

COURT OF APPEAL FOR ONTARIO

CITATION: Ontario (Labour, Immigration, Training and Skills
Development) v. Benevides, 2025 ONCA 426

DATE: 20250609

DOCKET: COA-24-OM-0264

Paciocco J.A. (Motions Judge)

BETWEEN

His Majesty the King in Right of Ontario (Ministry of Labour, Immigration, Trade
and Skills Development)

Appellant (Moving Party)

and

Luis Benevides

Respondent (Responding Party)

Sara MacDonald and Wes Wilson, for the moving party

Kaleigh Davidson and Harleen Toor, for the responding party

Heard: March 19, 2025

ENDORSEMENT

OVERVIEW

[1] On April 15, 2020, an exceptionally dangerous accident occurred on a worksite in Vaughan. Three hundred feet in the air, while being hoisted onto the roof of a tower, two stacked wooden pallets holding eight spools of elevator cable broke apart causing all eight spools to crash to the ground. Expert evidence

confirmed that the wood in the top pallet gave way under the weight of the load, causing it to break apart and release its load, damaging the pallet below. The spools, which cumulatively weighed approximately 4,000 pounds, fell on and around a Walmart store, including on its roof and a pedestrian walkway. Remarkably, there were no casualties.

[2] There were at least two contractors involved in the project: Hardwall Construction Limited (“Hardwall”), the owner of the crane; and Selko Elevators Limited (“Selko”), described as a “user” of the crane in the Tower Crane Safe Use Agreement that these two parties had entered into. Among its other provisions, the agreement required Hardwall to provide a “swamper” to assist the crane operator, “when the operator’s view of the intended path of travel is obstructed and/or if a person could be endangered by the load while it’s being hoisted”. The agreement also required Selko to provide a “rigger ... who will rig the load safely”.

[3] Luis Benevides, a Hardwall employee, was designated to perform the swamper’s role. After the load was rigged by two Selko employees, and after checking with one of those employees, Mr. Benevides “changed the strapping” to a “choke mode” from the “basket mode” that the riggers had applied. He then performed safety checks to make sure the strapping was secure and the load balanced. He then signalled the crane operator to raise the load.

[4] As a result of his involvement, Mr. Benevides was charged with four counts of failing to carry out obligations designated in *Construction Projects*, O. Reg. 213/91, contrary to s. 28(1)(a) of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1.

[5] One of those charges was for failing, as a worker, “to ensure the measures and procedures prescribed by section 37(1) of Ontario Regulation 213/91, were carried out”. Section 37(1) requires that material be “moved in a manner that does not endanger a worker.”

[6] The other three charges alleged failures by him to ensure the measures and procedures prescribed by ss. 172(1)(a), (b) and (c) of the regulation, in turn, were carried out. Section 172(1) provides, in relevant part:

172. (1) A ... device for rigging or hoisting an object, including its fittings and attachments,

(a) shall be suitable for its intended use;

(b) shall be suitable for and capable of supporting the object being rigged or hoisted;

(c) shall be so arranged as to prevent the object or any part of the object from slipping or falling;

....

[7] As indicated, the load failed because a wooden pallet gave way. During Mr. Benevides’ trial no evidence was presented that any of the tasks that he performed caused or contributed to the failure of the load or were otherwise

unsuitable. There was no evidence that the load he inspected was improperly strapped, or that he had been assigned responsibility for inspecting or otherwise determining the integrity of the wooden pallets. He was acquitted of all charges after the presiding justice allowed a motion for a directed verdict of acquittal. She recognized that offences contrary to the *Occupational Health and Safety Act* had been committed, but she concluded that “there is absolutely no evidence that the Crown has adduced to identify Mr. Benevides being the person responsible that committed the offence.”

[8] The Crown then brought an unsuccessful provincial offences appeal of Mr. Benevides’ acquittals.

[9] In the motion before me, the Crown seeks leave to appeal the decision of the provincial offences appeal judge. For the reasons that follow, I would grant leave to appeal.

ISSUES

[10] Section 131 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, sets out the two relevant requirements that a moving party must meet to obtain leave to appeal to the Court of Appeal. First, the moving party must raise a “question of law alone”. Second, the Court of Appeal must be satisfied that “in the particular circumstances of the case” leave to appeal is “essential in the public interest or for the due administration of justice”.

[11] The Crown's description of the errors of law it relies on has evolved but the issues it raised before me can fairly be described and organized as follows:

- A. Should leave to appeal be granted to argue that the directed verdict test was misapplied?
- B. Should leave to appeal be granted to argue that the appeal judge misconceived how to determine responsibility for obligations under the *Occupational Health and Safety Act*?
- C. Should leave to appeal be granted to argue that the private business contract between the crane owner and user was misused in identifying Mr. Benevides' responsibility?
- D. Should leave to appeal be granted to argue that the trial justice erred by considering due diligence and foreseeability when resolving the directed verdict motion?

