CITATION: *Carroll v Tom's Gully Mining Pty Ltd* [2007] NTMC 033

PARTIES:	JOHN CARROLL
	v
	TOM'S GULLY MINING PTY LTD
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Justices Act, Mining Management Act
FILE NO(s):	20703701
DELIVERED ON:	21 June 2007
DELIVERED AT:	Darwin
HEARING DATE(s):	4 June 2007
JUDGMENT OF:	Jenny Blokland CM

CATCHWORDS:

CRIMINAL LAW – SENTENCING – OCCUPATIONAL HEALTH AND SAFETY – CORPORATION – CAPACITY TO PAY – RELEVANT PRINCIPLES

Mining Management Act (NT) ss29, 16, 23, 73, 31
Sentencing Act (NT) ss5, 17
Carroll v ERA [2005] NTMC 06
Carroll v Alan, unreported, 11 September 2006, Luppino SM
Director of Public Prosecutions v Amcor Packaging Australia Pty Ltd (2005) 11 VR 557
R v Howe and Son [1999] 2 All ER 249

REPRESENTATION:

Counsel:

Complainant:	Mr Anderson
Defendant:	Mr Elliott

Solicitors:

Complainant:	Department of Justice
Defendant:	Not Noted

Judgment category classification:	C
Judgment ID number:	[2007] NTMC 033
Number of paragraphs:	

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20703701

BETWEEN:

JOHN CARROLL
Complainant

AND:

TOM'S GULLY MINING PTY LTD
Defendant

REASONS FOR DECISION

(Delivered 21 June 2007)

JENNY BLOKLAND CM:

Introduction

1. This matter involves sentencing Tom's Gully Mining Pty Ltd ("the defendant") for breaches of the *Mining Management Act* NT. A plea of guilty to three counts was entered on the defendant's behalf to the following counts (as amended):

    1. On or about 23 May 2006, at the Tom's Gully Mine via Old Mount Bundey Station, Arnhem Highway in the Northern Territory of Australia ("the mining site"), being the operator for the mining site, failed to do an act, in breach of an obligation imposed by Division 1 of the *Mining Management Act*, and in so doing caused an adverse effect on the health of a person, namely Benedict Michael Clarke, contrary to section 23 (5) of the *Mining Management Act*.

    Particulars of act

To establish, implement and maintain an appropriate safety, health and environment protection management system for the mining site, including establishing, implementing and maintaining a system to provide adequate instruction or training to workers in the safe use of a PC 40 Excavator, and establishing, implementing and maintaining a system requiring workers to consider, identify and avoid or minimise hazards associated with all work tasks to be undertaken by the workers.

Particulars of obligation

So far as is practicable, to operate and maintain the mining site to minimise risk to the safety and health of the workers on the mining site, as required by section 16 of the *Mining Management Act*.

2. Between 23 May 2006 and 29 May 2006, being the operator for a mining site, failed to notify the Chief Executive Officer of the agency administering the Mining Management Act of the occurrence of a serious accident on the mining site as soon as practicable after it became aware of the occurrence of the serious accident, contrary to section 29 (1) of the *Mining Management Act*.

Particulars of serious accident

Event on 23 May 2006 causing injury to the finger of Benedict Michael Clarke.

3. On or about 5 July 2006, at the Tom's Gully Mine via Old Mount Bundey Station, Arnhem Highway in the Northern Territory of Australia ("the mining site"), being the operator for the mining site, failed to do an act, in breach of an obligation imposed by Division 1 of the *Mining Management Act*, and in so doing caused serious injury to a person, namely Anthony John Pearce, knowing, or ought reasonably to have been expected to know, that the failure to do the act might cause a

serious injury to a person, contrary to section 23 (4) of the *Mining Management Act*.

Particulars of act

To establish, implement and maintain an appropriate safety, health and environment protection management system for the mining site, including establishing, implementing and maintaining a system to ensure workers are not placed at risk by unguarded machinery or by being asked to perform inherently dangerous tasks on partially commissioned machinery, and establishing, implementing and maintaining a system requiring workers to consider, identify and avoid or minimise hazards associated with all work tasks to be undertaken by the workers.

