

IN THE DISTRICT COURT  
AT WHAKATANE

CRI-2016-087-001115  
[2017] NZDC 528

WORKSAFE NEW ZEALAND  
Prosecutor

v

TRACKS CONCRETE (2002) LIMITED  
Defendant

Hearing: 13 January 2017  
Appearances: S Elliott for the Prosecutor  
S Grice for the Defendant  
Judgment: 13 January 2017

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**NOTES OF JUDGE L M BIDOIS ON SENTENCING**

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[1] Tracks Concrete (2002) Limited (Tracks) has pleaded guilty to two charges. They are, as an employer, failed to take all practical steps to ensure the safety of an employee who was exposed to the hazard of a brake activation on a boat trailer during maintenance and they did fail as soon as possible after a serious harm occurrence, to provide WorkSafe with written notice.

[2] Briefly, in terms of the summary, Tracks main business is concreting and have 40 employees. The victim, Mr Milne, has been employed as a diesel mechanic. Tracks allow employees' vehicles to be fixed.

[3] On 22 December 2015 a boat and trailer was brought to the workshop that needed repairs, which included the electronic hydraulics. Work was required to fix an electric problem and the brake pads.

[4] Mr Milne, the victim and Mr Smith, the supervisor, were working in the workshop that day. Smith instructed the victim to replace the brake pads. Also an electrician was engaged to assist with the electrical work. All three men worked on the brake system simultaneously. When testing whether or not the brake system was working the electrician activated the brakes. This caused the brake callipers to close and clamp together. Mr Milne, who did not know this was going to happen, was holding a brake calliper as he was working at a different site when it was activated. As a result his hand was trapped in the calliper.

[5] The electrician and Mr Smith heard the victim scream and realised what had happened. They cut cables and hydraulic lines. That was not successful. They then tried to bleed a screw to release the callipers. That failed. In the end, the callipers were cut from the trailer using a grinder. The callipers were cut in half freeing the victim's hand.

[6] As a result, he went to hospital overnight. Three fingers were partially amputated. There was ongoing rehabilitation and further surgery. After four months he returned to part-time work. He later returned to full-time work.

[7] Tracks did not notify WorkSafe of the accident.

[8] There is a comprehensive summary with detailed aspects of the case.

[9] In relation to this matter, relevant sentencing principles and purposes I have to have regard to include holding you accountable for your offending and promoting a sense of responsibility in you. There is a need for deterrence and denunciation when dealing with work site accidents. I have to take into account the effect the offending has had on the victim but also have regard to the defendant's circumstances.

[10] I have received comprehensive submissions and cases from both counsel for WorkSafe and for the defendant.

[11] Mr Elliott, on behalf of WorkSafe, says that a reparation order in the vicinity of \$30,000 to \$40,000 should be imposed. A starting point for the s 6 offence should be in the region of \$90,000 and \$40,000 for the other charge. There is an entitlement to reduction in the starting point for mitigating factors, such as 25 percent for the plea.

[12] Both counsel helpfully outline the leading case of *DoL v Hanham & Philp Contractors Limited*<sup>1</sup> which sets out the process that the Court needs to undertake. The three main steps are assessing the amount of reparation, fixing the amount of fine, making an overall assessment of proportionality and appropriateness of total imposition of reparation and fine. Reparation and fine serve discrete statutory purposes. There are starting points in terms of the fine being low culpability, medium culpability or high culpability.

[13] Mr Milne, the victim, sustained serious injuries. He has returned to work after nine months but he continues to suffer pain, loss of dexterity, sensitivity, sleeplessness, anxiety and embarrassment.

[14] The company had offered him \$15,000 at the time. Parts of three fingers were amputated.

[15] In the case of *Big Tuff Pallets*<sup>2</sup> the Court determined emotional harm reparation of \$20,000 and a further \$5000 for consequential financial loss. In another case of *New Zealand Timber Limited*<sup>3</sup> fingers and part of a thumb were amputated and \$38,000 for emotional harm was ordered.

[16] ACC shortfall payments are claimed being \$1730 and \$206 medical fees for out-of-pocket expenses are also claimed.

[17] Mr Elliott submits that the defendant's culpability falls in the upper end of the medium culpability band and justifies a starting range of \$90,000. There is the failure to notify. He says that it should be \$40,000.

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<sup>1</sup> *DoL v Hanham & Philp Contractors Limited* (2008) 6 NZELR 79 (HC).

<sup>2</sup> *Big Tuff Pallets Ltd v Department of Labour* (2009) 7 NZELR 322 (HC).

