News

Court upholds convictions in ride fatality

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Alberta's highest court has dismissed an appeal of an appeal court's ruling that convicted Calgary-based technology company XI Technologies Inc. on two counts, following a work-related fatality, under the provincial *Occupational Health and Safety Act*.

XI was appealing an earlier Alberta Court of Queen's Bench decision to reverse a lower court's acquittal of charges that it failed to ensure the health and safety of its employees, and failed to ensure that all equipment used at a work site would safely perform the function for which it was intended or designed.

In the case, Nathan Shair was one of three XI workers assigned to run a simulated calf-roping experience at an annual customer appreciation event held during the 2007 Calgary Stampede. Partygoers would sit on top of a rented stationary mechanical horse and attempt to lasso a mechanical calf propelled from beneath the machine by the force of a large truck spring. Shair died after a steel lever came loose and struck him in the head.

In *R. v. XI Technologies Inc.* [2011] A.J. No. 1144, Judge Sherry Van de Veen acquitted XI of both charges, finding that only in hindsight would the company both have been expected to request proper operating instructions for the machine and recognize the significant risk posed to the operators by reaching into the machine to manually release the hinge hook attached to the lever.

As the appellate court noted, the machine was not the one they ordered, and was delivered to the event without an operator and proper written instructions, leaving XI Technologies personnel to figure out how to operate it. Before Shair's tragic mishap, another employee was also injured by the lever but did not require medical care.

Last year, Alberta Court of Queen's Bench Justice Patrick Sullivan allowed the Crown's appeal and entered the two convictions against XI. The summary conviction appeal judge disagreed with

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the trial judge's assessment of risk versus hazard, relying on the Ontario Court of Appeal's decision in *R. v. Rio Algom Ltd.* [1988] O.J. No. 1810, which outlines a test to determine whether a reasonable person would have foreseen a potential danger and not whether the precise injury was foreseeable. Justice Sullivan also determined that XI's liability was due to its decision to continue operating the machine once the danger associated with its operation was apparent, regardless of the risk being the result of design or mechanical malfunction.

"A reasonable employer would have ensured operational instructions were received *before* handing an unfamiliar machine over to its employees to operate," Justice Sullivan wrote in *Alberta v. XI Technologies Inc.* [2012] A.J. No. 1002.

In hearing XI's challenge of Justice Sullivan's decision in *Alberta v. XI Technologies Inc.* [2013] A.J. No. 805, the appellate court held on Aug. 13 that Judge Van De Veen accepted evidence that showed hazards associated with operating the calf-riding machine, which was "incompatible" with her finding that the risk "was only foreseeable with the benefit of hindsight."

Justice Sullivan correctly ruled that Judge Van De Veen's decision that the risk "was only obvious with the benefit of hindsight was incompatible with the balance of evidence," the appeal court noted, and XI Technologies failed to "do all that was reasonably practicable in the circumstances to avoid the reasonably foreseeable risks," said Alberta Court of Appeal Justices Peter Martin, Bruce McDonald and Karen Horner in their judgment.

They also found that the company demonstrated a lack of due diligence in operating a machine without anyone having any familiarity with it or adequate instructions, particularly since it would be used by partygoers consuming alcohol.

In Toronto personal injury lawyer Alf Kwinter's view, the Alberta appellate court decision "makes eminently good sense," compared to the trial judge "making all these findings against the company" but who then "goes ahead and acquits it, which makes no sense."

The lesson for employers is that if they discover machinery or equipment is defective, "they're not going to correct it by getting around the problems," said Kwinter, founding partner of Singer, Kwinter.

"You're not going to make an inherently dangerous machine safe, and employers should be cautioned against trying to work around defects."