Particulars of obligation

So far as is practicable, to operate and maintain the mining site to minimise risk to the safety and health of the workers on the mining site, as required by section 16 of the *Mining Management Act*.

Particulars of serious injury

A deep laceration to the left arm.

2. The essential facts agreed were received as Exhibit P1 and provide as follows:

Charge 1

1. The defendant, Tom's Gully Mining Pty Ltd, has been the operator of a mining site known as Tom's Gully Mine(the site), approximately 90 kilometres south-east of Darwin on Mt Bundey Station, since about November 2005. There was an operating gold mine on the site in the

late 1980s and early 1990s. The site was re-commissioned from late 2005.

2. In May 2006 the defendant hired a PC 40 mini excavator to undertake work on the site. The mini excavator was principally operated by the defendant's employee, Jeffery Hunt. Mr Hunt was familiar with the operation of machinery such as the mini excavator, but was not aware of the appropriate method of removing the excavator's bucket. The bucket had to be removed from time to time when it was necessary to change a different size bucket for the excavating task at hand. Mr Hunt was given no direction, guidance or training in the removal of the bucket from the mini excavator because the defendant assumed it was not necessary.

3. When it became necessary to remove the bucket from the mini excavator, Mr Hunt devised a method of removal of his own initiative. The method he devised required the simultaneous operation of the hydraulic arm of the excavator by himself, while an assistant operated a purpose designed pry bar which was provided with the excavator to release a spring mechanism which released a pin holding the bucket. During this process the assistant had to let go of the pry bar and stand clear to avoid injury, when instructed to do so by Mr Hunt.

4. The process was undertaken a number of times without incident. On several of those occasions, Mr Hunt was assisted by his brother-in-law, Ben Clarke, who was also employed by the defendant as a mill operator. As the mill was not operational at the time, Mr Clarke was undertaking general labouring duties.

5. On the morning of 23 May 2006, Mr Hunt asked Mr Clarke to assist him in removing the bucket from the mini excavator. Mr Clarke operated the pry bar while Mr Hunt operated the hydraulic arm of the mini excavator. At the appropriate time, Mr Hunt told Mr Clarke to

let go of the pry bar. However, Mr Clarke did not let go quickly enough and caught the tip of his right ring finger between the pry bar and the hydraulic arm of the excavator.

6. Mr Clarke received first aid at the site before being admitted to hospital in Darwin. He later underwent surgery to repair his finger tip. The medical report discloses that Mr Clarke's finger tip suffered a "near total amputation", but was able to be saved after is was sutured at the Emergency Department of the Royal Darwin Hospital. A specialist hand surgeon then stabilised the tip fracture with a pin and performed a microscopic nail bed repair. Mr Clarke was able to return to work on light duties on the afternoon of 25 May 2006. Within 6 weeks the finger was fully functional again.

7. Section 31 of the *Mining Management Act* (the Act) obliged the defendant to carry out an investigation into the accident and provide a written report to the complainant (the Chief Executive Officer of the Department administering the Act). In its report, the defendant identified the following as contributing factors to the accident:

(a) The defendant did not have a written procedure for changing buckets on the mini excavator;

(b) A job hazard analysis had not been undertaken for the task; and

(c) The workers were not given any training in how to do the task.

The report recommended that, in future, equipment supplied to the site with movable attachments should be delivered with training, or an operating manual provided.

8. Shortly after the accident, the company that supplied the mini excavator gave a demonstration on site showing how the buckets could be removed by a single operator by placing the hydraulic arm in a

particular position and then using the pry bar to release the spring mechanism while the arm was in that fixed position.

9. This demonstration took only a few minutes. Had this method been demonstrated when the mini excavator was first supplied, and followed by Mr Hunt, Mr Clarke would not have been asked to assist and would not have been injured.

10. Section 16 of the Act creates an obligation on the defendant to "so far as is practicable, operate and maintain the site to minimise risk to the safety and health of the workers on the site". Section 73 of the Act provides that the acts or omissions of its directors, employees, or agents, are taken to be defendant's for the purposes of this proceeding.

