

KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 102**

Date: **2025 07 14**
File No.: CRM-SA-00292-2021
Judicial Centre: Saskatoon

BETWEEN:

BANFF CONSTRUCTORS LTD.

APPELLANT

- and -

HIS MAJESTY THE KING

RESPONDENT

Counsel:

David Myrol, K.C.
Buffy L. Rodgers

for the appellant
for the respondent

JUDGMENT
July 14, 2025

ZERR J.

Introduction

[1] Eric Ndayishimiye died at work.

[2] On July 21, 2016, Eric was working at the Jim Pattison Children's Hospital in Saskatoon, then under construction.

[3] The general contractor was Graham Construction [Graham]. Graham had subcontracted with Banff Constructors Ltd. [Banff] to supply labour for the project. Banff was Eric's employer.

[4] At the time he died, Eric was removing nails from boards, part of his job

on the clean-up crew. While he worked, another Banff employee named Gerard McLaren was moving a heavy piece of equipment, variously referred to in evidence as a trolley cart, table cart, translation cart, Pilosio cart, and ST-50 cart. The cart fell on Eric and caused his death.

[5] Banff was charged with failing to comply with subsections 12(b) and (c) of *The Occupational Health and Safety Regulations, 1996*, RRS c 0-1.1 Reg 1. Section 12(b) requires employers to arrange for the use, handling, storage, and transport of articles and substances in a manner that protects the health and safety of workers. Section 12(c) requires employers to provide any information, instruction, training and supervision that is necessary to protect the health and safety of workers at work.

[6] Pilosio Canada Ltd. [Pilosio] was also charged. The Crown alleged Pilosio was a “supplier” that had failed to comply with subsection 3-15(a) of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [Act]. Subsection 3-15(a) requires suppliers to ensure, insofar as is reasonably practicable, that any “plant” it supplies to any owner, contractor, employer, worker or self-employed person for use in or at a place of employment is safe when used in accordance with the instructions and complies with the requirements of Part III of the Act and the regulations made pursuant to Part III. “Plant” is defined to include any equipment employed or used in the carrying on of an occupation.

[7] All three counts were tried together. After a lengthy trial in Provincial Court, Banff was found guilty of counts 2 and 3. Pilosio was acquitted of count 1.

[8] In relation to each count, Banff was sentenced to a fine of \$250,000 including surcharge.

[9] Although Banff initially appealed both conviction and sentence, it later abandoned its sentence appeal.

[10] For the following reasons I have determined the convictions against Banff must be set aside and a new trial ordered.

Jurisdiction

[11] Part XXVII of the *Criminal Code*, RSC 1985, c C-46, governs appeals in summary conviction matters. Pursuant to s. 813(a)(i) and (ii), a defendant may appeal from conviction, sentence, or both. Pursuant to s. 822(1), most of the powers of the court of appeal apply to summary conviction appeals. As noted by Justice Popescul (as he then was) in *R v Helm*, 2011 SKQB 32, 368 Sask R 115, a summary conviction appeal court may allow a defendant's conviction appeal if the verdict was unreasonable and cannot be supported by the evidence, was based on a wrong decision on a question of law, or on any ground if there was a miscarriage of justice. However, if a legal error did not result in a substantial wrong or miscarriage of justice, the defendant's appeal must be dismissed: para. 11.

Elements of the Offences

[12] Both offences are strict liability offences. This means the Crown must prove the *actus reus* beyond a reasonable doubt. If they do, the onus shifts to the defendant to prove due diligence on a balance of probabilities.

[13] The *actus reus* of count 2 is made up of the following elements:

- that Banff was an employer at a place of employment;
- that Banff failed to make arrangements for the use, handling and transport of trolleys in a manner that protects the health and safety of workers; and
- that Banff's failure resulted in the death of Eric Ndayishimiye.

[14] The *actus reus* of count 3 is made up of the following elements:

- that Banff was an employer at a place of employment;
- that Banff failed to provide any information, instructions, training and supervision that is necessary to protect the health and safety of workers at work; and
- that Banff's failure resulted in the death of Eric Ndayishimiye.

Issues

[15] As framed by Banff, the issues to be determined are:

1. Are the verdicts unreasonable?
2. Did the trial judge err in law in applying the principles of strict liability to the facts?
3. Did the trial judge err in law when he admitted the hearsay evidence of Gerard McLaren as proof of the truth of its contents?

ARE THE VERDICTS UNREASONABLE?

Standard of Review

[16] To decide whether a verdict is unreasonable, an appellate court must determine whether the verdict is one that a properly instructed jury or judge could reasonably have rendered: *R v R.P.*, 2012 SCC 22, [2012] 1 SCR 746 [*R.P.*], citing *R v Yebe*, [1987] 2 SCR 168 and *R v Biniaris*, 2000 SCC 15 at para 36, [2001] 1 SCR 381.

[17] An appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that is: (a) plainly contradicted by the evidence relied upon in support of that inference or finding

or (b) incompatible with evidence not otherwise contradicted or rejected by the trial judge: *R.P.* at para 9, citing *R v Sinclair*, 2011 SCC 40 at paras 4, 16 and 19-20, [2011] 3 SCR 3 [*Sinclair*], and *R v Beaudry*, 2007 SCC 5, [2007] 1 SCR 190.

[18] Determining whether a verdict is unreasonable may require an appellate court to review the trial court's credibility assessments. However, credibility assessments may be interfered with only if they "cannot be supported on any reasonable view of the evidence": *R v Burke*, [1996] 1 SCR 474 at para 7.

[19] In *R v Cook*, 2023 SKCA 117, 437 CCC (3d) 110 [*Cook*], Kalmakoff J.A. held:

32 ... Appellate intervention under s. 686(1)(a)(i) will be warranted where there is no evidence to support the conclusion reached by the trial judge, where the verdict is plainly contradicted by the evidence relied on by the trial judge in support of an inference, or where the verdict is shown to be "incompatible with evidence that is uncontradicted and not rejected by the judge" (*R v Brunelle*, 2022 SCC 5 at para 10, 412 CCC (3d) 489; see also: *R v Sinclair*, 2011 SCC 40 at paras 4, 16 and 19-21, [2011] 3 SCR 3; and *R v Beaudry*, 2007 SCC 5, [2007] 1 SCR 190).

