IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. A.W. Leil Cranes & Equipment (1986) Limited*, 2003NSPC60

Date: 20030328
Docket: 1002471, 1002472, 1002473, 1002474
Registry: Halifax

Between:

Her Majesty the Queen

v.

A.W. LEIL CRANES & EQUIPMENT (1986) LIMITED

Revised Judgment:	The text of the original decision is replaced by this corrected decision released March 12, 2004
Judge:	The Honourable Judge Alan T. Tufts
Heard:	October 21, 22, 23, 24 & December 12, 2002, in Halifax, Nova Scotia
Written Decision:	March 28, 2003
Counsel:	R. Woodburn, Counsel for the Crown Duncan Beveridge, Q.C., Counsel for the Defendant

By the Court:

INTRODUCTION

[1] On September 16th, 1999 a 50 ton crane owned and operated by A.W. Leil Cranes & Equipment (1986) Limited ("A.W. Leil") tipped over sending three men, who were in the work platform at the end of the 117 foot boom, to the ground and causing them to sustain serious injury. The men in the basket had been doing work on a four-storey apartment building located in Bedford, Nova Scotia. After an investigation by the Department of Labour the defendant A.W. Leil was charged with four offences under the **Occupational Health and Safety Act** for:

(1) failing to provide information necessary for the crane operator to determine the safe operating load capacity of the crane;

(2) using a crane supported work platform the design of which was not certified by a professional engineer;

(3) failing to supervise the crane operator who was alleged to have not been capable of safely operating the crane without supervision;

(4) failing to ensure that the lift device, i.e. the crane was not loaded beyond its safe capacity.

RES JUDICATA ISSUE

BACKGROUND

[2] Two Informations were laid regarding this matter. Both Informations were sworn August 24, 2000 and allege identical offences; that is, the four charges under the **Occupation Health and Safety Act.** One information charges "A.W. Leil Cranes & Equipment (1986) Limited" and the second information charges "A.W. Leil Cranes & Equipment (1986) Limited, operating in the name and style of Sagadore Cranes & Equipment Limited."

[3] On September 27, 2000, the defendant appeared by Counsel relative to both Informations. Pleas on both Informations were adjourned until October 18,

2000 when "not guilty" pleas were entered on all counts on both Informations. The matter was then set over to October 24, 2000, when trial dates were set for July 16 – 19, 2001. This date was subsequently adjourned at the request of the

Defence and a new trial date of March 4 – 7th, 2002 was set for both Informations. This trial date was also rescheduled to October 21 – 24th, 2002. A Pre-Trial conference had been held – not by the presiding trial judge - but it does not appear the status of the two Informations was discussed.

[4] On October 21st, 2002 the defendant appeared for trial. Both informations were before the Court. The Court inquired of the Crown with respect to its intentions with respect to both Informations. The Crown indicated that it was proceeding on the information charging "A.W. Leil Cranes & Equipment (1986) Limited" and indicated its intention not to proceed on the second information charging "A.W. Leil Cranes & Equipment (1986) Limited operating in the name and style of Sagadore Cranes & Equipment". The Defence indicated at this time that it was unaware that there were two informations. The Court indicated at that time that it would set aside the second information, i.e. the information in which the Crown was not proceeding until the conclusion of the proceeding. The Crown proceeded to call evidence with respect to the information charging A.W. Leil Cranes & Equipment (1986) Limited.

[5] The trial proceeded for the four scheduled days. At the conclusion of the fourth day the Crown had completed its case, tendered its exhibits and rested. It was anticipated that the matter would then go over until December to conclude the proceeding. It was at this time the Court inquired regarding the status of the second information. Again the Crown indicated its intentions not to proceed with respect to this information and the Court announced "that one can be dismissed". The information was endorsed to the effect that the information was dismissed for want of prosecution.

[6] The matter was then rescheduled to December 12, 2002, to determine if the Defence was to call evidence and to continue with the proceeding.

[7] On December 12, 2002 the Defence elected not to call evidence and indicated to the Court that previously entered the plea of not guilty entered with respect to the ongoing proceeding included the plea of **autrefois acquit**

and that because the Court had dismissed the other information charging the same offences against the same Defendant that the present proceeding should be dismissed and raised the issue of **res judicata**. The Court reserved its ruling with respect to that issue. The proceeding continued with submissions from Counsel with respect to the merits of the charges.

REVIEW OF CASE LAW

[8] The Defence relies on the cases of **R. v. Riddle** (1979) 48 C.C.C.(2d) 365 (S.C.C.**), R. v. Peterson,** (1982) 69 C.C.C.(2d), 385 (S.C.C.) and **R. v. Conrad,** [1983] N.S.J., No.320 (N.S.S.C.A.D.). The Crown relied primarily on the case of **R. v. Selhi,** (1985), 18 C.C.C.(3d), 131 (SaskCA) aff 53 C.C.C.(3d) 536 (S.C.C.).

> The law on double jeopardy is reviewed extensively by C. David Freeman in "Double Jeopardy Protection in Canada: A Consideration of Development, Doctrine and Current Controversy (1988) 12 C.L.J.3. At page 10 the author says; The application of the protection against double jeopardy where the initial prosecution resulted in an acquittal is directed towards different concerns. It is generally accepted through the maximum namo debit bis vexari pro una et eadem causa and has been described as a rule based more on policy or convenience.

The author continues at p. 11;

> The double jeopardy protection, as it attaches after acquittal, places great emphasis on the importance of finality in judicial proceedings. One can discern two broadly based goals: the maintenance of the integrity of the criminal process (including interest in the preservation of judicial resources and controlling prosecutorial discretion) and the protection of the position of a vulnerable accused against unfair interference by the state. Thus the underlying rational becomes a redress of the imbalance power as between the state and the individual in the interest of the adjudicative process in the individual accused.

At p. 12 the author reviews the provisions of the **Criminal Code** and the pleas of *autrefois***.** He says as follows:

> There are essentially three issues to be determined by the trial Judge;
>
> (1) Whether the accused has previously been finally acquitted or convicted of the same delict.

(2) Whether the offence to which the accused now stands charged is the same as the past offence (including whether it but adds a statement of intention or circumstances of aggravation, or, is an included offence to the first charge

(3) Whether the accused was actually in jeopardy at the first trial.

