkCover Authority of New South Wales (Inspector Glass) v Flexible Packaging (Australia) Pty Limited* (2005) 144 IR 385 at [2]; and *T and M Industries (Aust) Pty Ltd v WorkCover Authority (NSW) (Inspector Sequeira)* (2006) 151 IR 130 at [77].

195 As the prosecutor submitted, workers often spend half, or more than half, of their waking hours on workdays at their places of work. Their safety is paramount. Given the discussion in the English, Canadian and Australian cases regarding the nature of regulatory offences, I do not believe there is any doubt that the offences under the OHS Act are other than regulatory offences.

196 Being regulatory offences does not, of course, automatically cast them as absolute offences: *He Kaw Teh* per Brennan J at 567. Indeed, as the cases

referred to by the defendant demonstrate, there is little doubt that at least since *He Kaw Teh* in Australia and *R v Sault Ste Marie* in Canada, the tendency in respect of statutory offences (including regulatory or public welfare offences), where it is not apparent as to the legislature's intention regarding *mens rea* being an ingredient of the offence, has been to steer the middle course of strict liability rather than regard the offences as absolute. I note, in particular, the observations of Hunt CJ at CL in *Hawthorne v Morcam* at 133:

Neither the difficulty in securing convictions nor pragmatic concerns about unmeritorious acquittals warrant the imposition of an absolute liability: *He Kaw Teh's* case (at 580). The trend of modern authority is clearly to limit offences of absolute liability, and the strength of the common law presumption that the defendant's knowledge of the wrongfulness of his act is an essential element of every offence has recently been reaffirmed by the High Court in *He Kaw Teh's* case. The offence created by s 10 is defined only by reference to its external elements, and accordingly a mental element is usually implied: *He Kaw Teh's* case (at 565 - 566). I have considered the many cases to which the prosecutor has referred as establishing that "public health" statutes constitute a special category. It is significant that they all pre-date *He Kaw Teh's* case, which finally exorcised the doubts which had previously plagued the common law presumption in favour of a *Proudman v Dayman* "defence".

197 It should be explained that in Canada it has been held that all offences under the *Occupational Health and Safety Act* are strict liability offences. This is despite the fact that the Act requires an employer to "ensure" certain safety measures prescribed by the regulations (see for example s 14(1)(c)). However, it is important to understand the reason this is so. It was explained by the decision in *R. v. Cancoil Thermal Corp.* (1986) 27 C. C. C. (3rd) 295 where it was held that:

Absolute liability where there is a potential penalty of imprisonment violates s. 7 of the Canadian Charter of Rights and Freedoms. Here, the statutory defence of due diligence was expressly excluded from the offence of failing to provide a guard, suggesting that the legislature had, as a matter of policy, determined that the defence was one of absolute liability. However, to avoid a violation of s. 7, it had to be treated as creating a strict liability offence, with the defence of due diligence available.

See also *Ref. re S. 94(2) of Motor Vehicle Act* [1985] 2 S.C.R. 486.

198 The same tendency, apparent in Australia and Canada, to adopt the middle course of strict liability did not occur in the United Kingdom because the courts have not adopted the notion. In this respect, *Dawson J* in *He Kaw Teh* observed at 591:

The English cases are of limited assistance in this area because the courts there have not taken up the defence of honest and reasonable mistake and see themselves as having to decide between an offence requiring *mens rea* to be proved as an ingredient and absolute liability which excludes guilty intent entirely. Although there are those in England who have

been attracted by what has been called "the half-way house" of strict liability, the concept has not been adopted there. See *Sweet v. Parsley* [1969] UKHL 1; (1970) AC 132, esp. at pp 150, 158 and 164. This is, perhaps, surprising since the modern application of the concept begins with *Reg. v. Tolson* (1889) 23 QBD 168 and, in particular, the judgment of *Cave J.* at p 181. See also *Sherras v. De Rutzen* (1895) 1 QB 918. But it is unnecessary to pursue the divergent development of the law in England.

199 Of course, his Honour was concerned with the *Customs Act* and a truly criminal offence that carried a penalty of life imprisonment. What I am concerned with here is a regulatory offence that has its origins in English legislation, which the English courts have regarded as providing for an absolute liability offence. I acknowledge it would not ordinarily follow that an offence under s 8(1) of the 2000 OHS Act must be regarded as an absolute liability offence because it falls into the class of regulatory offences and that is because of the decision in *He Kaw Teh* and the tendency since that decision to adopt the middle course of strict liability. However, there are other considerations, which I shall come to in due course, including legislative intention, that point to an offence under s 8(1) being an absolute liability offence.

200 Whilst *Dawson J* in *He Kaw Teh* found the English cases of only limited assistance, because of the close historical connection and parallels between the English workplace safety laws and those applicable in New South Wales, I believe the relevant English cases to be of considerable assistance and I will come to more of those cases later but before doing so I return to the tests laid down in *He Kaw Teh*.

The words of the statute and the subject matter with which it deals **Statutory construction**

201 In the context of construing a statute, the words of the statute and the subject matter of the statute are two closely interrelated considerations. I prefer to deal with them together rather than as separate issues to be considered.

202 The process of construction must always begin by examining the context of the provision that is being construed: *Project Blue Sky Inc and Others v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] per *McHugh, Gummow, Kirby and Hayne JJ.* See also *K & S Lake City Freighters Proprietary Limited v Gordon & Gotch Limited* (1985) 157 CLR 309 at 312, per *Gibbs CJ*; at 315, per *Mason J*; at 321, per *Deane J.* The objective is to find the underlying purpose or object of the statute and, if possible, to adopt an interpretation of the relevant statutory provision that furthers the purpose or object: *D C Pearce & R S Geddes, Statutory Interpretation in Australia*, (6th ed, 2006) at 33.

203 In *Cooper Brookes (Wollongong) Proprietary Limited v The Commissioner of Taxation of the Commonwealth of Australia* (1981) 147 CLR 297 the High Court (*Mason and Wilson JJ*) at 320 - 321 provided the following guidance in construing statutes:

In some cases in the past these rules of construction have been applied too rigidly. The fundamental object of statutory

construction in every case is to ascertain the legislative intention by reference to the language of the instrument viewed as a whole. But in performing that task the courts look to the operation of the statute according to its terms and to legitimate aids to construction.

...

On the other hand, when the judge labels the operation of the statute as "absurd", "extraordinary", "capricious", "irrational" or "obscure" he assigns a ground for concluding that the legislature could not have intended such an operation and that an alternative interpretation must be preferred. But the propriety of departing from the literal interpretation is not confined to situations described by these labels. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions.

Quite obviously questions of degree arise. If the choice is between two strongly competing interpretations, as we have said, the advantage may lie with that which produces the fairer and more convenient operation so long as it conforms to the legislative intention. If, however, one interpretation has a powerful advantage in ordinary meaning and grammatical sense, it will only be displaced if its operation is perceived to be unintended.

204 In *Saraswati v The Queen* (1991) 172 CLR 1 at 21 - 22 *McHugh* J stated:

In many cases, the grammatical or literal meaning of a statutory provision will give effect to the purpose of the legislation. Consequently, it will constitute the "ordinary meaning" to be applied. If, however, the literal or grammatical meaning of a provision does not give effect to that purpose, that meaning cannot be regarded as "the ordinary meaning" and cannot prevail. It must give way to the construction which will promote the underlying purpose or object of an Act: *Interpretation Act*, s.33.

...

Moreover, once a court concludes that the literal or grammatical meaning of a provision does not conform to the legislative purpose as ascertained from the statute as a whole including the policy which may be discerned from its provisions, it is entitled to give effect to that purpose by addition to, omission from, or clarification of, the particular provision: see *Kammins Co. v. Zenith Investments* (1971) AC 850, at pp 880 - 882; *Jones v. Wrotham Park Estates* (1980)

AC 74, at p 105; *Cooper Brookes*, at pp 321 - 323; In re *Lockwood, Decd.* (1958) Ch 231, at p 238.

But where the text of a legislative provision is grammatically capable of only one meaning and neither the context nor any purpose of the Act throws any real doubt on that meaning, the grammatical meaning is "the ordinary meaning" to be applied. A court cannot depart from "the ordinary meaning" of a legislative provision simply because that meaning produces anomalies: cf. *Cooper Brookes*, at pp 305, 320. But s.34 of the *Interpretation Act* assumes that it may do so if the ordinary meaning conveyed by the text of the provision "taking into account its context in the Act ... and the purpose or object underlying the Act" leads to a result that is "manifestly absurd" or "unreasonable". Furthermore, if "the ordinary meaning" of a legislative provision is manifestly absurd or unreasonable, a real doubt must arise as to whether Parliament intended the enactment to have its ordinary meaning: cf. *Cooper Brookes* at p 320. In *re Rouss* (1917) 116 NE 782, at p 785, *Cardozo J.* pointed out that, while consequences cannot alter the meaning of legislative provisions, they may help to fix their meaning....

Objects of 2000 OHS Act

205 In *He Kaw Teh*, *Brennan J* (at 576), after citing *Proudman v Dayman*, observed: "The purpose of the statute is the surest guide of the legislature's intention as to the mental state to be implied".

206 The *Interpretation Act* 1987 in s 33 provides, relevantly, that a construction that would promote the purpose or object underlying the Act shall be preferred to a construction that would not promote that purpose or object.

207 The long title of the 2000 OHS Act is: "An Act to secure the health, safety and welfare of persons at work; to repeal the Occupational Health and Safety Act 1983; and for other purposes".

208 The objects of the 2000 OHS Act include the following in s 3:

(a) to secure and promote the health, safety and welfare of people at work,

(b) to protect people at a place of work against risks to health or safety arising out of the activities of persons at work,

(c) to promote a safe and healthy work environment for people at work that protects them from injury and illness and that is adapted to their physiological and psychological needs,

...

e) to ensure that risks to health and safety at a place of work are identified, assessed and eliminated or controlled,

...

209 The requirement in s 8(1) that an employer "must ensure" the health, safety and welfare at work of all the employees of the employer is consistent with the foregoing objects.

Meaning of word "ensure"

210 The ordinary grammatical meaning of the word "ensure" is to guarantee or make certain: see *Carrington Slipways; Shannon v Comalco Aluminium Ltd* (1986) 19 IR 358 at 359; *Drake Personnel Ltd v WorkCover Authority of NSW (Inspector Ch'ng)* at 449; *Mount Isa Mines Ltd v Peachey* (Unreported, Queensland Court of Appeal, McMurdo P, McPherson JA and Muir J, 1 December 1998) at [15] per Muir J; *Doval v Anka Builders Pty Ltd* (1992) 28 NSWLR 1; *Hardy v St Vincent's Hospital Toowoomba Ltd* [2000] 2 Qd R 19. The word "ensure" in s 8(1) is given emphasis by the preceding word "must".

211 Used in a statute regulating occupational health and safety in workplaces, the words "must ensure" is more likely to reflect an intention on the part of Parliament to impose absolute liability and to displace any presumption that *mens rea* is an ingredient of the offence to be proved by the prosecution: see, for example, *Cancoil*.

212 In *Powercoal Pty Ltd and Another v Industrial Relations Commission Of NSW and Another* (2005) 64 NSWLR 406; 156 A Crim R 269; 145 IR 327; the Court of Appeal considered the words "management of the corporation" in the context of s 50 of the 1983 OHS Act and stated:

[116] The objects of the Act, and the general nature of the duties imposed by the Act, suggest that Parliament did not intend to give the language of s 50(1) a narrow, let alone a technical, meaning. The purposive approach to interpretation required at common law, and now by s 33 of the *Interpretation Act* 1987, suggests that the words "management of the corporation" should not be read down so as to apply only to central management.

213 For the reasons expressed by the Court of Appeal in *Powercoal*, the words "must ensure" in s 8(1) of the 2000 OHS Act should also not be read down so as to require the prosecution to prove *mens rea* or for the prosecution to carry the burden of having to negative honest and reasonable belief beyond reasonable doubt.

214 The words of s 8(1) stand in marked contrast to those in s 32A of the 2000 OHS Act, which was inserted in 2005 (Act No. 35 of 2005):

32A Reckless conduct causing death at workplace by person with OHS duties

(1) In this section:

conduct includes acts or omissions.

(2) A person:

(a) whose conduct causes the death of another person at any place of work, and

(b) who owes a duty under Part 2

with respect to the health or safety of that person when engaging in that conduct, and

(c) who is reckless as to the danger of death or serious injury to any person to whom that duty is owed that arises from that conduct, is guilty of an offence.

Maximum penalty:

(a) in the case of a corporation—
15,000 penalty units, or

(b) in the case of an individual—
imprisonment for 5 years or 1,500
penalty units, or both.

(3) It is a defence to any proceedings against a person for that offence if the person proves that there was a reasonable excuse for the conduct.

(4) For the purposes of this section:

(a) a person's conduct causes death if it substantially contributes to the death, and

(b) the death of a person is taken to have been caused at a place of work if the person is injured at the place of work but dies elsewhere as a result of the injury, and

(c) it does not matter that the conduct that causes death did not occur at the place of work.

(5) If a corporation owes a duty under Part 2 with respect to the health or safety of any person, any director or other person concerned in the management of the corporation is taken also to owe that duty for the purposes of subsection (2).

(6) Section 26 (Offences by corporations—liability of directors and managers) does not apply to an offence against this section. However, this does not prevent a director or other person concerned in the management of a corporation from being prosecuted under this section for an offence committed by the director or other person.

215 It will be noted that it is a defence to proceedings under s 32A if the person proves that there was a reasonable excuse for the conduct. This, of course, is not determinative, as s 233B(1)(c) of the *Customs Act* in *He Kaw Teh* was not determinative of the nature of the offence under s 233B(1)(b) of that Act, which did not indicate one way or the other whether the Parliament intended that the offence

created by that provision should have no mental ingredient. However, it does suggest the legislature intended that the nature of the offence where reckless conduct caused death would be different to conduct involving a failure to ensure safety under the general duty provisions of the statute. Section 8(1) imports no mental element such as "without reasonable excuse", "knowingly", "wilfully", "recklessly" or "negligently".

216 In *Allen v United Carpet Mills Pty. Ltd. and Another* [1989] VR 323 at 329 Nathan J found that s 39(1) of the *Environment Protection Act 1970* (Vic), which provided that "a person shall not cause or permit any waters to be polluted", created an absolute liability offence. His Honour noted: "It would be difficult to frame language in more absolute and embracive terms". It is difficult to envisage more absolute language than "must ensure".

217 In *Waugh v Kippen* the High Court considered cl 25 of r 1 the General Rule made under the *Factories and Shops Act 1960* (Qld), which provided in part:

Weights. (1) A male employee over eighteen (18) years of age shall not be permitted or allowed to lift carry or move by hand any object so heavy as to be likely to cause risk of injury.

218 In relation to this provision the Court (*Gibbs CJ, Mason, Wilson and Dawson JJ*) stated at 165:

But of course the rule does not impose absolute liability on an employer. The proscription is in terms of "permitted or allowed". These words presuppose an awareness, actual or constructive, on the part of an employer that an employee was engaged in moving by hand an object so heavy as to be likely to cause risk of injury to him. In the case of an employee who by reason of physical incapacity is more than ordinarily susceptible to the risk of injury, liability is to be adjudged in the light of what the employer knew or ought to have known of that employee's incapacity.

219 There are no words in s 8(1) that would presuppose an awareness, actual or constructive, on the part of an employer of a risk to the employee's health and safety. That is to say, there is nothing in s 8(1) to suggest that it is necessary for the prosecution to prove the employer knew of a risk to the health and safety of employees, but despite that knowledge failed to eliminate the risk.

OHS Act is a remedial statute

220 The 2000 OHS Act is both preventive and remedial in nature: *Haynes v CI & D Manufacturing Pty Limited* (1994) 60 IR 149 at 157. It is a beneficial piece of legislation which is to be construed "so as to give the fullest relief which the fair meaning of its language will allow": *Bull and Others v The Attorney-General for New South Wales* (1913) 17 CLR 370 at 384 per Isaacs J:

221 In this regard, *Watson J* observed in *Carrington Slipways*:

As it was said in *Rice v. Henley* (1914) 19 CLR 19 at 22:

In interpreting an Act which is directed to guarding against accidents and to the preservation of human life I think one should endeavour to carry out the objects of the legislature as far as the language of the Act will

reasonably permit [per Isaacs J].

See also, *Butler and Another v Fife Coal Company Limited* (1912) AC 149 esp at 178 - 179, when Lord Shaw stated the approach as:

The commanding principle in the construction of a statute passed to remedy the evils and to protect against the dangers which confront or threaten persons or classes of His Majesty's subjects is that, consistently with the actual language employed, the Act shall be interpreted in the sense favourable to making the remedy effective and the protection secure. This principle is sound and undeniable.

222 The 2000 OHS Act may also be regarded as a penal statute and, therefore, to be strictly construed. In *Waugh v Kippen* at 164 the High Court considered the question of conflict between the two principles of interpretation (beneficial legislation to be interpreted liberally, penal statutes to be interpreted strictly) in the context of the *Factories and Shops Act 1960* (Qld). The High Court (*Gibbs CJ, Mason, Wilson and Dawson JJ*) stated at 164 - 165:

If such a conflict was to arise, the Court must proceed with its primary task of extracting the intention of the legislature from the fair meaning of words by which it has expressed that intention, remembering that it is a remedial measure passed for the protection of the worker. It should not be construed so strictly as to deprive the worker of the protection which Parliament intended that he should have: *Harrison v. National Coal Board* (1951) AC 639, per Lord Porter at p 650; *John Summers & Son Ltd. v. Frost* (1955) AC 740, per Viscount Simonds at p 751; *McCarthy v. Coldair, Ltd.* (1951) 2 TLR 1226, per Denning L.J. at pp 1227 - 1228. In such a context the strict construction rule is indeed one of last resort. Furthermore, the process of construction must yield for all purposes a definitive statement of the incidents of an obligation imposed on the employer. The legislature cannot speak with a forked tongue.

Defendant's reliance on *Kirk Group*

223 In contending the offence was not absolute, the defendant relied on what Basten JA observed at [146] in *Kirk Group* in relation to s 15 of the 1983 OHS Act, which I shall repeat:

Although the structure of the legislative scheme is a significant consideration, it does not dictate the conclusion that the liability imposed by ss 15 and 16 is in each case absolute. Taken literally, s 15 requires an employer to ensure that workers do not fall sick, suffer strokes or heart attacks or die at work, even for reasons entirely unrelated to the work environment. That construction is not adopted, because it would not be sensible in the statutory context. Similarly, it appears that the obligation does not extend to the removal of risks which are so remote as to be speculative. That exclusion might extend to the risk of events which, though remote, are statistically predictable. But if the obligation is not taken to include its full literal extent, by what principle is that

construction achieved? Whether the obligation extended to conduct of which the employer was not aware and of which it could not be said that it should reasonably have been aware, is a question of construction to be determined at least with reference to the principles discussed in the cases referred to above. The Court was not taken to any authority in the Industrial Court which addressed those principles.