[20] He went on to endorse the following principles:

- although the court must "dig into" the evidence to a certain extent, an allegation of unreasonable verdict does not give the court the power to retry the case or set aside a conviction because the evidence may support an alternate outcome: *Cook* at para 33.
- if a conviction is possible on the record, it is not sufficient that a different trier of fact might have acquitted: *R v Lee*, 2010 ABCA 1 at para 7, 251 CCC (3d) 346.
- if the evidence as a whole is reasonably capable of supporting the trial judge's conclusion, an appellate court should not interfere on the basis

that the verdict is unreasonable: *R v Hoskins*, 2021 SKCA 23 at para 107; *R v Farnham*, 2016 SKCA 111 at para 40, 485 Sask R 44.

- the mere presence of imperfections or contradictory details in witness testimony is not a sufficient basis from which to infer that a verdict is unreasonable: *R v Ross*, 2022 SKCA 149 at para 20.
- a misapprehension of evidence may render the verdict unreasonable: *R v Morrissey* (1995), 97 CCC (3d) 193 (Ont CA); *Sinclair* at para 12 (dissenting judgment of Fish J.A.). Misapprehension of evidence includes the failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence; however, the alleged misapprehension must go to the substance, not the detail, and must be material to the reasoning of the trial judge: *R v Singharath*, 2023 SKCA 6 at paras 38-39, 422 CCC (3d) 112 [*Singharath*].

[21] At trial, Banff argued the table cart had an inherent design flaw. Banff additionally argued the three-page technical newsletter that accompanied the table cart failed to warn of the danger created when both lock pins were pulled at the same time. In other words, Banff argued that it had been supplied with a flawed cart and flawed instructions. Compounding the problem was the absence of anything to signal these inadequacies. According to Banff, there were no red flags.

[22] Within this context, Banff argued the Crown could not prove beyond a reasonable doubt it had failed to make arrangements for the use, handling and transport of the table carts in a manner that protected the health and safety of workers. Nor could the Crown prove beyond a reasonable doubt it had failed to provide information, instructions, training, and supervision necessary to protect the health and safety of workers. If the court disagreed, this same context – inherent design flaw, inadequate

instructions, no red flags – was highly relevant to the court’s assessment of Banff’s due diligence.

[23] Between paragraphs 155 and 237 of its brief of law, Banff sets out why, it says, the verdicts are unreasonable. In brief, Banff takes issue with several of the trial judge’s factual findings. Although Banff has organized its written submissions under eight headings, I have distilled them to five:

- findings respecting the table cart’s design;
- findings respecting the table cart’s arrival and the adequacy of accompanying information;
- findings respecting the Banff crew’s safe work procedures;
- findings respecting the Grande Prairie Hospital construction site; and
- findings respecting the T-extensions.

These findings will be assessed against the standard of review articulated in *R.P.*; namely: are they essential to the verdict? If so, are they plainly contradicted by the evidence relied upon to support them or incompatible with evidence not otherwise contradicted or rejected?

1. Findings respecting the table cart’s design

[24] At paragraph 72 of the judgment (2021 SKPC 30 [*Judgment*]), the trial judge found that the table cart did not have an inherent design flaw. Banff argues this finding is incompatible with the evidence of its expert, Dr. David Rogowsky, and Pilosio’s expert, Mr. Robert Sparling.

[25] Banff further argues the trial judge made contradictory findings. At

paragraph 58 of the *Judgment*, he found the table cart, “tends to sway out of control with the pins removed”. Nevertheless, he concluded the cart’s design was not inherently flawed.

[26] A review of the relevant evidence is required.

[27] Dr. David Rogowsky was an expert witness, qualified to give opinion evidence in the area of structural engineering.

[28] According to Dr. Rogowsky, the table cart’s design was not only flawed but deceptively so. Safe operation required the user to manually remove two pins to reconfigure the cart and then replace the pins elsewhere so they could serve their dual function as travel stops. It took Dr. Rogowsky four hours of inspecting the table cart to discern the pins’ dual use. He testified he was “flabbergasted” that a designer would choose this safety measure when a \$0.50 welded travel stop would have totally mitigated the risk.

[29] According to Dr. Rogowsky, the cart’s design meant that, if the pins were not used as travel stops, the cart’s base became too narrow, creating the risk it would topple. If only one pin was removed at a time (and the cart maneuvered in a triangle configuration), it was safe. Had there been a welded travel stop, the table cart would not have fallen over.

[30] Robert Sparling was called by Pilosio as an expert witness, qualified to give opinion evidence in the area of forensic engineering with specializations in product failure, material failure, and product analysis.

[31] Mr. Sparling testified that when the lock pins were pulled and then placed in the holes in the centre frame, they served as travel stops. Without the pins as travel stops, the end frames can over-rotate, creating the risk of collapse.

[32] Respecting design issues, Mr. Sparling testified as follows:

A ... Yesterday, when we tested the cart, we did find that if the axles were rotated fully, that it did become unstable and would overturn. So we -- we agree with Dr. Rogowsky's opinion that, you know, the axles did need travel stops. Dr. Rogowsky did not opine on whether the pins could be used as travel stops. And it's my understanding, from having tested the cart, that they can be used as travel stops, and that Pilosio intended them to be used as travel stops.

Q And -- and if those pins were used as travel stops, what would your opinion be with respect to the stability of the cart?

A So we tested that yesterday. I opined on it in the report, and I again tested it yesterday. We put the -- the pins in as travel stops and rotated both end frames as far as we could so they did act as travel stops, and we found that with the pins in as travel stops, the -- the cart was safe to use and would not overturn.

(Trial transcript, Volume 1, page T158)

Later, he testified:

A So one of the things that would make this cart obviously more stable is to limit the travel of those end frames so that we don't get that extremely narrow base. When I first saw the images of this incident, the first thing that came to mind was why aren't there travel stops. And then the first thing I very quickly said is, I would bet those pins are intended to be used as travel stops. As soon as I saw it, I said to myself, it only makes sense that we're going to put these pins in there so it can't fully rotate around and get into that narrow condition. When we started talking to Pilosio, we became aware that that was, in fact, the intent. And based on my testing yesterday, had the pins been used as travel stops as intended, it would have made the cart stable, and the event wouldn't likely have occurred.

