

**IN THE DISTRICT COURT  
AT PAPA KURA**

**I TE KŌTI-Ā-ROHE  
KI PAPA KURA**

**CRI-2019-055-000339  
[2019] NZDC 14015**

**WORKSAFE NEW ZEALAND**  
Prosecutor

v

**JAPANESE CAR PARTS LIMITED**  
Defendant

Hearing: 19 July 2019  
Appearances: Ms Jeffs for the Prosecutor  
Mr Boshier and Mr Williams for the Defendant  
Judgment: 14 August 2019

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**RESERVED DECISION OF JUDGE J BERGSENG**

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**The charge**

[1] On 2 May 2019 Japanese Car Parts Limited (JCPL) pleaded guilty to a charge of being a person conducting a business or undertaking (PCBU), failed to comply with a duty that exposed an individual, including one of its employees, Mr Polua Esera, to the risk of death or serious injury arising from the operation of a forklift<sup>1</sup>.

[2] The particulars were that it was reasonably practical for JCPL to have ensured that:

1. it developed and implemented an adequate traffic management plan;

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<sup>1</sup> Sections 36(1)(a), 48(1) & (2)(c) of the Health and Safety at Work Act 2015.

2. any load lifted and/or moved by forklift was secured and attached to the forklift, for example by using a forklift clamp;
3. it had developed and documented an adequate system of work for lifting and moving loads while operating forklifts;
4. trained forklift operators were trained in the safe system of work;
5. it monitored and enforced compliance with the safe systems of work; and
6. it reviewed the ongoing effectiveness of the safe system of work.

[3] The maximum penalty for this offence is a fine not exceeding \$1,500,000.

### **The facts**

[4] The summary of facts is not in dispute. JCPL is in the business of dismantling vehicles for resale as parts or wrecking them for steel recycling. It's work site includes a warehouse where the process of dismantling the vehicles is carried out (dismantling area).

[5] The dismantling area was set up so that vehicles were dismantled on either side of a central corridor. Forklifts travelled along the central corridor bringing vehicles in for dismantling and then once dismantled, to remove the parts and vehicle body from the dismantling area.

[6] JCPL had an inadequate management plan in place in the dismantling area. It had not physically marked the work areas, pedestrian walkways, entries and exits, or put in place any barriers to separate pedestrians from forklifts.

[7] JCPL's procedure for transporting dismantled vehicles involved placing the forklift tines through the windows of the vehicle, regardless of the type of vehicle being moved. JCPL did not require the vehicle to be secured and attached to the forklift before it was moved.

[8] On 14 February 2018 at least six workers and three forklifts were in the dismantling area and working in close proximity to each other. The dismantling area

was cluttered, and without any physical barriers separating the workers from the forklifts.

[9] At around 3:20pm an employee of JCPL placed the forklift tines under the body of a dismantled vehicle, raised it to the height of the roof of the forklift cabin and proceeded to drive forward along the central corridor. At the same time Mr Esera was dismantling a vehicle facing away from the central corridor. As the forklift passed Mr Esera, the vehicle body slipped off the right hand tine and fell onto Mr Esera, pinning him to the floor.

[10] Mr Esera suffered serious injuries, including a fractured jaw, rotator cuff tear, dislocation of his left shoulder, dislocation to his right collar bone and concussion.

[11] The forklift driver had previously received four warnings for conduct issues relating to the operation of forklifts. However, the defendant continued to allow him to operate forklifts without any additional re-training or supervision.

[12] Since incorporation in April 2010 until the time of this incident, JCPL had operated without incident and had not been subject to an investigation or charge under the Act.

[13] The guilty plea was entered at the earliest reasonable opportunity.

### **Impact on Mr Esera**

#### *Mr Esera's statement*

[14] Mr Esera and his partner, Ms Ngataki, provided victim impact statements. Mr Esera is 45 years old and has been with his partner for nine years. He remains under the care of his orthopaedic specialist. He has had surgery on his left shoulder and will also require surgery on his right shoulder. He has been diagnosed with a frozen shoulder which can take between one to two years to resolve. Mr Esera describes limited arm movement, only being able to hold his left and right arm up to just short of shoulder height. He is currently waiting to see a pain specialist.

*Ms Ngataki's statement*

[15] Ms Ngataki provides a more detailed statement of the impact the accident has had on Mr Esera. She describes their daily lives as now being very difficult, emotionally, physically and financially. She describes Mr Esera as suffering daily and that he can be a completely different person from day to day as he tries to cope with the continuous pain from his injuries and the mental stresses on him.