[9] These principles and issues have been reviewed by the authorities. A complete review of the case law is necessary and I will briefly review the relevant authorities. While all of the cases reviewed below are not directly relevant, the manner in which the principles of double jeopardy are applied are instructive to the application of those principles in this unique situation.

[10] In **R. v. Riddle**, *supra*, the defendant was charged with assault and plead not guilty. No evidence was called on the day of the trial and the charges were dismissed. A new Information was laid the following week and a plea of *autrefois acquit* was made. The Supreme Court of Canada found the defendant was in jeopardy once a plea of not guilty was entered, i.e., the moment the issue was joined. The Court found that the *autrefois* plea is applicable in summary proceedings and the proper procedure is to enter a not guilty plea which embraces the concept of *res judicata*.

[11] Dickson, J., (as he was then) said that the term "on the merits" does nothing to further the test for the application of *bis vexari maxim*. There is no basis in the **Code** or in common-in law for the super added requirement that there must be a trial "on the merits". The phrase merely serves to emphasize the general requirement that the previous dismissal must have been made by a Court of competent jurisdiction whose proceedings were free from jurisdictional error and which rendered judgment on the charge.

[12] Speaking generally, it is not readily apparent why the Crown should have the right to decline to adduce evidence in support of its charge and then assert the irrelevance of a dismissal consequent thereon or why the Crown should be able to avoid the effect of a refusal of adjournment by declining to lead evidence in laying a fresh information following dismissal of the first charge.

[13] In **Bonli v. Gosselin et. al.** (1981) 25 C.R.(3d) 303 (Sask.C.A.) the defendant was charged with dangerous driving. The trial Court allowed the Crown to withdraw the charge and a new charge was laid with identical wording. An *autrefois acquit* plea was entered but was rejected, *Certiorari* was sought but denied. The Court found that the defendant should have appealed the trial Court's original ruling but also held **R. v. Riddle,** *supra* could be distinguished as there was no dismissal and consequently no verdict with respect to the original charge.

[14] In **R. v. Logan,** (1981) 64 C.C.C.(2d) 238 (N.S.S.C.A.D.) the defendant was charged with driving while disqualified under s. 238(3) of the **Criminal Code.** The charge was found to be *ultra vires* parliament. The defendant had plead not guilty and after trial the charge was dismissed on the *ultra vires* argument. New charges were laid under the **Motor Vehicle Act** and an *autrefois* was plead. The Nova Scotia Court of Appeal held that the defendant was never in jeopardy under the original charge. The Court had no jurisdiction to proceed under the **Criminal Code.** It held that the previous dismissal must be made by a Court of competent jurisdiction which was proceeding free from jurisdictional error. The Court found that the trial Court had no jurisdiction to "dismiss" the charge.

[15] In **R. v. Peterson** *supra*, the defendant was charged with refusing the breathalyzer and impaired driving. Because several adjournments were without the defendant's consent the Provincial Court Judge dismissed both charges finding the Court no longer had jurisdiction. New charges were laid and the plea of *autrefois* was entered. The defendant was later convicted and appealed.

[16] The Supreme Court of Canada held that the trial Judge was wrong to conclude that he did not have jurisdiction over the original charges. However, his dismissal determined the matter. The Court found that the defendant was in jeopardy and because the trial Judge's dismissal was incorrect this did not change the matter. The Court order of dismissal stood until it was overturned on appeal which in that case it was not. The plea of *autrefois acquit* accordingly should have succeeded in the subsequent proceeding on the principles laid out in **R. v. Riddle,** *supra*. The Court

found that once the plea is entered before a Court of competent jurisdiction the defendant is in jeopardy.

[17] In **MacNeill v. The Attorney General of Nova Scotia,** (1982), N.S.R.(2d) 72 (N.S.S.C.A.D.) the defendant was charged with failing the breathalyzer. The charge was dismissed as the Information was a nullity. New charges were laid and a plea of *autrefois* was entered. The Nova Scotia Court of Appeal held that the *autrefois* plea did not succeed. It held that **R. v. Riddle**, *supra*, could be distinguished because no plea had ever been entered with respect to the original charge, accordingly the defendant was not in jeopardy and the issue was not joined.

[18] In **R. v. Conrad,** *supra*, the defendant was charged with having an overweight vehicle. A plea of not guilty was entered on a summary offence ticket and on the trial date the Court allowed the Crown to withdraw the summary offence ticket. When a long form Information was laid an *autrefois* plea was entered. The Nova Scotia Court of Appeal held that the withdrawal of the summary offence ticket amounted to a dismissal and relied on **R. v. Riddle,** *supra*, and **R. v. Peterson,** *supra*, to find that the *autrefois* plea should succeed. It held that *res judicata* was a valid defence to the re-laid charge. The Court distinguished **R. v. Logan,** *supra,* and found that the defendant was in jeopardy and could only be released from jeopardy by a judicial disposition. Leave to appeal to the Supreme Court of Canada was denied.

[19] In **R. v. Gould,** [1985]**,** W.W.R. 430 (Sask.C.A.) the accused was charged under the **Narcotics Control Act**. Committal for trial was quashed but later restored. The Attorney General then preferred an indictment against the accused. The accused had never entered a plea with respect to the original charge even after the committal was restored. A plea of *autrefois acquit* to the preferred indictment was entered but did not succeed. The Court found that the accused was never in jeopardy, had never plead to the original charge and relied in its findings in **R. v. Riddle,** *supra,* and **R. v. Peterson,** *supra*. Appeal to the Supreme Court of Canada was refused.

[20] In **R. v. Selhi,** (1985), 18C.C.C.(3d), 131 (Sask.C.A.) aff. 53 C.C.C.(3d) 576 (S.C.C.) the defendant was charged with failing the breathalyzer and leaving

the scene of the accident. On the day the trial was to be set the Crown withdrew, with leave of the Court, the charges and re-laid the same charges. The defendant plead *autrefois* to the new charges. The Saskatchewan Court of Appeal found that the plea of *autrefois acquit* did not succeed. It distinguished **R. v. Riddle,** *supra,* and **R. v. Peterson,** *supra*. It declined to follow **R. v. Conrad,** *supra*. The Court held that *autrefois* did not arise until the charge proceeded to determination. Withdrawal is not the same as an acquittal, it held. On appeal to the Supreme Court of Canada the appeal was dismissed. The Court held:

> The withdrawal flowed from a purely technical consideration, and did not represent a decision on legal or factual grounds. Moreover to expose the accused to an information based upon the same events and offences mentioned in the original information would expose him to no prejudice. Finally the withdrawal occurred at the very beginning of the trial, before any evidence was adduced.