224 There are a number of things to be noted about these observations. First, his Honour appears not to have had the benefit of the history of the provision nor extrinsic material, which confirms that the meaning of the provision is the ordinary meaning conveyed by the text of the provision: see s 34(1)(a) of the *Interpretation Act*. I will return to this later.

225 Secondly, a literal interpretation of s 8(1) does not lead to an absurd, irrational or unreasonable result. This is so for the following reasons:

(1) the prosecution must prove all of the elements of the offence beyond reasonable doubt: *State Rail Authority of New South Wales v Dawson* (1990) 37 IR 110 at 120 - 121. This includes proving that the defendant owes the duty under s 8(1) to the employee or employees affected and that the safety standard has been breached;

(2) there will be no offence unless the defendant's acts or omissions caused the risk as pleaded in the particular circumstances at a particular time when the employee or employees were exposed to the risk: *Drake Personnel Ltd* at 449; *The Crown in Right of the State of New South Wales (Department of Education and Training) v O'Sullivan* (2005) 143 IR 57 at [45]. The question of causation is to be dealt with in a practical and common sense way: *O'Sullivan* at [50]. Where person who suffers a stroke or heart attack or dies at work for reasons entirely unrelated to the work environment, it is most unlikely this would give rise to an offence under s 8(1) because there would have been no act or omission on the part of the employer that could be said to have caused a risk to the health or safety of the employer there would be an absence of causation;

(3) the 2000 OHS Act in s 28 provides for two defences: the reasonable practicability defence (s 28(a)); and the absence of control defence (s 28(b)). Where a person dies at work for reasons entirely unrelated to the work environment it is unlikely in the first place that any charge would be laid, but even if the offence was found to have been committed, the cause of it would surely be a matter over which the employer had no control and against the happening of which it was impracticable for the employer to make provision;

(4) in relation to the reasonable practicability defence, the test is not whether steps could be taken that were guaranteed to prevent the risk to health and safety but rather whether steps were available that could have materially reduced the risk: see *William and Margaret Adamson t/a John Adamson & Sons v*

Procurator Fiscal, Lanark [2000] ScotHC 102 at [21]; *R v Gateway Foodmarkets Ltd* [1997] ICR 382 at 387 - 388. In other words, the defence requires a defendant to satisfy the court that it has done what is reasonably practicable to avoid a state of affairs. The defence is, therefore, flexible because it does not restrict the way in which the defendant can show that it has done what is reasonably practicable (*R v Davies* at [26]). It should be noted that under consideration in *Adamson Procurator Fiscal* and *R v Davies* was s 3(1) of the *Health and Safety at Work etc Act 1974* (UK); (5) in *R v British Steel Plc* [1995] ICR 586, Steyn LJ considered the "troublesome" issue raised by counsel that where an individual employee was guilty of negligence, the corporate employer would not have the defence of reasonable practicability and, therefore, the section could not sensibly be given such wide effect as to make the employer criminally liable for the acts or omissions of even its most junior employees, where these have put another employee, or even the same employee, at risk of injury to his health, safety or welfare. The court concluded at 594:

there may be circumstances in which it might be regarded as absurd that an employer should even be technically guilty of a criminal offence"--but that-- "in any event, so-called absurdities are not peculiar to this corner of the law: at the extremities of the field of application of many rules surprising results are often to be found. That circumstance is inherent in the adoption of general rules to govern an infinity of particular circumstances.

In *R v Gateway Foodmarkets Ltd* the Court noted what was said in *British Steel Plc* and stated at 388:

The answer lies, we suggest, in the application of the qualification or caveat contained in the statute itself. The duty under each section is broken if the specified consequences occur, but only if "so far as is reasonably practicable" they have not been guarded against. So the company is in breach of duty unless all reasonable precautions have been taken, and we would interpret this as meaning "taken by the company or on its behalf." In other words,

the breach of duty and liability under the section do not depend upon any failure by the company itself, meaning those persons who embody the company, to take all reasonable precautions. Rather, the company is liable in the event that there is a failure to ensure the safety, etc. of any employee, unless all reasonable precautions have been taken--as we would add, by the company or on its behalf.

If this is correct, then it follows that the qualification places upon the company the onus of proving that all reasonable precautions were taken both by it and by its servants and agents on its behalf. The concept of the "directing mind" of the company has no application here. The further question is whether this includes all those persons for whose negligence the employer is vicariously liable to third parties for the purposes of the law of tort. If it does, then the employer is not able to rely on the statutory defence when any of his employees has been negligent, i.e. failed to take reasonable precautions, "in the course of his employment." That phrase has been widely defined, and if the same test applies here then the statutory defence is limited to the rare case where the individual employee was on a frolic of his own, and where there was no failure to take reasonable precautions at any other level. It is possible that some narrower test should be defined, but as stated above we do not consider that it is necessary to decide this for the purposes of the present appeal.

I shall return later to the UK legislation and authorities.

226 Referring back to the statement of *Basten JA* in *Kirk Group*, his Honour said: Similarly, it appears that the obligation [to ensure safety] does

not extend to the removal of risks which are so remote as to be speculative. That exclusion might extend to the risk of events which, though remote, are statistically predictable. But if the obligation is not taken to include its full literal extent, by what principle is that construction achieved?

227 I have sought to explain the qualifications that apply to the absolute obligation in s 8(1). As for "risks which are so remote as to be speculative" I must confess that I do not understand how such a test can enter into consideration where the offence is an absolute one. Notions of "remote" and "speculative" would appear to have their origins in *Drake Personnel* at 452 (where reference is made to *Kirkby v A & M I Hanson Pty Ltd* (1994) 55 IR 40 at 50). However, if reasonable foreseeability is not relevant to the question of liability under the 2000 OHS Act (see *Drake Personnel* at 452), I am unable to see, with respect, how "remote" and "speculative", as independent tests, can enter the picture unless it is in the context of causation or one of the defences under s 28.

History of the legislation

228 An important part of the context of s 8(1) is the history of the legislation and it is permissible for the Court to have regard to historical and other extrinsic material including second reading speeches, parliamentary reports and reports of committees of inquiry: *Interpretation Act*, ss 34(2)(b), 34(2)(c), 34(2)(f); *R v Lavender*. Also see the judgment of *Wilson and Dawson JJ* in *He Kaw Teh* and their regard for the history of s 233(b) of the *Customs Act*. See also: *Gammon* and the regard had for the history of the Buildings Ordinance and whether that assisted in determining whether the offences under it were strict liability offences; and *Sweet v Parsley* where the House of Lords considered the history of the *Dangerous Drugs Act 1965* (UK).

229 The history of the legislation begins with the Robens Report on *Safety and Health at Work 1972*. As Richard Johnstone notes in his book "Occupational Health and Safety Law and Policy", LBC Information Services, 1997 at 70, the British Committee on Safety and Health at Work, chaired by Lord *Robens* was the first British or Australian body to examine OHS legislation as a whole. The Report recommended legislation which set goals for duty holders to encourage them to be safety conscious so as to prevent accidents, rather than purely prescriptive measures: see [127] - [132] of the Robens Report. As Johnstone further notes at 74, most of the Report's recommendations were introduced into the English *Health and Safety at Work etc Act* and "have been taken up, to a greater or lesser degree, by all of the Australian Governments". See also Final Report of the Inquiry into Workplace Safety, Vol 1, Parliament of New South Wales, Legislative Council Standing Committee on Law and Justice, November 1998 and *Ford v North West County Council* (1987) 23 IR 155 at 161.

230 The following table compares relevant provisions of the English statute to the 1983 OHS Act:

Health and Safety at Work etc Act 1974 (UK) *Occupational Health and Safety Act 1983* (NSW)

Section 1 provides that its provisions shall have effect with a view to securing the

health, safety and welfare of persons at work and protecting persons other than persons at work against risks to health or safety and controlling the keeping and use of dangerous substances. Section 5 provides the objects of the Act are to secure health, safety and welfare of persons at work; to protect persons at a place of work (other than persons at work) against risks to health or safety arising out of the activities of persons at work; and to promote an occupational environment for persons at work which is adapted to their physiological and psychological needs.

Section 2 provides that it shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.

Section 15 provides that every employer shall ensure the health, safety and welfare at work of all the employer's employees

Section 3 provides that it shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment are not exposed to risks to their health or safety. This duty is placed on self employed persons as well. Section 16 provides that every employer shall ensure that persons not in the employer's employment are not exposed to risks to their health or safety arising from the conduct of the employer's undertaking while they are at the employer's place of work. This duty is placed on self employed persons as well.

Section 4 places a duty on persons who have control, to any extent, on non-domestic premises that are used by non-employees as a place of work, or as a place where they may use plant or substances provided for their use there, to take such measures as it is reasonable for a person in their position to take to ensure, so far as is reasonably practicable, that the premises are safe and without risks to health.

Section 17 provides that each person who has to any extent, control of non-domestic premises which have been made available to non-employees as a place of work or any plant or substance in any non-domestic premises that have been provided for use of non-employees at work, shall ensure that the premises and means of access to and egress from, or the plant or substances, are safe and without risks to health. Section 17(2) provides that this duty includes persons who by virtue of a contract or lease have an obligation in relation to the maintenance of non-domestic premises or the safety of any plant or substances.

Section 7 provides employees to take reasonable care for the health and safety of himself and other persons at work and to co-operate with duty holders to enable their respective duty to be complied with.

Section 19 provides that employees shall take reasonable care of people who are at his or her place of work and co-operate with their employer or any other person to ensure that Occupational Health and Safety duties are complied with

Section 40 provides that the onus of proving what was reasonably practicable in the circumstances lies with the defendant. The defendant has to show that it was not practicable or not reasonably practicable to do more than what was in fact done by the defendant, or that there were no better practical means than those that were used, in order to satisfy the general duty. Section 53 provides a defence whereby it was not reasonably practicable for the person to comply with the provision of the Act; or the commission of the offence was due to causes of which the person had no control and against the happening of which it was impracticable for the person to make provision. The onus lies on the defendant on

the balance of probabilities.

231 A person guilty of an offence under the general duties provisions of the UK Act is liable on summary conviction to a fine not exceeding £20,000 and on indictment to an unlimited fine. Under the 1983 OHS Act, initially the prescribed maximum penalties for breach of the general duties provisions were \$50,000 for corporations and \$5,000 in any other case. Penalties for these provisions were amended by the *Occupational Health and Safety Legislation (Amendment) Act 1990* to \$250,000 for corporations and \$25,000 in other cases. In 1995, the *WorkCover Legislation Amendment Act 1995* increased the penalties to \$550,000 and \$55,000 respectively. The 1995 amendments also made provision for an additional monetary penalty to be imposed for certain subsequent breaches and in any case other than one involving a corporation, "or 2 years imprisonment, or both".

232 In relation to penalties under the 2000 OHS Act, s 17 of the *Crimes (Sentencing Procedure) Act 1999* provides that the value of a penalty unit is \$110. Accordingly, the above maximum penalties under the 2000 OHS Act are as follows:

- (a) in the case of a corporation (being a previous offender)—\$825,000, or
- (b) in the case of a corporation (not being a previous offender)—\$550,000, or
- (c) in the case of an individual (being a previous offender)—\$82,500 or imprisonment for 2 years, or both, or
- (d) in the case of an individual (not being a previous offender)—\$55,000.

233 Following the Robens Report, various Australian Governments set up committees to review their existing legislation. In New South Wales it was the Williams Committee (T G Williams being a former Chief Industrial Magistrate). Mr Williams gave his report (Report of Commission of Inquiry into Occupational Health and Safety) to the Minister in June 1981. His recommendations were modelled on the Robens Report recommendations. In his second reading speech on the Occupational Health and Safety Bill given on 1 December 1982, Mr Pat Hills, Minister for Industrial Relations, relevantly stated:

[I]t has been necessary to incorporate in this bill a unique division relating to general duties for safety, health and welfare at all workplaces. These general duties clauses are sufficiently broad to cover virtually every conceivable risk in a work situation ...

Though applying to employers, these general duties clauses impose a duty also on employees for safe working practices. Employers and the self-employed are required to ensure that those persons not in their employment are not exposed to risks arising from the conduct of the operation while they are at the place of work.... Manufacturers and suppliers are also to ensure that their products, such as plant and substances for use at work, have been properly assessed and comply with safety and health standards.

234 Section 3(1) (and ss 2(1), 4(2) and 6(1)(a)) of the English *Health and Safety at Work etc Act* use the word "ensure". It has been repeatedly held that a contravention of the sections is an absolute liability offence: see for example, *Austin Rover Group Ltd v Her Majesty's Inspector of Factories* [1989] 3 WLR 520 at 526 per Goff LJ (s 4(2)); *R v British Steel* (s 3(1)); *R v Associated Octel Co Ltd* (1985) ICR 285 (s 3(1)); *R v Board of Trustees of the Science Museum* (1993) ICR 867 (s 3(1)); *R v Davies* (s 3(1)). Given that the 1983 OHS Act is modelled on the UK Act and that the general duties provisions of the 1983 OHS Act (ss 15 - 18) contain the word "ensure", a strong argument exists for saying it was the New South Wales legislature's intention that offences under those provisions were to be absolute liability offences.

Legislative intention

235 Section 34(1) of the *Interpretation Act* allows for the use of extrinsic material if that material is "capable of assisting in the ascertainment of the meaning of the provision". That it was the legislature's intention to make an offence under s 8(1) of the 2000 OHS Act an absolute liability offence would seem to have been put beyond doubt in the second reading speech of the Minister in relation to the *Occupational Health and Safety Bill 2000* where the Hon J W Shaw QC stated (Hansard, 26 May 2000, 5936, 5937, 5938):

The Occupational Health and Safety Bill is a significant step in this Government's program of workplace safety reform. It is a modernisation of the pioneering legislation of 1983. It will provide the framework for workplace safety in the new technological era. The path to modernisation was commenced in 1996. A tripartite panel of review, chaired by Professor Ron McCallum, was asked to conduct an independent review of the *Occupational Health and Safety Act*. The panel's report and recommendations were presented to the Legislative Council Standing Committee on Law and Justice for its historic inquiry into workplace safety. The Committee published an interim report in December 1997 and its final report in November 1998. In those reports, the committee provided a comprehensive package of recommendations, totalling 61, as a blueprint for modernisation. The issues of workplace health and safety affect almost every citizen, as a worker, an employer or a visitor to a place of work. Workplace injuries result in significant social and economic costs to families, businesses and the whole community.

...

I now turn to those recommendations of the workplace safety reports that have legislative form in the manifestation of the bill that I have presented to the House, the *Occupational Health and Safety Bill 2000*. A major theme covered by a number of recommendations is the need to overhaul the *Occupational Health and Safety Act 1983*. This has been achieved with the

development of an entirely modernised bill. It is now in plain English and has been reorganised in a coherent manner that will facilitate comprehension and access. However, there has been no substantive change to the meaning except for those matters to which I will refer today.

...

It is an important part of this legislation, pursuant to section 15 of the 1983 Act, that the obligation to provide a safe workplace is absolute. However, it is qualified by the defence available to employers under section 53 of the Act—now clause 28 of the bill—that it may not be reasonably practicable to do so. That is the balance contained in the innovatory 1983 model based on the English Robens model of occupational health and safety that was enacted—I think courageously and correctly—by the Government in 1983. The bill contains two additional provisions clarifying government liability for occupational health and safety. These arose in the context of proceedings taken against government agencies rather than from workplace safety report recommendations. The important point is that the amendments ensure that prosecutions can be undertaken when they are warranted (my emphasis).

236 The second reading speech referred to the tripartite panel of review, chaired by Professor Ron McCallum, which was asked to conduct an independent review of the 1983 OHS Act. As Mr Shaw said, the panel's report and recommendations were presented to the Legislative Council Standing Committee on Law and Justice for its inquiry into workplace safety. The panel's report at 12 and 13 refers to the absolute nature of the duties under the general duties provisions of the 1983 OHS Act and to the decisions in *Carrington Slipways* and *Shannon v Comalco Aluminium* in that regard. The Standing Committee accepted the absolute nature of the duties in its Interim Report on the Inquiry into Workplace Safety, December 1997 and that such duties should continue to be a feature of the Act.

237 Clearly, in his second reading speech, the Minister indicated his approval of the interpretation of the 1983 OHS Act by the Industrial Court as to the absolute nature of the offences and the legislature's intention that that would carry over into the 2000 OHS Act.

238 It is noteworthy that in relation to its objects the 1983 OHS Act provided, *inter alia*, that:

- (1) The objects of this Act are:
 - (a) to secure the health, safety and welfare of persons at work,
 - (b) to protect persons at a place of work (other than persons at work) against risks to health or safety arising out of the activities of persons at work,

(c) to promote an occupational environment for persons at work which is adapted to their physiological and psychological needs, and

(d) to provide the means whereby the associated occupational health and safety legislation may be progressively replaced by comprehensive provisions made by or under this Act.

...

239 In the 2000 OHS Act there are additional objects, one of which is s 3(e), which provides:

(e) to *ensure* that risks to health and safety at a place of work are identified, assessed and eliminated or controlled (my emphasis).

240 It is also noteworthy that whereas s 15(1) of the 1983 OHS Act provided that: "Every employer shall ensure the health, safety and welfare at work of all the employer's employees", the preamble to s 8(1) of the 2000 OHS Act provides that: "An employer must ensure the health, safety and welfare at work of all the employees of the employer". The word "shall" may be used in a mandatory or directory sense depending upon the context in which it is used: *Grunwick Processing Laboratories Ltd and Others v Advisory, Conciliation and Arbitration Service and Another* [1978] AC 655 at 698 per Lord *Salmon*. It seems to me the use of the word "must" in s 8(1) removes any doubt about what the legislature intended, namely, that it is mandatory for an employer to ensure the safety of employees.

Whether imposition of absolute liability would assist in the enforcement of the relevant statutory duty

241 In *Sweet v Parsley*, Lord *Diplock* said at 163:

But where the subject matter of a statute is the regulation of a particular activity involving potential danger to public health, safety or morals in which citizens have a choice as to whether they participate or not, the court may feel driven to infer an intention of Parliament to impose by penal sanctions a higher duty of care on those who choose to participate and to place upon them an obligation to take whatever measures may be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfil the ordinary common law duty of care. But such an inference is not lightly to be drawn, nor is there any room for it unless there is something that the person on whom the obligation is imposed can do directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the obligation (see *Lim Chin Aik v. The Queen* [1963] A.C. 160,

174).