11. The defendant has breached its obligation pursuant to section 16 by failing to ensure that its employees received training or instruction in the safe removal of buckets from the mini excavator. As was demonstrated after the accident, it was practicable to provide such instruction (see section 12).

12. The injury suffered by Mr Clarke was a result of this failure (see section 22).

13. The maximum penalty for this offence for a corporation is currently a fine of up to $27,500.00

Charge 2

14. The accident was a "serious accident", as defined in section 4 of the Act, because Mr Clarke was unable to carry out the full range of his normal work activities for more than one shift. However, the defendant did not report the accident to the Department of Primary Industry, Fisheries and Mines, as soon as practicable, or at all, as required by section 29 of the Act.

15. The accident was reported to the Department on 29 May 2006 by someone other than the defendant, in the form of a complaint. Section 63 of the Act prohibits disclosure of the name of the person who made the complaint. After receiving the complaint, the Department contacted the defendant and commenced an investigation in to the matter.

16. On 17 May 2006, 6 days before the accident, the defendant had been warned by the Department for not reporting a serious accident that occurred early on 13 May until late on 16 May 2006. No charges were laid with respect to the accident or the delay in reporting it.

17. The current maximum penalty for a corporation for this regulatory offence is $110,000.00.

Charge 3

18. The victim in this matter, Anthony Pearce, is a trade qualified fitter and turner who worked on a casual basis for a business called Mine Maintenance and Construction (MMC). Mr Pearce had worked for MMC for approximately 6 years and had been deployed to a number of mine sites as a mine site fitter.

19. On 4 July 2006 Mr Pearce was engaged by MMC to do 3 night shifts, commencing on the evenings of 4, 5, and 6 July, as a mine site fitter at Tom's Gully Mine.

20. At the commencement of his second shift at he site at 6.00pm on 5 July 2006, Mr Pearce was instructed by his employer and a representative of the defendant to undertake a number of tasks that evening, including a lube run. A lube run involves lubricating all working equipment in the plant.

21. At approximately 10.30pm Mr Pearce was advised by an employee of the defendant that a conveyer belt on the mill feed conveyor in the treatment plant was slipping and needed tensioning. By this time Mr Pearce had commenced the lube run. Mr Pearce then attended at the conveyor with the defendant's employee and commenced "tracking" the conveyor belt. The defendant's employee left Mr Pearce at the conveyor to attend to other duties.

22. Whilst at the conveyor, Mr Pearce decided to grease the conveyor bearings so he wouldn't have to return later to do so on his lube run. The area at the rear of the conveyor was dark and dusty. There were no guards around the conveyor or the tail drum because the guards required Australian Standards and the engineering design drawings for the conveyor were still to be constructed and installed. Once the guards were installed remote grease lines would enable points behind the guards to be safely greased from beyond the guards. The defendant had commenced operating the conveyor before the guards and greasing system had been completed.

23. At approximately 120.45pm, Mr Pearce greased the bearing housing and then used a torch to see if the inner lube point on the tail drum could be safely accessed. Just as Mr Pearce realised the inner lube point could not be safely reached, the sleeve of his shirt caught on the speed indicator tab on the side of the tail drum and his left arm was pulled between the drum and the conveyor frame. Mr Pearce suffered a deep laceration to his left forearm.

24. Mr Pearce received first aid at the site and was then transported to hospital in Darwin by ambulance for treatment. Mr Pearce suffered 4 severed tendons, a severed nerve and a severed artery. His treatment has included micro-surgery, skin grafting, and extensive physiotherapy. [tender medical report, photo] The specialist surgeon

who has treated Mr Pearce says it will be 12 to 24 months after the accident before an assessment can be made as to how well the nerve will recover. The final outcome could vary form little disability to a significant disability. It remains to be seen if further surgery will be required.

25. In its report on the accident, the defendant identified the following as among the contributing factors:

(a) The guards for the conveyor had not been manufactured before the conveyor was installed;

(b) The guards had not been fitted to the conveyor yet the conveyor was operating;

(c) Remote grease lines had not been installed on the conveyor;

(d) There was no protocol for the start up of the area;

(e) There was no area specific induction and no job hazard analysis completed for the task;

(f) There was no isolation procedure for the processing plant and the moving conveyor had not been isolated; and

(g) There was poor judgment on Mr Pearce's part in attempting to locate the grease nipple on the unguarded conveyor while it was operating.

