

More Power!

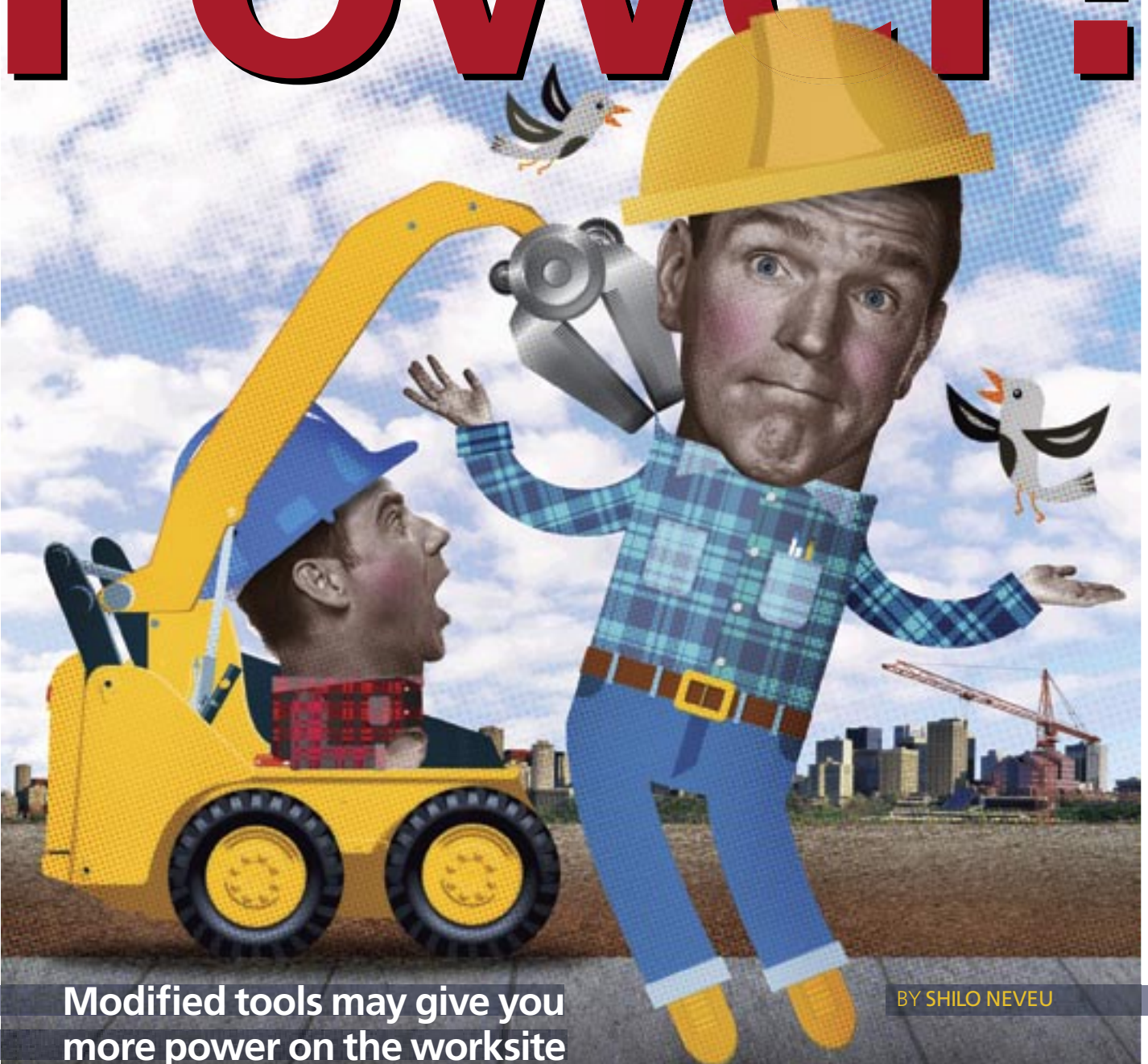


ILLUSTRATION BY HEFF O'REILLY

Modified tools may give you more power on the worksite but they can also bring greater liability in the court room

BY SHILO NEVEU

Do you remember Tim “The Tool Man” Taylor, the calamitous handyman from the 1990s TV show *Home Improvement*? Episode after episode we watched as Tim modified his tools to make them bigger and better. Then, in some haphazard fashion, Tim tested the modified tool, often causing havoc to everything around him.