[21] In **R. v. Moore**, (1988), 41 C.C.C.(3d), 289, (S.C.C.) the accused was charged with a number of offences relating to the possession of stolen goods. Not guilty pleas were entered and the trial Judge quashed the Information because
of a defect. When the charges were re-laid in a new Information the accused entered a plea of *autrefois acquit.*

[22] In the Supreme Court of Canada the Court held that the *autrefois* plea should succeed in a four – three decision. This decision contains an interesting discussion between the majority decision written by Lamer J., who wrote the decision in **R. v. Peterson,** *supra,* and the dissenting decision written by Dickson J., who wrote the decision in **R. v. Riddle,** *supra*.

[23] The majority found that the original charges were not a nullity. It held that the trial Judge could have amended the Information and the Crown should have appealed the trial Judge's failure to so amend. The Court found that while the quashing of the Information by the trial Judge was wrong, it amounted to an acquittal and remained unchallenged. The majority found that the Crown could not ignore the previous proceeding and commence a new Information. The Court held:

> The Crown simply ignored the disposition of a case in a Court of record and commenced new proceedings on the same information, alleging the same cause, while leaving the record in the Court below unchallenged." Dickson J., wrote the dissent.

At **p.** 303 he says;

> Whether or not a judicial determination that ends proceedings will support a plea of *autrefois acquit* will depend on the nature of the legal basis for the decision. Decisions based on substantive legal principles will generally support a plea of *autrefois acquit*. **Riddle** is an example of this sort of decision. The Crown was called upon to prove its case against the accused and could not do so. The Court should not try to distinguish cases where the Crown fails to lead evidence or lead insufficient evidence. Either way the Crown has failed to prove its case and the accused is entitled not to be subjected to another trial. Decisions based on procedure are more complex. Some decisions may end defective proceedings without barring the Crown from starting anew; other decisions may amount to a final determination that can be appealed but cannot be replaced by new proceedings. It would be difficult, if not impossible to devise a formula which would precisely cover all possible situations. Without attempting to identify all the factors involved, three that are important to the decision are the nature of the defect involved, the stage of the proceedings at which it is raised, and the degree of prejudice to the accused." (emphasis added)

[24] Dickson, J., in dissent then went on to consider the effort to reconcile the decisions in **R. v. Doyle** (1976), 29 C.C.C.(2d) 177 (a previous decision of the Supreme Court of Canada regarding relaying of an Information after a loss of jurisdiction) and **R. v. Peterson,** *supra*. He found that the holding in **Peterson,** *supra*, which did not consider **Doyle** went too far in its application of *autrefois acquit***,** and said at **p.** 306;

> In any event **Peterson** certainly should not be extended and applied here. We must not lose sight of the fact that the common law rule has always been that subsequent proceedings are not precluded by the quashing of a defective charge. While the analysis leading to that result must now take into account the more flexible modern policy regarding technical defects, amendments, and appeals, the justice of the result reached has not changed.

[25] In **R. v. Pretty,** (1989), 47 C.C.C.(3d), 70 (B.C.C.A.) the defendant was charged with assault causing bodily harm**.** The information was quashed as

no place of the offence was alleged. On the re-laid information the defendant entered a plea of *autrefois acquit*. The Court in that case found that the plea did not succeed. No plea had been entered on the first charge and the defendant was not in jeopardy when the charge was quashed before plea. The Court in that case relied on **R. v. Gould,** *supra*.

[26] In **R. v. Chamberlain,** (1991), N.B.J., No.614, (N.B.Q.B.) the defendant was charged under s. 86(1)(a) of the **Criminal Code.** The charge did not proceed and was withdrawn after a not guilty plea was entered. On a re-laid charge under s. 87 of the **Criminal Code** a plea of *autrefois* was entered. However, the plea did not succeed as the charges were different. The Court also found that the defendant was not in jeopardy since the charges were withdrawn before evidence was called. In this latter respect the Court relied on **R. v. Selhi,** *supra*.

[27] In **R. v. Walsh,** (1996) 106C.C.C.(3d), 462 (N.S.C.A.) the defendant was charged in a private prosecution for common assault. The complainant did not appear and the charge was dismissed before a plea was entered. The Crown
subsequently laid charges of assault causing bodily harm. An *autrefois* plea was entered with respect to the second charge. The Court in that case found that the defendant was never in jeopardy on the first charge as no plea had been entered.

[28] In **R. v. Bourque,** [1999], N.B.J., No.462 (N.B.C.A.) the Crown withdrew a charge under s. 811 of the **Criminal Code** on the date of trial, after the defendant had entered a not guilty plea and replaced it with a charge under s. 127. The Court found that the *autrefois* plea did not succeed. It found that the withdrawal of the plea did not justify the *res judicata* defence and relied on **R. v. Selhi,** *supra*.

[29] While many of the above authorities dealt with the dismissal or quashing of "defective charges" which is not present here, the principles outlined and the approach taken by the cases can be applied in this case.

[30] The situation in this proceeding however is unique and is distinguishable from all other cases with respect to the plea of *autrefois acquit* and the defence of *res judicata*. In the cases noted above the original or first charges

were always dismissed or determined prior to the laying of the subsequent charges. Accordingly, the plea of *autrefois acquit* or a general plea of not guilty was made after the dismissal, quashing or acquittal of the "earlier proceeding." In this case while the Information was dismissed prior to the determination of the subject proceeding it was dismissed after the trial had begun and after the Crown had completed its case in this proceeding.

[31] The Crown suggested that the defendants in the two Informations are distinguishable and that the dismissal on the second Information is not a dismissal of the charges against the present defendant. The defence maintained that it is the same defendant in both charges.

[32] I agree that it is the same defendant in both charges. Both Informations allege the same offences on the same dates. The Informations are otherwise identical. These two Informations are essentially duplicate informations.

RESULT

[33] In my opinion the plea of *autrefois acquit* and the defence of *res judicata* should not succeed for the following reasons.

