IN THE DISTRICT COURT
AT WHANGAREI

I TE KŌTI-Ā-ROHE
KI WHANGĀREI-TERENGA-PARĀOA

CRI-2021-088-002541
[2022] NZDC 16086

WORKSAFE NEW ZEALAND
Prosecutor

v

JOHNSTON'S DIRECT LOGISTICS LIMITED
Defendant

Hearing:	29 July 2022
Appearances:	A Everett for the Prosecutor W McKean and L Lee for the Defendant
Judgment:	29 July 2022

NOTES OF JUDGE D J ORCHARD ON SENTENCING

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[1] Johnston's Direct Logistics Limited, who I shall refer to as JDL, has pleaded guilty to one charge under the Health and Safety at Work Act 2015, ss 48(1), (2)(c) and 36(2). The offence description and particulars are set out in the charging document and are as follows:

Offence Description

[2] Being a PCBU, which is a person undertaking a business or undertaking, having a duty to ensure, so far as is reasonably practicable, that the health and safety of other persons, including Story Bailey Turner Dave, is not put at risk from work carried out as part of the conduct of the business or undertaking, namely the use of truck, registration HBE2574, and trailer, registration 7P186, combination, for the

transport of freight, did fail to comply with that duty and that failure exposed Story Bailey Turner Dave to a risk of death or serious injury.

Particulars

[3] It was reasonably practicable for Johnston's Direct Logistics Limited to:

(a) Develop, implement and maintain an effective process of fortnightly inspections of all its vehicles, including towed vehicles, to ensure that all vehicles remain safe and roadworthy, including inspecting the components of the vehicles for wear or damage, and maintaining a record of the inspections to ensure that no vehicles were omitted from the inspection process.

(b) Develop, implement and maintain an effective process to ensure that none of its vehicles were permitted to operate without a current certificate or warrant of fitness.

(c) Develop, implement and maintain an effective system to identify and record the maximum towed mass and gross vehicle mass of every towing vehicle and trailer, to ensure that towing componentry fitted to its vehicles, including safety connections and attachments, were appropriately rated for safe use at the permissible load capacity.

[4] The maximum penalty for this offence is a fine, not exceeding $1.5 million.

[5] The charge arises out of a tragic accident, which occurred on State Highway 1 near Matai, Northland, on 30 October 2020, when a trailer became detached from a JDL truck and collided, first, with a following vehicle, driven by Mr Bernard Turner, who was accompanied by his wife, Katherine Wynyard, one of their daughters, Billie Turner, Billie's tamariki, and Mr Turner and Ms Wynyard's mokos, Story Bailey Turner Dave, aged nine, and her brother, Josh Turner Dave, who is now, I understand, aged 10.

[6] Story was fatally injured and died at the scene. While the other occupants of the family's vehicle suffered injury, their physical injuries were moderate. The main impact on them has been their grief at the loss of Story.

[7] The trailer continued on and struck a second vehicle, driven by Ms Kate Nigh, at the time 30 years old and employed as a nurse in Northland. Ms Nigh was fortunate in that she escaped with only moderate injuries also but, once again, the emotional impact on her has been lasting.

[8] Following the accident, an examination of the truck and trailer was carried out by a consultant engineer for a company called Transport Specifications Limited (TSL). Worksafe and the police had already completed an investigation and established that the truck did not meet warrant of fitness standards and that the trailer's certificate of fitness had expired on 1 September 2020 and was approximately nine weeks out of date at the time of the accident. It also established that the trailer had had its electronic brakes removed.

[9] These failures, however, were not what caused the accident. TSL's expert found, and I take this directly from the written submissions filed by the prosecution, and I read from paragraph 3.9 and I quote:

> The condition of the tow ball and tow coupling involved in this incident is of significant concern. The level of wearing on the tow ball is very extensive. TSL have not observed a tow ball with wearing this extensive before. Practical tests were conducted and TSL was able to physically disconnect the tow ball from the tow coupling by hand.
>
> An area of concern identified was excessive wearing on the tow ball locking plunger. The plunger's primary role is to engage with the tow ball, locking the tow ball into the coupling socket. This prevents the tow ball from decoupling from the trailer. The plunger is held in position by spring force, requiring the handle on top of the coupling to be pulled to release the tow ball.
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> There has been heavy wearing between the plunger and tow ball, resulting in the plunger mating surface mushrooming outwards. The result of this wearing is a reduction in the interference tolerance between the tow ball and plunger, which is required to prevent the tow ball decoupling.
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> Following the excessive wearing between the tow ball and tow coupling the tow ball and coupling plunger have worn to such an extent that the trailer was able to decouple while in operation. Following TSL tests, where this was possible by hand, it would be expected that decoupling could occur very easily in operation. A small bump in the road, or a change in road angle, could easily

reduce the trailer drawbar loading to the point where the trailer could decouple. TSL" –

[10] I am going on to para [3.10] and down to [3.13] inclusive.

> TSL also identified that there was a missing slack adjustment screw, which may otherwise have reduced the wear and tear to the tow ball and tow coupling. As the trailer was not fitted with brakes it was required to have one or two safety chains. It is not clear if the safety chain attached to the trailer was compliant with necessary standards as the total weight that was being pulled was not gathered in the investigation; however, it was concluded that the D-Link, linking the chain to the trailer and truck, had a lower safety rating than was required by New Zealand Standards.
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> While the defendant stated it undertook pre-start checks of its vehicles these checks did not include inspection of trailers and their couplings. No check was completed on the day of the incident, nor is there any record of checks conducted for the three weeks immediately prior to the incident.
>
> The defendant stated that it undertook fortnightly inspections of vehicles, to review the currency of certificates and warrants of fitness; however, not all vehicles were subject to these checks.
>
> The defendant also stated that the trailer may not have been subject to these fortnightly checks. In any event, these checks failed to record that the trailer's certificate of fitness had expired.

[11] Paras [22] and [23] of the summary of facts, which is the document which sets out the circumstances of the offence and which has been accepted as accurate by the defendant, through his plea of guilty, provides as follows:

> 22. JDL advised that the towball had been replaced in or about August 2020, approximately two months before the incident. JDL had identified excess movement in the connection between the previous towball and the coupling of another trailer. JDL identified that this movement might cause wear to the components and therefore JDL had replaced both the towball and the coupling on the other trailer. JDL advised that when replacing the towball, the neck of the towball was spray-painted pink to indicate the size of the towball (to differentiate it from a 50mm towball).
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> 23. Worksafe sought expert opinion as to the condition of the towball from consultant engineer, Alex Robinson, of Transport Specifications Limited (**TSL**), who inspected the tow components and found:
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> > The condition of the towball and tow coupling involved in this incident is of significant concern. The level of wearing on the towball is very extensive and not consistent with the expected wear patterns for a towball replaced so closely to the date of the incident. It is possible that the towball was not replaced and was the original towball fitted with the new towbar approximately 1 year prior to the incident, the observed wear patterns would be considered excessive even after this time period. TSL have not observed a towball with wearing this

> extensive before, practical tests were conducted and TSL was able to physically disconnect the towball from the tow coupling by hand.

[12] Consultant engineer, Alex Robinson, of Transport Specifications Limited (TSL), who inspected the tow components, found the condition of the tow ball and tow coupling involved in this incident is of significant concern. The level of wearing on the tow ball is very extensive and not consistent with the expected wear patterns for a tow ball replaced so close to the date of the incident. It is possible that the tow ball was not replaced and was the original tow ball, fitted with the new tow bar, approximately one year prior to the incident. The observed wear patterns would be considered excessive, even after this time period. TSL have not observed a tow ball with wearing this extensive before.

[13] Practical tests, as I have said before, were conducted and TSL was able to physically disconnect the tow ball from the tow coupling by hand.

[14] Notwithstanding Mr Robinson's obvious reservations about the assertion that the tow ball on the truck, at the time of the accident, had been replaced at a date so close to the accident, for the purposes of this sentencing exercise I proceed on the basis that it had. I do so because I cannot do otherwise, unless I am satisfied, beyond reasonable doubt, that the claim as to the replacement of the tow ball is inaccurate.

[15] The summary of facts also contains photographs of both the tow ball and the trailer's tow coupling. To a layman's eye the wear on both is obvious, even from a photograph, and I infer that it would have been even more so to an experienced eye looking directly at those two pieces of equipment.

