

## Safe work procedures and PPE

### Terry Killian and Stacey Boulton - DibbsBarker

[Slide Text saying: "WorkCover Queensland"]

[DibbsBarker (Logo) Text: "DibbsBarker"]

[Slide Text saying: "Safe work procedures and PPE, 26 March 2015"]

#### ^Melanie Stojanovic:^

Good afternoon everyone. Welcome to this WorkCover Queensland facilitated webinar and thank you for joining us today as we discuss another key area in relation to common law claims. This webinar is part of our Understanding Common Law series and today's session is on safe work procedures and PPE.

[Slide Text saying: "Meet your moderator

Melanie Stojanovic, Industry Manager, WorkCover Queensland"]

[Graphic: Photograph of Melanie Stojanovic]

My name is Melanie Stojanovic and I'm an Industry Manager at WorkCover Queensland and I will be your Moderator for today's session.

[Slide Text saying: "How to interact today

Select audio on the control panel to change between computer audio and telephone.

Click on the red button to hide and unhide the panel.

Type your comments and questions here.

Your comments and questions will appear here throughout the webinar."]

[Graphic: Webinar Control Panel]

Before we start, I'd like to quickly take you through how this webinar format works and specifically how you can interact during the session. On the current slide you'll see an image of the webinar Control Panel. You can select 'audio' on the Control Panel and change between computer audio and telephone, depending on your preferred method. If you have headphones and speakers connected to your computer, select 'Mic & Speakers' otherwise choose 'Telephone' to access the dial-in details. You can hide and unhide the Control Panel using the coloured arrow. This will make sure you can see the entire screen. If you have a comment or question for the Presenter or Moderator, please type your comment or question in the bottom panel and press 'Send' to submit.

Your comments and questions will then appear in the middle section. Please send through your comments or questions as the session progresses and we'll try to answer them as we move through the webinar.

I kindly ask that all questions are kept to general issues as opposed to specific claim-related issues. If we can't get to the questions during the session, we will either address them at the end of the session or follow up with some summary points or frequently asked questions after we finish the webinar.

[Slide Text saying: "After the webinar

- Webinar recording and presentation will be on [workcoverqld.com.au](http://workcoverqld.com.au) in the coming days
- If we don't get to all of your questions, we will collect them and publish answers on our website afterwards
- So we can continually improve our level of service, we would appreciate you completing a short survey at the end of the webinar"]

The webinar recording and presentation will be on [workcoverqld.com.au](http://workcoverqld.com.au) website in the coming days and so that we can continually improve our level of service, we would appreciate you completing a short survey at the end of the webinar.

As way of background, WorkCover has managed 3,729 common law claims in the 2013-14 financial year and generally speaking, common law claims are very high cost and take more than a year to finalise. Costs usually include settlement, legal costs and other outlays for the claimant and the defendant. This webinar series is designed to help raise customer awareness and education on how to mitigate the impact of common law.

Before we get started on the actual presentation we've got a short poll for you to answer this morning. So, the first question is "Have you experienced a common law claim in the last two years?" So I've just launched that poll on the screen.

[Slide Text saying: "Have you experienced a common law claim in the last two years?"

Please select one

- Yes and it's still ongoing.
- Yes, it's finalised.
- No." ]

If you can please answer that question. The first option is "Yes," and you still have a common law claim ongoing, "Yes, but it's now finalised," or "No," you haven't experienced a common law claim within your business in the last two years. And I'll close the poll and share those responses.

[Slide Text saying: "Have you experienced a common law claim in the last two years?"]

[Graphic: Bar graph showing percentage results of poll: No, and it's still ongoing – 35%, Yes, it's finalised – 15% and No – 50%]

So you can see that 35 percent of you have a current common law claim that's still ongoing with the business, 15 percent have had one although now it's finalised and 50 percent have not yet experienced a common law claim or haven't actually experienced one in the last two years. Thank you for participating in that.

[Slide Text saying: "Meet your presenter

Terry Killian, Partner, DibbsBarker Brisbane

Stacey Boulton, Special Counsel, DibbsBarker Brisbane"]

[Graphic: Photograph of Terry Killian and Photograph of Stacey Boulton]

So, today's webinar will be presented by Terry Killian and Stacey Boulton from DibbsBarker. DibbsBarker is part of a WorkCover Queensland-appointed legal panel of lawyers from a select group of firms to defend common law claims. Terry has over 20 years litigation experience and for the past 15 years has focused predominantly on the defence of damages claims acting for underwriters and self-insurers.

Terry advises clients on liability claims, common law workers' compensation claims, medico-legal issues, catastrophic injury claims and mediation and alternative dispute resolution. In the claims management space he has a particular focus on the energy, resources and mining sectors.

Stacey focuses on defendant insurance law matters including public liability, product liability and workers' compensation claims. Stacey provides specialist advice to local and international insurers, including advice on indemnity issues, liability, quantum, third party contribution and general case management.

With that, I'll now hand across to Terry to commence the webinar.

[Slide Text saying: "Session summary

- *Liability—duty of care, breach and causation*
- *The scope of the employer's duty of care includes devising, maintaining and enforcing a safe system of work*
- *Overview of key issues and case examples*
- *Safe system of work and PPE to prevent foreseeable risks of injury*
- *Addressing risks—risk assessments, training, instruction and reinforcement*
- *Importance of documentary evidence of the system, training, instruction and enforcement*
- *Questions / queries"]*

**^Terry Killian:^**

Thank you Melanie and good afternoon everyone. As Melanie mentioned, this afternoon is the third in a series of Understanding Common Law webinars that WorkCover is running. If you haven't participated in the earlier sessions, you'll still get enough information this afternoon to get a complete picture of the issues that we're addressing. If you have participated in the earlier sessions, there'll probably be a little bit of overlap at the start and I think necessarily, the way the webinar series is formulated, each one leads into the next with some overlap and there are no black and white lines that can be drawn between the particular topics.

