

PROVINCIAL OFFENCES COURT

HER MAJESTY THE QUEEN

v.

DATA CABLE COMPANY INCORPORATED

REASONS FOR JUDGMENT

BY HER WORSHIP JUSTICE OF THE PEACE E. WALKER
on October 30, 2013, at ORANGEVILLE, Ontario

APPEARANCES:

C. Glaister
S. Crawford

Ministry Prosecutor
Counsel for Data Cable Company Incorporated

(i)

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W I T N E S S E S

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...NO WITNESSES WERE CALLED AT THIS TIME

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WALKER, J.P. (Orally):

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So, we're here today to have the Ruling on Section 45(a), Section 45(b) Section 46 of Regulation 851/90, contrary to Section 25(1)(c) of the Occupational Health and Safety Act and Section 25(2)(a) with particulars that the defendant failed to provide information, instruction and supervision to a worker on how to safely move and store materials on "A" frame carts.

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The trial was conducted October 23rd and 24th of 2013 and, today, we are here for the decision rendered, 30 October, 2013. So, I'm just going to go through quickly with the reading of the charges.

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The Data Cable Company Incorporated under Information number 12-0204 properly sworn 30th day of July 2012 faces four charges. At the commencement of the day and before arraignment, Information 12-0113 was withdrawn at the request of the Prosecution. Process was removed from the withdrawn information and attached to the re-laid information and a copy of the re-laid information was provided to defence before arraignment. Not guilty pleas were entered on all four counts.

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Without reading the actual counts one, two and three, I do note that counts one to three have no particulars however count number four did have the particulars attached, that the defendant failed to provide information, instruction and supervision to a worker on how to safely move and store materials on "A" frame carts.

These offences are strict liability offences and hence the responsibility lies with the Prosecution to prove these charges beyond a reasonable doubt.

Occupational Health and Safety Act 25(1), An employer shall ensure that (c) the measures and procedures prescribed are carried out in the workplace;

And 25(2), Without limiting the strict duty imposed by subsection (1), an employer shall, (a) provide information, instruction and supervision to a worker to protect the health or safety of the worker.

Industrial Establishments, R.R.O. 1990, Reg. 851, Section 45,

Material, articles or things required to be lifted, carried or moved, shall be lifted, carried or moved in such a way and with such precautions and safeguards, including protective clothing,

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guards or other precautions as will ensure that the lifting, carrying or moving of the material, articles does not endanger the safety of any worker;

(b) shall be transported, placed or stored so that the material, articles or things,

(i) will not tip, collapse or fall and,

(ii) can be removed or withdrawn without endangering the safety of any worker.

And Section 46. Machinery, equipment or material that may tip or fall or endanger any worker shall be secured against tipping or falling.

The first issue to be addressed in relation to the charges is has the actus reas been made out beyond a reasonable doubt. If it has been made out, then the defence of due must be considered.

The test for due diligence is on a balance of probabilities. If the actus reas has not been made out, the finding of the court will be to dismiss the charge. Each count will be reviewed on its merits separately.

Exhibit Number One is filed as the corporate profile for the Data Cable Company Incorporated.

The Prosecution called four witnesses;
Nicholas Evans, Inspector with the Ministry of

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Labour, responsible for Occupational Health and Safety Act enforcement both proactively and reactively, Jamie Boisse-White, Brandon McCartney and Laura McCartney.

On August 24th, 2011, Nicholas Evans received a call at 3:05 p.m. from the Orangeville Police Service about an incident that occurred at the Data Cable Company Incorporated, located at 31 Robb Boulevard, Orangeville, Ontario. Nicholas Evans attended at the Data Cable Company Incorporated on the 25th August, 2011, between 9:07 a.m. and 9:51 a.m.

During the investigation, Nicholas Evans took a series of photographs entered as Exhibit Number Two. Nicholas Evans went through the photo exhibits. Pictures of the A frame cart directly involved in this incident, specifically the rod, I've also interchangeably referred to it as, the bar, the missing lynch pin laying on the cutting table frame, another A frame cart has green tape and a washer used to hold the rod in place, cart W11.

Mr. Evans described tests he conducted on an empty A frame cart, where he was able to slide the rod along and it was insufficient to keep the rod on the cradle.

No weight bearing tests were performed by

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himself or demonstrated at his request by an employee.