What would happen if this scene was reenacted on a modern day construction worksite? Recently, we came across a very interesting

matter that could have been taken directly from a *Home Improvement* episode.

An employer required a very specific tool to perform a very specific job. The only way to get this tool was to combine a stock tool with a modification, which according to the supplier, was designed to be used with a variety of different stock tools. As such, it was assumed that the modification was safe to use with the stock tool.

This is not an uncommon situation. With the ever-changing nature of construction, employers have to adapt new construc-

tion practices to the day-to-day construction environment. However, an employer must stop and consider what his responsibilities are to his workers to ensure the construction practices are both safe for use and being used safely.

In this case, the employer purchased the stock tool from an authorized dealer and had the dealer mount the modification to the stock tool, resulting in a modified stock tool or MST. Once the MST was assembled, it was shipped to the worksite where a worker, who was very familiar with the stock tool and its operation, was required to read the manufacturer’s specifications provided prior to using the MST. After a couple days of using the MST, a tragic incident occurred resulting in fatal injuries to the worker. The investigation that followed concluded that the modification made to the stock tool was too powerful for the tool, which created a fundamental defect in the MST and directly resulted in the fatality. In addition, a contributing factor to the incident was the improper use of the MST by the worker, attributed to his lack of knowledge about the MST.

As a result of the incident, the employer was charged with not taking all reasonable precautions necessary to protect the health and safety of the worker and not providing a tool that met manufacturer specifications.

The employer felt that had there been a fundamental flaw in the design of the MST, the authorized dealer should have alerted him. The employer wanted to know, “Why me?” Our advice to the employer was very sobering and will likely surprise you.

In most jurisdictions in Canada, a supplier of equipment or a tool can be held liable for not supplying something that meets occupational health and safety (OHS) legislation. However, this does not remove the employer’s responsibility under the OHS legislation for their employee.

You may be familiar with the term “internal responsibility system” or, as used by Justice Mary L. Hogan in a recent Ontario Superior Court of Justice decision, “belts and braces”. These terms are used to describe the underlying philosophy of the OHS legislation in Canada. Paraphrasing Justice Hogan, the responsibilities under the OHS Act overlap, creating a redundancy which operates to the advantage of workers. This “belt and braces” approach to OHS uses more than one method to ensure workers are protected. If the “belt”



ILLUSTRATION BY HEFF O'REILLY

does not work to safeguard a worker, the back-up system of the “braces” might, or vice versa. If all workplace parties are required to exercise due diligence, the failure of one party to exercise the requisite due diligence might be compensated for by the diligence of one of the other workplace parties. The purpose is to leave little to chance and to make protection of workers an overlapping responsibility.

Conversely, with overlapping responsibilities comes joint and several liability. That means that everyone responsible for the safety of a worker can be held individually or jointly accountable depending on the facts of the incident. In the end, the Crown prosecutors decide who they will charge and with what charge. Generally, the Crown will go after all parties involved in the incident, as each party has a responsibility to protect the health and safety of the worker. It is safe to assume that if a worker gets hurt on a worksite, all potentially responsible parties are sitting in a “hot seat”, but the employer’s hot seat is generally a little warmer.

How does this apply to our MST? While the manufacturer likely contributed to the cause of incident and potentially could be charged, even if the manufacturer fell down on its responsibilities, a court is going to ask the employer what he did to prevent the incident

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from occurring. The employer, and similarly other parties, can not point to the manufacturer or any other party for his due diligence. A court will expect all parties to individually demonstrate what they did to prevent the incident from occurring.

The employer in this case study assumed, without asking anyone, that the MST was

safe for use by his worker. So, what should our employer have done?

In many jurisdictions in Canada, once a tool is modified, the employer who introduces the modified tool to the worksite is responsible for the safety of the tool and ensuring its safe use. This is troublesome because the MST has no complete operator’s

manual for its use and no guarantee that it is even safe to be used. Our employer would have one operator’s manual for the stock tool and another for the modification but not one for the MST. The Tool Man once stated that “A real man doesn’t need a manual”. Unfortunately, by law, you do!

