

Disposed
JB
Sentencing

**IN THE DISTRICT COURT
AT HAMILTON**

**I TE KŌTI-Ā-ROHE
KI KIRIKIROA**

**CRI-2020-019-001186
[2021] NZDC 3036**

WORKSAFE NEW ZEALAND
Prosecutor

v

VEHICLE INSPECTION NEW ZEALAND LIMITED
Defendant

Hearing: 18 February 2021

Appearances: A Everett for the Prosecutor
R Marchant and S Curlett for the Defendant

Judgment: 18 February 2021

NOTES OF JUDGE D M WILSON QC ON SENTENCING

[1] Vehicle Inspection New Zealand Limited has pleaded guilty to a charge that being a PCBU, it failed to ensure so far as was reasonably practicable, the health and safety of other persons including the late Reece David Jacobsen was not put at risk from work carried out as part of the conduct of the business or undertaking, when moving vehicles for inspection on 61 Tasman Road, Te Rapa and that that failure exposed Mr Jacobsen to risk of death or serious injury.

[2] Vehicle Inspection New Zealand Limited pleaded guilty at an early stage. It acknowledged that it failed to take reasonably practicable steps including to:

- (a) develop, document, communicate and implement a traffic management plan;

- (b) demarcate and provide special signage and cautionary markings for all restricted areas and pedestrian walkways at the site;
- (c) identify the driveway area in front of the workshop as a no standing zone; and
- (d) provide convex mirrors in areas to assist vehicles moving around the site including the building and the workshop.

[3] On 27 February 2019 Mr Reece David Jacobsen was at that work site waiting to obtain a certificate of fitness for his work truck. He was waiting outside engaged on his phone when he was hit by a bus driven by an employee of the defendant, a Mr Matenga. Mr Matenga recalled seeing Mr Jacobsen outside the premises on his phone before the incident. CCTV footage shows that Mr Jacobsen had moved to a corner garden. He appeared to have covered one ear with his hand presumably to block out the environmental noise of the vehicles.

[4] Mr Matenga was driving a bus that he had been working on off site. He misjudged a left turn near the exit to the site colliding with Mr Jacobsen. The impact of the collision had cracked the windscreen of the bus and knocked Mr Jacobsen off his feet. His head struck the concrete driveway rendering him unconscious. He was taken to Waikato Hospital, placed on life support and never regained consciousness. He passed away on 29 March 2019 as a result of traumatic brain injuries.

[5] The defendant's hazard register and minutes of team meetings identified moving vehicles as a significant hazard, but they failed to identify or implement steps to eliminate or isolate the risk. Instead VINZ relied on administrative controls such as a suggestion that customers are escorted to wait in reception but even these controls were not consistently adhered to and a factor that concerned me was that, although staff at the premises knew that Mr Jacobsen was waiting outside in an area which was unsafe, they did not intervene and direct him to a place of safety. So he was left and there was no sign saying: "No standing in this area." He was using his phone for a period of at least 18 minutes while vehicles kept driving in the area.

[6] The sentencing criteria under the Health and Safety at Work Act 2015 require that the sentencing criteria be applied under the Sentencing Act 2002. What I am required to do here is to bear in mind the purpose of that Act and the potential for injury or death and whether that could reasonably have been expected to have occurred, the safety record of the company and there is no previous conviction. I have to treat the company as having a good previous safety record. I have got to look at the departure from prevailing standards. Here there is no issue about the financial capacity of the company to pay.

[7] Under s 7 of the Sentencing Act I need to hold the offender accountable, promote a sense of responsibility for the harm that has been caused. There I interpolate that the company has responded in a proper responsible manner and taken steps, not only to remediate in the areas where issues were disclosed by the inspection but also the affidavit of Mr Stevens makes clear to conduct a wide ranging analysis of safety features not limited to the tragic circumstances of this accident. Then I am required to look at the interests of the victim including reparation and also for deterrence and of course that in a case like this relates to the fine.

[8] Under s 8 of the Sentencing Act I have to look at the gravity of the offending, the degree of culpability and the seriousness of the offence indicated by the maximum prescribed penalty which is of course a fine not exceeding \$1.5 million and the harrowing effects of the offending on the family of the deceased. In that respect I have the victim impact statement by Mr Jacobsen's widow. She is now aged 37. She has three young children, aged twins of nine and the third child is six. At the time of the incident the twins were seven and the little one was five and Mrs Jacobsen was a neonatal intensive care nurse at Waikato Hospital.

[9] She recounts their lives being ripped apart by the earthquake of advice on the phone about what had happened. Her husband spent four weeks in intensive care. He was sedated. Her life was in utter turmoil being the remaining parent trying to keep things going for the children and attending her husband's bedside. When it came to the point that there was no hope that this was a non-survivable traumatic brain injury he passed away.

