

**IN THE DISTRICT COURT
AT MANUKAU**

**I TE KŌTI-Ā-ROHE
KI MANUKAU**

**CRI-2023-092-006702
[2024] NZDC 16025**

WORKSAFE NEW ZEALAND
Prosecutor

v

TRADE DEPOT LIMITED
Defendant

Hearing: 27 February 2024

Appearances: V Veikune for the Prosecutor
D Neutze and P Couldwell for the Defendant

Judgment: 27 February 2024

NOTES OF JUDGE S PATEL ON SENTENCING

[1] On 27 August 2022, [REDACTED], her husband [REDACTED] and her son in law, [REDACTED], went to the Onehunga branch of Trade Depot to purchase white ware products. After purchasing the white wear, Mrs [REDACTED], [REDACTED] and [REDACTED] went back to their vehicles to await delivery of the items.

[2] Mr [REDACTED], and employee of Trade Depot was driving a forklift and was delivering the purchased items. He unloaded the items behind [REDACTED] car. Meanwhile, Mrs [REDACTED] had got out of her car and was taking a photo of the items on her phone. She was standing behind the forklift when Mr [REDACTED] reversed into her. The summary of facts records that [REDACTED] checked the rear vision mirror before he did so but he did not see Mrs [REDACTED]. Mrs [REDACTED] did not hear

the reversing beeper of the forklift. As a result of being struck Mrs [REDACTED] suffered catastrophic injuries to her left leg.

[3] Prior to coming into court I had read the victim impact statements from Mrs [REDACTED], [REDACTED], [REDACTED] and [REDACTED] daughters, [REDACTED], [REDACTED] and [REDACTED]. [REDACTED], [REDACTED] and [REDACTED] also read their victim impact statements in Court. I have thanked each of them for the courage that they showed in being able to express how the day that we are dealing with has changed their lives forever.

[4] I summarise the impact on the family by taking the words of Mr Veikune in his submissions. There have been lifechanging consequences on the [REDACTED] family and particularly [REDACTED]. [REDACTED] had eight surgeries that she underwent over a period of two months. This required amputation of her left leg below the knee. There were two fractures to her right thumb, injuries to her left shoulder, and there has been a significant impact on Mrs [REDACTED] quality of life. It also remains a possibility that a further amputation above the knee might be required.

[5] Some of the things that [REDACTED] said in her victim impact statements are as follows. There has been a significant physical impact on her. She has had many surgeries. There was treatment over many months and that continues. She continues to suffer significant pain. There has been significant loss of her independence and a reduction in the quality of her life. This has impacted her social life and the time that she is able to spend with her children and more particularly her grandchildren. It limits her exercise. The time spent outdoors by [REDACTED] doing things most people take for granted is significantly restricted. As well there has been emotional harm which is ongoing. This includes PTSD, anxiety, depression and unsurprisingly a change of personality. There are just some of the things that have resulted from this incident.

[6] [REDACTED] spoke of trauma to himself, the long-term impact on his mental health, stress that is on him and the family due to the possibility of further treatment. There has been an economic impact on the joint income of [REDACTED] and [REDACTED]. [REDACTED] spoke of it being distressing watching [REDACTED] suffer with pain and the impact that this incident

has had on her mobility. He worries about what the future holds for both him, [REDACTED] and the wider family.

[7] [REDACTED] spoke of the emotional harm and the significant emotional distress that he suffered from witnessing the events of 27 August 2022. He also talked about the uncertainties about the future for [REDACTED] and the family and this weighs heavily on everyone. He feels consumed by worry which often feels overwhelming. There has been a heavy impact on his immediate family also because of the stress of this event and [REDACTED] also spoke of the significant impact on his mental and physical health.

[8] Although [REDACTED] and [REDACTED] did not read their statements. I read their statements prior to coming into court and [REDACTED] who is present in Court today.

[9] Turning first to [REDACTED], you returned home from London after you heard of the accident and you have supported your mum and dad financially and emotionally since this has happened. You have also unsurprisingly suffered trauma and psychological harm as a result of this incident and that is ongoing because things are uncertain for everyone.

[10] Turning to [REDACTED] victim impact statement, she says that Mum's injuries have caused a lot of angst and anxiety for her, and she worries about her mother's loss of freedom, mobility, spontaneity and what should be the happiest years of her retirement.

[11] [REDACTED] spoke of the psychological harm and trauma that she has suffered as a result.