ANALYSIS

[34] As indicated above the two Informations before the Court were duplicates. It is clear on all of the proceedings that there was never an intention to proceed on both informations. Given that they were duplicate Informations it would be impossible to proceed on both Informations. The Informations were always before the Court at the same time. Accordingly, it is not possible that the defendant was in jeopardy on both Informations at the same time. It was not possible for the defendant to be convicted on both Informations. And while the defendant entered not guilty pleas with respect to both Informations and on both Informations the "issue was joined", considering the Informations were duplicates it could not be said that there was any possibility of "double jeopardy."

[35] In order for the defendant to succeed with the plea of *autrefois acquit* and raise the principle of *res judicata* the defendant must have been in jeopardy with respect to the Information which was dismissed. In my opinion that is

not the case as the defendant was not in jeopardy on the duplicate Information.

[36] Secondly, in my opinion the Information which was dismissed was not an "earlier proceeding." The Crown did not subsequently commence proceedings after the dismissal of the "first" Information. While the dismissal of the "first" Information was before the conclusion of the trial on the second Information it is not, in my opinion, an "earlier proceeding" as contemplated by the authorities. This is not a case of recommencing a prosecution or retrying a defendant on a proceeding that had already been concluded.

[37] Finally, this matter is substantially a technical irregularity. It is quite clear at the commencement of the proceedings that the Court intended to deal with the second Information at the conclusion of the proceedings. It is also clear that when it was anticipated that there would be a further two month delay concluding the proceedings, the Court was in a sense "disposing" of the outstanding Information. There was clearly no prejudice to the defendant. It was not even aware of the other Information. Obviously, the Court should have continued with the present trial to its conclusion before dismissing the other Information. However, in my opinion the substance of the matter does not change. In my opinion this is the

sentiments that were expressed by the Supreme Court of Canada in **R. v. Selhi** where it concluded that the withdrawal of the earlier charges in that case was technical in nature. In my opinion the dismissal or disposing of the other Information in this proceeding amounts to the same.

[38] The Defence did not argue s.11(h) of the **Canadian Charter of Rights and Freedoms**.

[39] The plea of *autrefois acquit* is denied and the Defence of *res judicata* fails.

OCCUPATIONAL HEALTH AND SAFETY ACT

THE FACTS:

[40] The defendant was contracted to provide crane services at the material times in connection with the repair of a four storey apartment complex in Bedford,

Nova Scotia. The subject crane had been operating on the site for two days prior to the accident in question. On the day in question the crane operator had located the crane to work on the southwest corner of the subject building. The crane was a 50 Ton Grove hydraulic truck crane Model TMS475LP and was affixed with a fixed man basket. A large block and hook not necessary for the job at hand remained on the boom at its unextended end although the operator had some discussion with another employee of the Defendant as to whether it should be removed. The professional engineer in charge of the repairs and two construction workers were in the basket at the time of the accident.

[41] The professional engineer was in two way radio communications with the crane operator and was giving him instructions on where to locate the three men. The crane had been situated to accommodate the planned lift to the southwest corner of the building. This involved the removal of some bricks and investigation of the structure of the building, in order to determine the feasibility of more extensive repairs. The professional engineer also had a camera and was taking pictures of the repaired areas together with other areas of the building.

[42] The crane operator had ferried the men back and forth to this location throughout the day in the man basket by lowering and raising the crane to the desired location. At the conclusion of the repairs at the southwest corner the engineer directed the crane operator to take him and the two construction workers up over the top of the building to investigate the roof and the gable dormer.

[43] This involved extending the boom of the crane fully to 117 feet and extending the working radius of the crane. At the point where the basket containing the three men was opposite the roof gable dormer the boom was extended 117 feet, the operating radius was 101.9 feet and the boom inclination was 29.5 degrees.

[44] The crane operator then moved the boom to the left and began to “boom down” or lower the boom below the roof line of the four storey building. It was at this point that the entire crane tipped over and the boom and the man basket including the men descended quickly to the ground causing some damage to the man basket and injury to the men. There is some dispute

about the reasons why this final procedure was effected. The professional engineer indicated that the crane operator was in the process of taking the men down and concluding the lift. The crane operator indicated that the professional engineer directed him to lower the basket to the roofline of the building in order that more pictures could be taken by the engineer.

[45] In order to operate the crane safely the operator must know the length of the boom, the weight on the boom, either at the end or other points which create torque on the boom and the operating radius – that is the horizontal distance from the central line axis of rotation to the point at the end of the boom - or the inclination angle of the boom.

[46] In order to determine the safe operating range for the crane the operator refers to a "load chart" which shows the length of the boom on one axis and the operating radius on the other. The chart then describes a range of loads which can be safely lifted at various boom lengths and operating radii.

[47] For the 50 Ton Grove there are two load charts depending on whether the boom is extended over the rear of the crane or whether the boom is extended over the side of the crane.

[48] During the initial planned lift at the southwest corner of the building, the boom length of the crane was set approximately seventy feet with an operating radius of approximately sixty-one and a half feet. Given the weight of the basket, the block, the men and the tools, described below, the crane was being operated within the lifting capacities as shown on the load chart. However, as the boom was extended and the operating radius increased and as the basket was extended over the roof of the building, the limits shown on the load chart were exceeded. There is no dispute that at the time of the accident the crane operator was operating the crane well above the safe operating capacity of the crane as shown on the load chart.

[49] While it is not critical to the outcome of these charges, I agree with the submissions of the Defence that the crane operator was "booming down" to allow the engineer to take pictures of the face of the building at its roof line when the crane tipped over. At the very least the crane operator was of that

opinion and that appears to be verified by the evidence of the other two men in the work basket.

[50] Clearly this was to be the last task before returning the men to the ground. The operator said in his evidence "... let the boom down and take a picture of the face of the building and said we'd be all done." This may explain the engineer's evidence that he thought the operator was returning to the ground and denied asking the operator to "boom down" to take further pictures.

Occupational Health and Safety Principles

[51] The principles with respect to occupational health and safety have been developed through a series of case authorities. Those cases have been referred to in **R. v. the Minister of Transportation and Public Works**, a decision
of the Provincial Court of Nova Scotia per McDougall, P.C.J., September 30, 2002. The purpose of the statute is to impose on each person a responsibility to protect the worker even from his/her own carelessness by creating joint and several obligations. The constructor has a heavy burden commensurate with the ability to control – **R. v. Stelco** [1989], O.J. No. 3122, p. 5.

