



**Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover
Authority of New South Wales (Inspector Childs) [2010] HCA 1
(3 February 2010)**

FACTS:

An employee of Kirk Group Holdings Pty Ltd (“Kirk”) was involved in a fatal farming accident, when the all terrain vehicle which he was driving rolled down a hill. Kirk was the owner of the farm, but took no active role in its operations.

Kirk was prosecuted on the basis that he had failed to employ proper and adequate measures which were ‘reasonably practicable’ in order to secure a safe working environment. Kirk was found guilty, but appealed to the high Court on the basis that the NSW Industrial Relations Commission had allowed a lack of particulars in the complaint so as to prevent Kirk from properly defend the charges.

ISSUES:

If a risk is present, the question is – what action on the part of the employer was required to address it? The action must be a matter which practically the employer could have adopted.

FINDING:

The High Court found that the test which is relevant for the defence is whether the particular steps not taken by the employer were reasonably practicable, and that it is not necessary to establish that every possible risk was obviated.

QUOTE:

Heydon J [at 125]...

“...the proceedings should never have been instituted...It is absurd to have prosecuted the owner of a farm and its principal on the ground that the principal had failed properly to ensure the health, safety and welfare of his manager, who was a man of optimum skill and experience – skill and experience much greater than his own – and a man whose conduct in driving straight down the side of a hill instead of on a formed and safe road was inexplicably reckless...”

IMPACT:

The case illustrates a significant shift of the weight of burden previously placed on employers in prosecutions for breaches of the OH & S legislation. The defendant should be properly appraised of the particular case which he is required to meet. The prosecution must establish the particular action which the employer should have taken and that to do so was reasonably practicable.