When a new tool like the MST is intro-



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duced to the worksite, your employee may understand all the individual hazards for the stock tool or the modification. But when you put them together, it's a different story. How the MST operates and how it behaves in a particular working environment will be different than the stock tool and as such, the MST will have unique hazards that need to be considered and controlled.

Lastly, since the modification can be adapted for various stock tools, the manufacturer would have no ability to assess the proper operation of the MST or know the limitations of its use in every circumstance. As such, it is the employer who needs to identify these hazards and associated controls to the worker. This is true for any new process, material or equipment being introduced to the work environment. Its specific use in your working environment needs to be assessed and proper controls put into use by the workers. The employer is the person who carries these responsibilities.

When assessing the types of controls which should be in place, the courts have

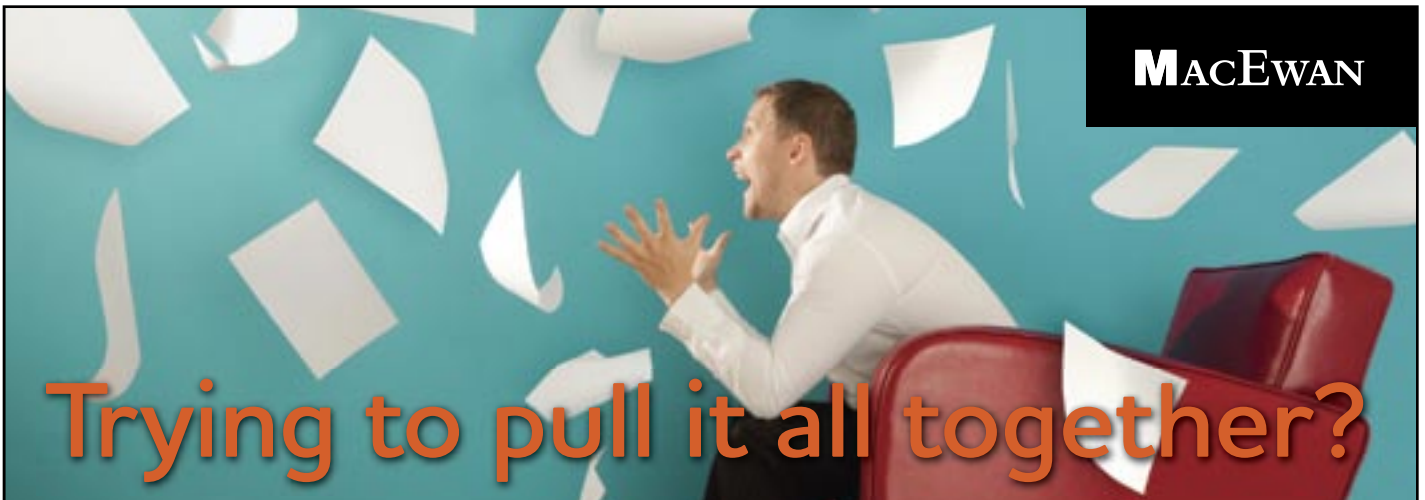
When assessing the types of controls which should be in place, the courts have been clear on the issue; the greater the consequences of using a new tool, process, material or equipment, the greater the steps required to ensure the safety of the worker.

been clear on the issue; the greater the consequences of using a new tool, process, material or equipment, the greater the steps required to ensure the safety of the worker. Your actions should be proportional to the potential outcome. In the case of the MST, a minimum requirement would have been for the employer to insist on someone "certifying" the MST safe for use and issuing instructions on how to use the MST safely. To get these answers, the employer should have asked the manufacturer of the stock tool, the manufacturer of the modification, the authorized dealer or even better, a certifying engineer. It was the responsibility of the employer to ensure someone gave this direction so it

could be communicated to the worker.

Construction is a very dynamic environment with projects continuing to get bigger, more unusual and ultimately more challenging. With this comes major risk for the employer and their workers. Ultimately, new processes, materials, equipment and tools will be introduced to the working environment (cue The Tool Man grunt) but responsibility for ensuring that these construction practices are safe for use and being used safely lies with the employer. ☐

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