[52] Each individual is accountable to the extent of his/her responsibility and/or control as dictated by the hazard presented and not the size, scale or operation or economic resources of the employer – **R. v. Adam Clark Company,** [1990],N.S.J. No.451, p. 3.

[53] The duty imposed is not that of an insurer with the benefit of hindsight, which would amount to absolute liability, or to anticipate the way an accident might happen. The duty is to identify risks and develop systems that would minimize the potential hazard - **R. v. London, (City)** [1999], O.J. No. 4461, p. **2.**

[54] The duty can neither be contracted out nor delegated – **R. v. Wyssen,** (1992) 10 0.R. (3d) 193 at pg. 198 (Ontario, C.A.).

[55] The issue is what the defendant did to discharge his/her duties with respect to that particular site, not what general education did the employer carry out

or what a sub-contractor failed to do – **R. v. Dagmar Construction Limited** [1989] O.J. No. 1665.

[56] The control of the constructor as it relates to its experience, resources and on site involvement will impact on the determination of whether due diligence was exercised with respect to the prevention of the prohibited act – **R. v. Belhi Brothers Ontario Limited** [1993, O.J. No. 1600).

[57] I will now deal with each count of the information.

Count #1

That A.W.Leil Cranes & Equipment (1986) Limited, on or about the 16th day of September, 1999, at or near 80 Waterfront Drive, Bedford, in the County of Halifax, Province of Nova Scotia, did fail, as an employer, to take every precaution that is reasonable in the circumstances to provide such information, instruction, training, supervision and facilities as are necessary to the health and safety of the employees, contrary to Section 13(1)(c) of the **Occupational Health and Safety Act** and did thereby commit an offence contrary to Section 74(1)(a) of the **Occupational Health and Safety Act,** S.N.S., C.7.

Particulars

The defendant failed to provide its employee Kenneth Kennedy with the information, to wit: the weight of man-basket #S02 and the crane load block, he required to determine the safe working load capacity of 50 ton Grove hydraulic truck crane, model TMS475LP, Serial #30485.

[58] Section 13(1)(c) of the **Occupational Health and Safety Act** provides as follows:

Every employer shall take every precaution that is reasonable in the circumstances to provide such information, instruction, training, supervision and facilities as are necessary to the health or safety of the employees.

[59] The Crown's position is that the defendant failed to provide to the crane operator sufficient information with respect to the weight of the man basket as well as with respect to the block and hook which were necessary to do the

load calculations in order to determine the safe operating capacity of the crane.

[60] The Crown argued that the operator only knew the approximate weight of the basket as 1000 to 1200 lbs. and did not factor into the calculations the weight of the block and hook.

[61] The Defence argued that the operator was given all the information that was necessary to do a safe lift. The Defence argued that the operator thought that the total weight was 1800 lbs. although it was actually 1908 lbs. The Defence argued that it is not necessary to know the exact weight as long as the operator had enough information to know that the weight was within the lifting capacity. The Defence argued that he knew this.

[62] The Defence also argued that it was not the lack of knowledge; that is, the weight of the basket or the hook which eventually caused the crane to tip. It was, the Defence argued, the increase in the operating radius on the lowering of the boom angle which caused the accident and the weight was inconsequential as the crane would have tipped over at this critical point under any weight.

[63] The actual weight of the man basket – 1260 lbs., the men – 550 lbs. and the equipment – 98 lbs, totaled 1908 lbs. The hook/block which was attached to the unextended portion of the boom weighed 780 lbs. In his report Stephen Mallett calculated the torque or arm moment for the weight of the man basket and contents and the block. Because both were attached to the boom at different lengths different amounts of torque were generated. His calculations indicate that the man basket and contents generated 203,393 ft. lbs. of torque and that the block generated 58,266 ft. lbs. of torque.

[64] There was no precise indication of weights given to the crane operator of the basket or the block. There was nothing printed on either device or any written information which the operator could easily access to determine the weights of either. He was not otherwise told what the weights were. While I agree with the Defence that the precise information is not required, clearly sufficient information of the weights must be given in order for the operator to operate the crane within the safe load capacity of the crane. Clearly the weights are critical to the safe operation of the crane and define the threshold limits for which the load chart is designed.

[65] I agree with the Crown's submission that the exact cause of the accident is not critical to the determination of this count in the information. I agree with the Crown's submission that the offence was complete before the crane was operated. It was certainly complete when the operator began to extend the boom and go beyond the planned lift at the south end of the building.

[66] While it may not be necessary to have the precise information and his knowledge that there was approximately 1800 lbs. may have been adequate, given that the actual weight was 1908 lbs. and there had been no other factors. However, the defendant's failure to apprise the operator of the weight of the block together with his lack of knowledge of the true weight of the basket and contents constitutes the offence in my opinion. Given the weight of the block and the torque generated by it, its presence had a significant impact on the safe operation of the crane. Obviously at a critical point it would have overloaded the safe capacity of the crane. In my opinion the weight of this block was necessary for the operator to have in order to determine the safe operating range and capacity of the crane. The defendant's failure to provide this information constitutes the offence. Accordingly the defendant is found guilty of Count One.

Count #2

That A.W.Leil Cranes & Equipment (1986) Limited, on or about the 16th day of September, 1999, at or near 80 Waterfront Drive, Bedford, in the county of Halifax, Province of Nova Scotia, did fail, to erect, use, or maintain a crane supported work platform according to a design certified by a professional engineer contrary to Section 37(7) of the **Fall Protection and Scaffolding Regulations** and did thereby commit an offence contrary to Section 74(1)(a) of the **Occupational Health and Safety Act,** S.N.S. 1996, C7.

Particulars

The defendant erected, used, or maintained a crane supported work platform, to wit: fixed basket, serial #S02, that was not commercially manufactured and that the design for which was not certified by a professional engineer.

[67] S. 37(7) of the **Fall Protection and Scaffolding Regulations** provides as follows:

> The design of a crane supported work platform that is not commercially manufactured shall be certified by a professional engineer and erected, used, maintained and dismantled according to the design.

[68] The Crown argued that the subject man basket was not commercially manufactured. The load chart for the 50 Ton Grove requires that any equipment used in connection with the crane must be furnished or installed by the manufacturer, i.e. Grove, which did not occur in this case.