242 Lord *Diplock's* observations were considered in *Gammon*, a decision of the Privy Council. *Gammon* was concerned with whether offences under ss 40(2A)(b) and 40(2B)(b) of the Buildings Ordinance (Laws of Hong Kong, 1981 rev., c. 123) were strict liability offences. Because English law does not recognize the tripartite categorization of criminal offences crystallised in *He Kaw Teh*, the terms "strict liability" and "absolute liability" have tended to be used interchangeably. In *Gammon*, Lord *Scarman* used "strict" in the sense of "absolute".

243 The relevant provisions of s 40 were as follows:

(2A) ... any ... registered contractor ... directly concerned with [building works] who ... (b) diverges or deviates in any material way from any work shown in a plan approved by the building authority under this Ordinance ... shall be guilty of an offence and shall be liable on conviction to a fine ... and to imprisonment. ...

(2B) Any person ... directly concerned with any [building works] who ... (b) carries out or ... permits ... such works to be carried out, in such manner as is likely to cause a risk of injury to any person or damage to any property, shall be guilty of an offence and shall be liable on conviction to a fine ... and to imprisonment ...

244 In referring to the provisions of s 40, Lord *Scarman* at 14 - 15 stated:

Its overall purpose is clearly to regulate the planning, design and construction of the building works to which it relates in the interests of safety. It covers a field of activity where there is, especially in Hong Kong, a potential danger to public safety and the activity which the Ordinance is intended to regulate is one in which citizens have a choice as to whether they participate or not. Part IV (section 40) of the Ordinance makes it very clear that the legislature intended that criminal sanctions for contraventions of the Ordinance should be a feature of its enforcement. But it is not to be supposed that the legislature intended that any of the offences created by the Ordinance should be offences of strict liability unless it is plain, from a consideration of the subject matter of the Ordinance and of the wording of the particular provision creating the offence, that an object of the Ordinance, e.g., the promotion of greater vigilance by those having responsibility under the Ordinance, would be served by the imposition of strict liability.

The appellants submit that there is no necessity for strict liability in respect of any of the offences charged. Their first submission is that strict liability would not promote greater vigilance. If the persons charged had no knowledge of an essential fact, what could they have done to avoid its occurrence?

... their Lordships are satisfied that strict liability would help to promote greater vigilance in the matters covered by the two

offences with which this appeal is concerned (the material deviation under section 40(2A)(b) and the risk of injury or damage under subsection (2B)(b)).

...

... the legislature by enacting Part IV (section 40) of the Ordinance clearly took the view that criminal liability and punishment were needed as a deterrent against slipshod or incompetent supervision, control or execution of building works. The imposition of strict liability for some offences clearly would emphasise to those concerned the need for high standards of care in the supervision and execution of work.

245 At 17, Lord *Scarman* noted that the maximum penalties for the offences under s 40 were "heavy": a fine of \$250,000 and imprisonment for three years. His Lordship stated: "There is no doubt that the penalty indicates the seriousness with which the legislature viewed the offences." However, his Lordship went on to state:

The severity of the maximum penalties is a more formidable point. But it has to be considered in the light of the Ordinance read as a whole. For reasons which their Lordships have already developed, there is nothing inconsistent with the purpose of the Ordinance in imposing severe penalties for offences of strict liability. The legislature could reasonably have intended severity to be a significant deterrent, bearing in mind the risks to public safety arising from some contraventions of the Ordinance. Their Lordships agree with the view on this point of the Court of Appeal. It must be crucially important that those who participate in or bear responsibility for the carrying out of works in a manner which complies with the requirements of the Ordinance should know that severe penalties await them in the event of any contravention or non-compliance with the Ordinance by themselves or by anyone over whom they are required to exercise supervision or control.

246 In considering s 40(2A), Lord *Scarman* stated at 17 - 18:

This provision applies to building owners, authorised persons (i.e., architects, surveyors, structural engineers), registered structural engineers and registered contractors. It is thus confined to persons bearing responsibility for the decision to undertake works and for their supervision and control. There is plainly an element of mens rea in the offences it creates: the wording of subparagraphs (a) and (b) does not make clear how far mens rea extends: the wording of subparagraph (c) reveals an offence of full mens rea....

The wording of subparagraph (b) clearly requires knowledge of the approved plan and of the fact of deviation. But in their Lordships' view it would be of little use in promoting public safety if it also required proof of knowledge of the materiality of the deviation. As it was put on behalf of the Attorney-General,

if the offence requires knowledge of the materiality of the deviation to be proved, the defendant is virtually judge in his own cause. The object of the provision is to assist in preventing material deviations from occurring. If a building owner, an authorised or a registered person is unaware of the materiality of the deviation which he authorises (and knowledge of the deviation is necessary), he plainly ought to be. He is made liable to criminal penalties because of the threat to public safety arising from material deviations from plans occurring within the sphere of his responsibility. The effectiveness of the Ordinance would be seriously weakened if it were open to such a person to plead ignorance of what was material. In the words already quoted of the Court of Appeal: "it therefore behoves the incompetent to stay away and the competent to conduct themselves with proper care.

247 In relation to s 40(2B)(b) his Lordship stated at 18 - 19:

The construction of subsection (2B)(b) is more difficult, but their Lordships are satisfied that it imposes strict liability for substantially the same reasons as those which have led them to this conclusion in respect of subsection (2A)(b). The offence created clearly requires a degree of mens rea. A person cannot carry out works or authorise or permit them to be carried out in a certain manner unless he knows the manner which he is employing, authorising, or permitting. The appellants laid great emphasis on the reference to permitting as an indication of full mens rea. They referred their Lordships to *James & Son Ltd. v. Smeeth* [1955] 1 Q.B. 78. But their Lordships agree with the answer of the Court of Appeal to this point:

We would therefore hold that the word 'permitting' in section 40(2B)(b) does not by itself import mens rea in the sense of intention to cause a likelihood of risk of injury or knowledge that such likelihood would result but does require that the defendant shall have had a power to control whether the actus reus (the carrying out of the works in the manner which in fact causes a likelihood of risk of injury) shall be committed or not.

248 In summary then, the Privy Council in *Gammon* held that that the presumption that *mens rea* was an essential ingredient of a statutory offence could be displaced by clear words and by necessary implication where the statute creating the offence dealt with an issue of social concern, including public safety, provided that strict (meaning absolute) liability would be effective to promote the objects of the statute; that since greater vigilance would be promoted if knowledge of the materiality of the deviation from the plan was not a necessary ingredient of the offence, subsection (2A)(b) was to be construed as requiring knowledge of the deviation from the plan but imposing strict (meaning absolute) liability for the deviation being a material one; that similarly, provided the appellants had knowledge of the manner in which the works were carried out, they had committed an offence under

subsection (2B)(b) even if they did not know that there was a resulting risk of injury or damage.

249 Considering s 8(1) of the 2000 OHS Act in light of the decision in *Gammon*, the following points may be made:

(i) the overall purpose of the 2000 OHS Act is to secure the health, safety and welfare of persons at work;

(ii) the 2000 OHS Act covers a field of activity where there is a potential risk to the safety, health and welfare of employees and other persons and the activity which the 2000 OHS Act is intended to regulate is one in which citizens have a choice as to whether they participate or not;

(iii) the legislature took the view that criminal liability and punishment were needed as a deterrent against failures by employers and others to ensure the safety of employees and other persons. The imposition of absolute liability for contravention of the general duties provisions of the 2000 OHS Act clearly would emphasise to those concerned the need for high standards of care in the supervision and execution of work;

(iv) the objective test laid down in *He Kaw Teh* was that there must be something a person who is the subject of the prosecution can do to promote the observance of the legislation. *Gibbs* CJ (at 530) considered steps could have been taken by the appellant in that case to ensure observance of the statute and formed the view that the public interest demands care be taken to ensure that baggage brought into the country does not contain drugs. Under the 2000 OHS Act a defendant could take all reasonably practicable steps to avoid a risk to health and safety. Further, the imposition of absolute liability would clearly assist in meeting the following objects of the 2000 OHS Act:

(a) to secure and promote the health, safety and welfare of people at work,

(b) to protect people at a place of work against risks to health or safety arising out of the activities of persons at work,

(c) to promote a safe and healthy work environment for people at work that protects them from injury and illness and that is adapted to their physiological and psychological needs,

...

(e) to ensure that risks to health and safety at a place of work are identified, assessed and eliminated or controlled.

Penalties

250 The question of penalties needs to be separately considered. The view taken in *Gammon* was that although the Ordinance provided for "heavy" penalties, including imprisonment, the legislature could reasonably have intended severity to be a significant deterrent, bearing in mind the risks to public safety arising from some contraventions of the Ordinance. The same rationale may be applied to the 2000 OHS Act. Additionally, however, I agree with the following points made by the prosecutor:

(i) whilst the 2000 OHS Act provides for heavy penalties, including a maximum term of imprisonment of two years, it is to be noted that imprisonment was not originally a feature of the 1983 OHS Act. Imprisonment was introduced in 1995 and only in respect of natural persons who are previous offenders. The size of the maximum monetary penalties at the time the 1983 OHS Act commenced may be regarded as not inconsistent with a regulatory offence such as that reflected in the Act. The fact that the original Act did not provide for imprisonment is an important factor in assessing the nature of the offence: *R v Davies* at [18] - [19];

(ii) The fact that the monetary penalties have increased over time has reflected the legislature's increasing concern at the lack of safety in some aspects of industrial operation (see, for example, "Final Report of the Inquiry Into Workplace Safety", Volume One, Parliament of New South Wales, Standing Committee on Law & Justice Legislative Council, November 1998, at 28 – 29). It is an untenable proposition that Parliament, by implication, retrospectively changed what was an absolute liability offence into a strict liability offence when the 1983 OHS Act was amended after its introduction to increase the maximum available penalties. The same applies when Parliament enacted the 2000 OHS Act and maintained the higher penalty regime;

(iii) the penalty regime under the 2000 OHS Act in relation to imprisonment is at the low end of penalties in the criminal calendar and is markedly different to that which applied in *He Kaw Teh*. In commenting on the penalties under the *Customs Act*, *Gibbs* CJ said at 530 and 535:

... offences of this kind, at least where heroin in commercial quantities is involved, are truly criminal; a convicted offender is

exposed to obloquy and disgrace and becomes liable to the highest penalty that may be imposed under the law. It is unlikely that the Parliament intended that the consequences of committing an offence so serious should be visited on a person who had no intention to do anything wrong and no knowledge that he was doing so.

...

I have already shown that the offence created by s.233B(1)(b) is treated by the Parliament in some circumstances as being one of the most serious in the criminal calendar. It seems improbable that the Parliament would have intended that it might be committed as a result of mere carelessness, although that would be the case if guilty knowledge was not an element, and an unreasonable although honest mistake would not be sufficient to exculpate the accused. It is true that the penalty of life imprisonment provided by the statute is a maximum one and that a judge who considered that the accused had brought in narcotic goods in the honest but unreasonable belief that his luggage did not contain them would sentence accordingly.

Nevertheless, to provide that a sentence of life imprisonment might be imposed for an offence committed merely through negligence would appear to be exceedingly severe. The gravity of the offence suggests that guilty knowledge was intended to be an element of it.

251 It is noted that in *Chief of the General Staff v Stuart*, Black CJ said at 304:

... the fact that a penalty of up to six months imprisonment may be imposed for an offence against s 44 seems equivocal as an indication of whether or not the presumption of mens rea has been displaced. On the one hand the maximum penalty is a term of imprisonment but, on the other hand, the maximum

penalty of six months imprisonment is at the low end of the scale of maximum penalties of imprisonment provided for by the Act for service offences.

Difficulty of proof

252 A further matter that needs to be considered is that if *mens rea* were considered to be an ingredient of an offence under s 8(1) it would impose upon the prosecution the burden of proof beyond reasonable doubt. Only a relatively few employers are not corporations. The prosecutor submitted that it would be virtually impossible, or in practice unreasonably difficult, to prove the state of mind of a large corporation or a corporation sole in the absence of admissions. With that submission I agree.

253 The English Court of Appeal addressed this issue in *R v British Steel*, where it was stated at 1362 and 1364:

If we had to consider the matter de novo we would still have concluded that the words of section 3(1) are in context capable of one interpretation only, namely, that, subject to the defence of reasonable practicability, section 3(1) of the Act of 1974 creates an absolute prohibition. The defence is a narrow one ...

We would go further. If it be accepted that Parliament considered it necessary for the protection of public health and safety to impose, subject to the defence of reasonable practicability, absolute criminal liability, it would drive a juggernaut through the legislative scheme if corporate employers could avoid criminal liability where the potentially harmful event is committed by someone who is not the directing mind of the company. After all, as *Stuart-Smith* L.J. observed in *Reg. v Associated Octel Co. Ltd.*, at p. 292, section 3(1) is framed to achieve a result, namely, that persons not employed are not exposed to risks to their health and safety by the conduct of the undertaking. If we accept *British Steel plc*'s submission, it would be particularly easy for large industrial companies engaged in multifarious hazardous operations, to escape liability on the basis that the company through its "directing mind" or senior management was not involved. That would emasculate the legislation.

...

Furthermore, a culture of guarding against the risks to health and safety by virtue of hazardous industrial operations will be promoted.

254 It would drive a juggernaut through the legislative scheme of the 2000 OHS Act if corporate employers could avoid criminal liability where someone who is not the directing mind of the corporation commits the potentially harmful event. It would emasculate the legislation if the prosecution had to prove a "directing mind".

Honest and reasonable mistake of fact

255 In *He Kaw Teh*, Gibbs CJ stated:

There has developed a principle that an honest and reasonable mistake of fact will be a ground of exculpation in cases in which actual knowledge is not required as an element of an offence...

These cases establish that if it is held that guilty knowledge is not an ingredient of an offence, it does not follow that the offence is an absolute one. A middle course, between imposing absolute liability and requiring proof of guilty knowledge or intention, is to hold that an accused will not be guilty if he acted under an honest and reasonable mistake as to the existence of facts, which, if true, would have made his act innocent.

256 In my view, for the reasons I have given, actual knowledge is not required as an element of an offence under s 8(1). Moreover, I consider that the terms of s 8(1) leave no scope to presume *mens rea* is present as an ingredient of the offence to enable the defence of honest and reasonable mistake of fact to be raised. Nevertheless, if I am wrong about this second matter, I should consider whether the proper defence has been raised in these proceedings and, if so, whether the prosecution has negated the defence beyond reasonable doubt.

257 As the prosecutor submitted, the defence is only available where the defence introduces evidentiary material either by cross-examination or in the defence case to establish that the defendant acted under a mistaken belief which was both reasonable and relevant to culpability: *Von Lieven v Stewart Kemish* (1990) 21 NSWLR 52 at 65. Moreover, the defence only excuses the defendant where (*Von Lieven v Stewart* at 66 - 67):

(a) There is the existence of an actual or positive belief in the existence of some fact or facts which, if true, would make the act in question innocent.

(b) The belief is honest and based on reasonable grounds.

258 If the belief relevantly constitutes a mistake then it is necessary to examine the question whether the mistake was based on honest and reasonable grounds. The reasonableness of an exculpatory belief is an objective matter (*He Kaw Teh* at 575).

259 In raising the defence of honest and reasonable mistake of fact, it was the defendant's submission that no one within DOCS "knew this woman [Ms Cooper] would attack with a weapon and that she posed a risk of violent attack." It was submitted that Ms Cooper went to the interview with Ms Philips and Ms Williams on Monday 24 May 2004 with a knife concealed upon her person – in her boot. However, neither Ms Philips nor Ms Williams, nor the receptionist who let Ms Cooper into the office, nor the supervisor of the two caseworkers, Ms Christopher, nor any other person in the office, had the slightest suspicion that Ms Cooper had a concealed knife. It was submitted that:

This was a surprise attack. The evidence is that Ms Cooper went to some lengths to conceal the knife and to surprise both case-workers. Your Honour should accept that neither Ms

Philps nor Ms Williams would have let themselves be in that interview room with Ms Cooper if they had known of her concealed weapon and her bad intent.

It is quite clear therefore that the risk of a violent knife attack by Ms Cooper was unknown to the two employees of the defendant who were most directly at that risk. A fortiori it was unknown to any other employee of the defendant. Clearly it was also unknown to NSW Police and to the Mental Health Unit of the Department of Health that had assessed Ms Cooper the day before at Ballina Hospital.

260 It was further submitted by Mr *Skinner* of counsel for the defendant that:

Given then that the evidence is clear that the risk of a violent attack with a weapon by Ms Cooper was unknown to the defendant, and that its employees, particularly Ms Philps and Ms Williams, honestly and reasonably believed that they were not at such risk when they went into the interview room with Ms Cooper, it is submitted that the defendant has a complete defence upon application of the correct law.

...

It should be accepted by your Honour that these two young women and the supervisor that day also did not think they were at risk of having Cheryl Cooper go into the room. On the Monday, the critical day, they did not think they were at risk.

The issue here is, “Was it reasonable for them to think that?”

...

The first defence we raise is, there was lack of knowledge, there is an evidentiary trigger to establish it is an issue that must be looked at. The belief which we are raising is one of something not occurring, that is, Cheryl Cooper did not pose a risk of a violent attack as she was not going to attack them.

The defence is usually brought in a positive way, “I held an honest belief I had a licence,” or that these were not inclosed lands. It is not a hard concept and it is quite realistic to express the proposition Kylie Philps honestly believed Cheryl Cooper was not a risk when she went into that room and if Ms Philps and the others thought she was a risk they would have done other things. My client did not know that. Unless the prosecution can disprove either that belief was held or that it was reasonable, we must succeed.

261 It was submitted for the prosecutor that if no proper factual basis for the defence existed, there was nothing that the prosecutor was required to negative: *Hunter Water Board v State Rail Authority per Stein J* at 20. The case concerned a prosecution of the defendant for contravention of s 16 of the *Clean Waters Act* 1970, which provided that a person shall not pollute waters. Diesel oil had escaped

from a break in an underground pipeline at the defendant's rail depot into an unmade drain and had made its way into a creek system. The defendant alleged honest and reasonable mistake or belief in a certain state of facts which, if true, would render its conduct innocent. The defendant's depot manager, Mr Creighton, gave evidence in the proceedings. At 20, his Honour observed:

[W]hen one examines Mr Creighton's evidence in the light of his answers in cross-examination, it is apparent that his belief was based more on faith than facts. He had never seen the pipe; he knew it had never been tested although it could have been; his knowledge was mostly second-hand; and his knowledge of the relevant area of the site, although claimed as substantial, was in fact slight. For example, he claims not to have been aware until the incident that the depot was wholly built upon a reclaimed swamp. He says he was subsequently informed of this by an SRA officer. He was of course aware of the nearby problems of the crumbling banks of the creek and the tendency of the sides of any hole dug to fall in. In my opinion Mr Creighton never really turned his mind to the integrity of the pipe or the possibility of its failure: see *Gherashe v Boase* [1959] VR 1. His basis for not so considering the possibility was his belief that there had never been a problem before and that PVC pipes were, to use his words, "maintenance free".