[12] As a result of this incident Trade Depot Limited was charged pursuant to s 36(2) of the Health and Safety at Work Act 2015 in that it failed to take all reasonably practical steps to ensure that Mrs [REDACTED] safety was not put at risk from work carried out as part of its business, namely operating forklifts in the customer collection area where Mrs [REDACTED] was struck by the forklift.

[13] Trade Depot has pleaded guilty to that charge and now appears for sentence.

[14] WorkSafe conducted an investigation into the incident. The findings of that investigation are set out in detail in the summary of facts and it is the summary of facts that is the factual basis of sentencing. It is a very long document and I do not intend to go through it line by line. However, I highlight the following points in relation to the investigation of WorkSafe.

[15] In terms of the forklift, it was deficient. The system used to monitor its health and safety servicing and checks yielded no information. Staff were required to check the forklifts weekly for maintenance and safety issues and no completed forms indicated whether such checks had been undertaken.

[16] Second WorkSafe also looked into Trade Depot's health and safety system. There is a document entitled "Hazard Register Trade Depot 306 Neilson Street, Onehunga". I was told by counsel for Trade Depot during submissions today that that hazard register came into being around 2016. That hazard register identified forklifts as a hazard. However, this did not extend to the customer collection area where Mrs [REDACTED] was struck. A pedestrian "no go zone" was considered in that document to be sufficient to manage the risk to customers, however, no pedestrian no go zones existed at the time of the incident.

[17] There is another document entitled "Traffic management vehicle policy document" that is set out at paragraphs [18] to [22] of the summary of facts. This document contained guidance for developing a safe site for mobile plant and pedestrians to operate. I referred to having controls including one-way systems, well-marked road and pedestrian areas, training and inductions for staff and visitors on pedestrian areas and traffic flows, designating loading and unloading areas and to have spotters to assist vehicle positioning to name but a few.

[18] I understand that Trade Depot was in the process of reviewing its policies and procedures and developing a traffic management plan at the Onehunga site. However, no traffic management plan was implemented at the time of the incident. There were no well marked no pedestrian areas in place to manage the risk of interaction between the forklifts and pedestrians in the customer collection area. This was despite the customer collection area having multiple forklift and truck

movements and interactions with pedestrians entering and exiting the showroom, warehouse and waiting to collect their goods.

[19] During the investigation, Trade Depot stated that the controls in place in the customer collections area were that forklifts were not to operate where customers were, and customers were to always wait in their vehicles. Trade Depot stated that staff were to collect their customer's goods from the warehouse using a trolley or pallet jack and to deliver it to their vehicle. Trade Depot also stated that staff were advised to let customers know at the point of purchase, that is inside the building, that they should remain in their vehicles and to advise people to get back into the vehicles if they exited their vehicles them for any reason when in the loading area.

[20] Mr [REDACTED] was aware of these controls and recited them to the police following the incident. It is clear however that none of these controls that may have mitigated the risk to Mrs [REDACTED] or other members of the public were in place at the time of this incident.

[21] WorkSafe also instructed an expert, Andrew Young, who provided an opinion on the safety features of the traffic management at the Onehunga site, and the salient features of his report are set out at paragraphs [28]. That includes, there being no traffic management plan at the site, consideration for customer experience and safety had not been undertaken and this has resulted in a "busy, chaotic customer loading area that is essentially unmanaged". It did not appear that Trade Depot had implemented their own traffic management devices to effectively separate the pedestrians in mobile plant and simply used what was existing regardless of whether it suited the purposes. There were no clearly identified pedestrian no go zones in the customer collection area, there were no barricades physically blocking access for pedestrians.

[22] At paragraph [29] of the summary of facts, reference is made to the traffic management plan at paragraph [28F]. Overall this assessment document does not satisfactorily identify hazards, identify the risks that associated with them, consider suitable controls or identify how to measure the effectiveness of the control measures.

[23] The industry standards and guidelines are referred to at paragraph [32] of the summary of facts notes that the good practice guidance outlines at paragraph [4.1] that the main aim of any work site design should be separation of vehicles and pedestrians as much as possible. The guidance outlines multiple examples of greater controls the defendant could have put in place to manage the risk. That includes creating exclusion zones for forklift only areas, use of barriers and guard rails, having separate entrances and exits for vehicles and pedestrians, having a one-way drive through, loading and unloading system and using devices like reversing sensors, reversing cameras, mirror, rotating lights or audible reversing alarms on forklifts.

[24] Remedial steps have been taken by Trade Depot. Improvement notices were issued by WorkSafe to ensure there was a barrier between the pedestrian pathway and vehicles to ensure healthy and safety procedures were in place for forklifts operating near people.