<sup>3</sup> *Worksafe New Zealand v New Zealand Timber Ltd* [2015] NZDC 19471.

[18] Mitigating factors are co-operation, steps taken to mitigate loss since, the defendant willing to undertake restorative justice, guilty plea and offer of amends. Totality is important.

[19] For the defendant, Ms Grice, accepts the summary and both charges and advises the Court that Tracks has updated its health and safety procedures. It has implemented a specific machine isolation procedure to avoid anything happening in the future. She said Tracks has measures in place to ensure isolation of machinery being worked on. She submits that such an incident had not occurred previously in 20 years.

[20] There have been immediate steps taken to address the injuries that had been caused. There was an offer of amends in terms of \$15,000 but I will come to that shortly. There was a belief that notification of the accident was not required because of something seen on a website.

[21] Reparation is compensatory in nature and designed to recompense an individual for loss, harm or damage resulting from the offending. The fine is effectively punitive.

[22] Ms Grice reminds the Court that at a subsequent restorative justice meeting \$20,000 has been agreed and paid for as emotional harm reparation. She refers to a number of cases to justify \$20,000 should have been the figure. That was agreed to. She submits that the culpability is in the medium range. The company had a process in place and knew about likely risks but was let down by employees. The supervisor ought to have been well aware of the need to use the isolation procedure. He was part of the implementation of a card system.

[23] She submits that the starting point should be around \$50,000 with significant credit for a guilty plea, good safety record, first offender, co-operation, review of its safety procedure since, participation in restorative justice and the fact that amends has been made.

[24] In terms of the failing to report she submits that the fine starting point should be around \$10,000 and that it was an innocent error by the company.

[25] In relation to these matters the aggravating features are the fact there are two charges and there is the effect that the offending has had on the victim. The comprehensive victim impact statement says he has worked for Tracks for two years. It is the worst pain he has ever felt. He expected to have no fingers when he came through. He had been using a variety of pain killers but that has not worked. He was off work for several months. He has problems with memory. He relies on his mother to do lots of things for him. His loss of dexterity, extreme sensitivity affects his concentration. His ability to grip has been significantly affected. There was a second lot of surgery. He has had to rely on ACC payments, which was a reduced amount in terms of income.

[26] He had plans to set up his own business which is now on hold. He had dreams of working overseas but that is on hold. He describes himself as an easy going person with hunting and fishing as his main hobbies and those have been seriously affected. He has ridden in motocross and road bikes since he was four or five and he cannot do that anymore. He thinks that he is now more intolerant of people.

[27] His mother has provided a report. She was obviously upset when she heard about him being hurt. She has had to provide a lot of support for him and it is stressful for her. He has been a mechanic since he has been a kid. This has impacted on him and her not in a good way.

[28] The mitigating factors are the plea of guilty, remorse, amends, restorative justice – which I will come to shortly – a first offender, steps taken at the time to address the injuries. The fact that they have reviewed processes and have put in place new procedures to avoid such incidents.

[29] In terms of the restorative justice meeting that took place on 12 January, an amount of \$20,000 was offered and accepted by the victim. There was obviously some grief exchanged. At the end of the day the defendant acknowledged its

offending and responded to questions asked and explained the changes that were made, which was of some comfort to the victim. The defendant acknowledged the physical and emotional trauma caused to the victim. An offer of \$20,000 was made, accepted and has since been paid.

[30] In relation to these matters I have to determine a number of matters. Firstly, there is reparation. An agreement of \$20,000 was reached at the restorative justice meeting. In my view, there is always goodwill on both sides. That was an increase by the defendant from an earlier offer. It was accepted by the victim.

[31] There is obviously an ongoing relationship in terms of employment between the two. I am not privy to the actual discussion. Many victims are embarrassed to talk about financial matters in those sorts of situations because they do not want to create an impression that they are only having those discussions because they are after money. The parties on this occasion agreed. Many cases have been referred to me. None will ever be the same because such things as the pain, impact on quality of life are always going to be different, as are the injuries that are sustained.

[32] It is for the Court to determine reparation. In relation to this matter I fix the reparation for harm at \$25,000. I recognise that a payment of \$20,000 has been made so in respect of the s 6 offence there is going to be an order of \$5000 reparation.

[33] In addition, there is going to be actual loss suffered which has been agreed to, which is \$1730 from ACC and \$206.