As we move through this afternoon, the 50 percent of you, who according to the poll have not experienced a common law claim or at least not experienced one in the last two years, will be very grateful. The 50 percent who have will recognise I suspect, a number of the issues that we address as live issues from the very claims that you're running.

From an overview perspective the previous sessions have spoken about the way the law treats the issue of liability in a common law context. That is, those concepts mentioned in the slide - duty of care, breach of that duty of care and whether that actually causes the injury that the injured worker has sustained.

What we will focus pretty heavily on this afternoon in the webinar is this concept of how the duty of care requires an employer to devise, maintain and enforce a safe system of work, and we'll spend some time talking about what that actually means in a practical context. Necessarily what we talk about this afternoon will be general in nature. The specific issues, the specific systems of work when we get on to

talking about personal protective equipment, the specific items that are used will vary from business to business and industry to industry, and what I think is useful as we go through a session like this, is for you to think of in the context of your particular operational business, a role or an issue which has arisen for the business that has proved problematic around a system of work.

So if you're in that, that 50 percent of people who have got a current claim or have had one finalised, think about the sort of issues that were live in that claim. If you haven't, think about the sort of areas where you might have had a near miss or just those areas where in your business every day, processes or procedures are undertaken on a regular basis and it gives a good context for what we talk about.

Stacey and I this afternoon will go through the key issues that are always looked at both by the courts if a matter ever gets there, and by panel lawyers such as ourselves when we're defending a claim on WorkCover's instructions on your behalf. That will overlap between the overriding obligation around a safe system of work and how personal protective equipment forms part of a system of work but isn't a system in and of itself.

We will touch on things like risk assessments which you see commonly come up. Risk assessments as we'll discuss aren't the be all and end all, but they are an important part of a system of work. We'll talk about aspects of training, we'll talk about different ways that people are trained and the ways in which that training is reinforced through the day-to-day operations of the business. And then finally we'll touch on - having gone through those elements of the system, how do we actually prove that in a live case example? And one of the previous webinars that have been conducted as part of this series talks about evidence. We'll overlap into that evidence area towards the end of our session today as well, and hopefully we will have time for some questions and queries, either at the end or on the way through which Melanie will coordinate for us.

[Slide Text saying: "Key themes

- *Devise, maintain and enforce*
- *Three distinct elements, which must all be present*
- *A system of work is*
  - *the way that we safely do the tasks that are a usual part of the job/business*
  - *the way that we address/manage tasks that are unusual or one offs"*

So as I mentioned, the real key theme for today and the real take-away point that applies to every single common law claim that we see, is this concept of an obligation on an employer to devise, maintain and enforce a safe system of work. Those of you who have experienced a common law claim will appreciate that in the particulars of negligence in the Notice of Claim or in the Statement of Claim if the matter goes into litigation, almost without fail the first allegation will be that the employer failed to provide a safe system of work, and then there'll be some very specific elements of that system of work which are addressed.

The critical thing that I'd like you to take away from this afternoon's presentation is that there are three distinct elements to that obligation, that is, to devise, to maintain and to enforce, and they all need to be present in order for an employer to demonstrate that they've actually discharged their obligations around the duty of care. Those concepts are referred to time and time again in cases that consider this area of the law and we will touch on some examples of cases this afternoon, but whilst we talk about four or five different case examples, there are hundreds of them, and it is very, very unusual to see a case in a workplace scenario that doesn't spend a considerable period of the liability discussion talking about these concepts.

So what is a system of work? It's a broad concept and it's regularly spoken about, but what does it actually mean? Well, stripped of the legal E's, what I think it means is the way that we actually go about in a business safely doing the tasks that are a usual part of that business, that is things that your workers do regularly on a day-to-day basis and how that's done within your operation, and secondly, and as importantly, how we manage or address the tasks that come up that are unusual or one-offs, where there might not always be a specific system in place, because you simply can't have a system of work that sets out some form of documented process or detailed process for every single task that a worker might be expected to do throughout the entirety of their career. What you have to do is have in place a process that addresses those one-off tasks, or addresses those issues, where there isn't a specific process and says "Well what do we do when confronted with that?", "What sort of risk analysis might be undertaken at that point and how do we approach that scenario?"

[Slide Text saying: "Devise

- *Systems and procedures*
- *More than a technical guide*
- *More than a 'folder on a shelf'*
- *Informed by statutory obligations, codes, standard, etc."*]

Our first component as I mentioned, is around this idea of devising a safe system of work, and a safe system of work is, as I say in the slide, it's more than just a technical guide. It's more than a set of technical instructions about how to carry out a task. It has to clearly encompass the safety aspects of that task, so how you go about doing those tasks safely, and there is an enormous amount of guidance that is given in relation to setting up a system of work, and it's informed very heavily by the sorts of statutory obligations that are imposed upon employers. Depending upon the industry that you operate in, the starting point's often for most employers, the Workplace Health and Safety Act and the various subordinate legislation that goes with that, the codes of practice etc., which prescribe in many cases the way to go about actually devising a system of work that minimises risk.

Those of you with an occupational health and safety bent will be well aware of the concepts of hierarchy of control and how you step down that hierarchy of control, as much as possible trying not to rely upon an individual person having to do something difficult in order to achieve the safe system of work. That is, you're trying to engineer away the problem wherever possible.

Beyond that there are specific examples in particular industries, things like the Coal Mining Safety and Health Act which can be quite prescriptive and incorporate specific statutory roles and statutory obligations on particular individuals to both develop or devise that system of work, and as we move forward, to maintain and enforce that system of work. There is an enormous amount of guidance that's available both professionally. There is material for example, on the WorkSafe Queensland website that takes you through both the codes of practice, the standards. There are video examples of systems of work and devising systems of work if you're in a smaller business and you're looking for some guidance in that regard.

As a lawyer, I'm not going to tell you how to set up your system of work. You've obviously got more technical expertise than I ever would have in any particular industry. My experience is we tend to be much better at telling people what they've done wrong after they've already done it than telling you what you should do before you've done it wrong. That's perhaps a failing of the legal profession in general.