The defendant's report recommended that 13 remedial actions be taken.

26. The defendant reported the accident to the Department at approximately 9.00am on the morning after the accident. The Department immediately commenced an investigation.

27. The defendant has breached it obligation pursuant to section 16 by failing to ensure that Mr Pearce did not to attempt to grease the conveyor until all appropriate guarding and remote grease lines had been installed. Had the guarding and remote grease lines been in place at the time, the accident would not have happened.

28. The injury by Mr Pearce was a result of this failure (see section 22). The injury is serious because it has caused permanent injury to this health (section 23(6)).

29. The defendant knew or ought reasonably have known that its failure might have caused injury (section 23(4)(c)).

30. The penalty for this offence for a corporation is currently a fine of between $27,500.00 and $275,000.00.

About the defendant company

3. The defendant company was originally wholly owned by Brisbane based mining company Renison Consolidated Mines NL (Renison). Prior to commencing mining operations at the Tom's Gully Mine, Renison entered into an Alliance Agreement with publicly listed Indonesian mining and engineering company PT Petrosea Tbk (Petrosea) which resulted in Petrosea obtaining a 50% shareholding in the defendant company and a contract to provide mining and maintenance services at Tom's Gully Mine with a contract value of US$84.6 million. The defendant company is the operating company for the mining operations at the mine but has no ownership interest in the mine. Tom's Gully Holdings Pty Ltd, a 100% owned subsidiary of Renison, owns the mining tenements and plant and equipment associated with the mine. The defendant company is designed to break even from its operations and invoices Tom's Gully Holdings Pty Ltd for the costs it incurs.

4. On 25 May 2007 the Directors of Renison Consolidated Mines announced to the Australian Stock Exchange that it had entered into an agreement with Vancouver based miner listed on the Toronto Stock Exchange, GBS Gold International Inc, to sell its 100% interest in Tom's Gully Mine and associated exploration interests for consideration of up to A$51 million, subject to shareholder approval.

Relevant Sentencing Considerations

Capacity to pay

5. Although the facts were agreed, there was significant comment made on behalf of the defendant in relation to those facts concerning the Defendant company's structure and its capacity to pay: (para 2, sub paras 31 & 32 above). It was emphasized on behalf of the defendant that whatever penalty the Court imposed on the defendant, the defendant could not be seen in the same light as larger corporations who have been subject to penalty under the *Mining Management Act* (by comparison see the defendant companies in *Carroll v ERA* [2005] NTMC 06 and *Carroll v Alan*, unreported, Luppino SM, 11 September 2006). With that proposition I agree. It was submitted the defendant company, strictly speaking, had no capacity to pay. At the same time, the Court was assured the defendant company would make arrangements to pay the Court imposed penalty, (subject of course to exercise of rights of appeal). I confirm I agree with the view expressed in submissions that capacity to pay is a relevant consideration in sentencing corporate offenders.

6. From the structure of the defendant company as outlined to the Court, I have concluded the defendant has the capacity to pay a fine, (despite the fact that it has not turned a profit, nor does it own assets capable of realisation), when the provisions of the *Sentencing Act* are properly considered. Section 17 *Sentencing Act* directs the Court, when determining the amount of a fine, to take into account *as far as practicable* (emphasis added): (a) the

financial circumstances of the offender and (b) the *nature of the burden* that its payment will impose on the offender.

7. For all practical purposes, given the Defendant company is a wholly owned subsidiary of Renison, its *financial circumstances* and the *nature of the burden* of any fine imposed should be considered in the light of the access the Defendant has to the financial resources of its parent company. The relationship of the Defendant to Renison and any corporate successor informs the question of the *financial circumstances* and the *nature of the burden* in this context. The assessment of *financial circumstances* admits consideration of the resources available to the defendant beyond the financial assets directly held by it. The circumstances of the defendant indicate it is capable of paying a significant fine. This is of course only one of a number of considerations.