[69] Accordingly the Crown argued a design certificate is required. The inspection certificate provided by the defendant is not a design certificate. The Crown argued that the purpose of the design certificate is to determine if the man basket can properly fit or be used with the 50 Ton Grove crane.

[70] The Defence argued that there is no evidence to show beyond a reasonable doubt that the design of the subject man basket was not certified by a professional engineer.

[71] The Defence argued that a design certificate is not required by the legislation to be kept by the defendant. The Defence also argued that a professional engineer certified the basket to be safe although no design certificate was in evidence.

[72] The regulation only requires that the design of the basket be certified by a professional engineer and erected, used and maintained according to that design. Here it is specifically alleged that the basket was not commercially manufactured and the design was not certified by a professional engineer. It is clear the basket was not commercially manufactured. The regulations do not appear to require that a design certificate be on hand or maintained by the defendant. Clearly no such certificate was maintained as the defendant did not respond when the compliance order for production of the same was made. However this does not determine the issue.

[73] The burden is on the Crown to show that the design of the basket was <u>not</u> certified by a professional engineer. It is not for the Defence to show that it was. It is certainly possible that a professional engineer designed the basket or certified the design although no written certificate was maintained by the defendant. There is nothing in the evidence which the Court can infer that

the basket was not designed or the design of which was not certified by a professional engineer. It was certainly open to the Crown to have a professional engineer give an opinion that the subject basket could not possibly be designed by a professional engineer or if otherwise designed, the design could not possibly have been certified by a professional engineer. No such evidence was before the Court. Accordingly no adverse inference against the defendant can be drawn in my opinion. The defendant is accordingly found not guilty of Count Two.

Count #3

That A.W. Leil Cranes & Equipment (1986) Limited on or about the 16th day of September, 1999, at or near 80 waterfront Drive, Bedford, in the County of Halifax, Province of Nova Scotia, did fail to ensure that no person works without supervision at any machine unless the person is capable of safely operating the machine without supervision, contrary to s. 121(c) of the **Industrial Safety Regulations** and did thereby commit an offence contrary to **Section 74(1)(a) of the Occupational Health and Safety Act, S.N.S., C7.**

Particulars:

The defendant failed to ensure that its employee Kenneth Kennedy worked with supervision while he operated for the first time 50 ton Grove hydraulic truck crane, model TMS475LP, Serial #30485, identified as unit #960, while it was equipped with a crane supported work platform, to wit: fixed basket, serial #S02.

[74] Section 121 of the **Industrial Safety Regulations** provide as follows:

Every employer shall ensure that no person works without supervision at any machine unless the person:

(a) has received adequate training and instruction in the operation of the machine and any dangers connected therewith;

(b) has received adequate supervision by a person having thorough knowledge and experience with the machine; and

> (c) is capable of safety operating the machine without supervision."

[75] Clearly, a person cannot work without supervision unless all three requirements in Regulation 121 are satisfied. However, the Crown has only alleged that in this case the crane operator did not satisfy the requirement under Regulation 121(c)**.** Particularly the Crown is alleging that the crane operator was not capable of safely operating the crane without supervision. Accordingly it is not necessary for the Court to consider the other two subsections and whether the crane operator in this case satisfied either subparagraph (a) and subparagraph (b).

[76] The issue, in short, is whether the crane operator in this case was capable of safely operating the 50 Ton Grove crane without supervision.

[77] The Crown's position is that the operator was not capable of operating the 50 Ton Grove Crane safely. The Crown maintained that the operator in this case "simply did not know what he was doing." The Crown argued that the mistakes the operator made were "astounding." The Crown submitted that the operator made the following mistakes:

(1) he did not know the weight of the man basket;

(2) he guessed at the weight of the men and equipment;

(3) he did not account for the hook/block;

(4) he did not do appropriate load calculations for the lift areas where the crane eventually tipped over;

(5) that the crane operator was unaware of the 50% reduction rule for man baskets.

[78] The Crown argued that it is irrelevant as to why the operator was in the critical place where the crane tipped over. Whether the operator was asked to be there by the professional engineer or whether he was in the process of

"booming down" to return the men to the ground is irrelevant in the Crown's submissions. The Crown argued that he did not do any preparation work, i.e., load calculations to determine whether that maneuver was safe in any event.

[79] The Crown argued that the operator had only 227 ½ hours on 50 – 80 ton cranes which the Crown submitted is not sufficient given the present requirements for apprentices on similar type cranes. The Crown also argued that the operator was given minimal instruction on the 50 Ton Grove when he was first introduced to it in Dartmouth, Nova Scotia, by one of the defendant's employees.

[80] The Crown maintained that there are significant differences between cranes such as the 50 Ton Grove and boom trucks on which the operator had extensive experience.

[81] The Crown argued that while the principles of operation are similar, there is a significant difference. Particularly, boom trucks are operated from outside and generally have smaller loads at smaller operating radiuses. There is only one load chart, i.e. over the side and that the boom truck is more forgiving and easier to detect when the same is "coming light", a term used to describe when the crane is reaching its threshold in terms of weight versus boom angle.

[82] The Crown further argued that larger cranes have a different operating view. That is, one cannot see the outriggers and one cannot "feel" when the outriggers are beginning to lift. The Crown maintained that it is only through experience on a particular type of crane that the operator can safely operate the crane. Here the operator's only experience on cranes was on different types of cranes and his experience on the 50 Ton Grove was extremely limited.

[83] The Defence argued that there is no evidence that the crane operator needed to have supervision while operating the 50 Ton Grove crane with a man basket for the first time. It argued that no expert evidence was tendered to support that position and that in particular no person testified that this operator was not capable.

[84] The Defence also argued that the operator was licensed and still is to this date. He had 363 ½ hours experience with cranes with man baskets. It is also argued that while much of his experience is with boom trucks these devices are in fact cranes and operate under the same principles as the crane in question; i.e., they must be level, the outriggers must be properly placed, the operator must know the weight to be lifted and finally that load calculations must be made and load chart thresholds observed.

[85] The Defence argued that there is no evidence that this operator was not capable of operating this crane with the fixed man basket. It argued that any comments made by Brian Burgess, an employee of the Defendant, were ill informed and without the knowledge of the operator's prior experience with the 50 Ton Grove or 35 Ton Grove cranes.