The other critical thing about your system of work is that it needs to be more than just what I describe in the slide as the folder that sits on a shelf. It can't just be something that's been beautifully prepared, that a lot of time's gone into setting up a system of work, but then nothing actually happens with that system.

It sits on the Occ Health and Safety Manager's desk and it's not actually the way that things are done within a particular organisation.

[Slide Text saying: "Maintain

- *Systems and procedures are in fact 'the way we do things around here'*
- *Embedded in the culture*
- *How are people trained in systems and how is that regularly reinforced at an operational level?"]*

And that's this second element. That's the critical component of this second element about maintaining the system of work. Really, the position that you need to get to and the position that we're looking for when we're making an assessment of whether or not there are realistic prospects of defending a claim based on the fact that a safe system of work is in place, is "Are the systems and procedures that have been devised, are they the way that things are actually done around here?", "Is that the actual way that work is performed within the organisation?", "Are they at the risk of," sort of slipping into management speak, "Are they embedded in the culture of the organisation?", "Are people trained in those systems?", "What's the process of training them?", "What's the process of training them originally?" and then "What's the process of reinforcing that training as they move through that system of work?" because anecdotally I would have thought at least half the cases that we are asked to consider and advise upon and come up with strategies in terms of either resolving or fighting a particular case, there will be a system of work that an employer has in place.

There will be a way of doing the task that the particular individual was doing at the time that they sustained their injury, and where the real fight will be is, "Was that way of doing it actually the way that it was done on the particular factory floor or in the particular mine site, or was it simply a theoretical process and the actual way that things happened under the time pressures of day-to-day work weren't followed through from that system of work?" and there'll be considerable, usually factual debate about that. So it's really helpful if we can actually demonstrate that it is part of the culture, that it is regularly reinforced on the way through.

[Slide Text saying: "Enforce

- *How do you prove the system is actually followed day to day?*
- *Examples of action taken for failure to comply*
- *Are people trained in systems and how is that regularly reinforced at an operational level?"]*

Then there's the element that we refer to as "enforcement" and this is where we prove that we actually follow our own system in the context of a particular case. So, we've set up the system of work, we've got a system for that task that you have in mind that applies to your particular workforce, and we can show that we trained our particular employee in that. Then how do we enforce that? Can we show that firstly it was reinforced, and that's often a critical element. We commonly will see an example where there's a system, there's a documented system often of work, and the particular employee who's bringing the claim, we can prove that they were trained in that system of work and they'd signed off on it manual when they commenced employment in say, 2004. But then they sustain an injury in 2012 and we can't establish any reinforcement or refresher training, or follow-up training between 2004 and 2012. So, that's the sort of thing that we're looking for in terms of enforcement.

And a classic and a very practical way of doing that is the concept that many of you would be familiar with around toolbox talks, and using toolbox talks as a method of operationally reinforcing the system of work, and also calling people out where there might be practices or unsafe procedures that develop day-to-day, that don't actually follow that documented system of work. So toolbox talks are a very good, practical

example of that. From our perspective and we'll touch on it at the end, there needs to be some evidence of those toolbox talks and what's spoken about. That doesn't need to be a detailed set of minutes that go for 50 pages, but it needs to talk about "What was actually discussed?", "What were the issues that were discussed on that particular day?" and as critically, "Who was there?"

With things like toolbox talks we also jump into refresher training and the need to use refresher training to update training as systems, procedures, equipment etc. change. It's critically important as you'll see when we move into the case examples, to be able to demonstrate that as an employer you actually enforce your own system of work and then taken to that's logical conclusion, can you point to examples of people actually being disciplined for not following the system of work, because if you've got 500 employees and over a 10-year period not a single person's ever been disciplined for not following the system of work, then a court's likely to draw an inference that that system of work isn't really enforced on a day-to-day basis.

So, that touches on – and in fact, we received a, a specific question through the system saying "What would be an acceptable way of demonstrating the system's regularly reinforced?" I think those examples that we just spoke about, the question of toolbox talks, the question of refresher training and being able to show that from time to time people are actually disciplined at whatever level relative to the specific breach or the specific failing that might have occurred, that people are actually disciplined for not following the system of work. That can go right through to - as one of the case examples that we'll speak about this afternoon - that can go right through to people's employment being terminated for their failure to follow safety processes, at an extreme example.

We've also had a comment come through which I think is an exceptionally valid one, and that's to talk about the fact that both standard operating procedures and personal protective equipment have to be reviewed and signed off on a regular basis because technology changes, and certainly the technology with which each of you I suspect operate your business would be vastly different now to what it was even five years ago, much less 10, and the way in which our workplaces operate change. So again, that's an example of why that induction training undertaken in 2004, whilst useful, isn't of itself likely to amount to a complete defence for a claim for an injury that's sustained in 2012.

*[Slide Text saying: "Safe system of work*

*The duty of care requires an employer to devise, maintain and enforce a safe system of work.*

*Example: In Bankstown Foundry Pty Ltd v Braistina, a hoist which would have avoided the risk of injury was available to be used by the injured employee for heavy work. It was held that a safe system of work would not only include access to a hoist for heavy work but also a direction that the hoist be used and workers trained in its use and enforcement of that direction by ensuring workers use the hoist for heavy work."]*2056

All right. We're going to jump into some specific examples now around this and some examples of how the court have approached that and Stacey's going to take us through that.

**^Stacey Boulton:^**

Thanks Terry and good afternoon everyone. As Terry has outlined, a safe system of work involves requiring an employer to devise, maintain and enforce that system. This was reiterated in the case of Bankstown Foundry and Braistina. In that case, a safe system of work involved the use of a hoist. The hoist would have avoided the injury. The hoist, if available, if used as it was available, would have avoided the injury. It was held that a safe system of work would not only include access to the hoist for heavy work, but also a direction that the hoist had to be used and enforcement of that direction by ensuring that workers use the hoist appropriately for heavy work.