[12] There is significant overlap between the first three of these issues.

ANALYSIS

(1) Should leave to appeal be granted to argue that the directed verdict test was misapplied?

[13] A directed verdict of acquittal is appropriate if the Crown has presented no evidence on an essential element of an offence: *United States of America v. Shephard*, [1977] 2 S.C.R. 1067, at p. 1080; *R. v. Timminco Ltd.*

(2001), 54 O.R. (3d) 21 (C.A.), at paras. 18-20. As the Crown conceded, both judicial officers stated this legal test correctly. It argues, however, that they both failed to properly apply the test. The gravamen of the Crown argument, as I understand it, is that a proper application of the test requires the correct identification of the essential elements of the charged offences, and that neither the trial justice nor the appeal judge defined the *actus reus* of the offences correctly. The jurists below therefore failed to properly apply the directed verdict test.

[14] Although the Crown did not articulate the issues directly in this way, its position, in effect, is that if a defendant “moved or stored material in a manner that endangered a worker”, then they have failed to work in compliance with s. 37(1) of O. Reg. 213/91, whether the task performed by the worker created or contributed to that danger. Similarly, the Crown’s position is that if the worker “was working with ‘a container, sling or similar device for rigging or hoisting’” that is (a) not suitable for its intended use, (b) not capable of supporting the object being hoisted, or (c) not arranged to prevent the object from falling, then the *actus reus* of ss. 172(1)(a), (b), or (c) will be made out – whether or not any of the tasks performed by or assigned to the worker resulted in those failings.

[15] But the trial justice required that for a worker to be liable under those provisions, the specific work done by or assigned to the worker must create or contribute to the danger in s. 37(1), or the deficiencies identified in ss. 172(1)(a),

(b), or (c). As mentioned above, the heart of the trial justice's reasoning was that "there is absolutely no evidence that the Crown has adduced to identify Mr. Benevides being the person responsible that committed the offence", and the appeal judge upheld her decision, in material part on this basis.

[16] I agree with the Crown that if the jurists below misunderstood the elements of the offences, then the "no evidence" test was not applied properly. I also agree that the proper *actus reus* of these offences raises a question of law. I accept that the resolution of this issue, which does not appear to be addressed directly in the case law, is "essential in the public interest or for the due administration of justice". On the one hand, the Crown is proposing a sweeping reach for *prima facie* liability. On the other hand, its interpretation would support an extensive network of responsibility for ensuring worker safety. These are pressing considerations.

[17] I also accept that it is in the interests of justice to grant leave on this issue. In my view, the language of s. 28(1)(a) of the Act that a "worker shall, (a) work in compliance with the provisions of this Act and the regulations", does not clearly impel either of the interpretations being advanced.

[18] It may be that by using the term "work" in assigning responsibility, s. 28(1) describes the specific task the worker performs, and not the general task the worker is participating in, thereby favouring Mr. Benevides' preferred interpretation. However, the provision is not entirely clear, and where the line is

drawn will have significant implications. If courts adopt the interpretation Mr. Benevides favours, this will impose restraints on workers' obligations to ensure safety.

[19] On the other hand, the construction that the Crown advances would impose extensive obligations on workers who perform incidental roles in hoisting objects, even when those workers have neither the expertise nor the experience to evaluate the entire hoisting system, nor the rank or seniority needed to direct how the task will be performed. If those workers do indeed bear responsibility for the sufficiency and safety of the entire hoisting process, there could also be limits on their ability to rely on (i) their limited role, (ii) the proper discharge of their assigned responsibilities, or (iii) their reliance on the expertise or experience of coworkers, to establish that they exercised due diligence.

[20] I recognize that lack of control over workers or the workplace is a relevant due diligence factor for employers: *R. v. Greater Sudbury (City)*, 2023 SCC 28, 487 D.L.R. (4th) 387, at paras. 4-5. However, different considerations may apply to workers. It is arguable that if the Act assigns responsibility to workers to ensure compliance with the Act and regulations relating to all aspects of the task they are participating in, then due diligence requires that they exercise some control over all aspects of those tasks. To be clear, I do not purport to resolve this question, but the point is that the extent of responsibility that the Crown promotes raises delicate correlated questions about the reach of the due diligence defence. If that defence

applies narrowly, the liability the Crown promotes could operate akin to absolute liability.

