

- \* SYDNEY
- \* BRISBANE
- \* MELBOURNE
- \* PERTH

**CASEWATCH****Laing O'Rourke (BMC) Pty Ltd v Kirwin [2011]  
Western Australia Supreme Court of Appeal [117] 17 May 2011****FACTS:**

The appellant was a company engaged to perform track and bridge work in an area of unusually high wind activity. When Cyclone George affected the area in March 2007, a number of workers were seriously injured by collapsed shelters which disintegrated under the wind load. The appellant was consequently charged with being an employer who had failed, so far as was practicable, to provide and maintain a safe working environment.

**ISSUES:**

Whether the appellant can be held liable in respect of injuries arising from Cyclone George and whether the appellant had a duty to check the design of the dongas provided to it by the principal under its contract.

**FINDING:**

The Court determined that the appellants had satisfied the duty owed under s19 of the Occupational Safety and Health Act 1984 and the design checks suggested went beyond what was practicable and reasonable.

**QUOTE:**

Murray JA held that...

*"30 The duty imposed on an employer by s 19(1) is not an absolute duty:...Important in this regard is the phrase 'so far as is practicable', which qualifies the duty in s 19(1)...."*

*"31... The words 'reasonably practicable' are ordinary words, bearing their ordinary meaning and simply call for the making of a value judgment in light of all the facts: Slivak v Lurgi (Australia) Pty Ltd [2001] HCA 6; (2001) 205 CLR 304, 322 (Gaudron J). Hindsight may mislead. As Harper J said in Holmes v RE Spence & Co Pty Ltd (1992) 5 VIR 119, 123 - 124, in relation to the equivalent provision in the Victorian legislation:..."*

*"The Act does not require employers to ensure that accidents never happen. It requires them to take such steps as are practicable to provide and maintain a safe working environment. The courts will best assist the attainment of this end by looking at the facts of each case as practical people would look at them: not with the benefit of hindsight, nor with the wisdom of Solomon, but nevertheless remembering that one of the chief responsibilities of all employers is the safety of those who work for them."*

**IMPACT:**

This decision reaffirms that the realism of Kirk's case is now entrenching and imposing on an employer duties that while onerous are practicable.

This publication is intended to be a topical report on recent cases in the construction, development and engineering industries. This publication is not intended to be a substitute for professional advice, and no liability is accepted. This publication may be reproduced with full acknowledgement.

**SYDNEY OFFICE**  
LEVEL 2  
148 ELIZABETH STREET  
SYDNEY NSW 2000  
TELEPHONE (02) 9283 5388  
FACSIMILE (02) 9283 8586

**MELBOURNE OFFICE**  
LEVEL 1  
221 QUEEN STREET  
MELBOURNE VIC 3000  
TELEPHONE (03) 9620 0322  
FACSIMILE (03) 9620 0422

**BRISBANE OFFICE**  
LEVEL 12  
239 GEORGE STREET  
BRISBANE QLD 4000  
TELEPHONE (07) 3034 3333  
FACSIMILE (07) 3221 3011

**PERTH OFFICE**  
LEVEL 18 CENTRAL PARK  
152-158 ST GEORGES TERRACE  
PERTH WA 6000  
TELEPHONE (08) 9288 1757  
FACSIMILE (08) 9288 4400