[34] The next matter I have got to determine is the fine. What is apparent is that a senior employee was the supervisor in charge of this operation. He had instructed the victim to work on the brake pads which involved the callipers, whilst he and the auto electrician worked at another area of the trailer. He had initiated the card system yet failed to implement it on this particular occasion. I have no doubt that the time of year was a factor and the need to try and get the boat and trailer out just before Christmas.

[35] The company had a policy. The company had expectations. The company were let down by a senior person. The supervisor knew the victim was working in an area where mechanical movement could occur. He and this auto electrician worked at a separate site which could well trigger – and in fact did trigger – mechanical movement which had serious consequences.

[36] The victim was an innocent party in this. There was no victim fault and that is an important factor when comparing with some of the other cases.

[37] From the company's perspective they were let down by the failure of their supervisor to implement policy, but he is their representative and they are caught by that.

[38] In relation to this matter on the s6 matter, I fix culpability in the medium range of \$75,000. I give a one-third deduction for the mitigating factors that I have identified. That is a reduction of \$25,000 leaving a fine of \$50,000.

[39] There shall be Court costs of \$130.

[40] There has been no issue as to proportionately or inability to pay.

[41] In relation to the second charge, the company explained that they saw on a website information that they did not think they had to report the matter. It seemed to me that it was obvious that this was an amputation that would have been serious harm. They should have known. They have made a mistake. I do not determine whether it was innocent or deliberate but they should have reported the matter.

[42] I fix the starting point at \$25,000. I deduct \$5000 for totality. I deduct by a further \$5000 for mitigating factors that I have identified. That is a fine of \$15,000 plus Court costs of \$130.

[43] **MS GRICE:** I am just looking at my notes on your sentencing and I just wanted to check, I am willing to accept it is my error on the calculations. But, Sir, looking at the fine ordered on the s6 charge, you talked about medium culpability and a start point of \$75,000 and then applied a one-third discount.

[44] **THE COURT:** That is \$25,000 if my maths are right.

[45] **MS GRICE:** Yes, Sir, I agree with that. My concern is with the discount, Sir, because I believe that my client is entitled to a 25 percent discount on its own for the early guilty plea, in terms of the Supreme Court decision in *Hessell*.

[46] **THE COURT:** Yes, 25 percent.

[47] **MS GRICE:** So 25 percent. And then, Sir, consistent with the cases I have cited to you I was seeking a 25-35 percent further discount, in terms of the mitigating factors. By my calculation the discount is being about eight percent. So, Sir, I am asking for a little bit more in terms of the mitigating factors.

[48] **THE COURT:** I deal with criminal matters all the time and I do not give more than a third. But, 40 percent sometimes I give is for youth. There is eight percent, or three percent or 10 percent. For my sake I think, I mean even on your submissions you asked for a \$10,000 starting point on the second charge and then ended up recommending \$5000 which is a 50 percent discount.

[49] **MS GRICE:** I do not think these types of matters they should get any more credit than what I give defendant's in criminal cases.

[50] **THE COURT:** I accept that, Sir. But I am not asking you to do anything inconsistent with previous cases. I mean, perhaps I could ask if my friend would be, you know, is opposed to an increased discount. But, Sir, I do believe it is consistent with other cases. I mean, those sorts of discounts that I have asked for have been taken from previous case law. I think my client, well my submission my client is entitled to those.

[51] **MS GRICE:** What do you say, Mr Elliott? The most I have ever given in a criminal matter is 40 percent and that is when there is a first offender and sometimes it is when it is a person under 20 as well. In reality it may well be that I am prepared to improve it or increase that mitigation from 33 to 40 percent. But, I do not accept



any base decision they get more than 50 percent. It is kind of, what is the point of charging people. So I will make that adjustment. So I will need a calculator.

Sir, [Not in front of microphone. Mr Elliott's question of about three words inaudible] ?

[52] **THE COURT:** No. So reviewed. So tell me what an extra seven percent will deduct it by please Ms Grice, I do not have a –

[53] **MS GRICE:** Sir, that would be a fine of \$45,000 under the s 6 charge.

[54] **THE COURT:** \$45,000 okay.


[55] **MS GRICE:** Under the s 6 charged. [“40 percent” – in response to Mr Elliott's query] And, Sir, that would be \$10,000 – sorry and that does not affect the s 25(3) charge. That remains at 15.

[56] **THE COURT:** 15?

[57] **MS GRICE:** Yes.

[58] **THE COURT:** Right, thank you.

[59] **MS GRICE:** Thank you, Sir.



L M Bidois  
District Court Judge