[16] Mr Esera now takes both antidepressants and pain killers. He gets distressed quickly and becomes agitated and aggressive. She describes his short-term memory as being very vague and that he quickly forgets conversations. She notes he becomes distracted and quickly disinterested. His anxiety is such that some days he refuses to leave the house. He refuses to socialise with family and friends and becomes agitated when people visit their home. His sleep has been affected and when he does sleep, he often has nightmares.

*The psychologist's report*

[17] As part of his rehabilitation Mr Esera was referred to Malcolm Falconer, a clinical psychologist. Mr Falconer has met with Mr Esera more than 20 times since May 2018. Mr Falconer describes Mr Esera as having obvious mood disturbance associated with his injuries. He has been diagnosed as being severely depressed and suffering from high anxiety.

[18] He describes Mr Esera as being in constant chronic pain since the injury. He reports frequent headaches and that the ongoing pain from his left shoulder and right arm is a chronic condition that he manages with daily pain medication.

[19] He initially diagnosed Mr Esera with post-traumatic stress disorder. However, since December 2018 that appears to be in remission.

[20] There is a concern that Mr Esera has suffered a traumatic brain injury. Generally post-concussion symptoms abate within six to 12 months. In Mr Esera's case more than 12 months has elapsed and he is still experiencing symptoms of

headaches, forgetfulness, short-term memory deficits and significant personality change with increased anger and irritability. This concern is being followed up through ACC.

[21] Mr Falconer's opinion is that the effect of the accident on Mr Esera has been significant and ongoing, such that it appears unlikely he will ever again work in a job involving manual labour. Mr Esera's most recent medical certificate confirms he is unfit for work until 26 August 2019, at which time he will be subject to further review.

### **The approach to sentencing under the Act**

[22] Section 151(2) of the Act sets out specific sentencing criteria to be applied:

- (2) The court must apply the Sentencing Act 2002 and must have particular regard to:
  - (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.

[23] Section 151(2)(b) of the Act also requires the Court to have particular regard to the purpose of the Act which provides:<sup>2</sup>

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-
  - (i) 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
  - (ii) Providing for fair and effective workplace representation, consultation, co-operation, and resolution of issues in relation to work health and safety; and
  - (iii) Encouraging union and employer organisations to take a constructive role in promoting improvements in work health and

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<sup>2</sup> S 3(1) Health and Safety at Work Act 2015.

- safety practices, and assisting PCBUs and workers to achieve a healthier and safer working environment; and
- (iv) Promoting the provision of advice, information, education, and training in relation to work health and safety;
  - (v) Securing compliance with this Act through effective and appropriate compliance and enforcement measures; and
  - (vi) Ensuring appropriate scrutiny and review of actions taken by persons performing functions or exercising powers under this Act; and
  - (vii) Providing a framework for continuous improvement and progressively higher standards of work health and safety.

[24] In furthering the purposes of the Act subsection (2) requires that 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.

[25] Against this legislative background the High Court in *Stumpmaster v WorkSafe New Zealand Ltd* concluded a four-step process to sentencing in health and safety prosecutions is required. This requires first, an assessment of the amount of reparation, second, to fix the amount of the fine by reference first to the guideline bands, and then having regard to aggravating and mitigating factors, third to determine whether further orders under ss 152-158 of the Act are required, and finally to make an overall assessment of the proportionality and appropriateness of the combined packet of sanctions imposed. This includes consideration of the defendant's ability to pay and also whether an increase is needed to reflect the financial capacity of the defendant.<sup>3</sup>

### **Step 1 - reparation**

[26] The prosecutor's submission is that Mr Esera has suffered serious life changing injuries which have had a profound effect on his day to day life and for his family. The prosecution submission is that an order for payment of \$50,000 would be an appropriate amount for emotional harm reparation.

[27] A calculation has been made in terms of the consequential losses suffered by Mr Esera in respect of the 20% shortfall between his ACC payments and JCPL salary.

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<sup>3</sup> *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020

The amount sought for the statutory shortfall is \$8,473.76.<sup>4</sup> Mr Esera has incurred medical expenses of \$1,391.99 and associated transport costs to of \$140.61.

[28] The total consequential loss award sought is \$10,006.36.

[29] JCPL takes no issue with the prosecutor's assessment of both the emotional harm payment and the consequential losses and in fact submits that they are both appropriate.

[30] The injuries sustained by Mr Esera were significant and have had an ongoing emotional and physical impact on him, such that it seems unlikely he will return to a manual labour position anytime in the near future, if at all.