In my opinion his evidence, properly understood, falls far short of raising an actual or positive belief in the existence of facts which, if correct, would make the act innocent. I find that no proper factual basis for the "defence" exists. In my opinion there is nothing raised by Mr Creighton's evidence which the prosecutor is required to negate.

If I be wrong in this conclusion there remains the question of whether the belief is one based on reasonable grounds. I do not accept that Mr Creighton's belief was reasonable. He should have known that the depot was on swamp land and that there were areas of instability including the subject area. He should have instituted regular maintenance checks of the pipe, bearing in mind it was in-ground, the use to which the pipe was put and the availability of tests. It cannot be suggested that the SRA did not have the resources to do so. The very large volumes of contaminated oil being transferred in such close proximity to the drain feeding to the Hunter Water Board's stormwater system, meant that the defendant should have been vigilant. It follows that I am not satisfied that the mistaken belief, if held, was based on reasonable grounds.

262 The judgment in *Hunter Water Board v State Rail Authority* was the subject of an appeal: *State Rail Authority of NSW v Hunter Water Board* (1992) 28 NSWLR 721. In affirming the judgment of Stein J, at 725 Gleeson CJ (with whom Cripps JA and Slattery A-J agreed) stated:

The concluding words in that passage [referring to what Cave

J said in *R v Tolson* (1889) 23 QBD 168 at 181] emphasise that what is involved is something more than inadvertence. In a number of different contexts courts have stressed the need to show an affirmative belief in a certain fact or state of affairs as distinct from a mere absence of knowledge...

In determining what state of mind will be treated as a mistaken belief for the purposes of a defence of strict liability created by statute, questions of statutory construction arise, and the purpose of the legislature in creating an offence needs to be considered...

It would be inconsistent with the legislative purpose underlying the *Clean Waters Act* to conclude that the mere lack of knowledge that pollution was occurring, or was likely to occur, based upon a general understanding or assumption that everything was in order, would be sufficient to amount to a mistaken belief. Rather, a belief in the existence of a set of facts which, if true, would take the conduct in question outside the operation of the statute would entail, in a case such as the present, a positive belief that the operation of the plant and equipment would not result in pollution. That belief would also need to be sufficiently specific to relate it to the elements of the particular offence.

263 In *R v Lavender* one of the subsidiary issues was that at trial counsel said: "I would invite your Honour to add, in relation to the manslaughter, a sixth element, being that the accused did not hold an honest and reasonable belief that it was safe to proceed." The invitation was declined. In the joint reasons (*Gleeson CJ, McHugh, Gummow and Hayne JJ*) it was said at [59] about the second of two reasons and why it would have been erroneous and inappropriate to give the jury such a direction:

The second reason is that the principle on which counsel based his argument, which applies in other contexts, is a principle relating to honest and reasonable mistake of fact. The principle was recently discussed in this Court in *Ostrowski v Palmer* (2004) 78 ALJR 957; 206 ALR 422. As the decision in that case illustrates, the principle concerns mistakes of fact. The belief concerning which counsel sought a direction was a (supposed) "belief that it was safe to proceed". Such a state of mind involves an opinion. It might be based upon certain factual inferences or hypotheses (the respondent did not give evidence, so the jury were not told by him exactly what facts or circumstances were operating in his mind), but it necessarily involves an element of judgment. Indeed, it involves a conclusion by the respondent that his conduct was reasonable. The direction sought would be inconsistent with what has been described as the objectivity of the test for involuntary manslaughter. The respondent's opinion that it was safe to act as he did was not a relevant matter. If there had been some particular fact or circumstance which the respondent knew, or thought he knew and which contributed

to that opinion, and the jury had been informed of that, and counsel had asked for a direction about it, then it may have been appropriate to invite the jury to take that into account: see *Jiminez v The Queen* (1992) 173 CLR 572.

264 Kirby J said the trial judge did not accede to a request by counsel for Mr Lavender to direct the jury that they had to be satisfied that Mr Lavender did not hold an honest and reasonable belief that it was safe to operate the front-end loader in the fashion which he did before they could convict (at [72]). His Honour agreed with the joint reasons that the trial judge was correct to refuse to so instruct the jury (at [83]). Callinan J and Heydon J also agreed (at [139] and [148]). Callinan J also reasoned that fact, opinion and belief are discrete concepts (at [141]).

265 Given the legislative purpose of the 2000 OHS Act - to secure the health, safety and welfare of persons at work - and adopting the approach of Gleeson CJ in *State Rail Authority v Hunter Water Board*, a belief in the existence of a set of facts which, if true, would take the conduct in question outside the operation of the statute would entail, in the present case, a positive belief that Ms Cooper did not represent a risk to the health and safety of employees at the Ballina CSC. An alternative formulation is whether Ms Philps and/or Ms Williams "believed on reasonable grounds" that it was safe to undertake the interview with Ms Cooper as they did on 24 May 2004: see *Jiminez v The Queen* (1992) 173 CLR 572 at 584 per Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ, referred to by Callinan J in *R v Lavender* at [142] - [143]. In order for the defence to be successful, it is not sufficient that Ms Philps, Ms Williams or Ms Christopher, or any other employee of the defendant, did not know of the risk of a violent knife attack by Ms Cooper on 24 May 2004.

266 Mr *Docking*, in contending that neither Ms Philps, Ms Williams nor anyone else believed on reasonable grounds that it was safe to interview Ms Cooper, referred to certain parts of the evidence. In the re-examination of Ms Philps by Mr *Docking*, the following exchange occurred:

Q. And you were asked about the boots, and the evidence might show whether shin height or some other height. But on or before 24 May 2004 for the purposes of your work when dealing with a client, had you ever previously turned your mind to the possibility that a client might have a concealed weapon on his or her person?

SKINNER: Sorry, I didn't hear the question.

A. Had I turned my mind to that, that a client may conceal a weapon, no.

DOCKING

Q. Had DoCS ever given you any information about that as a possibility?

A. Not to my knowledge, no.

267 In the re-examination of Ms Williams by Mr *Docking*, the following exchange occurred regarding whether Ms Williams had turned her mind to whether Ms

Cooper might have a concealed weapon:

Q. You answered a number of questions, agreed she had skimpy clothing on; you described as stringy strap top; can you tell the court if at the time before the attack you turned your mind to the issue of whether Cheryl might have a concealed weapon?

A. No, no.

Q. No what?

A. No, except when watching the bag, it is something with any client because we were certainly watching the bag, because with any client we don't know what they are going to pull out of their bag.

268 I also note the evidence that Ms Cooper was allowed to bring into the interview room on 24 May 2004 a small black bag and, at the time, Ms Meehan-Frost, the Senior Client Service Officer at Ballina CSC, thought "I hope she hasn't got a gun in there".

269 Based on its view of the evidence in the proceedings, the defendant contended that "the risk of a violent attack with a weapon by Ms Cooper was unknown to the defendant, and that its employees, particularly Ms Philps and Ms Williams, honestly and reasonably believed that they were not at such risk", and that "Kylie Philps honestly believed Cheryl Cooper was not a risk when she went into that room and if Ms Philps and the others thought she was a risk they would have done other things."

270 The evidence, however, was that neither Ms Philps nor Ms Williams had turned their minds to whether Ms Cooper might have a concealed weapon and, it must follow, had not turned their minds to whether that constituted a risk to their health and safety. That Ms Williams was watching Ms Cooper's bag would suggest that at least Ms Williams had some degree of concern that there may have been a risk, but that goes completely against the defendant's defence that there was an honest and reasonable mistake about the fact that Ms Cooper constituted a risk. The same reasoning applies to Ms Meehan-Frost's "hope" that Ms Cooper did not have a gun in her bag.

271 In any event, when one considers the evidence overall, it is not possible to accept that it was reasonable for Ms Philps and Ms Williams to believe that Ms Cooper constituted no risk to their safety. Within the week preceding 24 May 2004 or on the day itself:

- Ms Cooper had threatened to kill a caseworker, Ms Garcia. Both Ms Philps and Ms Williams were aware of the threat. When the threat was made Ms Williams described Ms Cooper as "basically frothing at the mouth";
- the two caseworkers said that during the initial interview at the Ballina Hospital Ms Cooper displayed a range of emotions, being extremely aggressive one minute and calm the next; she at times spoke gibberish. It was Ms Philps' evidence that after the interview Ms Williams and herself had rated Ms Cooper as a "high risk client";
- Ms Philps and Ms Williams took the death threat seriously and reported the threat to their superiors;
- on Wednesday 19 May 2004, Ms Philps saw Ms Cooper sitting in her car outside the Ballina CSC, hitting the steering wheel with her hands and head, and "revving"

the car. Ms Christopher also witnessed Ms Cooper's behaviour and rang the police. During their attendance, the police removed three to five knives and scissors from Ms Cooper's car;

- on 19 May 2004, Ms Christopher advised CSC staff that Ms Cooper was "very aggressive and threatening";
- in preparation for the interview on 19 May 2004 with Ms Cooper, Ms Williams arranged the furniture in the interview room to minimise the prospect of an attack by Ms Cooper;
- prior to the interview on 19 May 2004 Ms Christopher instructed the caseworkers not to allow Ms Cooper to take her bag into the interview room with her;
- during the interview on 19 May 2004 Ms Cooper said, "I was spoken to by the Police about the threats I made to the other DOCS worker. Kylie you should know I don't make threats, I make promises. If I drop dead before I get to see my kids again, every breath that you take before you die you will smell my rotting corpse up your nose";
- after the interview on 19 May 2004 Ms Cooper was speaking gibberish in the foyer of the CSC office. Ms Christopher called the police who took Ms Cooper to Ballina Hospital for a mental health assessment;
- Ms Cooper had a known history of drug abuse or use of medication, which the defendant acknowledged was potentially a major cause of client violence to staff;

· on Thursday 20 May 2004, the car ramming incident occurred. It is accepted that one would categorise the incident as one more in the class of "road rage" rather than "murderous rage". However, the incident was indicative of the potential for an incident to trigger strong hostility and aggression from Ms Cooper. Ms Philps and Ms Williams were aware of the car ramming incident;

· on the morning of 24 May 2004, Ms Philps was advised of the mental health assessment of Ms Cooper. That assessment rated Ms Cooper as a low risk overall. However, the assessment indicated that a further assessment should be undertaken within 24 hours. Further, that Ms Philps had not read that Ms Cooper had been assessed as a medium risk in relation to harm to others. Ms Williams and Ms Philps patently did not believe the assessment. Nor did Sergeant Martin, an experienced police officer, who advised Ms Philps of this view. In light of the close personal knowledge Ms Philps had of Ms Cooper and her conduct it was unreasonable for her to simply accept that part of the mental health assessment at face value that indicated Ms Cooper was a low risk overall, an assessment that Ms Philps conceded she did not understand;

· in preparation for the interview on 24 May 2004 the caseworkers moved the table in the interview room to act as a barrier between Ms Cooper and themselves and removed any objects that could have been used as a weapon. Yet the two caseworkers allowed Ms Cooper to sit on the table during the interview, thus negating any protection the table might afford as a barrier. It appears the caseworkers allowed Ms Cooper to sit on the table (and to take her bag into the room) because they "didn't want to make her more upset or angry than she already was". This suggests the caseworkers did turn their mind to whether Ms Cooper might constitute a risk to their safety and that there was no honest and reasonable mistake on their part that Ms Cooper constituted no such risk;

· it was very apparent that Ms Cooper was concerned about losing custody of her

children and it was causing her significant distress to the extent she made death threats. Ms Philips and Ms Williams were clearly alert to the cause of Ms Cooper's distress and it was unreasonable to believe that on being advised that she would not have access to her children as she had been earlier promised that Ms Cooper would take the news calmly and present no risk to the safety of the caseworkers. The defendant regarded Ms Cooper as "unpredictable". Ms Sherrington, whose role it was to work on complex cases and whose evidence I accept, stated that in light of threats to staff and the car ramming incident she would not have conducted the interview on 24 May. Instead, from behind the perspex at the front desk, she would have re-scheduled the appointment for a later time.

272 In light of the evidence, the defence of honest and reasonable mistake of fact is not available. That is to say, the prosecution has negated the defence of honest and reasonable mistake of fact beyond reasonable doubt. It, therefore, becomes unnecessary to consider whether the belief of Ms Philips and Ms Williams can be equated with that of the defendant: see *Hunter Water Board v State Rail Authority*, where *Stein J* in *obiter* expressed the view that Mr Creighton's belief could not be equated to that of the SRA because he did not represent the "mind or will" of the corporate defendant.

273 Before leaving the defendant's reliance on honest and reasonable mistake of fact, I should refer to the cases relied on by the defendant in this regard. In my opinion, each of the cases may be distinguished.

274 In *R v Wampfler*, the Court of Criminal Appeal considered s 6(1) of the *Indecent Articles and Classified Publications Act 1975*, which was relevantly in the following terms:

... a person who publishes an indecent article contravenes this section and is liable, on conviction on indictment [and penalties are then set out].

275 At 547, *Street CJ* observed:

On its face the statute does not expressly require knowledge on the part of the accused person and there is an inadequate basis for construing it so as to import an express obligation on the prosecution in this regard.

276 In finding that the offence was not absolute, his Honour stated at 548:

I have already quoted the definition of "publish" in s 5 of the New South Wales statute. The inclusion of such commonplace, ordinarily innocent, acts as distribute, deliver, send, and so on attracts the same observations as were made in *R v Ewart* (1905) 25 NZLR 709. In my view an offence such as that presently under consideration is not absolute. If the accused advances a sufficient basis for the proposition that he had an honest and reasonable belief in innocence then the onus of negating that belief rests upon the prosecution.

277 The observations made in *R v Ewart* (1905) 25 NZLR 709 to which his Honour referred may also be found at 548:

In *R v Ewart* the Court of Appeal was considering a prosecution for selling a newspaper which was, "as to parts thereof, of an indecent, immoral, and obscene nature". The relevant New Zealand legislation was informed by the same policy considerations as the *Indecent Articles and Classified Publications Act*. Williams J said (at 728):

"... The object, however, of the Offensive Publications Act is not to regulate trade nor protect the public health, but to prevent and punish acts which are in themselves of a highly immoral and disgraceful nature. No doubt the statute is also for the purpose of preventing the corruption of public morals, and it is true that if obscene matter is sold or distributed by accident or mistake the injury to the morals of those who read it is the same as if it had been distributed intentionally. But the object of the statute is to protect the public morals, by the prevention and punishment of a series of immoral acts. The majority of the acts mentioned in s 3 are of a kind in which the mental element of knowledge can hardly be imagined to be absent, and I think the terms of the section connote the mental element of knowledge as an ingredient of the offences specified. It is assumed that the offender must be aware of what he is doing. The acts forbidden are all on the face of them grossly immoral, and the essence of them is their immoral character. It is because they are immoral that they are prohibited. If the essential part of a prohibited act is its immorality, there must, in my opinion, be some immoral mental condition on the part of the perpetrator to justify a conviction."

Edwards J and *Chapman J*, in separate judgments, reached the same conclusion. *Chapman J* said (at 744):

"... Though it is quite reasonable that a man should be held *prima facie* responsible for whatever he sells in his shop, I cannot think that he is to be precluded from showing that with all care on his part something pernicious has been accidentally sold. In the same way, I do not think that it was intended that a newspaper-runner was to be convicted when he receives a parcel for sale, and instantly proceeds in all innocence to sell the papers without any real means of knowing the pernicious character of the one he is charged with selling."

278 Thus the observations in *Ewart* relied upon by *Street CJ* included that:

- the object of the *Offensive Publications Act* was not to regulate trade nor protect the public health;
- the majority of the acts mentioned in s 3 were of a kind in which the mental element of knowledge could hardly be imagined to be absent, and the terms of the section connoted the mental element of knowledge as an ingredient of the offences specified. It was assumed that the offender must be aware of what he

was doing.

279 In contrast, the 2000 OHS Act has as its object to secure the health, safety and welfare of persons at work and the mental element of knowledge in s 8(1) of the 2000 OHS Act could hardly be imagined to be present.

280 In *Environment Protection Authority v N* the Court of Criminal Appeal considered s 5(1) of the *Protection of the Environment Administration Act*, which was in the following terms:

A person who, without lawful authority, wilfully or negligently disposes of waste in a manner which harms or is likely to harm the environment is guilty of an offence.

Additionally, the Act provided in s 7 that:

... 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.

281 It is clear from the judgment in *Environment Protection Authority v N* that the word "wilfully" in s 5(1) of the *Protection of the Environment Administration Act* played an important part in the Court's decision. For example at 356, *Hunt CJ* at CL (with whom *Enderby* and *Allen JJ* agreed) stated:

But here, if there is no offence created by merely disposing of waste without authority, and the only basis upon which such an action is made to constitute an offence is where its consequence is to harm or to be likely to harm the environment, it seems to me that — both in order to give the word "wilfully" some work to do and in order to comply with the common law as stated by *Jordan CJ* in *R v Turnbull* (at 109; 71) (by showing that the accused "knew that all the facts constituting the ingredients necessary to make the act criminal were involved in what he was doing") — the prosecution must establish that the person charged with this offence pursuant to s 5(1) of the Act either intended or was aware that the waste which he was disposing of would or was likely to harm the environment.

282 I also note what his Honour said at 356 - 357:

It may fairly be assumed that the destruction of the environment is an enormous social problem which requires strict measures to be taken to prevent the continuation of that destruction. The maximum penalty of \$1,000,000 for a corporation and of \$150,000 (now increased) or imprisonment for seven years or both for an individual when the matter is tried on indictment in the Supreme Court (rather than summarily in the Land and Environment Court) demonstrates that the legislature clearly intended the offence to be "truly criminal", but it appears to me unlikely that the legislature could have intended that such a grave penalty should befall a person who was intending only quite lawfully to dispose of waste, who had no intention thereby to cause any harm to the environment and who was unaware that his manner of disposal was likely to cause such harm.

283 In *Hawthorne (Department of Health) v Morcam Pty Ltd* the Court of Criminal Appeal considered s 10 of the *Pure Food Act*, which was in the following terms:

No person shall sell any article of food which is adulterated or falsely described, which contains any matter foreign to the nature of the food or which is packed or enclosed for sale in any manner contrary to any provision of this Act or the regulations.