(Trial transcript, Volume 1, page T163)

[33] Although Mr. Sparling agreed a welded travel stop would have prevented over-rotation, he concluded the table cart was not inherently dangerous when used as

designed; that is, with the lock pins used as travel stops.

[34] Banff relies on the following portion of Mr. Sparling's cross-examination:

Q All right. You would be aware of the difference between engineering controls and administrative controls?

A Yes.

Q The administrative controls being simply safe work procedures?

A Yes.

Q So an administrative control in this case would be using the locking pins as temporary stops?

A Yes.

Q Because a person has to remove the locking pin and then realign the axle or the end frame, in your language, and then reinsert the locking pin?

A That's correct.

Q Okay. And it - an example of an engineering control would be a permanent welded travel stop?

A Yes.

Q Okay. And in terms of the hierarchy controls, is it your view that the preferable control methodology would be the engineering control versus the administrative control?

A Engineering controls should always be used over administrative controls, provided it doesn't change the functionality. And in this case, I don't believe a welded stop would have changed that functionality.

Q So if you were designing this machine, you'd put a welded stop on it?

A Yes.

(Trial transcript, Volume 1, page T190)

To Banff, this evidence equates to an acknowledgment the table cart's design was inherently flawed.

[35] The evidence of Johann Strunz is also relevant. Mr. Strunz is the CEO of Pilosio Group SPA and a member of Pilosio's Board of Directors.

[36] Called by Pilosio, Mr. Strunz testified that, when placed in the holes in the triangle plate, the lock pins limit the rotation of the axles to ensure the cart remains stable in the angled position.

[37] Mr. Strunz was asked why competitors had welded travel stops while Pilosio did not. He explained that Pilosio's design choice allowed the cart to navigate narrower spaces, enhancing its competitiveness in the residential construction market. If the user needed to rotate the axles more than the travel stops would allow, safety protocols required two operators, an unloaded cart, and no extensions. Thereafter, one pin would be pulled, the axle rotated to the desired extent, and the cart moved partially through the opening. The first axle would then be returned to perpendicular, after which the process would be repeated for the other axle.

[38] Having reviewed the evidence of Mr. Sparling and Mr. Strunz, I disagree with Banff that Dr. Rogowsky's evidence was uncontradicted. Despite acknowledging he would himself have used a welded travel stop, the bottom line of Mr. Sparling's testimony was that, when used as designed, the lock pins function as travel stops and prevent the cart from becoming unstable. Mr. Strunz testified that, when the pins are used as travel stops and safety protocols are followed, the cart is safe.

[39] Accordingly, it cannot be said the trial judge's conclusion (no inherent design flaw) was incompatible with evidence not otherwise contradicted or rejected.

[40] Similarly, I find no irreconcilable contradiction between the trial judge's finding the cart tended to sway out of control with both pins removed and his finding there was no inherent design flaw. Again, there is a difference between the way the cart was designed to be used and the risk that was created when it was used contrary to

design.

[41] The trial judge's conclusion about that the table cart's design was not inherently flawed does not provide a pathway to a finding of an unreasonable verdict.

2. *Findings respecting the table cart's arrival and the adequacy of accompanying information*

[42] This argument focuses upon paragraphs 82, 86, and 89 of the *Judgment*. At paragraph 86, the trial judge notes that the Banff workers figured out how to put the table cart together, fashioning pins to replace those that were missing. From this, he concludes it should have been evident that information was lacking. At paragraph 82, the trial judge characterizes the information Banff received as "glaringly scarce," its absence "blatant", and the accompanying information and instructions as falling short. At paragraph 89, he uses the phrase "almost no accompanying instruction."

[43] Banff argues these characterizations and conclusions are incompatible with the following evidence:

- the trial judge's factual finding that the table carts were a simple, straightforward piece of equipment that may have lulled the Banff crew into a false sense of security (para. 99);
- the evidence of Stephen King, lead hand for the Banff crew tasked with using the carts. Mr. King testified about his qualifications, experience, commitment to safety, comfort level with assembly and operation, and the process through which the crew familiarized itself with the carts. Mr. King testified he was comfortable with the carts, did not believe further training was required, and would not have hesitated to ask for help had he seen the need.
- the evidence of Dr. Rogowsky who testified it took him four hours of

inspecting the cart to figure out the pins were intended to be used as travel stops. He also testified, "... it's deceiving. It is simple, but unless someone points out that you have to move that locking pin, its not intuitively obvious that that's what you should do."

- the evidence of Eugene "Joey" Yusefawich, Vice President of Sales for Pilosio. According to Banff, Mr. Yusefawich likened the three-page technical newsletter to an instruction manual.
- the evidence of Johann Strunz, who resisted the suggestion the three-page technical newsletter was insufficient.

[44] To Banff, all of this evidence runs counter to the trial judge's factual finding that information was "glaringly scarce". Rather, Banff argues this evidence tends to show there was nothing about the table carts or the accompanying instructions that would signal a need for Banff to seek out supplementary information, instruction, or training. The cart was a simple, straightforward piece of equipment. The workers were able to assemble it and use it for its intended purpose. The use of the lock pins as travel stops was far from intuitive. Joey Yusefawich and Johann Strunz endorsed the three-page technical newsletter as adequate. How then, could the trial judge conclude that information was "glaringly scarce"?

[45] I agree with Banff insofar as the trial judge's description of the table carts as "relatively simple" in construction and appearance. I agree that Dr. Rogowsky and Stephen King testified as Banff describes. However, I disagree that either Johann Strunz or Joey Yusefawich stated unequivocally that the three-page technical newsletter was all the user required.

[46] Respecting the technical newsletter, Mr. Yusefawich testified as follows:

Q What's the purpose of that document?

A This is put out by Pulosio Engineering to let us know if there's anything changed with the cart, or what pieces and parts go with it. It's basically a guideline on how it -- instruction manual.

Q Okay. So does it tell you pretty well everything you need to know about this cart?

A Well, I can say honestly this is a manual, and a lot of guys respond better to a demonstration that they can see, feel, and touch. So I -- I know the equipment, and I say, This tells you everything you need to know about it, but it doesn't show you how to maybe turn the wheels properly or what pins to pull.

Q Okay.

A It says it, but it's not showing you.