[25] Additional work has also been carried out by Trade Depot and that is set out in the affidavit of Mr Riley at paragraph [8]. That includes exclusion zones, traffic management maps, forklift checks which have been digitised entering into an agreement with a service provider for forklifts, engaging traffic, planning consultants and others and it appears that this has occurred not only at the Onehunga site but across all sites which is to Trade Depot's credit.

[26] I turn now to what I need to take into consideration in the sentencing process. Section 151(2) of the Health and Safety at Work Act provides mandatory criteria when sentencing for this offence.

[27] The Court must take into consideration s 7 to 10 of the Sentencing Act 2002. The relevant purposes of sentence pursuant to s 7 of the Sentencing Act 2002, include holding Trade Depot accountable for the harm done by the offending, promoting in Trade Depot a sense of responsibility for that harm, providing for the interests of Mrs [REDACTED] and her family, denouncing the conduct in which Trade Depot was involved and finally deterring both Trade Depot and others in relation to this type of conduct.

[28] I also take into consideration the s 8 principles of sentence, which includes taking into consideration the gravity or the seriousness of the offending including the degree of the culpability of Trade Depot, the seriousness of the type of offence as indicated by the maximum prescribed penalty and the effects of the offending on Mrs ██████████ and her family, which I have already discussed.

[29] The approach to sentencing for an offence under the Health and Safety at Work Act is set out in the full High Court decision in a case called *Stumpmaster v WorkSafe New Zealand*.¹ The process or the steps that need to be followed are to first, assess the amount of the reparation and to fix the fine by reference to what are known as the guideline bands. Soon I will provide some detail about what that means. I also must have consideration of the aggravating and mitigating features of the offending. Aggravating features being features that increase the seriousness of the offending and mitigating features being matters that lessen the seriousness of the offending.

[30] I then need to consider whether further orders are required under s 152 to 158 of the Health and Safety at Work Act. I then need to make a proportionality assessment and to consider whether the sanctions imposed are appropriate having considered the first three steps.

[31] I turn to assessing the amount of the reparation which consists of an amount for emotional harm suffered by Mrs ██████████ and the consequential loss arising from emotional and physical harm.

[32] I turn first to the emotional harm. In fixing an award for emotional harm I am guided by previous decisions of the High Court which state that this is an intuitive exercise. The objective of the Court is to strike a figure that is just in all the circumstances and a figure which compensates for actual harm arising from the offence in the form of anguish, distress and emotional suffering.

[33] In this regard I consider the emotional harm and the impact of this offending as set out in the victim impact statement of Mrs ██████████. I have also considered the previous cases that have been helpfully referred to me by both counsel.

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

[34] The prosecution submits there ought to be an order of emotional harm in the region of between \$75,000 and \$80,000. In the written submissions filed on behalf of the defendant it was submitted that the emotional harm ought to be \$75,000. However, during his oral submissions today, Mr Neutze responsibly, did not forcefully challenge the \$80,000 figure as submitted by the prosecution.

[35] I consider that the award should be \$80,000 based on all the factors set out in Mrs ██████████ emotional victim impact statement. This has had a catastrophic effect on her life.

[36] I turn then to consequential loss. Both counsel agree that at the very least sum of \$70,958.12 ought to be ordered. On behalf of the prosecution, it is submitted that an additional consequential loss of \$40,544 ought to be ordered. That comprised the loss that arises from ██████████ ██████████ turning down a contract for work that he had at the time this incident took place and a loss of income arising from that. Again, responsibly Mr Neutze submitted that this could be seen as a loss suffered by Mrs ██████████ and coverable by an award of consequential loss. Therefore the amount of consequential loss total is \$111,502.12. That figure needs to be reduced because prior to the charge being laid, a payment of \$50,000 was made by Trade Depot to Ms ██████████. Therefore, the order for consequential loss will be \$61,502.12.

[37] I then turn to assessing the appropriate fine and setting a starting point. The leading case of *Stumpmaster* provides four guideline bands. Each band has a range of fines. In which band a particular offence falls depends on an assessment of the culpability of the defendant.

[38] The prosecution submits that Trade Depot's culpability falls somewhere between the medium and high culpability bands. The medium culpability band being a range of fines between \$250,000 and \$600,000. The high culpability band being between \$600,000 and \$1,000,000. The prosecution submits there should be a starting point of a fine between \$600,000 and \$700,000.

[39] On behalf of the defendant, it is submitted that culpability sits in the middle band with a starting point between \$450,000 and \$550,000.