[16] I also infer that it would have been plain to anyone connecting the trailer to the truck that the connection was not snug. The prosecution's assertion that the primary cause of the accident was the excessive wearing on the tow ball and tow coupling, which in turn meant that the trailer could be decoupled very easily during operation was the primary cause of the accident, is accepted by the defendant and, as I have just said, the shortcomings of the connection must have been obvious to anybody connecting the trailer to the truck.

[17] I turn now to sentencing criteria in cases such as this and by that I mean s 48 under the Act. In his submissions on sentence, counsel for the prosecution sets out the sentencing criteria, and the defence accept that that is the applicable law. I will reproduce it in these sentencing remarks.

> **4. SENTENCING CRITERIA**
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> 4.1 Section 151(2) of HSWA set out specific sentencing criteria to be applied when an offender is convicted of an offence under s 48 of HSWA. Section 151(2) states:
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> > (2) The court must apply the Sentencing Act 2002 and must have particular regard to:
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> > (a) section 7 to 10 of that Act; and
> >
> > (b) the purpose of this Act; and
> >
> > (c) the risk of, and the potential for illness, injury, or death that could have occurred; and
> >
> > (d) whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred; and
> >
> > (e) the safety record of the person (including without limitation, any warning, infringement notice, or improvement notice issued to the person or enforceable undertaking agreed to by the person) to the extent that it shows whether any aggravating factor is present; and
> >
> > (f) the degree of departure from prevailing standards in the person's sector or industry as an aggravating factor; and
> >
> > (g) the person's financial capacity or ability to pay any fine to the extent that it has the effect of increasing the amount of the fine.
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> 4.2 Section 7 of the Sentence Act 2002 sets out the purposes of sentencing. The Prosecutor submits that the most relevant purposes in this case are:
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> > (a) Holding the offender accountable for the harm done by the offending;
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> > (b) Promoting in the offender a sense of responsibility for that harm;
> >
> > (c) Providing for the interests of the victim including reparation;
> >
> > (d) To denounce the conduct in which the offender was involved;

(e) Deterrence both in relation to the offender and generally.

4.3 Section 8 of the Sentencing Act 2002 sets out the principles of sentencing. The prosecutor submits that the relevant principles in this context are:

(a) The gravity of the offending and the degree of culpability;

(b) The seriousness of the type of the offence as indicated by the maximum prescribed penalty; and

(c) The effects of the offending on the victim.

4.4 Section 151(2)(b) of HSWA obliges the Court to have particular regard to the purpose of HSWA, which is set out in s 3:

(1) The main purpose of this Act is to provide for a balanced framework to secure the health and safety of workers and workplaces by—

(a) protecting 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

(b) providing for fair and effective workplace representation, consultation, co-operation, and resolution of issues in relation to work health and safety; and

(c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting PCBUs and workers to achieve a healthier and safer working environment; and

(d) promoting the provision of advice, information, education, and training in relation to work health and safety; and

(e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and

(f) ensuring appropriate scrutiny and review of actions taken by persons performing functions or exercising powers under this Act; and

(g) providing a framework for continuous improvement and progressively higher standards of work health and safety.

(2) In furthering subsection (1)(a), regard must be had to the principle 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.

[18] As far as the approach to sentencing is concerned both counsel, in their helpful submissions, referred to *Stumpmaster v Worksafe New Zealand*.[1]

[19] Mr McKean, at para [17] of his submissions submitted that the Court in *Stumpmaster v Worksafe New Zealand* confirmed the following relevant considerations to assess the culpability of the offending:

(a) The identification of the operative acts or omissions at issue. This will usually involve the clear identification of the practicable steps which the Court finds it was reasonable for the offender to have taken, in terms of the HSWA.

(b) An assessment of the nature and seriousness of the risk of harm occurring, as well as the realised risk.

(c) The degree of departure from standards prevailing in the relevant industry.

(d) The obviousness of the hazard.

(e) The availability, cost and effectiveness of the means necessary to avoid the hazard.

(f) The current state of knowledge of the risks and the nature and severity of the harm which could result.

(g) The current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence.