So in the context of a safe system of work involving equipment, it's not just about having appropriate equipment available and we will often see claims where a piece of equipment was available in the workplace and could have been used to avoid the injury, but there's no evidence to demonstrate that the worker was actually instructed to use the specific equipment.

It is critical for the defence of a claim, for employers to establish that workers are trained in how to use the equipment, directed when the equipment is to be used and ensuring, for example, by way of supervision, that the equipment is actually used in the workplace.

*[Slide Text saying: "Successful defence—safe system of work*

*Case study: Scott v Jackson Garden Landscape Supplies Pty Ltd*

- *The plaintiff, a weekend sales assistant, sustained personal injury during a fall at her employer's premises when she stepped on "an object or something". The object that caused her to fall was never identified.*
- *Employer's evidence was that the cleaning system involved inspections at the end of the day on Friday, inspections by the weekend manager the following morning and the overarching manager and regular sweeping by a junior employee hired on the weekends for the primary purpose of sweeping the area where the plaintiff fell.*
- *The employer also instructed all employees to be vigilant about cleaning and to remove objects on the floor during the course of their normal duties and monitored this."*

So moving on to a very recent case and a bit of a good news story, but we take a look at it. It's a case, a very recent case that was successfully defended by DibbsBarker acting on behalf of WorkCover and the employer. It was a different system of work, being a cleaning system. The plaintiff's case was that the employer provided a deficient cleaning system and the defendant's employees didn't use or adhere to that system of work, i.e. so they were essentially arguing that although the system was there, it was not actually the way things were being done in the business.

*[Slide Text saying: "Cont'd: Scott v Jackson Garden Landscape Supplies Pty Ltd*

- *The Judge accepted that around 1-2 hours prior to the incident, the area where the plaintiff suffered her injury had been swept by the junior employee. The defendant's witnesses' evidence was accepted that the area was clean at the time of the fall.*
- *The judge was not satisfied the employer had breached its duty of care by failing to provide an adequate cleaning system or that the plaintiff's fall was caused by a failure to take reasonable care to provide an adequate cleaning system.*
- *The plaintiff's claim was dismissed.*
- *Outcome demonstrates successful defence by having an appropriate safe system in place together with evidence of adequate re-enforcement of the system."*

So we'll briefly take a look at, and you'll see on the slides, that actual case and the evidence and what was involved in establishing that the safe system of work actually, what it actually involved. In the case of Scott and Jackson Garden Landscape Supplies, just briefly the plaintiff was a weekend Sales Assistant who sustained personal injury during a fall at her employer's premises when, when she stepped on an object or something. The object that caused her fall was never actually identified. The employer's evidence was that the cleaning system which included a junior employee hired on weekends for the primary purpose of sweeping the workplace, including the area where the plaintiff fell. The employer had also regularly instructed all employees to be vigilant about cleaning and to remove any objects seen on the floor during

the course of their normal duties. The cleaning system also involved inspections at the end of the day, on a Friday and inspections by the Weekend Manager on the Saturday morning, and ad hoc inspections by the overarching Manager in addition to the regular sweeping by the junior employee.

The judge accepted that around one to two hours prior to the incident the area where the plaintiff suffered her injury, had been swept by the junior employee. The defendant's witnesses' evidence was accepted that the area was clean at the time of the fall. Much of this was oral evidence rather than documentary evidence and was a successful defence. The plaintiff's claim was dismissed and the outcome demonstrates that having an appropriate safe system in place together with evidence of adequate reinforcement, so the constant vigilance by other employees as well as the regular cleaning of the area, together with the evidence of what is actually done in the business on a daily basis to establish that system of work can be paramount to effectively defend liability claims.

*[Slide Text saying: "Safe system of work"*

*Case study: Marshall v Queensland Rehabilitation Services Pty Ltd*

- *The plaintiff was employed as an Assistant in Nursing. Whilst trying to transfer a patient, she allegedly sustained injuries.*
- *The employer provided an induction, instructions and training in manual handling tasks, patient transfers including the use of a sling and hoist and the plaintiff signed a manual handling competency form. Within 10 months, further manual handling training and instruction was provided by a physiotherapist and a further competency form signed. Instruction in respect of the care of dementia patients was also provided and under cross examination the plaintiff accepted she received instruction that if a resident resisted the process of being rolled she should stop the procedure.*
- *Adequate training and instruction was provided and the Court found in favour of the employer."*

So we might just take a look now at another successful defence. Then later we'll look at some not so successful ones. This matter of Marshall and Queensland Rehabilitation Services involved an Assistant in Nursing who sustained an injury whilst trying to transfer a patient. The plaintiff alleged that the defendant breached its duty of care including allegations that the employer had failed to provide adequate instruction, training and assistance to enable her to perform her duties safely.

The employer was able to demonstrate that it had implemented control measures and training to address essentially what was the risk in this case of manual handling risks. The employer was able to show that the claimant was provided with instructions and training in manual handling tasks and the content of that training included patient transfers, how to roll a patient and the use of a sling and a hoist.

Evidence that the plaintiff signed a manual handling competency form for that training was also submitted. Now as Terry was saying previously, the reinforcement and retraining and updating of training, so within 10 months of the initial training, further training instruction in manual handling was provided by a Physiotherapist and a further acknowledgement and competency form was signed by the plaintiff. The plaintiff had also received instruction in respect of the care of dementia patients and under cross examination she accepted that she received instruction that if a resident resisted the process of being rolled, she was to stop that procedure.

The evidence provided by the employer in that case was, was of an appropriate system of work and the court found in favour of the employer.