[86] The crane operator in question was properly licensed. His experience and hours operating other cranes and boom trucks are detailed in Exhibit 17. It shows his experience in operating cranes from August '97 to November of '99. The events in question took place September 16th, 1999. Most of his experience, prior to the accident, was on boom trucks although he did have experience with larger cranes including the 50 Ton Grove. The evidence showed that he had operated the same crane in the Annapolis Valley shortly before the events in question. At that time the crane was affixed with a swinging man basket. His only other experience with this crane was during a short demonstration in the Dartmouth area when he was given instructions by one of the defendant's managers on the operation of the crane.

[87] The issue here is whether the operator was capable of safely operating the 50 ton Grove crane such that supervision of him was not required by the defendant. The defence argued that the job to be undertaken on the day in question was not a particularly "tricky" or complex undertaking and that it was a "simple job" and because the operator made a mistake which caused the crane to tip over does not necessarily mean that he was "incapable" of operating this crane without supervision. The defence submitted that the operator "disregarded fundamental principles" and it was for this reason the accident occurred.

[88] In my opinion the operator was not capable of safely operating the 50 Ton Grove crane without supervision. The operator had operated cranes since

1991. He had taken a two week course but that had no specific training on lifting personnel. During the events in question the operator had set up the crane to work on the southwest corner of the subject building. He was told by Ken Lynch, an employee of the Defendant, where the best place to set up would be. The planned lift included lifting the three men in the man basket at the southwest corner of the building in order to inspect the masonry at that location. This was the third day that the crane was on site and the entire morning was devoted to the operator ferrying the men back and forth to that location.

[89] In the afternoon of the subject day and after the work at the southwest corner was done, the engineer instructed the operator to take them up over the top of the building in order that other photographs could be taken with respect to other parts of the building.

[90] The evidence does not disclose that the operator did any detailed load calculations as he extended the boom and increased the operating radius to allow the basket to be extended up over the roof of the building. He simply glanced at the load chart as he moved the basket in that direction. He admitted that had he known the engineer wanted to look at the peak of the building he would have moved the crane closer to the building in order to do that. He said at p. 227 of the transcript:

> "Up over top of the building itself, we were pulling outriggers up. It wasn't until I got myself past the outriggers and coming down on the face. If I had of thought the crane would of tipped over, I would of moved the crane for sure, yeah."

[91] While the operator understood and knew how to do load chart calculations he did not in fact do a load calculation with respect to this part of the lift. At the same time he was unaware of the exact weight which was being lifted and
more particularly was not cognizant of the weight of the hook/block which was still attached to the boom.

[92] It is shown on Exhibit 29, when the basket was located opposite the roof gable dormer at A2 and prior to the accident, the lifting capacity of the crane

as shown on the load chart was beyond the threshold levels. At that point the crane was at risk of tipping over. Obviously as the crane moved to the left the boom angle was decreased, the risk of the crane tipping over increased to the point that it finally did so as shown at A4 on Exhibit 29.

[93] In my opinion as soon as the operator moved away from the southwest corner, extended the boom length and increased the operating angle he began to operate the crane in an unsafe manner. He did so because he was not completely aware of the threshold levels of the lifting capacity of the crane as shown on the load chart. He did not do a load chart calculation and simply glanced at the chart to see if the lift could be done safely. He was guessing at the weight. In my opinion he was "feeling his way" along and was not operating the crane safely.

[94] Because the operator was asked to position the crane to a location which ultimately, allowed the crane to tip is immaterial. The fact that he was incapable of operating the crane safely was present at the outset; it was apparent to the Defendant and manifested itself when he moved away from the planned lift area ignoring fundamental safety requirements.

[95] He was of the opinion that this was a simple job and one of which he was capable. However, in my opinion, he did not appreciate the difference between operating this large 50 ton crane and the other smaller cranes and boom trucks on which he had most of his experience. I agree completely with the Crown's submission with respect to the difference between the operation of the boom trucks and large cranes such as the one in question. While the principles of operating a boom truck and a large crane are the same, experience derived primarily from operating boom trucks and smaller cranes is not equivalent to experience on larger cranes. Those differences as argued by the Crown are significant and I would agree with those submissions.

[96] It was the operator's inexperience on large cranes and his failure to appreciate the significant differences between operating large cranes and boom trucks which made him incapable of working without supervision.

[97] In my opinion the lack of experience and inability to operate a 50 Ton Grove crane safely, by this operator, was apparent and obvious and should or ought

to have been known by the defendant. I agree with the Defence to the extent that the operator committed a fundamental error in principle. Whether this was "a simple job" as suggested by the Defence and the crane operator is not clear. However if it was a "simple job" the operator was incapable of performing it given the results of what happened but more importantly because he completely ignored basic requirements of understanding and knowing the weights that were being lifted and by failing to perform the appropriate calculations after he left the planned lift area. If it was not, in fact, a simple job his description of it as such demonstrates his inability to understand or appreciate the need to take safe and appropriate measures, i.e., again understanding and knowing the weight to be lifted and doing the precise load chart calculations before performing the job.

[98] In my opinion the operator's inability was apparent to the defendant as demonstrated by the evidence of Brian Burgess, notwithstanding that Mr. Burgess was unaware of the operator's other limited experience.

[99] Finally, while the operator may have been technically capable of operating this crane, he was not capable of operating it "safely" as is required. To safely operate the crane he must have sufficient knowledge of the weight to be lifted and do the appropriate load chart calculations. He did neither. Also he was unaware of the industry standard of reducing the load by 50% when lifting personnel. And while this requirement was not included in the regulations it was an industry standard at the time.

[100] The defence of due diligence was not strenuously argued relative to this count and not at all relative to the other counts. However if the defendant believed in a state of facts, which if true would make its conduct innocent, the defendant is entitled to a not guilty verdict.

[101] In my opinion the defence has not shown due diligence on a balance of probability. The Defence called no evidence on this issue and no evidence from the Crown's case is present to satisfy this burden. The operator's inexperience on a large 50 ton crane and the fundamental errors and mistakes which he made on the day in question demonstrate that he was incapable of operating this large crane a fact which, in my opinion, was or ought to have been apparent to the defendant.

[102] Counsel referred the Court to **R. v. Belhi Brothers,** *supra* & **Ontario (Ministry of Labour) v. Bonik, Inc.** [1990, O.J. No. 2052].