(Trial transcript, Volume 2, page T216)

[47] During examination-in-chief, Mr. Strunz was asked whether the three-page technical newsletter constituted the whole of the instructions and warnings provided by Pulosio to customers. He replied as follows:

A Absolutely not. This is just a -- an additional support. When we -- according to all the experience and unit experience I have from my previous job, job site professionals don't like to read very much and look up the thick manuals. They appreciate a lot more on-site training. This is why we always conduct, on every new job site, an oral and physical training in person (INDISCERNABLE) the practical training. How to assemble a cart and how to operate the cart safely. This is additional information we give to go with the (INDISCERNABLE) manual.

(Trial transcript, Volume 1, pages T20-21)

[48] Under cross-examination, Mr. Strunz agreed that the technical newsletter plus the assembly instructions constitute the user's manual for the table cart. Although initially he appeared to agree the written materials are sufficient for safe operation, the overall import of his testimony suggests otherwise:

Q Okay. And, Mr. Strunz, you agree that the written materials

are not sufficient to ensure that this cart is operated safely.
Would you agree with that?

A I do not agree with that.

Q You believe the written materials are sufficient?

A I believe that the written material will never be sufficient, independently what -- of how much you write in because it has to be always customized. Every job site, everywhere we use, first of all. Second, the same thing, you need to get oral and physical training because the site manager, and the safety engineer, they will look in your manual and understand those manuals. The people who you're working with your gear are people who don't read. They need to be trained in a different way, orally and physically. And this is what counts.

Q So you're saying, then, is if someone is just presented with the written materials, that's not going to be sufficient?

A No way.

Q In fact, it would be dangerous to allow the workers to use the cart without more than what has been presented in the written materials. Would you agree?

A (INDISCERNABLE) definitely I would say to, and I think even the safety standards in this region are such that you need to work with professional, knowledgeable people, and I would not call those people knowledgeable or professional who haven't received any training to this gear (INDISCERNABLE).

...

Q I'm not quite sure I understand that you answered the question, Mr. Strunz. Without proper instruction, it would be dangerous to allow workers to rely simply on the written materials; would you agree with that?

A I would say the written materials are a supplement to the verbal and physical training that needs to be given to the workers handling, operating, and assembling this gear, to work in a safe manner.

(Trial transcript, Volume 1, pages T84-85)

[49] On appeal, Banff takes issue with the trial judge's finding that information was not only lacking, but obviously so. I agree with Banff's

characterization of this finding as essential to the verdict. The question thus becomes whether this finding is plainly contradicted by the evidence relied upon to support it or incompatible with evidence not otherwise contradicted or rejected.

[50] The trial judge relied upon the following pieces of evidence: (i) the table carts arrived unassembled; (ii) pins were missing; (iii) the Banff crew had only the three-page technical newsletter; and (iv) the Banff crew assembled the carts and figured out their operation, fashioning pins to replace the ones that were missing.

[51] I am satisfied these pieces of evidence support the factual findings in question.

[52] Furthermore, I am not satisfied the evidence highlighted by Banff is incompatible with these factual findings.

[53] Although Mr. Yusefawich and Mr. Strunz agreed there was little, if any, additional written material specific to the table cart, they emphasized the need to supplement the written materials with on-site training. As for Dr. Rogowsky's evidence that the dual use of the lock pins was neither obvious nor intuitive, I would be more inclined to view it as incompatible had the Banff crew not discovered for themselves that the table cart was unstable when the pins were pulled. Even if the solution was arguably hidden, the problem was not.

[54] The trial judge's findings respecting the adequacy of accompanying information does not provide a pathway to an unreasonable verdict.

3. Findings respecting the Banff crew's safe work procedures

[55] At trial, Banff argued that its crew, led by Stephen King, had figured out how to safely operate the cart and had arrived at a set of rules that adequately addressed all risks it posed. Accordingly, Banff argued it could not be held responsible for the

inexplicable and unforeseen actions of Gerard McLaren, who failed to follow Banff's safe work procedures.

[56] Banff takes issue with the following conclusions embedded within paragraphs 83, 93, and 94 of the *Judgment*, arguing they are incompatible with the evidence given by the members of the Banff crew:

- the Banff crew's safe handling instructions did not carry the same weight or meet the same standards for safety as official rules and training;
- the Banff crew's safe handling instructions did not carry the same authority for workers;
- hearing about how to use a piece of equipment or even seeing it modeled by other workers is not a replacement for official training;
- Gerard McLaren was not ignoring direct instruction, training, and established procedure; and
- the Banff crew lacked hard and fast rules about the cart's operation.

[57] A review of the evidence is clearly required.

[58] Stephen King, Emerson Klatt, Jordan Daniels, and Anthony Hnatuk all testified at trial. Pursuant to the principled exception to the hearsay rule, two out-of-court statements given by Gerard McLaren to Occupational Health and Safety Officers David Milo and Kelvin Kliwer on July 21, 2016 were admitted as proof of the truth of their contents. Collectively, the evidence suggests that two workers generally maneuvered the cart, particularly when it was loaded or when pins were removed. However, the evidence varied as to whether two people operating the cart was a rule. While all agreed two people were typically assigned to work the cart together, the

prohibition against solo operation was less clear.

[59] Stephen King testified he could not recall that having two people on the cart was a rule, though usually two people worked together. Emerson Klatt testified that, although having two people to maneuver the cart was not necessarily a requirement, from a practical standpoint moving the cart into position was a two-man job. Mr. Hnatuk, who did not usually work with the table carts, stated he was trained to operate the cart with a partner, and had not expected Mr. McLaren to move the cart alone – that was contrary to normal practice. Mr. McLaren told Officer Milo that sometimes two people moved the cart, and sometimes one person moved the cart. He recalled a safety meeting during which the workers were told that, if there was a table on the cart, two people had to move it; however, if there was no table on the cart, one person could move it.

[60] Despite this evidence, every worker also testified that one person may have moved the cart alone from time to time. Mr. King and Mr. Klatt acknowledged to having done so, and Mr. Klatt recalled the cart being moved by one person on many additional occasions. Mr. Daniels testified that the carts could be moved solo with a lot of precaution, and Mr. Hnatuk described how he and others would move the carts short distances, such as a foot, to get them out of their way. Not only was Mr. McLaren maneuvering the cart alone on the date of the accident, but he had done so previously and seen others do it.