[10] The effects on the family are recounted with a degree of restraint by Mrs Jacobsen. She was of course tasked with running the family where her husband had been the major income earner. There was a mortgage to cover, everyday costs and cars to maintain. It took time to get the life insurance paid out as of course the matter had been referred to the Coroner's Office and there were delays from that. Church family helped with monetary gifts as did others and there were the costs of the funeral which were set out.

[11] ACC fortunately covered 80 per cent of Mr Jacobsen's income and there was also reparation paid by Mr Matenga who himself was prosecuted for careless use causing death leading to a hearing in court where it was acknowledged that the bus had surged forward unexpectedly and fatally hit the deceased. All of those things were more immediate. It is of course months now, 23 months since he died, and Mrs Jacobsen being a solo parent had to give up her job as a neonatal nurse.

[12] I want to say clearly that the executive and directors of Vehicle Inspection New Zealand Limited have shown the greatest respect for this loss and have attended at the memorial service including one apparently travelling from Japan and that there are senior executives present in court here from around the country offering their respect and regrets for what has happened. The company has of course taken all remedial steps that were asked and more. So the degree of co-operation by the company, the remedial steps it has taken, its willingness to attend restorative justice and undertaking to meet the Court's orders in these matters are all an outstanding indication of its responsibility and acceptance of that.

[13] The purpose of the Health and Safety at Work Act is to provide a balanced framework to protect workers and other persons against harm to their health, safety and welfare by eliminating or minimising risks arising from work or from prescribed high risk plant and there are other requirements relating to providing advice, ensuring scrutiny and working on continuous improvement. The principle is this; that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from specified types of plant as is reasonably practicable.

[14] Both counsel have filed extensive and detailed submissions. They refer to the authorities that guide the Court. In *Stumpmaster v WorkSafe New Zealand* there are four steps to be taken in the sentencing process.¹ The first is to assess the reparation, then fix the fine, look at other orders that can be made, then make an overall assessment for the proportionality and appropriateness of the sanctions and then consider the defendant's financial capacity but that is not an issue here. There has been a significant degree of agreement between counsel as to orders that should be made and I can by consent make orders for consequential loss in the sum of \$148,885 and for costs of \$1,922.61.

[15] The issues therefore turn to the central matters of the appropriate award for emotional harm reparation and for the deterrent aspect of the fine. There is also agreement between counsel on a sound basis that credit should be given against the fine in respect of co-operation, remorse and restorative justice, offers to make reparation, previous good conduct and remedial steps in the amount of 30 per cent and that a full credit for early plea of guilty of 25 per cent should be applied to the fine that I fix.

[16] The submission of the prosecutor is that the appropriate fine would be a fine of \$600,000. In the course of his submissions counsel for VINZ slightly varied the written submissions to say that that range should be in the range of \$450,000 to \$500,000 having regard to all of the factors to which counsel have referred. There is no tariff case for the fine. It is accepted that the four guideline bands to assess culpability under *Stumpmaster* are the ones that should be adopted. The dispute here is as to whether as WorkSafe submit this falls into the cusp between medium and high culpability and WorkSafe submits that the appropriate figure for the fine is \$600,000.

[17] Accepting that no two cases are the same, WorkSafe primarily relies on *WorkSafe New Zealand v Higgins Contractors Ltd* where three road workers were killed.² They were deployed on the state highway. There was no safety briefing. The standard plan was not followed. There were highly significant departures from the

¹ *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881, [2019] DCR 19, (2018) 15 NZELR 1100.

² *WorkSafe New Zealand v Higgins Contractors Ltd* [2020] NZDC 17036.

standards and those three people were killed. Those circumstances of course arise in danger of the greatest level because these were road workers on a state highway.

[18] I agree with Mr Marchant that there are compelling distinctions between that case and this case. Here the maximum speed of traffic on the VINZ site was five kilometres per hour. In this case there was tragically one person killed. In *Higgins* there was no management plan, no briefing, no protection at all was provided and I have mentioned the aspect of open highway and its inherent and obvious dangers. In that case the figure of \$600,000 was the starting point.

[19] There is also reference to a case called *WorkSafe New Zealand Ltd v Cardinal Logistics Ltd* where a company had moved to new premises and started its business before implementing any sort of safety plan at all.³ A man was injured there, fortunately not killed, whereas here there was a traffic management plan. There was focus on the safe movement of traffic. The main focus was on the workshop area and movements there but, as Mr Marchant acknowledged, the blind spot related to what was happening outside and that is where that blind spot led to the tragic death of the deceased.

[20] Mr Marchant submitted that a closer analogy could be drawn from *WorkSafe New Zealand Ltd v Kuehne & Nagel Ltd* where a truck driver, I assume he was a New Zealander from his conduct, got out of his truck to help load the truck and he was hit by a forklift.⁴ There was a system that drivers should go to the safety area but there was no traffic management plan and the starting point there was a figure of \$420,000. Here there has been a significant focus on staff in the building but again the blind spot was the one that mattered outside the building.