Mr. Evans acknowledged that upon his inspection, each cart he saw had a mechanism for slippage except cart W16, the one involved in the incident.

He did not inspect every cart in operation at the Data Cable Company Incorporated.

Exhibit Number Three was the field inspection report and subsequent orders issued. These included time sheets and training records from the Data Cable Company and the agency that placed the worker, Jamie Boisse-White at The Data Cable Company Incorporated.

Exhibit Number Four was the two page document outlining the new employee checklist when the worker, Jamie Boisse-White was hired as an assembler. Specifically, was there any training pertaining to movement of reels of cable, the answer was 'no'.

Jamie Boisse-White was initially hired as an assembler, described by himself as sitting at a desk putting kits together. His job title later changed to cable cutter.

Under cross-examination, Nicholas Evans

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acknowledged that the Data Cable Company Incorporated is a light assembly company. He further acknowledged that following his investigation, recommended only one charge be laid; that being under Section 45(a), represented by count number one on the Information.

He acknowledged that training on the blue giant lifting device was incidental to his investigation and that this piece of equipment was not directly related to the incident.

Prosecution witness number two was Jamie Boisse-White, the injured worker. Mr. Boisse-White stated that he had been employed at the Data Cable Company Incorporated for approximately one and one half years, at the time of the incident.

His paycheque was received through Power Personnel, an agency that provides human resources on contract with various companies, albeit the court accepts that by definition, the Data Cable Company Incorporated is the employer and carries the responsibilities as such.

Jamie Boisse-White related the events of August 24, 2011 as, he was pulling nine metres of cable to be cut. He was working from the opposite side of the table from his usual position because Brandon, another worker, was in the spot.

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The cable sits on a cradle held by lynch pins. He works from a long blue table. He described locking the wheels, unreeling the cable on the table. He said, "I moved the cart up to the table, locked the wheels, moved to match up with the table".

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The cable was a little heavier and he needed to reach the table. He lined up the reel, pushed the reel away from himself. As he moved the reel, the bar slipped. The bar or rod sits on a cradle to allow the reel to spin. Lynch pins go at the end of the bar to stop it from sliding off. One lynch pin was missing. Jamie Boisse-White said, "I assume I forgot to put it in."

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Jamie Boisse-White was asked who trained him, he said, "When I first started, my mom." "Later, I received training on the 'blue giant'". Jamie Boisse-White is referring to when he first started as a cable cutter not when he was first placed as an employee at the Data Cable Company Incorporated.

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He was asked if he had ever seen a slip of the bar before, his response "Once, but I caught it". This incident was never reported and there was no specific details provided to the court.

Jamie Boisse-White also described using washers on occasion with the lynch pins. He says

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no one specifically told him to do this, "it seemed like a good idea". To the best of his knowledge, no one else employed this method as he was the only worker in that department.

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He was asked about the washer method by his mother and his supervisor, Laura McCartney. We later hear testimony from Phil Hopkins, the individual in charge of maintenance about this collar and tape process with a washer being on one of the carts.

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He was asked if anyone directly supervised him putting on the washer, the answer was 'no' but later in cross-examination, he stated that his mother, provided the training and direct supervision, albeit didn't have the title of supervisor, was some five to six feet away.

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Laura McCartney, the supervisor, was in her office an undescribed distance away. Documents were submitted under cross-examination pertaining to safety training and testing completed by Jamie Boisse-White through Power Personnel, prior to his placement at the Data Cable Company Incorporated.

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He further described health and safety training provided onsite directly from the Data Cable Company Incorporated by Michelle Ballum. Jamie Boisse-White was later transferred from his

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position as an assembler to that of cable cutter for the purpose of assisting his mother, the only cable cutter.

Hands on direct training was provided by Lisa Boisse. Delegation of this direct training and supervision came from Laura McCartney as Lisa Boisse was the only trained person currently working as a cable cutter within the company. There was no other capable trainer.

Jamie Boisse-White described that his training included being shown how to pull cables, load reels, put in the lynch pins, and specifically told not to remove the lynch pins until the reel was completely empty, the cutting process and how to operate the blue giant.

He stated that no one else but him was responsible for the lynch pins and he was adamant that he did not remove the lynch pin on that day but that he forgot to check it.