[20] The parties, likewise, agree that the proper approach to sentencing is to follow the four steps set out in *Stumpmaster v Worksafe New Zealand*, specifically:

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[1] *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020.

(a) to assess the amount of reparation to be paid to the victims;

(b) to fix the amount of the fine by reference, first, to the guideline bands and then having regard to aggravating and mitigating factors;

(c) to determine whether further orders, under ss 152 to 159 of HSWA are required; and finally

(d) to make an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps. This includes consideration of the defendant's financial capacity, if that is pleaded by the defendant.

[21] The guideline bands are also set out. Those are the guideline bands that are set in *Stumpmaster v Worksafe New Zealand* for offending under s 48 of the Act. Low culpability, up to $250,000. Medium culpability, $250,000 to $600,000. High culpability, $600,000 to $1,000,000. Very high culpability, $1,000,000 plus.

My assessment of JDL's culpability

[22] I am satisfied that the prestart checks carried out by the company before one of its vehicles operated with the trailer should have included an inspection of the tow ball and coupling. I do not accept counsel for the defendant's submission that even if there had been such a prestart check it would not have picked up the tow ball and tow coupling wear. I do not accept that this would have required measurement of the tow ball. To my mind, as I have already said, it would have been obvious to the naked eye that the coupling was worn, damaged and the connection was loose.

[23] That would have been made clearer when the connection between the ball and the coupling was actually made. The looseness of that connection should have been obvious to the person making it.

[24] I am also satisfied that the risk posed was obvious. It was that the trailer could become disconnected from the truck while being operated, quite possibly in a 100 kph

area, and consequently come into collision with another vehicle or cause the vehicle actually towing it to come into collision with it or have an accident.

[25] I have no specific information before me as to the availability, cost and effectiveness of the means necessary to avoid the hazard, but I think it is fair to assume that it would involve replacing the trailer coupling and the tow ball or the tow bar as a whole. The remedy, I would have thought, should have been reasonably and relatively inexpensively achieved.

Reparation

[26] The victim impact statement prepared by Story's family members and read to me today (I had already read them, bar one) make heart-breaking reading. Story was only nine years old at the time of the accident and a beloved member of clearly a loving family, whose greatest joy in life is spending time with each other, engaging in activities such as, for example, going fishing, going swimming, and the like, or just being with each other. It is clear too that Story was a delightful little girl, with much promise of a happy and fulfilling life before her, which also would have contributed to the lives of others, many who had not yet had the pleasure of meeting her. Time will ease the family's grief up to a point, that is what time does, even though people do not think it can at the time they suffer the loss and in the immediate aftermath. But Story cannot be replaced and her family will always feel her loss.

[27] I accept that Mr Johnston, the principal shareholder of the company, and perhaps even more particularly his father, who was driving the vehicle on that day is well aware of the suffering that their negligence, or at least the negligence of Mr Johnston Jnr, his company, has caused this family to suffer, and deeply and genuinely regret it. I hope in time the family will come to recognise that. Sometimes great grief and great harm is caused by negligence or oversights which are, in the end, human and we are all, I am afraid, capable of them. In this case it has been by an unsafe work practice and not being diligent enough to make sure that parts of vehicles are maintained as they should be. In hindsight the negligence is obvious. Perhaps not so much when you are busy running a company. I do not say that to excuse it, simply to emphasise that it is human. People fail sometimes. Sometimes in the way I have

just outlined, sometimes they are driving a car and their attention is distracted by something, could be a child in the car, could be something they see outside, could be anything, and they end up causing a fatal collision. It happens all the time.

[28] What I guess I am saying is that at the moment I sense that the family, understandably, cannot find it in their hearts to forgive. I sincerely hope that as time passes you will, because if you do not it will hurt you probably more than it will hurt Mr Johnston. To heal you need to find it in your hearts, ultimately, to forgive.

[29] Now I accept that Ms Nigh, who was driving the second vehicle struck by the trailer, has also suffered emotional harm as a result of the accident, and this arises principally from her memory of the scene in the immediate aftermath, and also, in a secondary way, to the erosion of her confidence as a driver, which has meant that she has avoided driving since then, particularly longer trips. She used to go regularly to Auckland to see her friends. She does not do that anymore because of that loss of confidence.