[21] Doing the best I can with those authorities which act as a broad rather than a specific guide, I set the starting figure for the fine at \$500,000. Against that there are, as I have mentioned, deductions of 55 per cent. Accordingly I set the fine sum of \$225,000.

³ *WorkSafe New Zealand Ltd v Cardinal Logistics Ltd* [2018] NZDC 19686.

⁴ *WorkSafe New Zealand Ltd v Kuehne & Nagel Ltd* [2018] NZDC 20761.

[22] I turn then to the issue of emotional harm reparation and here the respective positions are quite close. WorkSafe submits that the appropriate figure is \$130,000 whereas VINZ placed the figure in the range of \$115,000 to \$120,000. I should make it clear that Mr Marchant submitted to me that this was not in any way a diminishment of the concern that the company had about the wellbeing of the deceased's family but these submissions were made on the basis of the law and the authorities that guide the Court.

[23] Mr Everett for WorkSafe acknowledged that imposing reparation for emotional harm is an intuitive exercise, its quantification define finite calculation. The judicial objective is to strike a figure which is just in all the circumstances and which in the context compensates for actual harm arising from the offence in the form of anguish, distress and mental suffering. In doing that he cited *Big Tuff Pallets Ltd v Department of Labour*.⁵ It is not and cannot be a tariff for the loss of life or grief as then Chief Judge Doogue⁶ observed in *WorkSafe New Zealand v Department of Corrections*.⁷ He submitted, and I accept, that the emotional toll of the fatality has been significant and no monetary sum will fill the void.

[24] He drew my attention to a number of previous cases as examples of awards that have been made. They include:

WorkSafe New Zealand v CentrePort Ltd where \$170,000 was ordered;

WorkSafe New Zealand v Alderson Poultry Transport Ltd where \$130,000 was ordered to the deceased's family;

WorkSafe New Zealand v Ritchies Transport Holdings Ltd \$100,000 was awarded for emotional harm reparation to the families of the three deceased; and

⁵ *Big Tuff Pallets Ltd v Department of Labour* (2009) 7 NZELR 322.

⁶ Her Honour has since been appointed to the High Court.

⁷ *WorkSafe New Zealand v Department of Corrections* [2016] NZDC 24865, [2017] DCR 368.

WorkSafe v Higgins Contractors Ltd where the parties had agreed on a sum of \$130,000 to be paid to the family of each of the three men killed.⁸

[25] Mr Marchant provided through his learned junior a summary of authorities that are useful in emotional harm reparation cases. Most of those relate to awards made to the family of victims following a fatality. In:

WorkSafe New Zealand v Department of Corrections a figure of \$155,000 which was split between the widow, five children and each parent;

WorkSafe New Zealand v Toll Networks (NZ) Ltd \$110,000 to be apportioned equally, I understand that is not a death case;

WorkSafe New Zealand v Stevens and Stevens Ltd \$100,000 to the deceased's adult daughter;

WorkSafe New Zealand v Crafar Crouch Construction (Picton) Ltd \$115,000;

WorkSafe New Zealand v Homegrown Juice Co Ltd \$90,000; and

WorkSafe New Zealand v Guru NZ Ltd \$110,000.⁹

[26] Counsel also referred me to a decision of Venning J at paragraph [88] in *Oceana Gold (New Zealand Ltd) v WorkSafe New Zealand* where he acknowledged that the emotional harm reparation amount depends on the facts and he reviewing District Court decisions in fatal cases saw a range of between \$75,000 and \$110,000.¹⁰

⁸ *WorkSafe New Zealand v CentrePort Ltd* [2019] NZDC 12020, [2020] DCR 118; *WorkSafe New Zealand v Alderson Poultry Transport Ltd* [2019] NZDC 25090 and *WorkSafe New Zealand v Ritchies Transport Holdings Ltd* [2019] NZDC 18495.

⁹ *WorkSafe New Zealand v Toll Networks (NZ) Ltd* [2018] NZDC 11132; *WorkSafe New Zealand v Stevens and Stevens Ltd* [2018] NZDC 19098; *Crafar Crouch Construction (Picton) Ltd* [2019] NZDC 8209, [2020] DCR 64; *WorkSafe New Zealand v Homegrown Juice Co Ltd* [2019] NZDC 16605 and *WorkSafe New Zealand v Guru NZ Ltd* [2020] NZDC 2955.

¹⁰ *Oceana Gold (New Zealand) Ltd v WorkSafe New Zealand* [2019] NZHC 365.

[27] In my view the submission made by Mr Everett for emotional harm reparation in the sum of \$130,000 is within the appropriate range and that is the award that I make in that respect.

Judge DM Wilson QC
District Court Judge

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