He described his duties as; pick up orders, find a cable size, if already on a cart, unlock the wheels, push it over to the table. If it is on an A frame cart, you just move it, pins are already in. If the cable is not on a cart, use the blue giant to load it.

Jamie stated that on August 24th, he did not

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need to load the cable, it was already on the cart. He stated that we keep the cable on a cart once it's loaded. "It should have had both pins, I didn't check". Cable would have been pulled anywhere from zero times to 20 to 30 times in a day. He was asked if the reel had ever slipped previously, he said, "No."

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Prosecution witness number three was Brandon McCartney. This witness was 17 years of age at the time of the incident. He was present and witnessed the end result of the incident but didn't witness the actions of Jamie Boisse-White leading up to and during the incident.

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He was employed for the summer as an assembler and he was never assigned to duties relating to cutting cable. He articulated training he received for his position.

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Prosecution witness number four was Laura McCartney and on August the 24th, 2011, she was employed by the Data Cable Company Incorporated as a lead hand in the warehouse and Jamie Boisse-White's supervisor.

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At the time of the incident, she was in the shipping department. She indicated she provided some occupational health and safety training to Jamie but left the job shadowing and hands on training to Lisa Boisse, the only worker currently

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5 assigned to and trained on cable cutting. If any prior incident had occurred, she would be the first person notified. She had never been notified of any prior incidents involving the A frame cart.

10 At the end of the Prosecution's case, defence counsel put forth a motion for directed verdict on the basis that the Prosecution had no evidence of the actus reas.

15 Defence submitted there was no evidence of lifting, carrying or moving of the A frame cart. There was no evidence as to whether the pins were in place. Nicholas Evans testing was conducted on an empty A frame and not transferable to the conditions of the incident.

20 These submissions were in relation to counts one to three. Submissions with regard to count number four, failure to provide information, instruction and supervision to a worker on how to safely move and store materials on A frame carts.

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30 Evidence submitted to the court indicated that information and instruction came directly from Lisa Boisse at the direction of Laura McCartney. Direct, on the job supervision, was provided by Lisa Boisse at all times.

This company is a light assembly plant.

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Written policy and one to one direct supervision is not required. The Crown submitted that there had been direct rather than circumstantial evidence lead on the all the essential elements.

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On counts one to three, the court needs to focus on what would normally happen. On count four, the Crown emphasized that Jamie Boisse-White testified to using the washer system and had not received training on this.

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In considering a motion for a directed verdict, it is important not to weigh and analyze the quality of the evidence seeking whether the case has been made out beyond a reasonable doubt but whether there has been evidence led on each of the essential elements.

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The court is satisfied that there has been some evidence led on counts one to three in that the A frame cart was moved prior to the incident, albeit defence argued that it was not the actual movement of the cart that led to the incident but rather the pushing of the reel on the bar with a lynch pin missing that caused the incident.

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Motion for a directed verdict on counts one to three fails. Count number four, Nicholas Evans provided documentation on training provided for the initial position that Jamie Boisse-White was hired for but not for the position he was assigned

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to at the time of the incident.

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Jamie Boisse-White himself outlined training that he received through Power Personnel, by Michelle Ballum once placed at the Data Cable Company Incorporated and direct job related training on his assigned position at the time of the incident, by Lisa Boisse.

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Jamie Boisse-White was able to clearly articulate the steps required to safely move and store materials on A frame carts. He further articulated that he did not follow the steps he was trained on.

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At all times, Lisa Boisse was working within 40 to 50 feet of Jamie constituting supervision by the only other person trained in the specifics of the cutting process.

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The court did not make the inference that the ends justified that supervision was not provided. There was no circumstantial or direct evidence that the Data Cable Company Incorporated failed to provide information, instruction or supervision to a worker on how to safely move and store materials on A frame carts and count number four on information 12-0204 is dismissed and the trial proceeded with counts one to three.

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The Occupational Health and Safety Act is a public welfare Statute. The broad purpose of the Statute is to maintain and promote a reasonable level of protection for the health and safety of workers in and about their workplace. It should be interpreted in a manner consistent with its broad purpose.

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Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided.

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The Prosecution does not have to show why the accident happened or that the accident was reasonably foreseeable in the way it actually happened. An employer is not legally bound to provide the safest imaginable workplace.