284 The defendant had been charged with selling adulterated food (bread). The matter came before the Court as a case stated by the trial judge in the District Court which raised the issue of statutory construction. The issue was whether the offence was one of strict or absolute liability. I note the following in respect of the judgment:

- it was not clear what was the mischief with which the relevant provisions of the legislation were intended to deal: at 126 per *Mahoney* JA;
- the objects sought to be achieved by s 10 and the regulations were several and various and the ways in which those objects were, by the legislation, to be achieved were diverse: at 126 - 127 per *Mahoney* JA;
- considerations that difficulty in making effective the requirements of the legislation not of such obvious and pressing significance to rebut the presumption of *mens rea*: at 129 per *Mahoney* JA;
- less than overwhelming contention that to permit *Proudman v Dayman* defence would effectively emasculate the legislation: per *Hunt* CJ at CL at 132; per *Sully* J at 136;
- the statute itself was silent as to any intention to make the offence created by s 10 one of absolute liability. There was nothing in the Second Reading Speech to support the existence of such an intention: per *Hunt* CJ at CL at 131 - 132;
- absolute liability would not assist in preventing the sale of adulterated food: per *Hunt* CJ at CL at 133.

285 None of the foregoing matters, in my view, apply to the relevant offence under the 2000 OHS Act.

286 In *Chief of the General Staff v Stuart* service property, including weapons, was stolen when a vehicle in which the property was left was stolen. Two provisions of the relevant legislation, the *Defence Force Discipline Act*, were in question. Most relevant to this case was s 44, which was in the following terms:

- (1) A person, being a defence member or a defence civilian, who loses any property that is, or forms part of, service property issued for his use, or entrusted to his care, in connection with his duties is guilty of an offence for which the maximum punishment is imprisonment for 6 months.
- (2) It is a defence if a person charged with an offence under this section took reasonable steps for the safe-keeping of the property to which the charge relates.

287 It was held by the Court, *inter alia*, that:

- (i) as to the element of "loss" in the offence under s 44, the presumption of requiring proof of *mens rea* is displaced;
- (ii) as to elements of the offence under s 44 other than loss, the presumption of requiring proof of *mens rea* is not displaced.

288 At 303 - 304, *Black* CJ stated:

Is, then, the presumption displaced by the language or subject matter of s 44 and is it so far displaced that the offence is one of absolute liability, subject to the defence provided for by s 44(2)? In considering these questions, the nature of the subject matter of the section -- the loss of service property -- is of particular importance. Service property issued for the use of members of the Australian Defence Force, or entrusted to their care, will include property such as weapons and ammunition in respect of which there is an exceptionally high public interest that the property should not be lost. The high public interest in the security of service property is present not only when the defence force member is on active service but extends to peacetime activities in Australia....

What is particularly significant, in my view, is that the imposition of absolute liability in relation to the element of loss, in circumstances in which the taking of reasonable steps for the safe-keeping of the property is a defence, cannot be seen as a futile exercise to fine luckless victims but, on the contrary, can be seen as assisting in the furtherance of the policy of the section to protect service property from loss: see *Lim Chin Aik v The Queen* [1963] AC 160.

Before passing to other aspects of the question, I should note that the fact that a penalty of up to six months imprisonment may be imposed for an offence against s 44 seems equivocal as an indication of whether or not the presumption of mens rea has been displaced. On the one hand the maximum penalty is a term of imprisonment but, on the other hand, the maximum penalty of six months imprisonment is at the low end of the scale of maximum penalties of imprisonment provided for by the Act for service offences.

289 At 303 - 304, his Honour continued:

Turning now to the language of s 44, it will be seen that the scheme for the protection of service property against loss involves making it an offence to lose property whilst at the same time providing, by subs (2), that it is a defence if the person charged took reasonable steps for the safe-keeping of the property to which the charge relates. By s 12 of the Act the onus of proving the defence is on the person charged and the standard of proof is proof on the balance of probabilities. The Parliament might have made it an offence to fail to take reasonable steps for the safe-keeping of service property but this approach has not been adopted and in this respect there is a degree of contrast between s 44 and subss (2) and (3) of s 43.

As a matter of ordinary usage, there is no necessary element of intent in the notion of losing something....

As well as there being no necessary element of intent in the notion of losing something, the honest and reasonable mistake ground of exculpation would sit uneasily with the idea of loss and with s 44 as a whole. In circumstances of loss unaccompanied by any intention to lose it would often be very hard to see in respect of what facts the honest and reasonable mistake might be made. If such a mistake were, however, made with respect to matters such as the security of, say, a container in which an item of service property had been stowed, the presence of s 44(2) suggests that the legislature intended that the very question of reasonableness in such cases should be the subject of proof, on the balance of probabilities, by the accused. The policy of the section points in the same direction.

In all these circumstances, having regard to the language and structure of s 44 and the purpose of the section in protecting against loss the huge inventory and range of service property, as to which there is a high public interest in its security, I conclude that the presumption that mens rea is an ingredient in the offence is entirely displaced in relation to the element of loss.

290 I am unable to see how *Stuart* is of assistance to the defendant other than for the purpose of providing authority for the proposition that a defence such as that contained in s 44(2) of the *Defence Force Discipline Act* (said to be similar to the defence under s 28(a) of the 2000 OHS Act) is no reason to exclude the rule of honest and reasonable, but mistaken, belief in respect of the operation of a provision such as s 44(2). With respect, I accept that proposition, but it is not one that has any bearing on the outcome in the present proceedings.

291 I find that an offence under s 8(1) and s 12 of the 2000 OHS Act is an absolute liability offence.

LIABILITY OF THE DEFENDANT

292 As *Street* CJ observed in *Wampfler*, an absolute liability offence is one in which *mens rea* plays no part and guilt is established by proof of the objective ingredients of the offence.

293 In the present case, the prosecution has to prove beyond reasonable doubt the following essential ingredients, or elements of the offence, namely, that on 24 May 2004 at the Ballina CSC in New South Wales:

(1) the defendant was an employer for the purposes of the 2000 OHS Act;

(2) the defendant employed employees at its place of work;

(3) the defendant failed to ensure the health, safety or welfare of all of its employees (in particular, Gwen Balchin, Robin Kelly, Natajsia Lopic, Lynn Meehan-Frost, Kylie Philips, Teresa Pisanos, Rhonda Sherrington, Linda Williams and Raymond Hendrikas Wilton) whilst they were at work;

(4) there was a causal relationship between the facts causing the risk to safety and the defendant's acts or omissions.

294 In relation to the first two elements of the offence, as I apprehend it there was

no dispute that DOCS was, at the relevant time and place, an employer for the purposes of the 2000 OHS Act and that it employed employees (in particular, Gwen Balchin, Robin Kelly, Natajsia Lopic, Lynn Meehan-Frost, Kylie Philips, Teresa Pisanos, Rhonda Sherrington, Linda Williams and Raymond Hendrikas Wilton) at its place of work at Ballina CSC on 24 May 2004.

295 I turn to the third element, which concerns the question of the defendant's failure to ensure the safety of employees. As it was said in *Drake Personnel* at 452 (*Wright J*, President and *Walton J*, Vice President; *Peterson J* not dissenting) in relation to the 1983 OHS Act:

The general duties created by the OH&S Act are directed at obviating "risks" to the health, safety and welfare of persons in the workplace: see *Haynes v C I & D Manufacturing Pty Ltd* (1995) 60 IR 149 at 158-159. The occurrence of an accident and the sustaining of injuries by an employee will certainly represent relevant evidence of the existence of a risk to the health and safety of employees and the seriousness of that risk. However, it is not the accident itself which constitutes the offence, but rather the failure of the employer to ensure that its employees are not exposed to risks while at work.

296 The majority in *Drake Personnel* at 453 cited the following passage from *Haynes*:

Sections 15 and 16 of the OHS Act are both concerned with failures to ensure the health and safety of persons at workplaces in terms inter alia of "risks" thereto; thus, the sections, even absent any actual accident causing death or bodily injury, nevertheless comprehend the commission of an offence where the relevant "detriment to safety" (as spoken of in *Dawson* and *McMartin*) is but a risk, or, in other words, where the circumstances are such that an employer's act or omission has created a situation of potential danger to the health and safety of persons at his workplace. The OHS Act, as its long title, indicates, has the prime purpose "(t)o ensure the health, safety and welfare of persons at work" and that stated purpose may only reasonably be achieved, it seems to us, by construing the general duties or obligation cast on employers by Div 1 of Pt 3 thereof (which contains ss 15 and 16) as both preventive and remedial in nature, that is, both before and after the occurrence of an actual accident.

297 It is appropriate, then, to first identify the risk to the health, safety and welfare of employees and after that to consider whether there was any failure on the part of the defendant to ensure the employees were not exposed to the risk whilst at work.

298 It was alleged in the defendant's application for order that from time to time clients attended Ballina CSC for the purpose of being interviewed by DOCS employees. So much was uncontroversial. It was also alleged that:

[T]here was an actual risk of a DOCS employee suffering trauma, namely, a psychic or physical phenomena, or both, which may occur when an employee is exposed to a violent event involving a client that threatens danger or anxiety, or both, and can be created by being the victim or a witness to an

event or restraining any client.

299 I regard the risk to the health and safety of the defendant's employees as being a risk of exposure to a violent physical attack by a client or other person visiting the CSC. The risk to health obviously encompasses a risk of physical or psychological injury or illness. Further, the risk is not confined to the employee or employees who may be physically attacked, but any employee who witnesses the attack or its immediate aftermath, or who intervened in the attack in order to restrain the attacker and who may be placed at risk of traumatic stress caused by the intervention, or by seeing the injuries, or by the need to give aid to the victim of the attack.

300 The defendant contended that the risk must be something over and above the normal day-to-day risk faced by DOCS workers. Hence the defendant's classification of the risk as one of violent attack with intent to wound/cause grievous bodily harm at Ballina CSC on 24 May 2004.

301 In my opinion, in classifying the risk the way it did, the defendant worked back from the actual incident with the benefit of hindsight and the effect of doing so was to narrow the risk to a degree of preciseness which was impermissible. In *State of New South Wales (NSW Police) v Inspector Covi* [2005] NSWIRComm 303 at [26] the Full Bench observed:

[26] The observations in *WorkCover Authority of New South Wales (Inspector Childs) v Kirk Group Holdings Pty Limited and Anor* (2004) 135 IR 166 could have been written in response to the present appellant's written submissions. After referring to *O'Sullivan and Police Service (No 2)*, the court observed (at [133]):

[133] It is clear from the foregoing cases that careful attention must be paid to the correct identification of the risk the subject of the charges: *Police Service (No 2)* and *O'Sullivan* make it clear that it is inappropriate to seek to artificially confine the risk to one narrowly defined by reference to an accident with the benefit of hindsight: it is the general class of risk which matters. The danger repeatedly cautioned against of focussing too much attention on an accident is twofold: such a misguided focus can obscure the relevant risk, and it can also misdirect an analysis of causation.

302 As the Full Bench observed in *Covi*, it is the general class of risk that matters and a misguided focus may not only misdirect an analysis of causation, but also an analysis of reasonable foreseeability in the context of a consideration of the defence under s 28(a) of the 2000 OHS Act.

303 There was a large amount of evidence indicating an awareness by the defendant that its employees could be placed at risk by violent clients or the public. For example, in November 1992 there existed a "Policy on the Effective Management of Client Behaviour to Prevent Injury or Illness to Staff". The Policy, a comprehensive one, acknowledged the risk of assault by clients on DOCS staff; identified the "trigger events" for client violent behaviour (including personal factors such as history of violence, fear, frustration, etc); identified management strategies

for client behaviour; and identified training and education for staff to deal with client behaviour and principles concerning response to violent situations. Ms Christopher, in cross-examination, said there was always a potential for violence. 304 In its OHS Risk Management Policy, August 2004 and OHS Risk Management Procedures the defendant identified “psychological - verbal abuse or threat” as one of the typical hazards, and “Violence from clients/public” as one of the “Risk Categories”.

305 The defendant’s internal paper systems identified a number of causes, indicators or triggers of client/public violence to staff that applied beyond reasonable doubt to Cheryl Cooper before and on the charge date. First, a history of violence. As I noted earlier, the November 1992 Policy listed as one of the five major causes of client violence to staff: “1. personal factors (related to the occurrence of violent actions e.g. history of violence, medication, medical)”. The defendant’s July 2007 Policy and Procedures on "Preventing and Managing Client Initiated Violence Policy" listed a range of factors that will affect a client’s behaviour. A “Client Context Risk Management Tool” was introduced that prompted the manager and caseworker to consider all relevant aspects of the client’s behaviour and context. The Tool included reference to “History of violence/aggression (includes domestic violence, threats of violence against staff/others)” and “Pattern of violence or of obstructive behaviour”.

306 Other factors identified by the Tool that might indicate high potential for client violence were:

Changes which may indicate declining mental health e.g. more erratic, agitated, declining personal hygiene etc. Other factors were “Client due for mental health or other relevant assessment”; "Known history of abuse of alcohol or other drugs"; “There are also particular times during case management where client may be more prone to aggressive or violent behaviours (eg, initiation of court proceedings...)

307 In relation to this last factor, Mr Wilton gave evidence that clients sometimes are just very angry because the defendant has taken the children and the defendant is taking Children’s Court action. Mr Palmer’s evidence was to similar effect. Ms Sherrington’s evidence in this regard included the following:

Q. What type of clients generally were required to be dealt with by that CSC?

A. A very broad spectrum of clients. Any client who been affected by family crisis, clients with dysfunctions and clients with mental health issues and clients with drug and alcohol problems, clients with domestic violence, clients with poor parenting skills.

Q. In your experience, are you able to comment - this is generally about the potential danger of any of those types of violence, being violent to staff?

A. The potential for clients to be violent to staff is quite routinely experienced.

Q. Why?

A. Simply because of the nature of our brief, we interfere in the most sacred part of anyone’s life, their family and sometimes

our intervention is quite intrusive and there can be very little room for negotiation, depending on what has happened with the children.

Q. Prior to the stabbing incident, did you have experience with the department employees having to inform a parent or parents that their children were to be removed?

A. Frequently.

Q. And in your experience - I am talking generally, what impact did that have?

A. Sometimes parents are relieved, sometimes they are terribly terribly distressed, they are frequently angry and often very frustrated with the department's processes.

Q. What do you mean by angry and frustrated?

A. There is an overwhelming sense of powerlessness when you live with such an organisation like DOCS which is such a strongly child focussed agency where the parents needs are often put on the back burner for the sake of the child. That is obviously a hard concept for the parents to understand which they have been arguing and arguing successfully to explain their behaviour.

308 One may then consider the foregoing factors indicating a potential for violence in the context of what the defendant knew about Ms Cooper up to and including 24 May 2004. In that respect, the prosecutor identified from the evidence the following matters, which the Court accepts as reflecting the defendant's knowledge, or what the defendant should have known, regarding Ms Cooper and the risk she posed to the safety of DOCS staff at Ballina CSC:

- Ms Philips gave evidence that Ms Cooper was considered by Ms Philips and Ms Williams as a high risk client because of the behaviours that Ms Cooper was displaying;
- Ms Williams gave evidence that after 18 May 2004 Ms Cooper was recognised as a complex case and potentially highly violent;
- in an assessment report dated 16 August 2001, Ms Cooper admitted that she had “bursts of anger” and she took this out on objects such as the refrigerator, her car and a punching bag in the shed. Cheryl Cooper did not deny hitting the windscreen of her motor vehicle instead of hitting her children. There was considered to be a moderate risk to the children’s safety due to the angry outbursts;
- Ms Cooper was subject to domestic violence in the form of her ex-husband sodomising, suffocating and leaving her for dead. Also, during the marriage, her ex-husband hit Ms Cooper in the head while driving down the road and the children were present;

- Ms Cooper was subject to domestic violence in the form of her ex-boyfriend trying to stab her once;
- an assessment of Ms Cooper made reference to “17 previous reports found collectively for the children. Reports have been in regard to physical harm, domestic violence, sexual harm, inadequate shelter, medical treatment not provided, lack of school attendance, wellbeing concerns, neglect, carer: emotional

state, carer: drug use” and “... At this time mother was also acting irrationally and violent”;

- on 16 May 2004, at the Ballina Hospital, Ms Cooper was verbally abusing her three children and slapping them;
- on 16 May 2004, during the Hospital interview, it was decided that there should be two caseworkers because of information that Ms Cooper was erratic, smacked her children and was swearing;
- once at the Hospital, Ms Garcia formed the opinion that Ms Cooper was contradictory and at times irrational;
- the perception of Ms Britton at the Hospital on 16 May 2004 was that Cheryl Cooper was either manic or under the influence of something;
- on 18 May 2004, during a three-hour interview with Ms Cooper at the Ballina Hospital, Ms Philps observed about the behaviour of Cheryl Cooper that she was extremely aggressive one minute and calm the next, spoke in a different language described as gibberish, crying one minute and laughing the next minute, yelled obscenities directed at Ms Philps and Ms Williams, and laughed when describing past incidents of abuse to herself and her children. Ms Williams said: “Cheryl Cooper displayed an aggressive/passive type personality. At times this was directed at the caseworkers and at other times at people past and present she had known”;
- on 18 May 2004, in the presence of Ms Philps and Ms Williams during a three-hour interview, Ms Cooper made threats to kill Ms Garcia: “If I see her in the street I will kill her. I will discharge myself from hospital right now and go down to the DOCS office and sort her out” and also “you are all a pack of fucking cunts”. These threats were made after Ms Cooper alleged that Ms Garcia had lied to her about when she would see her children. Ms Philps said that she did not discount Ms Cooper actually following that threat;
- on 18 May 2004, by the completion of the three-hour interview, Ms Cooper agreed to sign a further Temporary Care Agreement that was for three months starting on 18 May 2004;
- on 18 May 2004, Ms Philps received telephone calls from the hospital advising that Ms Cooper was distressed that DOCS had taken her children (and she didn't know why) and then later that Cheryl Cooper had been discharged;
- on 19 May 2004, at about 7.45 - 8.00 am, Ms Christopher observed Ms Cooper to be sitting in her car outside the defendant's office. The engine was running and Ms Cooper was speaking incoherently to herself in a loud voice;
- at about 8.15 am on 19 May 2004, Ms Cooper was observed by Ms Philps to be sitting outside the defendant's place of work in a motor vehicle. Ms Cooper was hitting the steering wheel with her hand and head with sufficient force that Ms Philps thought Ms Cooper may injure herself. Ms Cooper continued to sit out the front yelling and "revving" the car;
- on 19 May 2004, a short time later, the ambulance arrived followed by the police. This was after Ms Christopher telephoned the police at Ballina to advise them of the situation. After the police made an appointment for Ms Cooper to attend the defendant's office that afternoon, the police took knives and a pair of scissors into the office from the car of Ms Cooper. The knives were variously described by witnesses as: 3 or 4 large kitchen knives; and five knives about the size of a cutlery knife and one of the knives looked longer appearing to be more of a chef's knife;
- on 19 May 2004, at 8.46 am, Ms Christopher sent an email with its “Importance”

said to be “High” and that represented, *inter alia*, “The hospital staff advised the caseworker that the natural mother [Ms Cooper] did not have any mental health concerns. Please be advised that this person is very aggressive and threatening”;