[61] As for the practice when pins were pulled, the workers generally believed two people were required. Mr. Klatt testified he never saw anybody, including himself, pull a pin while operating the cart alone. To Mr. Klatt, having two people on the cart when pins were pulled was a safe work practice he followed religiously. On this point, Mr. Daniels was consistent; pulling the pins alone was prohibited. However, Mr. King appeared to testify that, on occasion, he pulled both pins while maneuvering the cart

alone through narrow spaces.

Q Did you ever pull the pins out when -- when maneuvering the Pilosio cart?

A Yeah.

Q Which pins would you pull out?

A There's -- there's four on the bottom, there's two and two.

Q Okay.

A And you'd pull out, I think the two innards.

Q Okay. So you would -- and did you pull out them -- the two inside ones?

A Yeah.

Q Okay. And why would you do that?

A Just to get into narrower spaces.

Q And did you do that -- were you able to do that if you were pushing the cart by yourself?

A You -- you could, but it wouldn't go too far.

Q What do you mean by that?

A If you pull the pins out - -

Q M-hm.

A -- the -- (INDISCERNIBLE) before the legs would roll over, so you -- you could roll, like, you'll pull the pin and push them into place, and then, kind of, pull the leg back out, and put it on -- in again to, kind of, make, like, a T, or whatever.

Q Yeah.

A And then you can pull them back out again just so you can maneuver around, as needed.

Q Okay. And what about could you pull both of those pins out at the same time?

A Yeah.

Q And so in what situation would you pull them out at the same time?

A When you're trying to get into a tighter space, like, maybe up against a wall, or -- or yeah, when you're trying to get into a tighter space, really.

Q Okay. And had you ever done that before?

A The --

Q Pulled them out at the same time to get them into tight to a wall or something?

A I think so, yes.

(Trial transcript, Volume 3, pages T429-430)

[62] Later, he testified:

Q Okay. And is it your evidence when both pins were -- locking pins were in their position on these table carts they were stable?

A Yes.

Q And one man could move one of these table carts if it wasn't loaded?

A Yes.

Q And it got difficult if it was under load?

A Yeah, just because it was heavy.

Q And also if one person removed one of the locking pins and turned the wheels, or the -- the axle it was still stable because it was in a T-shape, right?

A Yes.

Q So like a tricycle?

A Yeah, yeah.

Q Yeah. So very stable, even at that point, right?

A Yeah.

Q When both pins were removed it was the practise that you developed that it always required two men to operate?

A If it got difficult, yes.

Q Pardon me?

A If it got difficult, yes.

Q No, when you remove both pins, locking pins --

A Yeah.

Q Okay. Was it a requirement that two men had to be there when you remove both pins?

A If it got difficult because they could still -- you could still push the cart and the wheels wouldn't roll because they -- I

think, this -- I'm not a hundred percent on this, but the -- the momentum going forward I thought the one end would stay as a T. I'd have to look into that for sure, but that's just something I recall right now.

Q Yeah. Okay. Was there something stopping it -- the one end from moving?

A It can only pivot one way I believe. Yeah, I think they -- they would only pivot the one way on the --

Q Okay.

A -- the stabilizing bar or whatever you want to call it.

(Trial transcript, Volume 3, pages T475-476)

[63] Lastly, testimony about whether one pin or both were removed at a time was inconsistent. Mr. King agreed that one pin would be pulled, the cart maneuvered, the pin replaced, and then repeated on the other side. Mr. Klatt indicated that both pins were pulled at the same time, so long as two people were attending to the cart. Mr. Daniels testified that he was told the standard practice was to remove one pin at a time, but they did occasionally remove both. As to what occurred on the date of the incident, Mr. McLaren told Officer Milo that he took out both pins to manoeuvre around a concrete column and the cart fell over.

[64] Within this evidentiary context, the trial judge's conclusion that the Banff crew lacked hard and fast rules seems particularly well grounded. This same evidence supports the inferences drawn by the trial judge; namely, the Banff crew's safe handling instructions did not carry the same weight or authority as official rules and training, nor were they an adequate replacement for official training. Although Mr. Klatt and Mr. Daniels testified that having two people on the cart when pulling any pins was a safe work practice to which they adhered, their lead hand, Mr. King, appeared to suggest one person could safely handle the cart with both pins pulled.

[65] The trial judge's factual findings respecting the Banff crew's safe work procedures do not provide a pathway to an inconsistent verdict.

4. Findings respecting the Grande Prairie Hospital construction site

[66] Banff directs my attention to paragraph 70 of the *Judgment*:

[70] ... It is my opinion, based on the evidence, that Pilosio did what was “reasonably practicable” when it supplied the table cart to *Graham* in Alberta and offered training on-site and online. ...

To Banff, there is little to distinguish between the information Pilosio provided to *Graham* in Alberta from the information Banff had in Saskatoon. In other words, the same information cannot be both “reasonably practicable” and “glaringly scarce”. To Banff, this internal inconsistency renders the verdicts unreasonable.

[67] Respectfully, there is a significant difference between the information provided to *Graham* in Alberta and to Banff in Saskatoon. In Alberta, Pilosio supplemented the written materials with on-site training.

[68] In this regard, Joey Yusefawich testified he conducted an on-site training session for *Graham* at the Grande Prairie Hospital construction site. During the session, he demonstrated physically and verbally how to raise and lower the cart, lock the wheels, maneuver the cart, expand it to pick up the table, and lower the loaded table. He testified that Pilosio did not train the Grande Prairie team on manipulating the cart to navigate through narrow spaces, as it was not a necessary function at that site. He made it clear at the Grande Prairie site that the cart’s masts must be fully collapsed before the cart is moved.

[69] In the face of this distinction, it cannot really be said that the *same* information was characterized as glaringly scarce in one context and reasonable in another. It was not the same information – at the Grande Prairie site, the written information was supplemented with site specific in-person training.

[70] However, Banff also draws my attention to four additional factual

findings. At paragraph 70, the trial judge states that, in Alberta, Pilosio provided *online* training. At paragraph 60, the trial judge states that the table carts were shipped from Grande Prairie to Saskatoon *without the express permission or knowledge of Pilosio*. At paragraph 89, the trial judge states that consultation with *the Banff crew in Grande Prairie* “would have brought some enlightenment”. And paragraph 97 concludes:

[97] ... I find that if the same training that had been offered to *Graham* in Alberta had been offered to *Banff* in Saskatoon, the possibility of this accident occurring would have been significantly eliminated.