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While it may strive to do so, what the Act requires is compliance with those regulations which shape a reasonably healthy and safe work environment. Certain minimally prescribed standards seek to prevent accidents on account of worker inadvertence.

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The employer owns and controls the workplace and is statutorily obligated to maintain the minimally reasonable level of safety described in the Regulations.

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Defence; Charter of Rights and Freedoms guarantees under Section 11(d), at a minimum, the right to be presumed innocent and requires that the defendant must be proven guilty beyond a reasonable doubt and that it is the Prosecution that must bear the burden of proof.

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R. versus Sault Ste Marie states,
Offences in which there is no necessity for the Prosecution to prove the existence of mens rea; the doing of the act prima facie imports the offences, leaving it open to the accused to avoid liability by providing that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances.

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The defence will be available (1) if the accused reasonably believed in a mistaken set of facts, which, if true, would render the act of or omission innocent or (2) if he took all reasonable steps to avoid the particular event. All Occupational Health and Safety Act charges have been held by the Court of Appeal to be, at a minimum, strict liability offences.

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Has the actus reas been made out beyond a reasonable doubt?

In count number one, defence argued that Jamie Boisse-White's actions of pushing on the reel to

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position it closer to the table does not constitute lifting, carrying, moving, transporting, placing or storing the A frame cart.

The question is, at what point in the activity being undertaken do the factors constitute the element of the offence? Jamie Boisse-White testified that he moved the A frame cart to position, locked the wheels and then slid the reel along the bar.

It was the action of pushing on the reel that resulted in the bar sliding off, making contact with the warehouse floor and the other end coming up and hitting Jamie in the face.

We have no direct evidence as to when that lynch pin became dislodged however, we have circumstantial evidence, the location of the lynch pin on the frame of the cutting table.

For the lynch pin to be located on the frame of the cutting table, one would have to have had placed it there, to which no one testified, or the lynch pin landed there as a result of becoming dislodged during the use of force placed on the reel by Jamie Boisse-White.

If the court accepts that this is the placement of where the pin landed once dislodged,

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then the movement of the A frame cart to the table had no bearing on the incident.

The court accepts that the lynch pin located on the cutting table came from cart W16 due to its proximity to the A frame cart, given that this was the only A frame cart identified as missing a lynch pin. And if the court accepts the testimony of Phil Hopkins that bars are stored separately when not in use with the lynch pins secured with the bar.

The court accepts that circumstantially, the lynch pin came from cart W16 being used by Jamie Boisse-White. Further, no one testified to the quality of the lynch pin found on the frame of the table. Was the lynch pin defective? Was it broken and not in good operating condition? No one testified to these factors.

Regardless of whether the safeguard (the lynch pin) was defective or whether the worker neglected to follow procedure, the court concludes from the evidence that is accepted that the actus reas for count number one has not been made out as the A frame cart in relation to the particulars of the incident, was not being lifted, carried or moved.

Under count number two, the actus reas has not been made out. Had count number one and two been

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proved, the Kienapple principle would have applied. We are dealing with the facts relevant to one incident that took place on the 24th August, 2011 involving one A frame cart and one worker. The incident involving the A frame cart was not being transported, placed or stored. Therefore, count number two is dismissed.

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This is with count number three, defence conceded that the Prosecution had made out its case and that the onus shifted to a defence of due diligence. The act prima facie imports the offence and Prosecution, defence and the court agree that on August 24th, 2011 a piece of equipment, the A frame bar, tipped and endangered the safety of a worker, Jamie Boisse-White during his employment with the Data Cable Company Incorporated.

Defence of Due Diligence:

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This is two branches of the due diligence defence; (1) mistake of fact and (2) reasonable precautions.

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In testing the due diligence defence, it is appropriate to ask what, in the circumstances, the defendant ought reasonably to have known taking into account the activity involved and the degree of tolerable risk in light of the nature and gravity of the potential harm at issue.

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Specifically, would a reasonable person have foreseen that a lynch pin would somehow become dislodged or removed from the rod held on to the A frame cart, resulting in destabilizing the rod and that rod no longer securing the reel?

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What was the method employed in the past? Did the lynch pin become dislodged during the movement of the A frame cart by Jamie Boisse-White or was it dislodged as a result of him pushing on the reel?