- on 19 May 2004, at about 12.15 pm, Ms Williams saw Ms Cooper sitting in the front of her car out the front of the building. Ms Cooper was reading the bible and was jabbering to herself. The radio was going fully but was turned down after a request to do so by Ms Williams. Ms Cooper started thumping herself on the chest, she was spitting and she said: “I’m going to die. When I die you will smell my rotting flesh up your nose until the day you die”;

- on 19 May 2004 commencing at about 1.00 or 2.00 pm (depending on which of two different times provided by Ms Philps is correct), a 30 minute interview was conducted by Ms Philps and Ms Williams with Ms Cooper during which:

- Cheryl Cooper was agitated/punching chest/ sarcastic;

- Ms Cooper said: “I feel like I am dead inside” and spoke in gibberish throughout this interview”. This was described as “talking in tongues” and Cheryl Cooper appearing possibly drug affected;

- Ms Cooper stated: “I was spoken to by the Police about the threats I made to the other DOCS worker. Kylie you should know I don’t make threats, I make promises. If I drop dead before I get to see my kids again, every breath you take before you die you will smell my rotting corpse up your nose”;

- on 19 May 2004, after the 30-minute interview, Ms Cooper remained behind a wall on the left hand side of the reception area for about 10 to 15 minutes and continued to talk gibberish or "in tongues". During this time, Ms Cooper wrote on the wall and on three posters - “God help those who really hurt children”, “Where’s God law”, “Spineless bastards soulless heathens” and a number of symbols were also drawn. The police were called and, upon arriving, took Ms Cooper away in the rear of a police truck. As Ms Williams affirmed: “The decision was made to contact police to ensure the safety of community members who may enter the building”;

- on 20 May 2004 Ms Christopher as Delegate of the Director-General signed an Order for assumption of care and protection of child or young person in hospital and premises. The children of Ms Cooper were suspected on reasonable grounds of being at serious risk of harm. The reasons for the assumption included that the children have been, or are at risk of being, physically abused or ill-treated;

- on 20 May 2004 at about 3.30 pm, Cheryl Cooper was interviewed by Ms Philps and Ms Williams in an interview room. Although Cheryl Cooper appeared calmer than previous meetings, the behaviour of Cheryl Cooper included:

- Cheryl Cooper was angry,

- speaking to the wall in gibberish or "in tongues",

- stating “I want my kids back I want them returned”,

- stating “God forgive me for what I am about to do” and, after looking at Ms Philps, “14000 dark angels are going to come and take your soul. I’m sorry”;

- whilst Ms Cooper was in the interview room with Ms Philps and Ms Williams on 20 May 2004, Ms Christopher organised three male staff members to come and stand with her outside the interview room. Ms Christopher explained: “I arranged this because I was concerned about Cheryl’s mental health issues and as a result was concerned about safety for my staff”;

- on 20 May 2004, after the above interview, Ms Christopher saw Ms Cooper laying

face down over the bonnet of her car and Ms Cooper vomited on the ground. The caseworkers believed Ms Cooper had taken something – valium or something like that;

- on 20 May 2004, during working hours, “client [Cheryl Cooper] used car to attack community members in their car” and this occurred outside the front of the defendant’s Ballina CSC. Cheryl Cooper screeched backwards into Tamar Street by reversing her car and began driving about 20 metres up the wrong side of the road. Cheryl Cooper then reversed back into the defendant’s car park between two of the defendant’s car, yelling and watching a car drive past. The female driver of the car that drove past made a gesture towards Cheryl Cooper. Cheryl Cooper then grabbed the steering wheel of her car and floored her car after the car that had driven past. There was smoke where Cheryl Cooper took off from her tyres spinning. Whilst that other car was stopped at a roundabout, Cheryl Cooper drove into the back of that stopped car. Cheryl Cooper then twice reversed and drove into the other car again. Cheryl Cooper ultimately drove off on the wrong side of the highway”;
- after a discussion with Ms Christopher, Ms Balchin and Ms Philips it was decided that a mental health assessment would be cancelled the next day and if Ms Cooper arrived for the appointment the police would be called;
- according to the history taken by Northern Rivers Area Health Services on 23 May 2004 from Ms Cooper, the explanation provided by Cheryl Cooper was: “... Children taken into DOCS care. Acting out behaviour, angry verbal outbursts, rammed a car & drove down wrong side of the road, after DOCS wouldn’t return children. Has access visit tomorrow from 1-2 & Wednesday from 3-4 ...”
- Mr Wilton, as Manager Casework, said he had been advised of Ms Cooper's threat to kill Ms Garcia and how she had crashed into another vehicle. He said he had formed the view that Ms Cooper had a predisposition to hurt, injure or even kill people and that she posed a risk of violence to staff;
- on 21 May 2004, at about 10.45 am, Ms Philips stated to the police that at the moment the whole [Ballina] CSC was thinking that Ms Cooper had mental health issues and it seemed impossible that the entire office could be wrong;
- on 24 May 2004, Ms Philips had a telephone conversation with Sergeant Martin of the NSW Police. Part of this exchange is summarised by Ms Philips: “CW [caseworker] stated that the Mental Health team believed that the n/m [Ms Cooper] had no mental health issues. Steve stated that he wasn’t an expert but believed that they were wrong and he had genuine concerns for the n/m’s safety.”
- on 24 May 2004, Ms Philips continued to work on the court papers. Once the defendant had assumed care for the children on Friday it needed to have the court papers in court by Monday afternoon. Mr Wilton said in his evidence:

... The decision to seek the Emergency Care order indicates that the officers dealing with the matter were highly concerned with Cheryl Cooper’s ability to care for her children. A matter would only go to the Children’s Court if the risk of harm to the children concerned could not be resolved in any other fashion. Additionally, the removal of children in this manner often causes parents to act out in a

variety of anti-social ways. Thus this action both indicates the potential for violent behaviour as well as creating the conditions where violent behaviour is more likely to occur ...”

· the grounds for the orders sought, set out in the Application to the Children’s Court, corroborate the opinions of Mr Wilton and otherwise confirm the risk. The grounds included:

Pursuant to section 71(1)(c), The Children have been or are likely to be physically abused or ill-treated.

...

Cheryl Cooper has continually shown disturbing behaviours such as aggression, non-compliance, non-engagement to the employees at the Ballina CSC.

...

Cheryl Cooper has not put the needs of the children first however has placed her own needs as a priority and has not been able to demonstrate that she can support her own emotional and physical needs let alone those of her children.

- on 24 May 2004 at about 1.20 pm, Ms Cooper arrived in the defendant’s reception area. After Ms Philps set up an interview room, one of the caseworkers let Cheryl Cooper into the room. Ms Philps set the room up by taking out any objects that might be able to be used as a weapon. They set the table up at one end of the room and arranged their chairs so that they could exit the room into the main office should they need to. The room was arranged so that Ms Cooper also had an exit door back out into the reception area should she wish to leave the interview. The employed method of setting up the interview room was usually used for potentially violent clients who already have a history of violence or aggression. Cheryl Cooper fell into that category because of yelling obscenities at the caseworkers and the anger towards Ms Garcia. It was employed for interviews at Ballina CSC before 24 May 2004. Ms Williams said: “The office was set up in such away to try and ensure everybody’s safety”;
- before permitting Ms Cooper to go from the foyer area of Ballina CSC into the interview room, Ms Philps did not telephone the police to get an update for information concerning Ms Cooper. Ms Philps could not advance any reason why she could not have done so;
- Ms Philps had to advise Ms Cooper that they had cancelled the visit with the

children and the contacts had to be rescheduled.

309 The evidence demonstrated overwhelmingly that Ms Cooper constituted a significant risk to the safety of DOCS employees at the Ballina CSC on 24 May 2004. Moreover, the evidence also demonstrated beyond doubt that the defendant was aware of this risk. The risk was manifested in the actual incident that occurred on 24 May 2004. Noting that the defendant, in its internal policy and procedure documents, accepted that violence and threats of violence from clients could result in physical or psychological illness or injury to employees, in so far as Ms Philips was concerned the risk materialised in her being stabbed by Ms Cooper. In so far as Mr Wilton was concerned, he confronted Ms Cooper who had a knife in her hand. He was diagnosed with psychological injuries, which manifested in both physical and psychological symptoms. Arising from his psychological injuries, Mr Wilton receives ongoing treatment in the form of weekly counselling sessions and taking daily anti-depressant medication. Mr Wilton lodged a workers' compensation claim that was accepted.

310 Ms Balchin was also placed at risk in her undoubtedly brave confrontation with Ms Cooper as she tried to wrestle with the client who was holding a knife at the time. Ms Balchin suffered "contusions/bruising/crushing". Ms Williams was in the interview room when Ms Cooper attacked Ms Philips. Ms Williams' safety was unquestionably at risk as she also, courageously, confronted Ms Cooper who had a knife in her hand. Ms Sherrington moved into the melee to remove Ms Philips and undoubtedly her safety was placed at risk. Ms Sherrington was stressed by the incident. Ms Lopic, Ms Meehan-Frost and Ms Pisanos were in the immediate vicinity of the interview room and witnesses to the actual incident or its aftermath, including the injuries suffered by Ms Philips. I am unable to find any evidence that Ms Kelly was at risk. I would observe that if it were not for the personal bravery of Mr Wilton and the others I have mentioned, the consequences of Ms Cooper's attack could have been more serious.

311 The question remains as to whether the defendant failed, in the manner particularised, to ensure that its employees were not exposed to risks to their health and safety from the conduct of Ms Cooper. Before addressing each of the particularised failures, it is necessary to say something about causation. A causal nexus between each of the acts or omissions and the risk has to be proven to the criminal standard. In *Newcastle Wallsend Coal Company Pty Ltd v WorkCover (Inspector McMartin)* the majority (*Walton J, Vice President and Boland J; Marks J* not dissenting on this point) stated in relation to causation:

[301] As foreshadowed at the beginning of our discussion of failures, the parties made submissions concerning the relevant principles governing causation. The principles relating to causation in this jurisdiction are well settled: *WorkCover v Kellogg (Aust)* at 253; *The Crown in the Right of the State of New South Wales (Department of Education and Training) v Maurice O'Sullivan* (2005) 143 IR 57 at [41]-[51]; and *State of New South Wales (NSW Police) v Inspector Covi* [2005] NSWIRComm 303 at [25]-[33]. In summary:

(a) As we noted above at [213], the Court held in *WorkCover v Kellogg (Aust) (No 1)* at 253 that it is necessary to establish both a relevant "failure" on the part of the employer and a "causal nexus" between the conduct of the defendant and the

consequent risk to the health, safety and welfare of its employees. It is not necessary to demonstrate a causal connection between the conduct of the defendant and the precise circumstances of the accident which gave rise to the prosecution.

(b) It is inappropriate to artificially confine the risk to one narrowly defined by reference to an accident with the benefit of hindsight. The danger repeatedly cautioned against of focussing too much attention on an accident is twofold: such a misguided focus can obscure the relevant risk, and it can also misdirect an analysis of causation (*WorkCover Authority of New South Wales v Kirk Group Holdings Pty Limited and Anor* at [133]; see, for example, *Haynes v C I & D Manufacturing Pty Ltd* at 156-7). See also *The Crown in the Right of the State of New South Wales (Department of Education and Training) v Maurice O'Sullivan* at [32]-[40].

(c) The fact that a risk was not created by, or under the control of, a defendant is not to the point: *The Crown in the Right of the State of New South Wales (Department of Education and Training) v Maurice O'Sullivan* at [42] and [44]. An employer cannot escape liability by contending simply that it did not create the risk.

(d) Causation has to be viewed in a common sense and practical way and is not decided as a philosophical or scientific question; see *State of New South Wales (NSW Police) v Inspector Covi* at [25] and *The Crown in the Right of the State of New South Wales (Department of Education and Training) v Maurice O'Sullivan* at [45].

(e) It is not necessary to find that the act or omission of the defendant was *the* cause of the risk arising but rather the question was whether the defendant's acts or omissions were a "substantial or significant cause [of the risk] viewed in a common sense and practical way" see *The Crown in the Right of the State of New South Wales (Department of Education and Training) v Maurice O'Sullivan* at [49]-[50].

(f) A risk to safety that exists independently of the defendant (such as a violent criminal) may increase or become more serious as a consequence of the employer's acts or omissions. In that way, the defendant's failure may materially contribute to the risk: see *The Crown in the Right of the State of New South Wales (Department of*

Failing to prevent the client, Ms Cheryl Cooper, from attending the place of work for an interview

312 After the car ramming incident on Thursday 20 May 2004, as I earlier noted, Ms Philps had a discussion with Ms Christopher and Ms Balchin. It was decided that due to the recent events the mental health assessment of Ms Cooper scheduled for the following day should be cancelled. Further, that if Ms Cooper arrived at the CSC the police should be called, as they expected Ms Cooper to be arrested and charged. On Friday 21 May 2004, Ms Philps cancelled the mental health assessment and advised the police that if Ms Cooper arrived for her interview, the police should attend. Ms Cooper did not arrive, but the police attended at 10.45 am. In light of Ms Cooper's failure to attend, Ms Philps decided to cancel the following Monday's access visit for Ms Cooper to see her children. Ms Philps attempted to contact Ms Cooper on her mobile phone a number of times on the Friday to advise of the cancelled access but had no success. Ms Cooper's mobile phone was turned off.

313 Ms Philps knew that it was possible that Ms Cooper might attend expecting a contact visit with her children on Monday 24 May 2004, although she did not expect Ms Cooper to actually appear. Ms Christopher was aware that Ms Cooper might attend, as Ms Philps advised her of the possibility on the morning of the stabbing attack.

314 It should have been apparent to Ms Philps, Ms Williams, Ms Christopher and indeed, Ms Balchin that given Ms Cooper's obvious concern with having been separated from her children there was every likelihood she would attend the access visit that had been arranged for Monday 24 May and, as far as Ms Cooper knew, had not been cancelled. Moreover, given the obvious risk associated with a situation where it had been decided Ms Cooper would not have access to her children and Ms Cooper's unpredictability, the threats she had made and her known capacity for violent behaviour, consideration should have been given to the taking of steps to ensure Ms Cooper did not present a risk to the safety of employees at the Ballina CSC.

315 It was submitted for the defendant that based on the mental health assessment, the absence of any advice from the police that they should be present if Ms Cooper presented herself on 24 May and Ms Cooper's relatively neat and calm appearance on 24 May, it was reasonable for the caseworkers to proceed to interview Ms Cooper without taking any necessary precautions in respect of their safety. However, neither Ms Philps nor Ms Williams nor Sergeant Martin agreed with the mental health assessment of Ms Cooper being mentally stable. Further, Ms Cooper's neat and calm appearance was at odds with her earlier appearance and demeanour and her capacity for aggressive behaviour. The two caseworkers had earlier observed the rapid mood swings that Ms Cooper was capable of. Ms Philps herself observed Ms Cooper being "very angry" and then "very passive"; crying then laughing. In these circumstances it was unreasonable to regard Ms Cooper as not representing any risk to safety.

316 I note that it had been decided on Friday 21 May to cancel the mental health assessment and the police were advised that if Ms Cooper arrived for her interview, the police should attend. Ms Cooper did not arrive, but the police attended in any event. No such arrangement was made for Monday 24 May,

despite there being, on an objective assessment, the likelihood that Ms Cooper would attend to see her children and if she were not given access there was the potential for her to react violently.

317 Despite what I regard as an obvious course of action, that is to take steps to prevent Ms Cooper from attending the CSC for the interview on Monday 24 May and thereby avoiding any risk to the safety of employees, no such steps were taken. Ms Cooper walked into the foyer of the CSC unimpeded and was then invited into the interview room by one of the caseworkers. There were various alternatives to this course of action. One of them was, as Ms Sherrington explained in her evidence, to speak to Ms Cooper from behind the protection of the perspex covering the reception area. Ms Sherrington said: "I think worker safety comes first; so in a case like this you would say, I would say it through the perspex, I would invite them to another appointment and I would invite where I could plan but I would do it from the perspex and as there was a different appointment to have empathy."

318 Another alternative was to have the police or security personnel present to prevent Ms Cooper accessing the CSC. Another viable alternative was to conduct any interview with Ms Cooper at the police station, which had been done before with other clients exhibiting a propensity for violence.

319 I agree with the prosecutor that it is impossible to come to any view other than that if Cheryl Cooper had been prevented from attending the place of work for an interview, no risk to health and safety would have arisen. The defendant's failure to prevent Ms Cooper's attendance was a "substantial or significant cause [of the risk] viewed in a commonsense and practical way".

320 Particular (c)(i) of the charge is made out.

Failing to undertake an adequate risk assessment of the client

321 It was alleged that there was a failure on the part of the defendant "to undertake an adequate risk assessment of the client that had a focus on the safety of the employees at the place of work, assessed the risk and assessed what preventative or control measures needed to be in place to prevent or reduce an incident arising or escalating to a more serious stage."

322 There is no doubt the defendant failed to undertake an adequate risk assessment of Ms Cooper. There is no statutory requirement for an employer to conduct a formal, structured risk assessment by, for example, allocating a risk score or a rating using a risk matrix, although given the requirement in reg 10 of the Occupational Health and Safety Regulation 2001 to assess the risk of harm to the health or safety of the classes of persons nominated in the regulation, it is highly advisable.

323 In the defendant's case, however, its policies and procedures provided for formal risk assessments to be conducted. Those policies and procedures, both at the time the charge was laid and after the incident on 24 May 2004, laid out in great detail the approach to be taken to risk assessment including in relation to the assessment of risk that clients presented. The policies and procedures were most relevant and applicable to an assessment of the type of risk presented by Ms Cooper. The policies and procedures to which I refer included: No. 92/136 Departmental Policy on the Effective Management of Client Behaviour to Prevent Injury or Illness to Staff, 20 November 1992; No. 95/148 Procedures for the Management of Threats to Staff, 29 December 1995; No. 96/65 Risk Assessment Policy Guidelines and Procedures, May 1996 that set down a method of conducting and recording the risk assessment process as signed by Rod Gilmour,

Director Corporate Services, including for the risks of injury or illness to staff from clients; DOCS Policy Statement OHS Policy dated 26 September 2003, which said that Managers and Supervisors were accountable to the Director-General for implementing and monitoring risk management strategies applicable to staff and workplaces that they manage; OHS Risk Management Policy, August 2004 and OHS Risk Management Procedures; and Preventing and Managing Client Initiated Violence Policy and Procedures, July 2007.

324 The formal policies and procedures were not followed by the defendant through any of its managers or caseworkers. Indeed, there was no formal policy or procedure in place in the Ballina CSC in relation to dealing with potentially violent clients and there was no systematic risk assessment to determine the risk of violence before and on the charge date.