[103] In **R. v. Belhi Brothers** the defendant was charged with failing to prevent a crane from being subjected to loads in excess of its load carrying capacity. The crane had been equipped with a computer which could advise the operator of the exact weight. However, the operator was not instructed on how to use the crane and the defendant was relying entirely on the past experience with the operator. The Court said, at p. 164:

> The question is whether or not it is reasonable for the defendant to rely entirely on the past experience of the crane operator. Defence relies on case law submitted to support the proposition that an employee need not be told each and every time how to proceed in doing his work safely, as long as that person is made aware by regular safety meetings as to what is expected. I certainly do not have any problem with such a proposition but in the case at hand, there was in fact no instructions given by Belhi Brothers to Mr. Gothier. In fact the company relied completely on his experience. I have no doubt that the defendant is quite aware of the fact that even though employees may be aware of the rules and regulations, it certainly does not mean that each and every one of them will follow those rules. I think it's up to the employer, through his supervisors, to advise the employees as to what is expected of them and to make sure that they in fact comply with those instructions.

[104] The Court in that case found that the operator should have been advised how to use the computer to ascertain the exact weight rather than relying on the operator's observations. Meetings should have been held with the operator, not to teach him how to operate the crane but to remind him of the different safety aspects to safely operate the crane. The defendant was found guilty.

[105] In **Ontario (Ministry of Labour) v. Bonik Inc.,** a case on which the defence relies, the defendant was charged for its failure to take proper measures to ensure that a construction crane was properly loaded. At issue was the sufficiency of the load chart installed in the crane. The operator in that case had 39 years experience and had been employed by the defendant for five years. He had had no other accidents.

[106] The trial Court found that the operator was competent. However, the operator's overreaching and overloading the crane caused the accident.

Whether a supervisor was present or not was not critical because it was up to the crane operator to determine where the crane should be located. The Court also found that the lack of a load chart for a 40 foot jib was not critical because the operator knew the loading capacity of the crane from experience. In that case it was obvious that with the 40 foot jib the crane could not handle greater loads than those it could have hoisted securely if the jib had been 30 feet or lower. Accordingly the load chart that was in the crane was enough for the operator to determine that the operation of the crane was well in excess of what the crane could handle and beyond the safe conditions of the crane. Accordingly no supervisor was required. The trial Judge made specific findings that the operator was aware of the need to make appropriate deductions because of the longer jib, even though the appropriate load chart was lacking.

[107] The **Bonik** decision can be distinguished from the case at bar. In **Bonik** the crane operator had always been the operator of the crane. He was familiar with its operation and was aware of the need to downgrade the manufacturer's rating chart for the longer jib. He was found to be a competent operator and well experienced and knew the loading capacity of the crane. The issue in that case turned primarily upon the lack of a load chart for the extended jib. The Court found that because of the experience and knowledge of the operator the absence of a load chart was not critical. With respect to the issue of supervision, the Court in that case found that there was no requirement to appoint a supervisor in every case and in any event there was no evidence that the supervisor on site was not "a competent person" as required by the regulation.

[108] In the case at bar the operator did not have sufficient experience on the 50 Ton Grove crane to allow him to operate it safely. When he moved from the location of the planned lift to over the top of the building he did not perform the appropriate load chart calculations which were required to operate the crane safely. In my opinion he was "feeling his way along" on the basis of his previous experience which was mostly related to the operation of boom trucks. As was pointed out by the Crown there is a significant difference between the operation of boom trucks and large cranes such as the one in question.

[109] In my opinion it was the operator's lack of experience on large cranes and undue reliance on his experience on boom trucks which made his operation of the crane at that point unsafe. His experience as a boom truck operator or more particularly his lack of experience on larger cranes was well known to the defendant. He was incapable of safely operating the crane without supervision. The situation in this case should be distinguished from that in **Bonik** which was relied upon by the Defence. The defendant is found guilty of Count Three.

Count #4

> That A.W. Leil Cranes & Equipment (1986) Limited, on or about the 16th day of September, 1999, at or near 80 Waterfront Driver, Bedford in the County of Halifax, Province of Nova Scotia, did fail to ensure that no lifting device was loaded beyond its safe working load except for the purpose of a test or when the load is certified as safe by a person satisfactory to an inspector, contrary to Section 122(b) of the **Industrial Safety Regulations** and did thereby commit an offence contrary to Section 74(1)(a) of the **Occupational Health and Safety Act,** S.N.S.1996, C7.
>
> Particulars**:**
>
> The defendant failed to ensure that 50 TonGrove hydraulic truck crane, model TMS475LP, serial #30485,identified as unit #960 was not loaded beyond its safe working load.

[110] Regulation 122(b) of the **Industrial Safety Regulations** reads as follows:

> Every employer shall ensure that no lifting device is loaded beyond its safe working load except for the purpose of a test or when the load is certified as safe by a person satisfactory to an inspector.

[111] The Crown argued that the defendant did not give the crane operator sufficient information to allow the operator to know the weight of the load to be lifted in order that the lift could be completed safely. The Crown also argued that not sufficient instruction, training and experience was given to the operator and that he accordingly had overloaded the crane at the time that it tipped over. The Crown made the same arguments as in Count #1 and Count #3 above.

[112] The defence maintained that the issue with respect to this count turns on the definition of “loaded”. The defence maintained that the crane was not overloaded to do the planned lift. While it may have been operated beyond its safe lifting capacity this does not necessarily mean that the crane was “loaded beyond its safe working load” as contemplated by the regulation.

[113] I cannot agree with the defence submission with respect to this issue. The crane was “loaded” at the time it was set up; that is, when the crane location was determined, the men and equipment were loaded into the basket and the decision to keep the block/hook on the boom. While the crane was loaded within the capacity of the crane to do the planned lift, the operator did not have any knowledge of the true “load” of the crane. He certainly did not adequately address his mind to the total weight or load particularly to the weight of the block. The crane continued to be “loaded” even after the operator moved away from the planned lift area. At this point and certainly by the time he reached the area of the gable dormer described above the crane was overloaded or loaded beyond its safe capacity. This overloading was the result of the operator’s original action principally because of the presence of the block. The arguments made by the Crown relative to the first and third counts are applicable here and I agree with those submissions. Accordingly the defendant is found guilty of Count Four.

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Alan T. Tufts, J.P.C.