*[Slide Text saying: "What is Personal Protective Equipment?"*

- *Personal protective equipment (PPE) is anything used or worn by a person to minimise risk to a person's health or safety and includes a wide range of clothing and safety equipment. PPE includes helmets, boots, goggles, face masks, hard hats, ear plugs, respirators, gloves, safety harnesses, high visibility clothing etc.*
- *PPE should be used to supplement higher level control measures.”]*

*[Graphic: Mouse wearing a red helmet standing in front of a mouse trap set with a piece of cheese]*

So we've looked at a couple of cases involving different systems of work that didn't specifically involve the use of PPE or personal protective equipment. Many of you will have organisations where workers may use personal protective equipment in one form or another to assist in managing potential risks. In a common law damages claim where PPE is involved, normally a worker's failure to use PPE is considered in the context of contributory negligence which may have the practical effect essentially of reducing the quantum of a claim. Other than in exceptional circumstances, it is not usually a complete defence.

So what is PPE? Personal protective equipment is really anything used or worn to assist in protecting the user against health and safety risks. There's a broad definition on the slide. PPE includes such things as you'll be familiar with, things like hard hats, face masks, goggles, helmets, gloves - and we'll talk about some cases involving gloves a little bit later on - safety harnesses and high visibility clothing. It is important to determine where PPE fits into an overall system of work. It is a component of devising the safe system of work. It's not an entire system or a complete solution. So even where engineering controls have been implemented, some hazards might remain and PPE is really there and should be used to supplement other control measures.

*[Slide Text saying: "PPE considerations*

*When choosing PPE consider:*

- *the specific task and consultation with users*
- *compatibility of PPE items where more than one type of PPE is required (for example ear muffs with a hard hat)*
- *ensure PPE is suitable for the work and workplace conditions*
- *purchase from reputable manufacturer / supplier*
- *PPE that complies with the relevant Australian Standard or equivalent standard.*

*PPE must be maintained, repaired or replaced so it continues to minimise the risk to the worker using it. This includes ensuring the equipment is:*

- *clean and hygienic and*
- *in good working order.”]*

So let's look at some matters to consider when choosing your PPE and devising your system of work.

When choosing PPE for the system of work, consider the specific task that is being done and the importance of consultation with users. People who are actually doing the job cannot be highlighted enough. It really - we see many, many examples where notional systems incorporating PPE look good on paper, but when we dig deeper the actual use of that may be problematic or there may be some practical impediments to using the PPE and its actual use may cause workers some concerns. Therefore, it really is critical to have consultation with users and not just an initial consultation, but review also after periods is

critical because people may then just, if there are problems and they're not raised, just stop using it. So it's important to ensure that it is raised and reviewed on a regular basis.

It is important to consider such things as the compatibility of PPE items, so where you're using more than one type of PPE. For example, on the slides we've got earmuffs and a hard hat. So you can use them together. Ensure PPE is suitable obviously for the task, the workplace and the conditions in the workplace. It should be really purchased from a reputable manufacturer or supplier and although Australian Standards can be quite extensive, if there are ones that are relevant to pieces of equipment, then the PPE should comply with the relevant Australian Standard.

Obviously not just purchasing PPE at the outset, the PPE must be maintained, repaired or replaced if necessary, so it continues to minimise the risk to the worker using it. As Terry was saying before and one of the audience suggested, obviously those systems become out-dated or, and obviously PPE can potentially become out-dated or weaken, such as hats may weaken over time. So it is really important to ensure that they are kept up to date, maintained appropriately and in good working order.

*[Slide Text saying: "Safe systems and PPE*

*Case study: Caird v State of Qld (2004) QSC 217*

- *The plaintiff was employed as a slaughterman/knifeman for Queensland Abattoir Corporation. Prior to beginning his employment there in 2000, he had worked for other abattoirs as a slaughterman for 21 years.*
- *He suffered a severed laceration of his left wrist and hand when an animal struck his right arm, leading to the knife injury on his left arm.*
- *Two aspects of the employer's operations were in issue:*
  - *whether the employer provided a safe system of work on the slaughter line*
  - *the supply of cut-resistant gloves"*

There is a comment that has just been made by a member of the audience. The comment is that - it is important to remember that PPE should be approved by the employer as some employees choose to purchase their own which may in itself have risks and that is a very valid comment and is another component to take into account.

So once the appropriate PPE is selected we've said it must be maintained, so I thought we'd look at some examples of systems involving PPE, its use or failure to use PPE and the consideration of contributory negligence. These have been detailed in the material for you, so I thought we'd just have a quick look at some examples from the meat industry starting with the Caird case. Caird and State of Queensland is an old case from 2004 and just briefly, we'll look at the particular matter in that case was the issue of workers wearing gloves.

In terms of the three elements discussed by Terry earlier, the case demonstrates the importance of an employer's provision of instruction in the system of work and the use of PPE and instruction in the use of PPE, and its ongoing reinforcement of that use. Briefly, the plaintiff was employed as a Slaughterman for Queensland Abattoir Corporation. He was experienced, having worked for other abattoirs for 21 years. He cut his left wrist and hand with a knife. There were two aspects of the employer's operations which were an issue: whether the employer provided a safe system of work on the slaughter line and the supply of cut-resistant gloves to workers to minimise that very real risk of injury when performing the specific task.

*[Slide Text saying: "Cont'd: Caird v State of Qld (2004) QSC 217*

- *Plaintiff alleged employer failed to: provide cut-resistant gloves, instruct him to wear the gloves & provide training how to perform duties when wearing the gloves*
- *Employer argued cut-resistant gloves provided and that plaintiff was at fault for not wearing them (contributory negligence)*
- *Evidence - cut-resistant gloves were available at the time of the injury however employer did not direct or insist on wear cut-resistant*
- *The employer did not insist on workers wearing cut-resistant gloves as workers were resistant to change, not averse to industrial action and employer wanted to be seen as a humane and considerate employer*
- *The Court held employer negligent as failed to provide a safe system of work - although employer supplied gloves, had not instructed or forced workers to wear them. No contributory negligence.”]*

So briefly just looking at the facts, the plaintiff alleged his employer was negligent because they failed to provide him with cut-resistant gloves, failed to instruct him to wear gloves and provided – and failed to provide him with training on how to perform these duties wearing gloves. The employer counter argued – counter argued saying that the cut-resistant gloves were provided and it was the injured worker that was at fault, essentially a contributory negligence argument, for not wearing them.