[71] To Banff, these passages reveal four clear misapprehensions of evidence. First, Pilosio did not provide online training to Graham in Alberta. Second, Banff did not provide labour to the Grande Prairie project meaning there was no Banff crew in Grande Prairie. Third, the table carts were transferred to Saskatoon with Joey Yusefawich’s knowledge and permission. Finally, the same training offered to Graham in Grande Prairie would not have “significantly eliminated” the possibility of the accident. This is because Joey Yusefawich, the person who would have provided the training, did not understand that the lock pins were to function as travel stops.

[72] I agree with Banff that there was no evidence that Pilosio provided online training to Graham in Alberta. I agree there was no evidence of a Banff crew in Grande Prairie. I also agree Joey Yusefawich knew the table carts had been transferred to Saskatoon. On this point, he testified, around November 2015, he met with Stan Heiber, Jordan Lyzitza, and about five other people at the Saskatoon Children’s Hospital site. Both worked with Graham – Stan as general manager and Jordan as project coordinator. As far as Mr. Yusefawich knew, the other people at the meeting worked with Graham as well.

[73] On March 10, 2016 Graham and Pilosio executed a rental agreement. Included in the list of materials Pilosio agreed to rent to Graham are three “translation

trolley carts”. Asked about this at trial, Joey Yusefawich testified:

Q All right. And so the -- the translation trolley, or the cart translation trolley ST50, and it says that it's used --

A Yes.

Q -- is that correct?

A Yes.

Q So it was used?

A Yes.

Q And so when you -- what do you mean by it was used? I think we have a general idea, but where was it used from?

A It was used a year previously on the Grande Prairie Regional Hospital site.

Q Okay. How many carts did you rent to the -- the children's hospital?

A We had four there.

Q Four there? Okay I -- I noticed that it says there's three for quantity in this rental agreement; why would that be?

A Because Stan Heiber already had one in his possession.

Q Okay.

A He wanted to see it and inspect it and have a look at it.

(Trial transcript, Volume 2, page T226)

[74] Under cross-examination, Mr. Yusefawich testified:

Q Okay. Is -- is it your evidence that the table carts were shipped from Grande Prairie, the hospital, to Saskatoon?

A They should've been shipped back to our yard in Calgary for inspection and then shipped to Saskatoon.

Q Okay. So they were used in Grande Prairie?

A Yes.

Q Should have been shipped to your yard in Calgary?

A Yes.

Q Should have been inspected?

A Yes.

...

Q ... And would you have any bill of lading shipping them from the Calgary office to --

A We should have all those records.

Q Okay. Did anybody ever ask you for those records?

A No. There is always paperwork done when the customer returns, either with a list or sends it back to us, and then we do a detailed inventory --

Q Right.

A -- and inspection.

...

Q So you're not able to personally say what the condition of the table carts were when they arrived in Saskatoon?

A Well, it's up to the customer to inspect them as well. So we ask them, Did you receive the equipment? Did you look at it? Are the counts correct? So --

Q Okay. That's your standard practice, right?

A That's standard practice.

Q But you don't have any direct personal knowledge of the condition of the carts when they arrived in Saskatoon, do you?

A Well, I know they were looked after and inspected and approved.

Q By Tad?

A Yes, or Tad would've alerted me and said, Joey, there's a problem, there's a crack, there's this or that. I would've been made aware.

Q And that's -- that's the assumption right?

A That's the rules.

Q Yeah. Okay. My question to you is personal knowledge.

A I did not go to the Saskatoon site and inspect the carts.

Q Okay. And you weren't there when they arrived?

A That's correct.

...

Q Do you know how high the ceilings were going to be built at the Saskatoon hospital?

A I think it was about 6 metres, but I don't recall.

- Q So your props would've been 6 metres?
A Yes. Well, not quite. The table and jacks and all the other apparatus --
- Q Yeah.
A -- to achieve that height.
- Q There's no way the table cart could reach that high based on this newsletter, right?
A That's correct.
- Q So how is Graham to use the table cart and the props together? What was the solution there?
A We didn't discuss the solution. We sent the carts out, and we never heard any feedback from it. I got a call from Kent letting me know that the carts arrived in pieces, and he was concerned there wasn't enough pieces. And I talked to Tad, and he said he sent everything, all the extensions and things like that, so that was about all we talked about.

(Trial transcript, Volume 2, pages T297-298, T301-302)

[75] Finally, I agree there was evidence tending to show Mr. Yusefawich, the person who would have provided on-site training, did not understand the lock pins were to serve as travel stops.

[76] On this point, he testified during examination-in-chief:

- Q Okay. Is there any mechanism on there that would prevent the cart from folding up?
A Those are the two pins that you remove that prevent it from folding up.
- Q What if you have the two pins removed?
A Then the cart will go into this position.
- Q Can it move further than -- than what we're seeing in diagram 345?
A No, not that I'm aware of.
- Q What would prevent it from going further?
A Maybe the steel, or the welding around it, or some cage on it.

Q Is there some welding or a steel cage on it?

A Well there is some hardware like you see here, that the wheels can interfere or -- or something. I'm not --

Q Well, I guess based on that diagram and based on the -- the photographs that we see, I'm trying to understand how you -
- we would have -- let's say looking at photograph --

A Sorry. This is basically what I'm saying. If -- if there's steel here on the front --

Q Yeah.

A -- that you would hit, or the -- or something would bind there. That's all I'm saying.

(Trial transcript, Volume 2, pages T219-220)

Notably, this testimony was given with reference to the three-page technical newsletter; specifically, with reference to the diagram on page 2 captioned "Angled position to pass through openings:"

[77] After reference to a photograph of the collapsed cart, Mr. Yusefawich's testimony continued:

Q So how -- how could it -- how -- in your experience with using and selling these carts, how would the cart be folded up in that way?

A I don't know, ma'am.

Q Is there something to prevent the cart from folding up in that way?

A I cannot -- no, I don't know the answer to that. We've never had a previous incident or any issues with the cart, so --

THE COURT: But wouldn't the locking pins keep them from doing that?

A Yes, I would assume that would be.