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Was step two in the process of placing the lynch pin, being the placement of the ring in the downward position after insertion, missed by Jamie or some other employee and when the weight on the reel changed, allowing more movement of the bar, the lynch pin fell out.

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Nicholas Evans testified that the lynch pin was located on the frame of the cutting table, which is in the vicinity of the A frame cart W16 and used by Jamie Boisse-White.

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Lynch pins in the rod of the A frame cart has been a process employed without incident for many years. Monthly workplace safety inspections are conducted on the equipment and employees are tested on their knowledge with random questions.

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The checklists of the training process,

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5 Exhibits Four and 10, demonstrate Jamie Boisse-White had the safety knowledge. Exhibit 12 and 14 demonstrate that he, on more than one occasion, failed to follow through in practice.

10 Jamie Boisse-White acknowledged in his testimony that he knew he was required to check the position of a lynch pin prior to the movement of the A frame cart and reel however, he failed to look to ensure the pin was properly in place. Jamie Boisse-White testified that on August 24, 2011, there were large orders to be filled.

15 Subjective standard; Is it reasonable that an employee, rushing to keep up with orders, could fail to look and ensure that the lynch pin was properly in place?

20 Was this incident a result of momentary error in judgment or indicative of non-compliance with safety standards by Jamie Boisse-White?

25 David Gillies has been an employee of the Data Cable Company Incorporated for 25 years. He testified that the lynch pin method of securing the bar within the cradle had been used as long as he could recall.

30 15 years ago, Mr. Gillies worked in the cutting department and lynch pins were used then. Larger reels are stored on an A frame with a solid

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bar. Each cart has two locking wheels.

There has never been a reported incident with the storage of reels on the A frames, on the A frame carts, no incidents involving the use of lynch pins, no 'near misses' that he is aware of.

Since this incident, the Data Cable Company Incorporated has opted to move to a double bolt system. This case is therefore dissimilar to *R. versus Rio Algom Ltd. (1988)* where there was a physical barrier that had become damaged over time. It was the erosion of the quality of the barrier that resulted in that incident.

Here, with the Data Cable Company Incorporated, the process requires some human action in order for the reels to be put on to the A frame cart and secured in place with lynch pins and now reinforced with two nuts and bolts.

Human error will still be a factor. The fact that there have been no incidents involving the methods for securing equipment with the A frame cart and the fact that Jamie Boisse-White was directly employing this method for seven months accessing the same carts, not the same cart, up to 20 times during one shift, without incident, is reliable evidence that the incident was not a foreseeable event.

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As in *R. vs. Timminico Ltd, (2004)*,

"It is not the purpose or intent of the Occupational Health and Safety Act to hold an employer liable in circumstances where the circumstance was attributable to the prohibited act of an employee intentionally or through his own negligence or inadvertence".

Phil Hopkins and Michelle Ballum testified to the practice of monthly safety checks of their equipment, their various departments, their employee's knowledge and practice of safety.

Exhibits 12 and 16 were monthly inspection reports for July and August 2011. An unsatisfactory grading was applied for two areas noted in the July 2011 report including two employees for not wearing personal protection equipment, one of whom was Jamie Boisse-White.

Both testified to the disciplinary actions taken as a result of finding workers in non-compliance. Written notations were made regarding corrective action to be taken when a department area did not meet standard.

So, based on the totality of the evidence, the court finds that the Data Cable Company Incorporated has established on a balance of probabilities the defence of due diligence with regard to count number three on Information number

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12-0204 properly sworn the 30th day July 2012, in that they took all reasonable steps to avoid the particular event.

It was the lack of follow through by the worker, Jamie Boisse-White regarding a process that he knew was proper, checking to see that the lynch pin was properly in place and secured to the end of the bar held within the cradle of the A frame cart, a process he followed many times correctly over a seven month period prior to the incident.

Therefore, the remaining charge is dismissed.
...PROCEEDINGS CONCLUDED

Certification

FORM 2

Certificate of Transcript
Evidence Act, Subsection 5(2)

I, Joyce Tuyp, certify that this document is a true and accurate transcription of the recording of R. v. the Data Cable Company Incorporated in the Provincial Offences Court, held at 55 Zina Street, Orangeville, Ontario, taken from Recording dated October 30, 2013 which has been certified in Form 1.

Dec 5/13

Date

Joyce Tuyp

Signature of Authorized Person