325 Nevertheless, it was contended for the defendant that it did assess the risk. Reference was made to the evidence of various witnesses including Ms Sherrington, Ms Thomas, Ms Garcia, Ms Philps and Ms Williams. The evidence was to the effect that risk assessment by DOCS workers was a continuing, everyday occurrence, which encompassed an appraisal of clients based on common sense, training and experience. It was said that formal, structured risk assessments were not always practicable given the heavy workload and the urgency of many situations that arose and which caseworkers were required to deal with quickly. However, that this did not mean no risk assessments were undertaken.

326 In relation to Ms Cooper, in particular, it was submitted for the defendant that the caseworkers consulted with their manager in the context of risk and what measures should be taken to avoid violence. This, it was said, was manifested in the precautions taken when interviewing Ms Cooper such as the placement of the table and the removal of objects from the room that could be used as missiles. However, I note Ms Christopher's concession in her evidence that she was unaware that any risk assessment had been carried out in respect of Ms Cooper and, similarly, Ms Balchin did not carry out any risk assessment of Ms Cooper.

327 I am able to accept that the caseworkers assessed the risk that Ms Cooper constituted, but the assessment was conducted almost subliminally and by no means adequately. It was unfortunate that the task of risk assessment was left largely to the two caseworkers involved and that the local management did not play a more interventionist role in what was a complex case; indeed, I have formed the view that it was left largely to Ms Philps who, with due respect for her ability as a caseworker, was limited in her experience in dealing with clients such as Ms Cooper. I note that none of the managers discussed with Ms Philps whether she had the level of skills and sufficient experience to work with a client like Cheryl Cooper, despite this being contemplated in paper systems of the defendant. Ms Williams was considerably more experienced and, without directing any criticism against her, took the view that she was the secondary caseworker and left a good deal of the responsibility for managing the case with Ms Philps.

328 In my view, an adequate risk assessment would have involved collecting all of the available information at the defendant's disposal about Ms Cooper and assessing it in the context of whether Ms Cooper constituted a risk to DOCS employees. This was not achieved prior to the date of the incident. Ms Cooper's aberrant behaviour should have triggered the necessary inquiries and should have

instilled a sense of urgency.

329 That information, taken together with the experience the caseworkers had gained in their direct dealings with Ms Cooper, should have, at the very least, signalled that there was a potential for Ms Cooper to act violently in her dealings with DOCS; it would have confirmed the informal assessment of Ms Philips and Ms Williams that Ms Cooper was a high risk client.

330 Based on this knowledge, an adequate risk assessment would have involved consultation with managers and other experienced staff and staff from other agencies as to how best to deal with the risk that Ms Cooper posed and an adequate protection plan developed. This was not done.

331 An adequate risk assessment would have considered the mental health assessment of Ms Cooper and it would have become evident that Ms Cooper was to be regarded as a medium level risk to others and that a further assessment was required within 24 hours of the first. It would also have provided the opportunity for an evaluation of the weight to be accorded to the mental health assessment in light of the contrary opinions held by the caseworkers and police. It may have been determined appropriate to have a further dialogue with Mental Health in order to allow input from the caseworkers about their experience with Ms Cooper, which may have led to a quite different assessment.

332 Ms Sherrington gave evidence that she would not have been satisfied with the mental health assessment and further:

Q. Would you have been satisfied she didn't have any mental health issues?

A. No.

Q. Why not?

A. Because there is evidence to the contrary. There is clear evidence from reading that e-mail that Cheryl Cooper was struggling with something.

Q. By reference to the e-mail, can you indicate what you refer to as the indicators?

A. The indicators I am referring to, speaking incoherently in a loud voice. Please be advised this person is aggressive and threatening; I would want to know more about that and sitting in her car outside DOCS with the engine running - and speaking - that sentence would worry me and the fact that she had threatened to kill a case worker would worry me, I would wonder what was going on with her.

Q. What would you do?

A. I would want another assessment from Mental Health.

Q. How would you go about that?

A. I would be talking to Acute Care Mental Health.

333 An adequate risk assessment would have involved determining appropriate control measures in order to eliminate the risk or reduce the risk to the extent reasonably practicable. Given the history of Ms Cooper before the 24 May 2004

interview and the fact she was to be told in that interview that access to her children was not to occur that day, the control measures put in place were inappropriate in dealing with Ms Cooper as a client.

334 Those control measures were of a low level nature and involved Ms Philps setting the room up by taking out any objects that might be able to be used as a weapon, placing the table at one end of the room and arranging the caseworkers' chairs so that they could exit the room into the main office should they need to. Ms Williams also had a personal duress alarm. Some of the immediate administrative staff were told about the interview taking place and the door was left ajar so reception clerical staff could see what was happening in the interview room. There were no control measures aimed at ensuring Ms Cooper did not bring a weapon into the interview room and, what is more, Ms Cooper was permitted to sit on the table, negating any protection the table might have provided as an obstacle and placing Ms Cooper much closer to the caseworkers than if she had been required to sit on a chair on the other side of the table.

335 The inadequacy of the implemented control measures is highlighted by the fact that they were less than what Ms Christopher put in place on 20 May 2004. On that day, Ms Christopher organised three male staff members to come and stand with her outside the interview room. This measure was not implemented on 24 May 2004, despite the potential for violence exhibited by Ms Cooper after the 20 May interview, in the car ramming incident.

336 I agree with the prosecutor's submission that an adequate risk assessment would have identified as an appropriate control measure on the charge date not to undertake the interview in the defendant's premises or, if it was decided the interview should proceed, having a security guard or police present either in the interview room or outside the interview room. Further, an adequate risk assessment would have identified during the interview that once Ms Cooper persisted in sitting on the table that the interview should have ceased unless she was seated at a safe distance from the interviewing employees.

337 I am satisfied to the criminal standard of proof that if an adequate risk assessment had been conducted by the defendant it would have identified the risk and would have enabled the defendant to apply appropriate control measures to avoid the risk. Particular (c)(ii) of the charge is made out.

Failing to undertake a Protection Planning Meeting in respect of the client

338 It seems to me in relation to this particularised failure that it duplicates the failure in particular (c)(ii). The purpose of a protection planning meeting would be to assess the risk and then to put in place measures to protect against the risk. Particular (c)(iii) is struck out.

Failing to ensure that there were a security guard(s) or police officers(s) present or then attended at the place of work whenever the client attended the place of work

339 There was no dispute that on 24 May 2004, no security guard was present to monitor Cheryl Cooper. Further, there was no dispute that on that date no police officer was present before the interview commenced at Ballina CSC and, furthermore, that the police only attended after the attack.

340 Prior to the 24 May 2004 incident, the evidence was that Ballina CSC staff

occasionally engaged private security guards in order to protect them while interviewing potentially violent clients. Witnesses employed by the defendant at Ballina CSC on 24 May 2004 who had personal experience and knowledge of the defendant implementing this step or measure were Mr Wilton, Ms Britton, Mr Barrett, Ms Williams and Ms Sherrington. In contrast, Ms Christopher, Ms Balchin and Ms Philips did not have personal experience of using security guards.

341 Mr Wilton said in his evidence:

From first hand experience ... We have had a number of occasions over a period of years when the centre has been on a higher alert than usual because of the opportunity that a client might act out violently towards either a child or a staff member or somebody from another agency who might be involved in the case and present in the CSC.

342 Mr Wilton also gave evidence that a security guard could have acted as a deterrent as the client would have had to consider if she is going to continue to attack. Ms Britton said that the defendant could have arranged for a security guard to be there when someone was going to tell Ms Cooper that she was not going to have access to her children. Mr Barrett said the security guard could be in the interview room or directly outside making sure that nobody was harmed or injured. In his experience one security guard seemed to be effective as he did not recall a violent incident on site whilst a guard was present.

343 Prior to the 24 May 2004 incident, Ballina CSC staff organised police officers to be present in order to protect them while interviewing potentially violent clients. Witnesses who had personal experience or knowledge of the defendant implementing this step or measure were Ms Britton, Mr Barrett, Mr Palmer, Ms Williams and Ms Sherrington. Ms Philips, Ms Christopher and Ms Balchin did not have personal experience of police being present.

344 Mr Barrett said just by having a police person present usually will keep the behaviour of most clients under control. If somebody does become violent, police can step in and assist physically. Typically, the police would stand up in the corner of the interview room whilst the interview was conducted and two officers would be present. In his experience, it was very effective to limit the potential for violence and there were no violent situations on the occasions that police were on site.

345 I note that in the Injury/Illness Incident/Accident Report Form dated 24 May 2004 from Ms Balchin to Mr Myers it was stated under the heading "Preventative Action": "Higher security attendance at the office if client to attend office ..." I also note that in the "Preventing and Managing Client Initiated Violence Policy and Procedures, July 2007", there was the option to "... call Police if circumstances warrant ..." Further, in that Policy and Procedures in its "Client Context Risk Management (CCRM) Tool" it lists as one control action "Request Police presence."

346 As the prosecutor submitted, even assuming a worst case scenario that the caseworkers did not stop the interview after Ms Cooper sat on the table, any security guard or police officer could have intervened later when Ms Cooper first slid across the table and struck Ms Philips in the face. At the very least, the actual incident of Ms Cooper dragging Ms Philips to the side of the room and stabbing Ms Philips another three times in the back would have been then prevented or certainly reduced. The same applies to Ms Cooper then following Ms Philips into the main office after Ms Philips broke free. There would have been no need for Ms Williams to run to the interview room door and yell for someone to ring the police whilst Ms Cooper and Ms Philips were fighting along the wall. The intervention of Ms Balchin,

Mr Wilton and Ms Sherrington all needing to become involved to variously assist Ms Philips, to disarm Ms Cooper and to restrain Ms Cooper would also have been obviated or reduced if there was any security guard or police officer present. 347 In *The Crown in Right of the State of New South Wales (Department of Education and Training) v O'Sullivan* the Full Bench considered circumstances involving an attack by a severely intellectually disabled student on a teacher left alone in a class room. It had been alleged the appellant had failed to provide adequate human resources. At [63] the Full Bench stated:

[63] Given the above circumstances, described by *Walton J* at [148] of his first judgment, it is, in our opinion, a matter of plain common sense that if Mr McKenzie [another teacher] had been present in the classroom at the time Mrs Griffiths was exposed to the risk of assault his presence would have had the effect of reducing the risk. His presence would have surely meant that the risk did not escalate or become a more serious potential danger. Whilst we accept that the presence of Mr McKenzie would not have eliminated entirely the risk of assault by violent and unpredictable students, we consider that on 9 February 1999 that risk escalated to a more serious level because of the absence of an additional staff member. It may, therefore, be safely concluded beyond reasonable doubt that the failure of the appellant to provide additional human resources in the face of the potential danger to which Mrs Griffiths was exposed on 9 February 1999, after Mr McKenzie left the classroom, materially contributed to a risk to Mrs Griffiths' health and safety.

348 In the same way, the absence of police or security guards on 24 May 2004 at Ballina CSC materially contributed to the risk to employees' safety. Particular (c)(iv) has been made out.

Failing to provide an alert in respect of the client or to warn employees that the client was to attend the place of work, or both

349 Apart from Ms Christopher and some administrative staff, the defendant's employees working at Ballina CSC were not alerted, informed or warned that Ms Cooper would be attending the Ballina CSC on 24 May 2004. Nothing was provided to such employees electronically, in writing or orally.

350 In contrast, on 19 May 2004 emails were sent from Ms Christopher to staff and to Ms Balchin and described as of "high" importance. Ms Christopher said this description meant that the recipients would see it come through as a high alert and open the email and read it. The emails referred to the incident at the Ballina Hospital when Ms Cooper made threats. Ms Christopher advised in the email that Ms Cooper was "very aggressive and threatening."

351 It was Mr Wilton's evidence, which I accept, that:

- there was no email or other warning informing staff that Cheryl Cooper was going to be interviewed by staff on 24 May 2004,
- he did not know Cheryl Cooper was in the building, he was in his office and what he heard sounded like horseplay,
- "... to this day, I can't for the life of me figure out why no one else was told that the client was in the building. We had not received any emails, there had not been any

security protocol. No one had said to us, we have got somebody who's demonstrated a predisposition to violence recently towards people, and we have decided to interview her in the Centre and these are the security arrangements we've made, no warning, no advice that she was ..."

And:

Q. In your interview with Mr Saunders, you variously said that you confirmed you did not know that Cheryl Cooper was in the building and you were not told that Cheryl Cooper was in the building. Now, without the benefit of hindsight, by that I mean knowing there was a stabbing incident, if you had been informed she was to come into the building on 24 May 2004, what would you have done?

A. I would have convened a meeting of the managers and argued for protection and some type of secure arrangement. I would not have let her back in the centre after what happened with the car incident.

352 In documentary material prepared after the incident on 24 May 2004, various references were made to the need for procedures to alert staff to the presence of potentially aggressive clients. For example, in an email dated 12 October 2005 attaching Draft – Security Rules – Ballina CSC, it was stated that one of the rules/conditions to be complied with was that: "Caseworkers must inform all staff through email of an appointment with an aggressive or known violent client. The email must outline the time of the interview, any special arrangements and the supervising manager."

353 The defendant's obligation under s 8(1) of the 2000 OHS Act may have been met by eliminating or preventing or minimising exposure to any risk by taking the step of alerting employees beforehand that Ms Cooper was to, or might, attend the Ballina CSC or, if she had already arrived unannounced, alerting employees to her presence. Particular (c)(v) has been made out.

Failing to have in place adequate interview facilities at the place of work

354 It was correctly contended by the prosecutor that on the charge date, the actual interview room was insensitive to administrative staff exposed potentially to violence, physical or verbal, because of its proximity to those administrative staff. It was noted that, for example, Ms Meehan-Frost was seated working at the switch about two metres from the door and could see into the interview room. Ms Philips and Ms Williams left the internal door open about 40 to 50 cm. Further, that none of these staff had been trained on how to deal with a potentially violent client who acted out violently.

355 It is correct to observe that on the charge date, the table in the interview room was not large enough to provide a complete barrier between the client and the two employees conducting the interviews. Ms Williams did place other chairs around the table to stop Ms Cooper coming around the table. Nevertheless, there was a gap at one end of the table because the table was not long enough. Thus, the table did not maintain an appropriate distance between, or restrict access to, the client and employees. After the incident the interview rooms were furnished to allow for one higher security interview space - a large rectangular table, set across the room, restricting access to the staff side of the interview space. Larger chairs

were purchased so that they could not be lifted so easy.

356 On the charge date, the internal door to the interview room did not have any actual window. There was a refrigerator blocking the blinds and window, and no worker was positioned outside monitoring the interview. There did not exist what was referred to as an operating observation room because that room was used as a storage room. There was no CCTV coverage of the interview room.

357 After 24 May 2004, the defendant ceased using the interview room in which the attack took place. After the incident, in interview rooms used at the Ballina CSC, there was introduced an actual window in the interview room door to permit vision and observation.

358 It is beyond reasonable doubt that if the post-charge measures taken to upgrade the security of the interview rooms had been implemented prior to 24 May 2004, it would have eliminated or prevented or minimised exposure to the risk of an assault by Ms Cooper. Particular (c)(vi) has been made out.

Failing to have in place an adequate emergency system

359 It was submitted for the prosecutor that on the charge date there was no adequate emergency system in place, in that there was:

- a. No departmental policy about when to activate a duress alarm.
- b. No procedure for what happens once a duress alarm was activated and how to respond.
- c. No emergency procedures in place in relation to violence by clients.
- d. No practice drills for responding to a duress alarm once it had been activated or responding to when a client became violent within the CSC.
- e. No mandatory requirement that Caseworkers take a personal duress alarm into an interview room when interviewing clients.

The evidence bears out this submission.

360 Regardless of whether or not the incident had occurred on 24 May 2004, the absence of an adequate emergency system being in place, in circumstances where there is the ever-present prospect of employees having to deal with potentially violent clients, makes out the charge. The defendant failed to ensure safety because there was no adequate system in place to deal with the real risk of an emergency caused by a violent client.

361 In this particular case, the defendant's failure to have an adequate emergency system in place meant that employees were exposed to the risk of injury or illness from the conduct of Cheryl Cooper. No employee received advice or instructions as to what role they had to play in the event of the risk of assault occurring in the CSC or how they might avoid being placed at risk, because there was no emergency procedure in place directing employees in such circumstances.

362 I note that documents issued by the defendant after the incident on 24 May 2004 addressed the need for an emergency plan and evacuation procedures to be developed and implemented and that there was introduced at Ballina a Duress Alarm Response Procedure.

363 Particular (c)(vii) has been made out.

OFFENCE MADE OUT

364 I find that the offence has been made out, notwithstanding that particular (c)(iii) has been struck out. It is unnecessary for the prosecutor to prove each and every particular: *Environment Protection Authority v Sydney Water Corporation Limited* (1997) 98 A Crim R 481 at 485. It follows that the defendant is guilty of an offence under s 8(1) of the 2000 OHS Act unless it is able to make out a defence under s 28 of that Act.

STATUTORY DEFENCES

365 The defendant raised the two defences under ss 28(a) and 28(b) of the 2000 OHS Act. The onus of proof lies with the defendant on the balance of probabilities: *The Crown in Right of the State of New South Wales (Department of Education and Training) v O'Sullivan* at [64].

366 As I earlier noted, the defendant contended that the risk must be something over and above the normal day-to-day risk faced by DOCS workers. Hence, the defendant's classification of the risk as one of violent attack with intent to wound/cause grievous bodily harm.

367 The proper identification of the risk is important, especially in the context of the statutory defences: *St Hilliers* at [32]. I indicated earlier that I did not accept the defendant's description of the risk and that, in my opinion, the relevant risk was a risk of exposure to a violent physical attack by a client or other person visiting the CSC.

Section 28(a) defence

368 In *St Hilliers* at [27] the Full Bench observed that the key principles to be followed in applying the provisions of s 28(a) were those set out by *Walton J*, Vice President in *WorkCover Authority of New South Wales (Inspector Byer) v Cleary Bros (Bombo)* at [87] - [88] in relation to the predecessor provision in the 1983 OHS Act, namely s 53(a):

[87] It is evident from these authorities that what is required by s53(a) of the Act is a balancing of the nature, likelihood and gravity of the risk to safety occasioning the offence with the costs, difficulty and trouble necessary to avert the risk. At one end of the scale, it could not be reasonably practicable to take precautions against a danger which could not have been known to be in existence: see *Jayne v National Coal Board* [1963] 3 All ER 220 at 224 and *Shannon v Comalco Aluminium Ltd* at 362. Similarly, if the happening of an event is not reasonably foreseeable then it will not generally be reasonably practicable to make provision against that event: see *WorkCover Authority of NSW (Inspector Mayo-Ramsay) v Maitland City Council* (1998) 83 IR 362 at 381; *WorkCover Authority of NSW v Kellogg (Aust) Pty Ltd* at 259 and *Austin Rover Ltd v Inspector of Factories* at 627 per Lord Goff and at 635 - 636 per Lord Jauncey of Tullichettle.