[30] No amount of money is going to compensate Story's family for the loss they have suffered, and the courts have long accepted that, but also accepted that really monetary compensation is the only way available to compensate for harm done so, inadequate though it is, that is the way the family will be compensated.

[31] The prosecution first submitted that there should be a payment of between $100,000 to $130,000 to the family as a whole, for emotional harm, and in its supplementary submissions, filed with the victim impact statements, submitted that the upper figure was the appropriate figure.

[32] In addition, it submitted that the sum of $10,000 should be paid to each of the surviving four family members, who were present in the vehicle at the time of the accident.

[33] Initially it submitted that $5,000 should be paid to Ms Nigh, but left open the possibility that that would be increased once it had to hand her victim impact

statement. It has consequently submitted that it should be increased and should be $10,000.

[34] I do not underestimate the impact on Ms Nigh, not at all, but at the same time it cannot be at the same level as the surviving family members. I also accept, as does the prosecution, that the company's financial position is not good.

[35] The company was only established in 2017. It is a relatively small, not very small, but a relatively small family business, and it has a significant debt of $500,000 to the Inland Revenue Department, which it is paying by instalments.

[36] It has also been placed under additional stress, as have many companies in the community, by the impact of COVID-19. The department accepts this and it does not quibble with the company's account of its financial position and essentially, what the department is saying is that it accepts that it is not in a good position to pay a fine. It is common ground of course that reparation should come before the payment of a fine.

[37] Now if the defendant company were a wealthy company I would have set the emotional payment to the family at $130,000. Because it is not, I am going to set it at $100,000.

[38] In relation to Ms Nigh, for the same reasons I am going to set the payment to her at $5,000.

[39] I know that the submission of the defendant is that it cannot pay a fine at that level but in my view, even given its current difficulties, given time it can and it should make reparation at that level.

[40] As far as the fine is concerned, I accept that the notional starting point should be $600,000, in the high range, at the bottom of the high range rather than in the medium range, of culpability. I accept that there are the mitigating factors present, that is conceded by the prosecution. First, an early guilty plea, and I accept the submission that it should be 25 per cent. Also, I accept that there ought to be an additional 15 per cent discount for the company's willingness, in the form of

Mr Johnston and his father, to engage in restorative justice, which the family, for obvious reasons, could not countenance at this time. For the remorse, that I accept, is felt and their co-operation and previous good character. That would give a total discount of 40 per cent, which is $240,000, and that leaves me with a notional end-point of $360,000.

[41] Now, as I have already said, the prosecution seems to concede that really the company is not in a position to pay a fine. My own view is that, given time, it could pay a fine, but I do accept that it has to be significantly discounted because of the company's position.

[42] So, I am convicting the company, on its plea of guilty, on this charge and it is sentenced to make reparation for emotional harm to the following persons in the following amounts:

(a) Story Turner Dave's family as a whole, $100,000.

(b) Bernard David Turner, $10,000.

(c) Katherine Naomi Wynyard, $10,000.

(d) Billie Turner, $10,000.

(e) Josh Turner Dave, $10,000.

(f) Kate Bernadette, $5,000.

(g) It is also ordered to pay a fine of $50,000.

[43] The timing of those payments should be as follows:

(a) The payments should begin on 1 June 2023, as suggested by the company's director, Mr Johnston. That is the date by which the company will have paid its debt to the IRD.

(b) From that time payments of $5,000 per month shall be made until, first the reparation and then the fine is paid. The way in which those monies should be applied is that the first and second payments should be directed to Mr Bernard David Turner. The third and fourth to Ms Katherine Naomi Wynyard. The fifth and sixth to Billie Turner, and then the next payment should be to Kate Bernard Nigh. The next payment should be the $100,000 to the family, obviously by payments of $5,000 a month. Then to Josh Turner Dave and those payments shall be held for Josh until he turns 18. Then, after reparation has been paid, the fine of $50,000 can be paid. All payments, as I say, at the rate of $5,000 per month, as suggested by the defendant.

(c) In addition to that, the defendant is ordered to pay costs to the prosecution, in the sum of $5,391.12, and I direct that the costs that I have ordered should be paid after reparation and the fine is paid.

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Judge D Orchard
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 17/10/2022