THE COURT: But --

Q MS. RODGERS But what I'm asking is, what happens when the locking pins are removed?

THE COURT: That's what I want to know.

A Yeah, and that's a good question. I don't know the answer to that. I'm assuming when you tip it, and I can't recall that you put the pins back in place, that should give it the stability it needs. But I'm just -- sorry, I don't -- I can't recall. I haven't seen them in a while.

(Trial transcript, Volume 2, pages T220-221)

[78] And, under cross-examination:

Q So this piece of equipment, this translation trolley cart, was designed to remove the locking pins so you could angle the wheels --

A Yes.

Q -- and go through smaller spots, right?

A Yes.

Q And the diagram says you can do it at the same time, right? You can remove both locking pins and rotate both axles, yes?

A Correct. Yes.

Q Okay. And I believe your evidence earlier was you just didn't expect that those wheels, if you remove the locking pins, could collapse?

A Correct.

Q So that wasn't something that, in your experience with this equipment, that you ever even anticipated?

A No.

(Trial transcript, Volume 2, page T292)

[79] The question thus becomes whether any of these four factual findings: (i) Pilosio provided online training in Alberta; (ii) Pilosio neither knew nor gave permission for the table carts to be shipped to Saskatoon; (iii) there was a Banff crew in Grande Prairie; and (iv) the same training would have "significantly eliminated" the possibility of the accident, are essential to the verdict (*R.P.*) or material to the reasoning of the trial judge (*Singharath*).

[80] For the following reasons, I have concluded that factual findings (i) and

(ii) are neither essential nor material, but findings (iii) and (iv) are.

(i) *Pilosio provided online training in Alberta*

[81] There is only one passing reference to online training. By contrast, all the key references are to “on-site” or “hands on” training. At paragraph 62 of the *Judgment*, the trial judge links the lack of “on-site” training to the fatal crash. At paragraph 72, he states that the table carts were used without incident in Grande Prairie because of appropriate “hands on” training. At paragraphs 97 and 99, he states:

[97] ... I find that if the same training that had been offered to *Graham* in Alberta had been offered to *Banff* in Saskatoon, the possibility of this accident occurring would have been significantly eliminated.

...

[99] Perhaps more significantly, they provided no real on-site training with a representative of *Pilosio* at the Children’s Hospital in Saskatoon. ...

[Underlining emphasis added]

[82] Clearly, the trial judge’s single reference to online training played no role in his decision making.

(ii) *Pilosio neither knew nor gave permission for the table carts to be shipped to Saskatoon*

[83] The second factual finding first appears at paragraph 60 of the *Judgment*. It is repeated at paragraph 66, as part of the trial judge’s analysis of whether *Pilosio* was a “supplier” within the meaning of the *Act*. Insofar as it appears in paragraphs 60 and 66, I find that this misapprehension of evidence is neither essential nor material to the verdicts *against Banff*.

[84] The same finding appears in paragraph 97:

[97] Based on the evidence presented, the carts were shipped to the Saskatoon construction site and essentially arrived in

pieces which had to be set up. No representative of *Pilosio* was notified of the transfer of the carts nor was anyone from *Pilosio* available to give instruction on proper set up and use of the cart.

...

[85] After careful consideration, I have again concluded that this factual finding, based upon a misapprehension of evidence, is neither essential nor material to the verdicts against Banff. No inferences adverse to Banff appear to have been drawn from it.

[86] This trial judge's finding that *Pilosio* did not know about the transfer of the table carts from Grande Prairie to Saskatoon is based on a misapprehension of evidence; however, one that is neither essential nor material to the verdicts against Banff.

(iii) *Banff crew in Grande Prairie*

[87] This factual finding appears at three points in the *Judgment*. At paragraph 89, the trial judge writes:

[89] ... Ultimately, worker safety is determined by proper training and access to reliable information; it was *Banff's* responsibility to fill the knowledge gap created when the table carts arrived in Saskatoon from Grande Prairie with almost no accompanying instruction. Consultation with *Graham*, the *Banff* crew in Grande Prairie or even *Pilosio* itself would have brought some enlightenment on the cart's operation, led to further instruction and clarification, and at the very least it would have illustrated *Banff's* due diligence in seeking the necessary information.

[emphasis added]

[88] At paragraph 99:

[99] ... If they had contacted either the *Banff* employees at the site in Grande Prairie or, if they had shipped the cart from Grande Prairie, together with the crew who was familiar with the cart and its operation, this accident would not likely have occurred. It is therefore my conclusion that *Banff* did completely

fail in the provision of instruction, information, training and supervision of the table cart at the Children's Hospital in Saskatoon.

[emphasis added]

[89] And finally, at paragraph 102:

[102] ... I further find that the defences promulgated by the defendant *Banff* have not been established as being reasonably practicable. They could easily have transferred at least one member of the team, who had worked with the cart on the build in Grande Prairie, to the Children's Hospital in Saskatoon and that person could have set up and trained the Saskatoon employees on its safe use. It is certainly easy to cast blame on the design of the cart, and further on to the *Banff* employee who is now safely ensconced in Ireland, but it is my opinion based on the evidence they did not provide any adequate training on the cart for the team in Saskatoon and it was their obligation to do so nor did they provide for its safe use or handling.

[emphasis added]

[90] Due diligence is made out when a defendant establishes, on a balance of probabilities, that they took all reasonable steps (reasonable care) to avoid committing the offence. In *R v Greater Sudbury*, 2023 SCC 28 at para 55, 487 DLR (4th) 387 [*Greater Sudbury*], Martin J. endorses the following passage from *R v Gonder* (1981), 62 CCC (2d) 326 (Y Terr Ct) at 332-33:

Reasonable care implies a scale of caring. The reasonableness of the care is inextricably related to the special circumstances of each case. A variable standard of care is necessary to ensure the requisite flexibility to raise or lower the requirements of care in accord with the special circumstances of each factual setting. The degree of care warranted in each case is principally governed by the following circumstances:

- (a) Gravity of potential harm.
- (b) Alternatives available to the accused.
- (c) Likelihood of harm.
- (d) Degree of knowledge or skill expected of the accused.
- (e) Extent [to which] underlying causes of the offence are beyond the control of the accused.