The evidence – the court proved that the cut-resistant gloves were available at the time of the worker's injury and if the worker had been wearing the glove it would have avoided the injury. However, further evidence established that the employer did not direct or insist that workers employed in the same area as the injured worker, actually wear cut-resistant gloves. Rather, they informed these workers that they didn't need to wear them while performing their duties, although it was compulsory for workers in other areas within the business to use them.

The employer couldn't establish it had enforced the use of gloves. The evidence was, was that they did not enforce the slaughterman wear cut-resistant gloves as they were resistant to change, they were not averse to taking industrial action and the employer was reluctant to carry out any action which might provoke industrial conflict and wanted to be seen as a considerate employer.

The court found that the employer failed to provide a safe system of work and although the worker was supplied with cut-resistant gloves, he was not actually instructed or forced to wear them. So there was no contributory negligence found.

[Slide Text saying: “Safe systems and PPE

*Case study: Tompkins v Kemp Meats Pty Ltd & Kemp Meats Pty Ltd v Tompkins*

- *The Plaintiff, an experienced slaughterman & supervisor trained in WH&S sustained injury when using a knife*
- *Plaintiff argued employer negligent as did not require use of cut resistant gloves*
- *Employer argued Plaintiff contributory negligent for failing to wear cut resistant gloves provided and he was an experienced meat worker & had prior history of cuts*
- *At first instance and on appeal: no reduction for contributory negligence as employer's system of work was deficient - it should have been mandatory for workers to wear gloves. The employer did not properly instruct workers to use gloves. Also there were insufficient gloves available for all of the workers*

- *Case demonstrates need for employers to properly instruct and enforce the requirement for workers to wear PPE (e.g. cut resistant gloves) even for experienced workers/leading hands.”]*

At that point I'll hand over to Terry to take you through another example.

**^Terry Killian:^**

The next example that we wanted to touch on in the slide that's up there is the Tompkins and Kemp Meats decision. We're not particularly picking on the meat industry, it's just there are some very good examples around personal protective equipment that come out of the case law in that space. And once again, very similarly to, to Stacey's previous example, this is another knife case. It's another case where on the evidence, the injured worker was very experienced and looked at objectively, could be known to have appreciated the risks of not using cut-resistant gloves, and that's something that's probably worth highlighting more broadly in terms of our earlier discussion about devising a safe system of work.

It's not uncommonly the case when confronted with a claim that someone will say to me, "We hired an experienced person and we expected that they would carry out their job safely. So it wasn't for us to tell them how to do their job safely. "Whilst I can sympathise with that and empathise with that view at a practical level, it's clearly not the way courts approach that obligation to devise a safe system of work. It's not enough to say "I employed a competent," for example, "qualified tradesman, and therefore they ought to have known how to do their job safely." That will never be successful as a claim, with perhaps the rare example of where their actual role is directly around devising the system or devising the safety system or it's a statutory role around those things. I digress.

Coming back to the, the specific example we're talking about, we had an experienced meat worker, he knew about the risk, but he hadn't worn the gloves, again, very similar to the previous example. What the employer was able to demonstrate here and where the evidence fell short, was that they'd undertaken what was ultimately determined by the court to have been a trial usage of these gloves, but the response from their workforce hadn't been positive. Basically the workers didn't like using the gloves. They were uncomfortable, there were various practical reasons why people didn't like using them, and I'm sure those of you who deal in that area or different areas will have had examples where items of personal protective equipment aren't liked by the workforce. They don't want it, they're too hot, they're too cumbersome. It's easier to do the job in the worker's view, not using the item of personal protective equipment.

Well what the court said in the Tompkins decision and has reinforced in many other cases is "That's not enough. If you as part of your system of work include personal protective equipment as an important element of that, then it's not enough for you to say 'Well, we provided it. They didn't like it. We can't make them wear it.'" What the courts ultimately say is "You can," or as the judge put it in that case, "You can't say 'We tried, but the workers wouldn't use the equipment or follow the system.' You've got to show that you took steps to enforce, up to and including in a serious case, the question of termination," and I know many of you will say "That overlaps into your industrial obligations and the challenges there." That's often a real challenge particularly around personal protective equipment, but in the context of our examples, Tompkins shows an employer that had probably devised a safe system of work, and that safe system of work included the gloves. What it couldn't demonstrate was that it had maintained or enforced that system and consequently the claim was successful and there was no reduction as Stacey mentioned in the context of contributory negligence.

*[Slide Text saying: "Contributory negligence*

*A worker's damages can be reduced to reflect the extent to which the worker has negligently contributed to his or her injuries – this rarely exceeds 20%.*

*At common law, a claimant's behaviour must exceed mere inattention or inadvertence before it is considered to be contributory negligence.*

- *failing to comply with instructions given by the employer*
- *failing to use protective clothing and equipment provided*
- *failing to use anything provided that was designed to reduce the worker's exposure to risk of injury*
- *failed, without reasonable excuse, to attend safety training organised by the employer that was conducted during normal working hours at which the information given would probably have enabled the worker to avoid, or minimise the effects of, the event resulting in the worker's injury.”]*

We've touched a little bit in the case examples on this concept of contributory negligence and I'm conscious that some of you will be very familiar with that concept, but there'll be others to whom it's something of a new concept. Basically what it means is that a court can, if it finds an employer liable, so if it finds that an employer is in breach of its duty of care, and that that's caused an employee to suffer an injury, it can find that the employee also contributed to their own injuries, and a classic example of that is a failure to use personal protective equipment that was part of the system of work.

The practical effect of that is to reduce any damages that the employee would otherwise have got, by the percentage finding of contributory negligence that was made, and that's something that exists at common law. It's now also something that is prescribed in the Workers' Compensation and Rehabilitation Act, and the slide gives you some examples taken from that Act of things that can amount to contributory negligence. I didn't propose to go through those item by item, but they're worth having in the back of your mind when we talk about contributory negligence.