[21] The interpretation the Crown promotes could also create practical problems on worksites if all workers involved in a process addressed in the Act or regulation bore responsibility for all aspects of that process.

[22] I also note that whichever interpretation is favoured, it will govern not only hoisting tasks, but all tasks regulated by the Act. Given the lack of clarity of the provision and what is at stake, it is not appropriate that this issue be resolved by a single judge during a leave application. The proper interpretation of the obligations of workers is best left to a panel of this court. Leave to appeal is therefore granted on this issue.

(2) Should leave to appeal be granted to argue that the appeal judge misconceived how responsibility for the obligations under the *Occupational Health and Safety Act* is to be determined?

[23] The Crown argues that it should be granted leave to appeal on the ground that the trial justice and the appeal judge erred in law by focusing on why the load failed and who was responsible for the failure rather than asking themselves whether Mr. Benevides breached his safety obligations. The Crown submits that this is a question that should be answered using a “belt and braces” approach, which it argues the trial justice and appeal judge failed to apply.

[24] These issues overlap substantially with the prior issue, for which leave is granted. If the Crown’s conception of the *actus reus* of the offence prevails, then the trial justice and appeal judge arguably did err in law by focusing on why the load failed and who was responsible for the failure.

[25] As for the “belt and braces” principle, it recognizes that responsibilities imposed by the *Occupational Health and Safety Act* are “often concurrent and overlapping” and imposed on multiple workplace participants: *Greater Sudbury (City)*, at paras. 5, 10, 11, and 45 (*per* Martin J.). Given this principle, it would arguably be an error for a judge to proceed as if there were “silos of responsibility” or to exonerate a worker for their failings by pointing to the failures of other workers: see *Greater Sudbury (City)*, at paras. 11, 45 (*per* Martin J.). There are strains of reasoning in the decisions below that suggest that the outcome may have been influenced by the fact that others bore responsibility for the deficiencies in lifting the load. In my view, it is essential when addressing the prior issue to consider whether this is properly a material consideration. I would grant leave to the Crown to make this companion argument, as well.

(3) Should leave to appeal be granted to argue that the private business contract between the crane owner and user was misused in identifying Mr. Benevides' responsibility?

[26] The Crown argues that the trial justice erred in law by relying on the private business contract between Hardwall and Selko, rather than the *Occupational Health and Safety Act*, to determine Mr. Benevides' safety obligations. I agree that had the trial justice done this, it would have been a legal error on her part, since the elements of a statutory offence depend upon the statute, not on the private agreement of the parties involved. However, if the Crown's *actus reus* theory is incorrect, then the scope of the workers' assigned responsibilities may be an appropriate consideration properly informed by a private business contract. Since it is inevitable that the job responsibilities assigned in the private agreement will be referenced by both parties in their submissions, it would be artificial to deny leave on this issue. Leave to appeal is therefore granted on this ground of appeal.

(4) Should leave to appeal be granted to argue that the trial justice erred by considering due diligence and foreseeability when resolving the directed verdict motion?

[27] The Crown submits that the trial justice erred in law by relying on the concepts of due diligence and foreseeability when directing the verdict of acquittal. It argues that it is a legal error to consider these factors in a directed verdict motion

because the Crown's burden is simply to show the *actus reus*. Once that is accomplished, the burden is on the defendant to show due diligence, a defence to which foreseeability may be relevant. In support of this submission the Crown notes that the trial justice expressly referred to due diligence in her reasons and found that the hazard that materialized was unforeseeable to Mr. Benevides.

[28] These arguments were made before the appeal judge and rejected, after he found that the trial justice had referred to due diligence not as an articulation of her reasons, but to assist her in understanding the context. I make two comments about this determination.

[29] First, the appeal judge, whose decision is under appeal, made no error in his own analysis of the law relating to the role of due diligence and foreseeability that could ground leave to appeal. He understood and applied the law.

[30] Second, even if the trial justice had mistakenly relied on due diligence and foreseeability in her decision and the appeal judge erred by failing to correct that error, which I need not decide, the appeal judge's conclusion that she did not rely on due diligence or foreseeability in assessing whether the Crown had established a *prima facie* case removes any risk that her decision would serve as a precedent for considering these factors in directed verdict motions.

[31] Nor has any such reliance by the trial justice given rise to a clear injustice. I have explained the basis for her decision to grant the directed verdict of acquittal, and it did not turn on due diligence or foreseeability considerations.

[32] There is therefore no basis for finding that leave to appeal on this issue is essential in the public interest or for the due administration of justice.

[33] I would not grant leave to appeal on this ground.

CONCLUSION

[34] The motion for leave to appeal is allowed on the first three issues.

“David M. Paciocco J.A.”