[91] As noted by Martin J. in *Greater Sudbury*, control is relevant to an analysis of due diligence:

[56] I agree that the "[e]xtent [to which] underlying causes of the offence are beyond the control of the accused" is a relevant factor. The fact-finder should assess, either in absolute or comparative terms, whether an employer had control over the worker and the workplace. Control is also an implicit consideration in assessing what alternatives were available to the accused (*J. Stoller* [1986 CarswellOnt 3654 (WL) (Prov Ct)], at paras. 22-24; *Campbell* [2004 CarswellOnt 116 (WL)], at para. 68; J. Swaigen and S. McRory, *Regulatory Offences In Canada: Liability and Defences* (2nd ed. 2018), at pp. 123-28). Indeed, "[r]easonableness of care is often best measured by comparing what was done against what could have been done" (*Gonder*, at p. 333 (emphasis added)). "What could have been done" is necessarily limited to steps or measures that are within the workplace actor's control and thus capable of being carried out..

[92] In this case, the trial judge includes the following as alternatives available to Banff:

- consultation with the "Banff crew" in Grande Prairie;
- shipping the table cart to Saskatoon, together with "the crew" that was familiar with it; and
- transferring at least one member of "the team" who had worked with the table cart in Grande Prairie to Saskatoon to set up the cart and train the Banff workers.

The reference to "*Banff* employees" in para. 99 and the implication that "shipping" or "transferring" workers was well within Banff's grasp leads me to believe all references to "the crew" and "the team" are based upon a misapprehension that a crew or team of Banff employees used the table cart in Grande Prairie.

[93] Respectfully, I find that the trial judge's misapprehension of evidence

insofar as a Banff crew in Alberta was material to the verdicts against Banff. Simply put, the trial judge overestimated Banff's connection to and control over the Grande Prairie site, leading him to identify a series of alternatives material to his analysis of Banff's due diligence defence that simply did not exist.

(iv) *The same training would have "significantly eliminated" the possibility of the accident*

[94] This factual finding does not engage with the evidence (reproduced above) tending to show that Joey Yusefawich did not understand the lock pins were to serve as travel stops. In fairness, his evidence leaves open the possibility that, at the time, he knew (or would have figured it out, given the opportunity) that the lock pins serve as travel stops. Regardless, I am satisfied the trial judge's conclusion that the same training would have "significantly eliminated" the prospect of the accident is essential to the verdict. Because of the way the charges were framed, the Crown was required to prove causation. At paragraph 97, he finds a causal connection between the fatal accident and Banff's failure to provide the same training to its employees in Saskatoon as Graham had provided in Grande Prairie. This is consistent with his finding at paragraph 62:

[62] I find that this [decision to alter the carts] was a fatal error as it was done without the knowledge, advice or consent of the designers and manufacturers of the cart. Had that advice and consent been sought, either the alteration would have been vetoed or a difference to the design by the originators would have been designed, tested and possibly approved. At the absolute least, *Pilosio* should have been advised of this design alteration. This was not done and with the lack of training on-site, this resulted in the fatal crash which killed Eric Ndayishimiye. The removal of the two pins simultaneously without two people holding the cart resulted in the cart collapsing. The wheels of the cart and the weight of the additional arms could not be sustained by the existing design of the cart and it collapsed while being moved by an employee of *Banff*.

[underling emphasis added]

[95] At paragraphs 98 and 99, the trial judge finds a causal connection between the fatal accident and two things – the modifications to the table cart and (“perhaps more significantly”) the lack of on-site training.

[96] In circumstances where there was evidence tending to show that on-site training may not have prevented the fatal accident, the trial judge’s failure to engage with that evidence is material to his conclusion on causation. Accordingly, I find this misapprehension of evidence also renders the verdict unreasonable.

5. *Findings Respecting the T-extensions*

[97] At paragraph 56 of the *Judgment*, the trial judge found “the cart was modified by *Banff* without the knowledge of *Pilosio* so the arms on the upright portion of the cart could reach higher.” At paragraph 71, he found that Graham was responsible for the modifications. At paragraphs 61 and 98, he states the cart was modified by Banff and/or Graham. And, at paragraph 62, he finds a causal connection between the modifications and the fatal accident.

[98] On appeal, Banff submits there is simply no evidence it was involved in any modifications to the T-extensions.

[99] Respecting the T-extensions, Stephen King testified:

Q -- who -- who manufactured them?

A -- no idea.

Q Okay. And -- when did you get those pieces, the T pieces?

A I think they just -- all of it showed up at the same time.

Q Okay.

THE COURT: They came with the cart?

A They -- they were there, that’s -- I don’t know if they came with it or they were -- I just got, here’s everything, put it together. Like, I -- I don’t know.

(Trial transcript, Volume 3, page T426)

[100] Similarly, Emerson Klatt testified that when the table cart arrived it was not tall enough to reach the height of the formwork, so somebody organized having taller extensions brought in, but he does not know who (“I don’t know who or where those were made”) (Trial Transcript Volume 2, page T320).

[101] Banff general foreman Daryl George testified he did not think Pilosio supplied the T-extensions, but he does not know who did.

[102] Joey Yusefawich and Johann Strunz testified the T-extensions were not Pilosio equipment but could not say who had done the modifications.

[103] Although a hand-drawn diagram of a T-extension on Graham letterhead was shown to Joey Yusefawich, he could not authenticate it, and it was never marked as a full exhibit.

[104] Within this evidentiary context, the trial judge’s conclusion that Banff and/or Graham modified the table carts seems consistent with the evidence. My concerns arise when I consider paragraph 56 (“the cart was modified by *Banff*”) along with paragraph 62 (“this was a fatal error”).

[105] There is also paragraph 98:

[98] The cart was modified by either *Graham* or *Banff* upon arrival in Saskatoon and they must bear the responsibility for doing that modification without the knowledge and consent of the designers of the cart.

[106] There was no evidence from which to differentiate between Banff and Graham when it came to responsibility for modifying the table carts. Accordingly, any findings or conclusions holding Banff responsible for having done so are a misapprehension of evidence that, considering the issue of causation, are material to the verdict and render it unreasonable.

Conclusion

[107] The verdicts against Banff are unreasonable.

[108] Having reached this conclusion, I need not go further and determine Banff's remaining grounds of appeal.

[109] The convictions are set aside and a new trial is ordered.

J.
K.L. ZERR