8. The *Sentencing Act* requires the Court to also consider, (*s 17(3)), any other order that it or any other court has made has made or proposes to make (a) providing for the confiscation of the proceeds of the crime; or (b) requiring the offender to make restitution or pay compensation.* I note the Victim Impact Statement of Tony John Pearce (*Ex P8*), the victim in the third offence has been receiving weekly payments and medical expenses since the offence. There is some query over whether he has received the proper amount from the insurer. As there is no information on whether these are court ordered payments, and it is not clear that the amount that has been paid is correct and given it is paid by the insurer on behalf of the defendant, I will not take into account the fact of worker's compensation payments as a mitigating matter in terms of the level of the fine to be imposed.

Objective Seriousness of the Offences

9. As with any sentencing, it is the objective seriousness of the offending that is at the heart of the matter and reflected in a number of overlapping sentencing guidelines in the *Sentencing Act* discussed by both counsel in the

course of submissions. Those guidelines that have attracted submissions in this matter, (either expressly or by implication) include: the maximum and minimum penalties: (*s*5 (2)(a) *Sentencing Act*); the harm done to the victim: (*s* 5(2)(b) *Sentencing Act*); the extent to which the offender is to blame for the offence: (*s* 5(2)(c) *Sentencing Act*); the prevalence of the offence: (*s* 5(2)(g) *Sentencing Act*) and cooperation and plea of guilty (*s* 5(2)(h)and (i) *Sentencing Act*). Both counsel agree that general deterrence and rehabilitation are significant factors for consideration (*s*5(1) *Sentencing Act*), the issue as is often the case is which of these factors should prevail in the assessment of the penalty. It is clear from the authorities that general deterrence is usually the dominant sentencing consideration: *Director of Public Prosecutions v Amcor Packaging Australia PtyLtd* (2005) 11 VR 557.

10. In relation to count one, the procedure adopted for changing the excavator's bucket was not the proper procedure and involved significant risk to the employees involved. The victim was not someone who was regularly engaged in that procedure. It caused injury requiring surgery after near total amputation of his finger: (Ex P3, Letter from Dr Mahajani). After six weeks the finger was fully functional again (Ex P7 VIS). There is no permanent injury although there is some minor scarring. In terms of the injury itself, it is not amongst the most serious examples, it was not life threatening, however, it is still a significant injury that would not have occurred had the defendant discharged its statutory duty under *s* 16 *Mining Management Act* .

11. It was submitted the defendant, or its management did not know the risky procedure was being utilized and that Mr Hunt, (who introduced the procedure), held the relevant qualifications and licenses to operate the relevant equipment. Although this mitigates the moral blameworthiness of the defendant to a degree, it is not as significant as it might be in other cases. If too much emphasis is put on that factor, it could conceivably undermine the objects of the *Mining Management Act* that, after all, for the

purposes of criminal liability attribute acts done by employees or agents to the corporation: (*s 73 Mining Management Act).*

12. In terms of rehabilitation it was submitted there had been a turn-over of management and two safety audits since these incidents; the processing manager was replaced in August 2006 and an Occupational health and Safety Professional was employed in October 2006. Further, the court was advised that site rosters had been changed to better manage fatigue; a site/safety system database had been introduced and the culture was more oriented towards safety. This is some mitigation.

13. The maximum penalty for this offence is $27,500. General deterrence is a significant factor in these cases. Mining is a dangerous activity if the statutory safety standards are not adhered to. The Court must be seen to do what it can to support the statutory regime of occupational health and safety. Although prevalence has been mentioned in relation to this matter, I don't consider it is clear that this is a prevalent offence given the apparently small number of prosecutions drawn to the court's attention. The efforts at rehabilitation, although extremely worthwhile must take a secondary role to general deterrence. When the rehabilitation efforts are taken into account including cooperation in the investigation I consider a fine of $14,000 to be appropriate. I appreciate the defendant does not have prior convictions. Taking into account the plea of guilty, I would impose a fine of $12,600 for count one.