[40] In assessing culpability regard must be had to the relevant factors listed in a previous decision of the *Department of Labour v Hanham & Philp Contractors Ltd.*² Assessing culpability requires identification of the operative acts or omissions at issue and the practicable steps it was reasonable for Trade Depot to have taken in terms of s 22 of the Health and Safety at Work Act.

[41] The reasonable and practicable steps that ought to have been taken are set out in the charge that Trade Depot pleaded guilty to. They are to have ensured a competent person conducted an adequate risk assessment of the traffic management at the Onehunga site. Second, to have developed, documented, and implemented an adequate traffic management plan at the Onehunga site and communicated and trained workers in the traffic management plan. Third, ensured that there was a physical separation of pedestrians and moving plant in the customer collection area of the Onehunga site. Fourth, to have monitored, ensured compliance and reviewed the ongoing effectiveness of the traffic management plan and fifth to have ensured that the forklift in question was safe to operate.

[42] The defence position is that there were some steps taken to mitigate the risk in the customer collection area, however the same were insufficient to ensure that the site was safe on 27 August 2022. Those steps were staff asking customers to remain in their vehicles when collecting their goods. Second that forklifts were not supposed to operate where customers were. Third that staff were required to use pallet jacks and not forklifts to carry goods to customer vehicles. Fourth staff being trained to advise customers who exited vehicles to get back into them.

[43] Mr ██████ was aware of these procedures. Those were things that he recounted to the investigators when they arrived at the scene. However, the critical point here is that none of those things that might have mitigated risk were in place.

[44] Other points made by counsel in written submissions was that there was a blind spot in the rear vision mirror, which was an area where Mrs ██████ was standing, and that Mr ██████ the driver of the forklift had an eyesight issue in that his peripheral

² *Department of Labour v Hanham & Philp Contractors Ltd* [2008] 6 NZELR 79.

vision was impaired. However, in that regard, there is no evidence that Mr [REDACTED] ever looked around to see if anything was behind him before he reversed the forklift.

[45] It is also submitted that none of the forklift's warning systems would have afforded Mrs [REDACTED] the opportunity to get out of the way. However, I consider that is speculative. I consider that risk may well have been avoided simply by Mr [REDACTED] turning around and looking behind him before he reversed the forklift.

[46] The second matter that I need to take into consideration is the nature and the seriousness of the risk. Both counsel responsibly accept that the risk of harm when forklifts are being operated around people is obvious, and I agree with that.

[47] The third matter I need to consider is the degree of departure from prevailing industry standards. The defendant accepts that the departure in this instance is significant. I agree.

[48] Counsel for the defendant submits that the defendant's culpability is reduced given that reliance was placed on a health and safety advisor. It is submitted that his advice on mitigating the risk of harm to customers in the carpark area was inadequate. However, this was not known to the defendant at the time.

[49] Additionally, it is submitted that staff were trained to drive forklifts in a manner to avoid the risk of harm and that included making eye contact with people in the vicinity when driving.

[50] However, I do not consider that culpability is reduced in this regard. That is because none of the aspects of either the traffic guidance document that had been in existence since 2016 had been implemented. The steps identified in the hazard register, also from 2016, also had not been implemented. Additionally, the forklift was not compliant with the standards that the defendant and staff did not follow the safety measures such as making eye contact when persons were nearby.

[51] I consider that there was a fundamental failure on the part of the defendant to implement or monitor compliance with the health and safety advice to reduce an

obvious and known risk. I consider that rather than decreasing the culpability of the defendant that this factor increases its culpability. In that regard, I consider that the case cited in support of that submission that is *WorkSafe v Westown* can be distinguished.³ In that case, reliance was placed by the defendant on an expert to put systems in place and devise a traffic management plan. The advice in that case was to wait until the office building was constructed to put those plans in place. Here the situation is markedly different. The hazard register was in place for some six years prior to this incident occurring as was the traffic guidance document. The hazard was obvious and well known yet no steps were taken to mitigate any of those risks.

[52] Counsel have helpfully referred me to many cases to assist in the setting of a starting point. I consider that two cases most like this case. First, *Worksafe v Cardinal Logistics*.⁴ That case also involved an incident with a forklift. In that case forklifts were identified as a significant hazard and a pedestrian segregation barrier was planned for a new larger work site along with painted demarcations between pedestrians and forklifts. Before such plan controls were put in place, a forklift collided with a pedestrian worker resulting in compound fractures to the pedestrian worker's arm and leg. A starting point of \$700,000 given the significance of the harm caused. It was noted that the defendant company had attempted to put appropriate traffic management arrangements in place and had to some extent been let down by their supplier. However, the Court noted that those matters ought to have been attended to prior to moving to that new site.