It's also as mentioned in the slide, something that is not usually assessed in very high percentage terms. The standard of care that's imposed upon employers is very high and when a court balances that standard against the standard that's imposed on individual workers to act safely in their own interests, often that balancing act results in what might be seen as something of a disparity or a very heavy weighting in terms of the employer. And for that reason as we've mentioned, it's rare to find contributory negligence cases where that finding exceeds 20 percent with a 20 percent reduction in the damages that flow.

[Slide Text saying: “Case study: Noel Bartley v Coles Myer Ltd

- *The Plaintiff, a butcher was unsuccessful at first instance, on appeal he argued that the employer was negligent on 2 occasions as employer did not provide a mesh glove and/or alternatively, if provided, failed to supervise him to ensure he used it.*
- *Court cited McLean v Tedman High Court decision ‘in deciding whether an employer has discharged his common law obligation to employees the Court must take account of the power of the employer to prescribe, warn, command and enforce obedience to his commands’.*
- *PPE was provided but the employer only discharged part of its duty.*
- *Attempts to enforce the use of gloves by employer were increased after the first injury.*
- *A workers refusal to obey cannot justify permitting a dangerous situation to continue.*
- *The plaintiff resisted and disobeyed employer’s instructions and was found contributory negligent and damages reduced by 50%.“]*

There are however, some examples where it does and just for something different we're going to talk about another meat case and another case where someone actually sustained injuries associated with

the use or non-use of mesh gloves. The Bartley and Coles Myer decision that we're running through actually went to the Queensland Court of Appeal, so the highest of the Queensland-based courts to assess how effectively the employer in this case had devised, maintained and enforced its system of work around the use of gloves, and through that, whether or not firstly there'd been a breach of duty at all, so was the employer liable at all, and then secondly, whether or not the injured worker had been guilty of contributory negligence.

And the court placed great weight on that High Court decision of McLean and Tedman which is referred to in the slides. That's something that in almost every case is quoted one way or another, and it talks about the, or it reinforces the concept that the employer has significant control over the way in which their workers go about doing things, and it's for that reason that it's a significant onus.

Now, what was able to be demonstrated in the Bartley case was that there was a safe system of work, that there was a heavy emphasis on the use of these gloves, particularly - and in this case the injured worker had actually suffered two injuries on two separate occasions not too far apart - particularly that there had been a very heavy focus on the enforcement of the system of work after the first incident occurred, and that there'd been something of a change in management style or culture I suppose, when we talked earlier about the culture of the organisation, and that significant steps had been taken by the direct Line Manager of this particular plaintiff, to enforce and reinforce the system of using the gloves.

And ultimately what the court found in that case, and obviously the plaintiff hadn't worn the gloves - didn't like the gloves, didn't think they were helpful, found them uncomfortable, all the usual sorts of things - what the court found was what it described as "deliberate resistance and disobedience" in relation to the following of that system and the use of that personal protective equipment. The consequence there was a reduction in the damages by 50 percent which as I mentioned, on an overall scale is a very significant reduction for contributory negligence.

*[Slide Text saying: "Evidence—examples supporting documents*

- *Written work procedures*
- *Safe work method statements*
- *Risk assessments*
- *Diary entries*
- *Instruction and training documentation*
- *Minutes of tool box meetings*
- *Disciplinary warnings (written and verbal notes of warnings) re: enforcement of safe system of work and/or use of PPE*
- *Details of PPE issued and date issued and acknowledgements of instructions on use."*

So there's some examples of what safe systems of work might constitute, some examples of where those systems have fallen down around those three elements of devise, maintain and enforce, and there's also been some examples about how personal protective equipment can be incorporated into a system of work but that in and of itself, personal protective equipment usually isn't a system of work. It's a part of a system of work and you've got to be able to demonstrate that it's a part of that system.

A previous webinar as I alluded to at the outset, has looked at the question of evidence and Stacey touched on the question of evidence when going through some of the case examples. It's not necessary for evidence to be written, for evidence of the system of work to be written in order to be successfully

used in a case, but it is much more likely that evidence of a system of work, the maintenance of that system of work and the enforcement of that system of work, will be accepted if there's a paper trail, electronic or otherwise. It's much harder to have oral evidence of a system of work accepted as just being the factual way that things occurred.

There are a whole heap of common things that we look for when we're assessing prospects of defending a particular claim, and they're touched on in the slide up there, starting with the idea of work procedures. "Is there actually a documented way that we go about doing this task?", "Are there risk assessments undertaken in relation to that task?", "If it's a common task, is that part of the system?", "If it's an uncommon task, are there, and they're variously described, but do the – are the workers themselves asked to perform an assessment when they come across an uncommon task, and is that documented in some way?" They get referred to by various acronyms depending upon your industry. I see them referred to as SLAM assessments, Take Five assessments, all of those things that are done on the job when confronted with a particular task that isn't what I'd call a standard task.

Your instruction, your training documentation, your minutes of your toolbox meetings, all of those things are critical and someone posed a question about refresher training when we touched on it earlier. There was a question about how often refresher training should take place. That really depends on what you're refreshing and how common that task is in the day-to-day work that's performed by your workforce, and how significant the risk might be. If they're common tasks then that refresher training should be undertaken on a very regular basis. As frequently as you can is probably the best I could put it at. If it's a less common task, then sometimes annual training might be enough, but it's not only that question of formal, sort of sitting people in a room for what might be considered formal training.

Often the most effective training is that on the job, practical, toolbox talks, the toing and froing and there being a record of that as you go through that process, because in my experience, most people who sustain injuries and bring common law claims, sustain those injuries performing tasks that they do routinely. They're not the super high-risk tasks that lead to the catastrophic events. Those do occur and there's often really good documented systems around those really high risk tasks. Where sometimes systems can fall down is around the more mundane tasks that give rise to the lifting back injury style claims, that sort of material. So those things are all part of the system.