14. In relation to count 2 (failure to report a serious accident), it was brought to the court's attention that the defendant had been previously warned about a delay in reporting a previous incident. In mitigation it was submitted that the employee responsible for the reporting was no longer employed; the company accepts its responsibility for this matter; that the records at that time were deficient but given all the steps to improve occupational work and safety this would not be an issue in the future. Although the accident was

reported six days after the reportable incident, it was not the defendant who reported it. The fact that the defendant had been previously warned is an aggravating factor: (*R v Howe and Son* [1999] 2 All ER 249). I have been strongly influenced by this factor in setting a penalty. This is a serious offence. The seriousness with which the legislature regards this offence is evident in the statutory maximum fine of $110,000. Compliance with reporting must be considered central to the maintenance of the regulatory regime that after all is regulating an activity with inherent dangers. Even bearing in mind the rehabilitation efforts of the defendants (detailed above), I consider a fine of $40,000 to be appropriate. Given the plea of guilty I would impose a fine of $36,000.

15. Count three is clearly the most serious of the offending. Once again, the defendant has clearly accepted responsibility. In my view the risk of accessing the inner lube point on the tail drum without the Australian Standard guards that were required should have been evident to the defendant. It does not require a great deal of insight to appreciate the risk. Mr Pearce has suffered a terrible and shocking injury. Dr Mahajani's report of 7 February 2007 (Exhibit P6) notes amongst other matters: *"…a large forearm injury that caused a total disruption to the deep flexor tendons of all the finger tendons (save thumb). In addition, he had also severed the ulnar artery and nerve and a skin defect that needed a small skin graft into the defect. In straight forward terms, this is a major injury to the hand and one of the principle nerves to the hand has been cut (there are three) and although it has been repaired, nerves may not heal perfectly and it would take at least 12 months to know where we are at in relation to the overall recovery of this nerve. The tendons have been repaired and sometimes they too can take some time to recover but in the context of a major nerve injury may take longer from the point of view that sensation and coordination are impaired.."*

16. Other material illustrative of the seriousness of this injury include the photograph (exhibit p5) and the Victim Impact Statement of Mr Tony Pearce (Exhibit P8). It is a lengthy statement but gives an idea of the extent of the pain and the horror he felt at the point of injury; the difficulties of surgery, the extensive hand therapy and the pain involved in rehabilitation; the ongoing pain and discomfort from the use of splints and strappings to assist in the rehabilitation and the need to stretch his tendons because his hand was initially curled up. He has had times of being full of anger and frustration at what has happened to him. It was not until October that he could use his hand again. He has had to rely a lot on other people. It was not until December that he was able to return to light duties. He is now working in a workshop and is happier but he feels that his work is not meaningful. He has suffered financially; he has been unable to participate in activities he once enjoyed such as working on his block in Litchfield; he states that "*words don't seem to do justice to the far reaching and long lasting impact, which will be with me for the rest of my life"*. The emotional impact he describes is significant with changing and dreadful moods and significant suffering for his partner too. The Court recognises and acknowledges the depth of the effect this offence has had on Mr Pearce.

17. In mitigation I am reminded to take into account all of the contributing factors set out in paragraph 25 of the agreed facts and I do take those into account but the fact remains that this offence would not have been committed had the defendant complied with its statutory obligations to ensure a safe work place to minimise the risk to the safety and health of the workers on its mining site. The statutory penalty is a minimum fine of $27,500 and a maximum of $275,000. I don't agree with counsel for the complainant that the minimum fine is reserved for only the very least serious cases. The principle of reserving the maximum penalty for the most conceivably serious case does not apply in the reverse to the minimum penalty, although I acknowledge that both the maximum and minimum must

be considered. The penalty for less serious cases will tend to cluster on or about the minimum but the sentencing practice in my observation of other types of offences that involve the imposition of mandatory minimums is simply that the minimum will always apply no matter how minor the offending. All issues considered, including the rehabilitation efforts of the defendant as identified above, there should be a fine of $100,000. For the plea of guilty I would reduce the fine to $90,000.

18. That gives a total in fines of $138,600. Reviewing the fines from the totality point of view and from the question of capacity to pay, I do not see any reason to reduce the fines further. The defendant will be convicted on each count and fined as indicated in these reasons. There will be $120 in victims levies and I will check with counsel on whether there is any issue concerning costs.

Dated this 21st day of June 2007.

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Ms Blokland
CHIEF MAGISTRATE