[88] At the other end of the scale, there will be cases, such as the present, in which known or obvious risks to safety exist. In these circumstances, the defendant will not have established a

defence under s53(a) of the Act where it was reasonably practicable to have complied with the Act by ensuring that persons were not exposed to those risks. This may be the case because no measures were reasonably available or because measures which were available were not reasonably practicable. As has been discussed, the assessment of the reasonable practicability of those steps requires a balancing of the quantum of the risk with the sacrifice (in money, time and trouble) in adopting the measures necessary to avert the risk. In my view, where there is a known risk which entails the potential for serious injury to persons in the workplace, the defendant will generally have to demonstrate that the costs, difficulty or trouble occasioned by the measures significantly outweigh the risk. This must be done by reference to the charge as brought by the prosecutor.

369 In determining whether a defendant should have reasonably foreseen a risk of injury, it is not necessary to show that a reasonable person placed in the defendant's position would have foreseen as a possibility the particular chain of cause and effect involved in the happening of the defendant's accident or, in other words, the precise risk of injury or how it occurred. It is sufficient that the risk is one of a class of risk that in a general way the defendant should have foreseen or it was reasonable to foresee in a general way the kind of thing that occurred.

370 In *Shannon v Comalco Aluminium Ltd* at 364 the Full Bench stated in relation to the application of s 53(a):

The standard of foreseeability is objective, but it is not necessary to show that a reasonable man placed in the defendant's position would have foreseen as a possibility the particular chain of cause and effect involved in the happening of the defendant's accident. (See *Caledonian Collieries Limited v Speirs* (1959) 97 C.L.R. 202; *Malleys Limited v Rogers* (1955) 55 S.R. (NSW) 390.)

The onus here lies upon the defendant company. The evidence relied upon cites without specificity that the company's servants believed that the system had been used elsewhere without explosion of gases intervening. All these instances except one do not relate to aluminium processing. In such cases where no aggregation of aluminium fines was involved in relation to an explosion which requires the presence of aluminium fines as a sine qua non the evidence is irrelevant and inadmissible. There is mention of another aluminium company, but no evidence relating to the use of filters, no evidence as to cyclical or recurrent use, no evidence as to whether the use of industrial processes giving rise to sparks or other forms of ignition in the presence of inflammable gas was permitted or took place, no evidence as to whether there was an aluminium fines burden or not, to mention only some of the obvious omissions. No attempt seems to have been made properly to lay the groundwork for an inference that if it was safe for one manufacturer, the

circumstances being the same, it would be safe for others. There is also the corroborated evidence, nowhere denied, of a strong smell consistent with the presence of venting gases and the potentiality for chemical reaction seems to be conceded. The absence of accidents over a long period of time does not conclude the issue of foreseeability in favour of the defendant company. Here, the use of processes giving off sparks or creating other sources of ignition was occasional only. The process of heating and separation of the coolant was cyclical. It was only when, in a process which made specifically designed provision for the venting of gases, the vented gases, which were detectable by odour, coincided with the use of grinders, oxyacetylene or electric welders to provide a source of ignition, that danger arose. The everyday use of the process is not in question.

We do not accept that on the evidence any defence has been made out. Even if there were some pertinent evidence, it has to be evaluated in the light of the purposes of the statute reflecting the increasing concern with safety in the working community (See *Bankstown Foundry Pty. Ltd. v Braistina* (1986) 60 ALJR 362; 65 ALR 14.

371 More recently, the Full Bench in *Mainbrace Constructions Pty Ltd v WorkCover Authority of New South Wales (Inspector Charles)* (2000) 102 IR 84 said at [76]:

[76] ...It appears that the appellant was not even aware of the risk. But it is not a matter whether the appellant was or was not aware. It is a matter of whether the appellant should have been aware: *WorkCover Authority of New South Wales (Inspector Glass) v Kellogg (Aust) Pty Limited* (unreported, Walton J, Vice President, IRC 97/4732, 4733, 19 October 1999). If the appellant had been aware, as it should have been, instructions not to use the trafficable ceiling until its safety was assured would have prevented the risk to safety arising.

372 The defendant has not discharged the onus of proving on the balance of probabilities that what occurred at Ballina CSC on 24 May 2004 was not reasonably foreseeable. The defendant's paper systems in connection with occupational health and safety policies and procedures that applied on or before the charge date are sufficient, in themselves, to show that the risk was reasonably foreseeable, indeed, foreseen by the defendant. But putting aside the paper systems, on or before the charge date it was reasonable to foresee the general kind of thing that occurred with Ms Cooper, namely, that Cheryl Cooper might in some way be violent towards the defendant's employees. In that respect, I refer to just four indicators:

(i) on 19 May 2004 at 8.46 am (and, therefore, before the car ramming incident), Ms Christopher sent an email with its "Importance" said to be "High" and that represented, *inter alia*,

“The hospital staff advised the caseworker that the natural mother did not have any mental health concerns. Please be advised that this person is very aggressive and threatening”;

(ii) on 20 May 2004 at about 3.30 pm (and, therefore, shortly before the car ramming incident), whilst Cheryl Cooper was in the interview room with Ms Philps and Ms Williams, Ms Christopher organised three male staff members to come and stand with her outside the interview room. Ms Christopher explained: “I arranged this because I was concerned about Cheryl’s mental health issues and as a result was concerned about safety for my staff”;

(iii) on 20 May 2004 (shortly after the car ramming incident), Ms Christopher for the third time in that week telephoned the NSW Police for reasons that included safety issues. The defendant cross-examined Ms Christopher:

Q. In this case it was partly because of your assessment with safety issues that you called at the police three times that week?

A. Yes;

(iv) on 24 May 2004, in the morning, the grounds for the orders sought as set out in the Application to the Children’s Court include: “Cheryl Cooper has continually shown disturbing behaviours such as aggression, non-compliance, non-engagement to the employees at the Ballina CSC.”

373 In addition to failing to show the risk was not reasonably foreseeable, the defendant failed to show, on the balance of probabilities, that it was not reasonably practicable to make provision against the happening of the event - in this case, the attack by Ms Cooper in the interview room at the Ballina CSC. Where the happening of an event is obvious or reasonably foreseeable, in considering a defence under s 28(a) it is necessary to consider the costs, difficulty and trouble necessary to avert the risk: *St Hilliers* at [37].

374 In *WorkCover Authority of New South Wales (Inspector Bultitude) v Grice Constructions Pty Limited* (2002) 115 IR 59 at [69] the Full Bench referred with approval to what was said by Walton J, Vice President in *WorkCover Authority of New South Wales (Inspector Glass) v Kellogg (Aust) Pty Ltd (No 1)* (1999) 101 IR 239 at 260 that the greater the magnitude of the risk and the greater the gravity of the harm, should the event occur, the higher is the duty to take precautions, even if these are expensive or difficult.

375 In the present case, there was a known risk that entailed the potential for serious injury to employees. On the other hand, the taking of precautions against the risk was neither expensive nor difficult.

376 In relation to particular (c)(i), failing to prevent Cheryl Cooper from attending the place of work for an interview, the precautions that could have been taken included: causing at Ballina CSC the attendance of a security guard or guards or a police officer or officers in order to prevent Ms Cooper entering the Tamar Street entrance through the automatic sliding doors or preventing Ms Cooper if she got into that foyer area from going from that part of the premises into the secured office area (including the interview room); interviewing Cheryl Cooper at Ballina Police Station in the presence of police after speaking at the Ballina CSC to Cheryl

Cooper from behind the protection of the perspex protected reception area; not opening the external door that allowed Ms Cooper to come into the interview room; and having a written policy or procedure in place on the day of the charge to prevent Ms Cooper from going either into the premises through the Tamar Street entrance or, if she was in that foyer area, from going any further into the office area where the interview rooms were located.

377 In relation to particular (c)(ii) precautions that could have been taken included: undertaking a formal risk assessment of occupational violence in respect of a client like Cheryl Cooper; implementing the defendant's paper systems in place before and at the time of the charge; consulting with a cross-section of employees at the Ballina CSC and in particular those with experience in the job; and considering before and on the charge date, information and documents dealing with potential client violence based on known client history, which were available to the defendant.

378 In relation to particular (c)(iv) the precaution that could have been taken was to ensure that there were security guards or police officers attending at the place of work whenever the client attended the place of work. In relation to particular (c)(v), providing an alert in respect of the client or warning employees that the client was to attend the place of work, or both. In relation to particular (c)(vi), precautions that could have been taken included: providing a table in the interview room that was large enough to provide a complete barrier or restricted access between the client and the two employees; installing a window in the internal door to the interview room to permit vision and observation; maintaining an operating and functional observation room with a window that permitted monitoring of the interview; and providing CCTV coverage of the interview room.

379 In relation to particular (c)(vii), precautions that could have been taken included: providing and implementing a departmental policy about when to activate a duress alarm; providing and implementing a procedure for what happens once a duress alarm was activated and how to respond; providing and implementing emergency procedures in relation to violence by clients; providing and implementing practice drills for responding to a duress alarm or responding when a client became violent within the CSC; and implementing the defendant's paper systems in place before and at the time of the charge.

380 The defendant failed to adduce evidence about the costs and benefits of the various alternative measures set out above or to address them. In any event, on any analysis it could not be said the costs, difficulty or trouble occasioned by the measures significantly outweighed the risk. The defence under s 28(a) has not been made out.

Section 28(b) defence

381 In relation to s 28(b), *Grove J in McMartin v The Broken Hill Proprietary Company Limited* (1988) 100 IR 241 at 245 encountered some difficulty in the terminology of s 53(b), the predecessor provision to s 28(b). His Honour stated:

In order to ascertain its application one is invited to consider first that the commission of the offence was due to causes over which the employer had no control yet if those are the circumstances (conjoined with the second requirement of the subsection) then no offence is committed hence in this context

the expression "commission of the offence" must have a particular meaning. An offence can be seen to be committed after proof of guilt, not before. I construe the phrase as connoting those facts which would create an offence unless the circumstances fall within the scope of a defence.

382 In the present proceedings, I take the same approach as *Grove J*, as did the Full Bench in *St Hilliers*. The offence having been found to have been committed in the present proceedings it remains to be considered whether the circumstances of the offence fall with the two limbs of the defence under s 28(b), namely whether the commission of the offence: *St Hilliers* at [52]:

(a) was due to causes over which the person [against whom proceedings have been brought] had no control; and

(b) against the happening of which it was impracticable to make provision.

383 In *St Hilliers* at [73] it was held that assessing the causes of the commission of the offence involved consideration of the causation between the failures pleaded and the risks pleaded. The defendant, however, sought to argue that the commission of the offence was due to causes not pleaded. This left the defendant failing to prove that it did not have control over the causes as they were pleaded. If the defendant is unable to prove that the causes it relies upon fall within the two limbs of the defence under s 28(b) then the defence will not be made out.

384 The three causes relied upon by the defendant were:

(i) Ms Philips in particular, but also Ms Williams and Ms Christopher, relied on a wrong assessment (in hindsight) by Mental Health of the risk posed by Ms Cooper;

(ii) the DOCS employees also relied on a wrong assessment by the police of the risk posed by Ms Cooper; and

(iii) there was ineffective supervision by Mr Wilton and Ms Sherrington and ineffective communications between the two teams in the Ballina CSC caused by personality conflict.

385 As to the first alleged cause, Ms Williams had not even read the mental health assessment provided to Ms Philips on 24 May 2004, but in her discussions with Ms Philips could not understand how the assessment could be so low. Ms Christopher only recalled seeing one page of the assessment (the eighth page containing the assessment of the current risk) and seems to have essentially relied on Ms Philips' judgment regarding any evaluation of the assessment.

386 As for Ms Philips:

- on 21 May 2004, at about 10.45 am, Ms Philips stated to the police that at the moment the whole [Ballina] CSC was thinking that Cheryl Cooper had mental health issues and it seemed impossible that the entire office could be wrong;
- Ms Philips always thought that Cheryl Cooper had mental health issues of some sort;
- on 24 May 2004, Ms Philips had a telephone conversation with Sergeant Martin of the NSW Police. Part of this exchange was summarised by Ms Philips: "CW [Ms Philips] stated that the Mental Health team believed that the n/m [natural mother] had no mental health issues. Steve stated that he wasn't an expert but believed that they

were wrong and he had genuine concerns for the n/m's safety”;

- there were limitations to the experience of Ms Philps. Ms Philps was under probation. Ms Philps did not think before 24 May 2004 that at Ballina CSC she had dealt with any psychiatrist for the purpose of work. Ms Philps had not seen the type of mental health assessment before. Ms Philps did not have any other client who rammed a car. At the time, Ms Philps did not have any other clients threatening to kill a DOCS worker;

- thus, in respect of Ms Philps, even though she was a caseworker of limited experience, Ms Philps had been dealing directly with Ms Cooper and clearly had a different view, confirmed by Sergeant Martin, about the risk constituted by Ms Cooper. In those circumstances, I do not believe that Ms Philps accepted the mental health assessment on its face and proceeded on the basis that Ms Cooper was a low risk or, if she did, then it was unreasonable for her to do so. If Ms Philps had doubts about the extent to which Ms Cooper was a risk, and she surely did, it was open to her to request a further mental health assessment into which DOCS could have an input prior to undertaking any further interviews with Ms Cooper.

387 Ms Sherrington was a child protection specialist and, unlike other employees at Ballina CSC, had experience in looking at mental health assessments. She was not asked to do so in respect of Ms Cooper's assessment. It was clearly within the defendant's control to have Ms Sherrington look at the assessment and it was not impracticable for her to do so.

388 The “Request for Mental State Examination” was completed on 23 May 2004 at 11.00 and it represented in writing that the client was to be re-assessed within 24 hours. This re-assessment did not occur or the defendant did not ascertain whether the 24 hours had expired by the time of the 24 May 2004 interview with Ms Cooper. It was clearly within the defendant's control to have Ms Cooper re-assessed after the expiry of the 24-hour period and was not impracticable for it to do so.

389 It appeared from the evidence that mental health workers accepted Ms Cooper's version of events and narratives without adequate reference to experienced staff in other agencies, including DOCS. It should have been apparent to the managers and caseworkers involved with Ms Cooper that this was the case and given their scepticism about the assessment of Ms Cooper being a low risk it was within their control to seek to have input into the assessment and there was no evidence this was impracticable.

390 The defendant's proposition amounts to this: the defendant had received a mental health assessment that was wrong in hindsight but it was left with no alternative but to accept that assessment. That is plainly wrong. The assessment was not adequately assimilated by the managers or caseworkers; the main responsibility for interpreting and applying the assessment was left with a caseworker with limited experience; the assessment was met with deep scepticism if not disbelief; there was an opportunity to seek advice about the assessment from an experienced specialist; and it was open to the defendant to seek a further assessment into which it could have input based on very recent experience of Ms Cooper's conduct.

391 The next contention was that there was an “effectively wrong assessment of the risk by the local police”. I agree with the submission of the prosecutor that the Police were never involved in assessing the risk that is the subject of the charge. Such a proposition was never put directly in those terms or even indirectly by the defendant to the police officers called to give evidence. Moreover, the Police were

never provided with all of the information and history about Ms Cooper that was in the possession of the defendant.

392 Finally, on this point, I note Sergeant Martin's evidence as follows:

Q. What did you think when you learnt there had been an interview in a DOCs' interview room at the DOCs' office involving Cheryl Cooper, Kylie Philps and another case worker?

...

Q. What did you think?

A. Once I found out the victim was Kylie, like she was standing at the front counter and bandaged, I spoke to Detectives and expressed: I just couldn't believe somebody of Coopers background in that last 24 hours, or two or three days, was put in a situation where she was able to basically reach over to a DOCs worker.

Q. What do you mean by that last reference "able to reach over to a DOCs worker"?

A. In hindsight I know it was in an interview room - to put themselves close enough for somebody to have something and slash their face or cut their face, I find they shouldn't have put themselves in that position. I don't tell them how to do their job, et cetera, I would have been a bit wary.

393 The third alleged cause was "... ineffective supervision by the managers Wilton and Sherrington, and ineffective communications between the two teams in the office, one of the causes of that was clearly the personality conflicts in the office."

394 In relation to Mr Wilton, neither Ms Philps nor Ms Williams were in his team and the evidence was that they did not seek to consult with him about Ms Cooper before or on the charge date. There was no dispute that on the charge date Mr Wilton was not alerted, informed or warned that Ms Cooper would be attending the Ballina CSC. Nothing was provided to Mr Wilton electronically, in writing or orally. Mr Wilton did not know Ms Cooper was in the building on 24 May 2004.

395 Ms Sherrington was not a manager at the time of the charge. She was in the role of child protection specialist that meant, if invited by Ms Philps and Ms Williams, Ms Sherrington might be involved as a consultant. Ms Sherrington was at work on the charge date and, therefore, available to be consulted. The evidence was that Ms Philps and Ms Williams did not seek to consult with her about Ms Cooper.

396 There was no dispute that on the charge date Ms Sherrington was not alerted, informed or warned that Ms Cooper would be attending the Ballina CSC. Nothing was provided to this employee electronically, in writing or orally. Ms Sherrington, by chance, happened to be standing near the printer in the main office area. She heard voices coming from the interview room and yelling. Another staff member was running and said they needed to call the police. These comprise the circumstances of how Ms Sherrington learnt on the charge date about the presence of Cheryl Cooper.

397 The evidence indicates that after Ms Garcia and Ms Britton (members of Mr Wilton's out of home care team) initially interviewed Ms Cooper in Hospital on 16

May 2004 the information from the interview was made available to the child protection team, although Ms Philips did not access the KIDS system where the information had been deposited prior to the attack on 24 May 2004. There was no breakdown in communication because of any personality conflict.

398 The defendant submitted that "office politics" or communication difficulties in relation to Mr Wilton and Ms Balchin were of relevance. I fail to see how that was the case. No lack of communications or personality conflict between Mr Wilton and Ms Balchin contributed in any material way to the risk in this case. I note that by Thursday 20 May 2004 at the latest, Mr Balchin was aware of DOCS' involvement with Ms Cooper because she participated in a decision to cancel the mental health assessment the following day because of the car ramming incident. From that point onwards it was open to Ms Balchin to take what steps she considered necessary, as manager, to ensure safety, without any further input from Mr Wilton. In any event, the defendant did not prove on the balance of probabilities that any personality conflict potentially affecting inter-office communications was a matter over which it had no control.

399 The defence under s 28(b) was not made out.

GUILTY FINDING

400 I find that the defendant, the State of New South Wales (Department of Community Services), is guilty of contravening s 8(1) of the *Occupational Health and Safety Act 2000*. The defendant will appear for sentencing at a convenient date. The parties will be advised.

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