It can go as far as, and someone's mentioned in a comment, things like noticeboard notices, or things that pop up on people's computer screens to remind them about systems. In an office environment things that remind about posture, things that – anything that reinforces the system of work and there are endless ways that you can do that now and I wouldn't seek to limit it, but the critical thing is when called upon, can we actually demonstrate that it happened, that is the training, the reinforcement etc., and can we demonstrate that it came to the attention of the particular worker?

*[Slide Text saying: "Session summary*

- *The scope of an employer's duty of care includes devising, maintaining and enforcing a safe system of work*
- *Involves risk assessments, training, instruction, supervision and reinforcement*
- *Further, an employer must provide its employees with proper equipment, personal protective clothing and other aids or devices as far as reasonably necessary to prevent foreseeable risks of injury and also enforce their use*
- *Importance of documentary evidence to successfully defend common law claims"*

So, hopefully before we touch on some final questions, what we'd like you to have taken out of this afternoon's session is firstly that key concept, that principle obligation to devise, maintain and enforce a safe system of work, the second concept of what that might actually involve at a practical level, the

occupational health and safety aspects of that, the risk assessment aspects, how you build that system of work, how you demonstrate that it's actually the way we do things around here, that it's not a theoretical system of work because that is the most common dispute that we find in the defensive claims. That is, that the system of work really is the quintessential document that sits on the shelf and it's not the way things are actually done and a dispute around whether or not it's the way that things are done.

The incorporation of personal protective into the system of work is often a very important component and it's necessary to show not only that it's available, but that you incorporate it, that you instruct people to use it and that when, for whatever reason they choose not to use it, you reinforce the system, you discipline, you insist upon the use of that, and as I alluded to, whilst it is certainly possible and you could never say that oral evidence isn't enough and Stacey gave an example of a case where it was accepted on oral evidence, documentary evidence is often much more strongly received and much easier for a judge to accept as evidence of that system of work as we go through a common law session.

*[Slide Text saying: "Questions submitted during the webinar"]*

Now there are a couple of questions that have been submitted. I'll touch on a couple of those and then I think Stacey also has a couple to finish off this afternoon's session.

The first is more in the nature of a comment. Someone commented about not just systems but also what are referred to as "near miss forms" or things that are completed when an incident occurs, but there isn't actually injury sustained. They are absolutely vital as the participant pointed out, to updating procedures and regularly updating procedures, and indeed, it will often be alleged in a common law claim that although there might not have been a previous incident where someone sustained injury in similar circumstances, that there had been previous near misses. And if there is evidence of previous near misses and nothing was done to update the system or to refresh training or to do something along those lines as a result of that, then the employer's case in defending the claim will often be much more difficult.

The second question came from a slightly different perspective and it was talking about the difference between no-fault systems and common law systems, and of course we're speaking this afternoon in the context of common law claims, so a context I should say, where a worker is seeking damages as a result of an injury that they say was negligently caused by their employer's activities.

The workers' compensation system in Queensland has two distinct components to it. It has a no-fault statutory compensation component and that simply requires that employment have been a significant cause of the injury or a significant contributing factor I should say, to the injury. What we're talking about this afternoon is that second element, that common law component.

With that I might pass over to Stacey for a couple of final questions that have come through.

**^Stacey Boulton:^**

Thanks Terry. One of the questions we had was moving back to the issue of PPE and specifically gloves, and the question was "If the gloves were not accepted by the workforce, could you not through consultation, come to an agreement for everybody?" So when we, essentially when we were talking before about one of the important things in developing that system of work and the ongoing ensuring that the system of work is appropriate for the tasks does involve consultation and I think that's a very valid comment that through consultation you may then come up with a new type of glove, a glove that works better, safer and since it has special grip or less grip if it's the type of task that doesn't require grip. So, I think that's a very valid comment that through consultation there may be a better piece of equipment once you're actually doing the task, to move to and update that system of work.

Another question we had was "Should employees sign a toolbox register if they attend these meetings?" I don't necessarily know that they – certainly it's a great evidence, evidentiary issue to have them sign it, but there are also other ways in terms of if it's noted that they are – who the attendees are on the day

that the toolbox talk is happening. So you can through that evidence as well, establish that they have been involved as opposed to them just signing it.

Terry, did you have any other questions or any issues or any information? No? Okay.

**^Melanie Stojanovic:^**

Fantastic. Thank you so much to Stacey and Terry today for going through that. We've actually had quite a run of questions towards the end that we've now run out of time to address directly, but what we'll do is we'll – we'll put those questions to Terry and Stacey over the next couple of days and we will also be publishing the answers to those online. So there was a few that unfortunately we couldn't get to today, but rest assured, we will post what we can as far as some frequently asked questions.

So thank you for attending today's session. It's been a great interaction with everybody online today. We will review the questions as I mentioned and publish them on the website. There'll also be a full recording and copy of the presentation. So if you did miss any of it, or you'd like to share any of it with members at your place of employment, you're welcome to do that as well.

*[Slide Text saying: "More information*

*The webinar recording and presentation slides will be available at [workcoverqld.com.au](http://workcoverqld.com.au) in the coming days.*

*Take a look at our other webinar and event videos on our website to learn about similar topics.*

*Upcoming webinars include ('events' page on our website):*

- *Considerations for working with a young or ageing workforce—30 April 2015<sup>2</sup>]*

So, just also a reminder that our website has extensive information on common law related issues including the case studies and court judgements, and many of those that we covered off today. There's some more detail available on our website. We'd welcome any feedback on today's session or suggestions for topics or formats for future sessions. This is the third of our four sessions that we've been running through this common law seminar series. So, the next one that comes up will be considerations for working with a young or ageing workforce, and that is being held on the 30<sup>th</sup> of April. You can log on to that session through our Events page on our website.

So there'll be a short survey that will pop up shortly that will give you the opportunity to provide the feedback. So, we'd much appreciate it if you could complete that. So thank you once again for your participation and we'll be publishing everything on the website in the next few days.

Thank you.

**[End of Transcript]**