[53] The other case that has some similarity to this case is the case of *WorkSafe v Japanese Car Parts*.⁵ There, a starting point of \$600,000 was set.

[54] I consider that the culpability of Trade Depot in this case falls into the low to medium end of the high band for the reasons that I have alluded to earlier and I set a starting point of \$700,000.

³ *WorkSafe v Westown* [2022] NZDC 22256.

⁴ *Worksafe v Cardinal Logistics* [2018] NZDC 19686.

⁵ *WorkSafe v Japanese Car Parts* [2019] NZDC 14015.

[55] I turn then to what discounts there ought to be. A plea of guilty was entered at an early opportunity. There were three adjournments, before the plea of guilty was entered. However, I accept the process of disclosure took some time to complete and there needed to be discussions between counsel so that there was an agreed summary of facts. Both, lawyers submit that there ought to be a 25 per cent discount for plea given it was relatively early and I agree.

[56] Both counsel also submit that there also ought to be a five per cent discount for the defendant's cooperation with the investigation. I note that Trade Depot were fully cooperative with the WorkSafe investigation, and I agree with counsel there ought to be an additional five per cent discount.

[57] It is submitted on behalf of the defendants that there ought to be a discount over and above that provided for by the plea of guilty. This is not strongly challenged by the prosecution. It is submitted on behalf of Trade Depot that this is based on Trade Depot's willingness to attend a restorative justice conference, willingness to pay voluntary reparation before it was charged.

[58] For there to be additional discount for remorse, there must be something more than a bare acceptance of responsibility that is inherent in the plea of guilty. There must be a tangible and demonstrable evidence of remorse. In this regard, the affidavit of Mr Wiley who is present in court today, the Chief Executive Officer of Trade Depot is consistent with a remorseful attitude as is his willingness to attend a restorative justice conference as well as the remedial steps that were taken later to ensure that a robust traffic management plan has been put in place at all the stores. I consider there ought to be an additional five per cent discount on that basis.

[59] It is also submitted that there ought to be an additional five per cent discount to recognise the remedial steps taken by Trade Depot. Traffic management plans have been put in place at each of the Trade Depot's sites, that is, reorganising customer carparking, closing access to its customer collection area and carrying out weekly audits of its forklifts and replacing all the forklift fleet. I consider there ought to be additional five per cent discount on that basis.

[60] I also consider that there ought to be an additional five per cent discount for the payment of \$50,000 to Mrs [REDACTED]. This discount was recognised in the case of *Stumpmaster* and this is not strongly challenged by the prosecution.

[61] I also consider there ought to be an additional five per cent discount for the payment of reparation.

[62] To summarise the discounts, 25 per cent for a plea of guilty, five per cent for cooperation, five per cent for remorse, five per cent for payment of reparation, five per cent for rectification steps that have been taken and an additional five per cent for immediate payment. That is a discount of 50 per cent.

[63] From the starting point of \$700,000, a 50 per cent discount, the fine will be one of \$350,000.

[64] It is submitted on behalf of the prosecution that there should be an uplift for a prior breach by Trade Depot of the Act. Trade Depot has a previous conviction for two breaches of the Act from 2016. Both convictions arose out of the same incident where 12 sheets of plasterboard fell on a worker's head causing a skull fracture and a facial fracture. The prosecution submits that there ought to be a five percent uplift for this. However, I consider that because the offending is different in kind to the offending before the courts that there should not be such an uplift.

[65] I turn then to what additional orders there ought to be. I award prosecutor's costs of \$955.06 and an external expert's costs, award of costs of \$8,437.50.

[66] I also make suppression orders for non-publication of the name and the identifying details of each of the victims and the information in each of the victim impact reports. There are similar orders in respect of the name and the identity details of the driver of the forklift, Mr [REDACTED]. I also make an order for the release of the summary of facts with the names of the relevant persons covered by those suppression orders to be redacted.

[67] The final step requires me to do a proportionality assessment. That is an assessment of the proportionality and the appropriateness of the sanctions in the first three steps. The total sentence must be proportionate to the circumstances of the offending and if the offender. When I stand back and consider the fine and all the other orders that I have made, I am satisfied that the amounts that I have ordered are proportionate to the circumstances of the offending and of the offender.

Judge S Patel

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 15/07/2024