[31] I have considered the cases referred to by the prosecutor and I am in agreement that the reparation payments as sought are entirely appropriate.<sup>5</sup> Accordingly, there will be an emotional harm award of \$50,000 together with consequential losses of \$10,006.36, being a total award of \$60,006.36.

## **Step 2 - assessing the quantum of the fine**

[32] *Stumpmaster* established four guideline bands for culpability, being low culpability with a starting point of up to \$250,000, medium culpability with a starting point of between \$250,000 to \$600,000, high culpability with a starting point of between \$600,000 to \$1,000,000, and very high culpability which attracts a starting point of \$1,000,000 plus.

## **Establishing the level of culpability**

### *The operative acts and omissions*

[33] The operative acts or admissions of JCPL are that:

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<sup>4</sup> This figure is calculated for the period 14 February 2018 to 26 August 2019, the date his most recent medical certificate confirms he will be unfit for work.

<sup>5</sup> *Oceana Gold (New Zealand) Ltd & Cropp Logging Ltd v WorkSafe NZ* [2019] NZHC 365, *Ministry of Business, Innovation and Employment v Abbas Ltd*, District Court Auckland, CRN13070501970, 18 June 2015 & *WorkSafe New Zealand Ltd v Macready Building Supplies Ltd* [2017] NZDC 1760.

- (i) it failed to manage the interaction between forklifts and pedestrians within the dismantling area by failing to ensure there was a separation between forklifts and pedestrians.
- (ii) the procedure for lifting and moving vehicles was not safe for every type of vehicle.
- (iii) there was no mechanism for securing the load to the forklift before it was moved.

[34] Regarding the interaction between forklifts and JCPL's employees dismantling vehicles, the layout of the dismantling area was such that they were both required to operate in the same cluttered work space. Despite this there were no floor markings, there were no warning lights on the forklifts and there were no physical barriers between the central corridor along which the forklifts travelled.

[35] A physical barrier, given the lack of any other precautions, was important when it is acknowledged the forklifts were carrying wrecked cars into the work area for dismantling and then the removal of the dismantled parts and remaining car body.

[36] The layout of this area, given the interaction between personnel and plant should have been an obvious point of danger identified by JCPL and steps taken to address the danger.

[37] JCPL's standard practice of car bodies being moved by the forklift tines being inserted through the windows of the vehicle was not always observed. On this occasion the forklift driver lifted the car body, dismantling having been completed, by placing the tines underneath the car body. He did not, in any way, secure it to the forklift. The removal of the car body in this manner was inherently and obviously dangerous.

[38] The employee had previously been issued with four warnings regarding his conduct, which included a warning regarding his operation of forklifts. The employee's training in the operation of forklifts had last taken place in 2016. He had



subsequently received warnings regarding the operation of the forklift but had not received any additional training in their operation.

[39] In summary, JCPL failed to develop and implement an adequate traffic management plan. As noted, there was no marking of allocated work areas, exclusion zones, walkways, entries and exits. It failed to put in place barriers along the walkways and allocated work areas so as to separate pedestrians and forklifts. It failed to ensure that loads being lifted and moved by forklift were properly secured. It failed to develop and document an adequate safe system of work for the lifting and moving of loads via forklifts. JCPL failed to adequately train its forklift operators in the safe systems of work. It also failed to monitor and enforce compliance with safe systems of work and failed to review the ongoing effectiveness of its systems of work.

[40] In 2016 JCPL had given some attention to health and safety issues at its workplace and engaged the services of an independent company to assist in establishing health and safety policies. Other than establishing such policies it seems nothing more was done regarding their implementation and ongoing compliance.

[41] To JCPL's credit, immediately following this accident they engaged a safety consultant to review all of their health and safety practices. That review identified significant deficiencies with their then policies. JCPL now have in place a vastly improved health and safety regime.<sup>6</sup>

#### *The nature and seriousness of the risk*

[42] Any assessment of the nature and seriousness of the risk of harm would have highlighted the inherent dangers for workers in the dismantling area. The interaction of personnel and moving plant such as forklifts in a relatively confined area, being described as "cluttered", gives rise to a significant risk and a very real potential for death or serious injury.

[43] On 14 February 2018 there were at least six employees and three forklifts operating in close proximity to each other in the dismantling area.

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<sup>6</sup> Appendix 5 of JCPL's submission report of SafeWork NZ Limited dated 12 July 2019.

[44] JCPL acknowledges that its inadequate traffic management systems created a significant risk of harm and that risk was realised in the injuries suffered by Mr Esera.

*The degree and departure from prevailing standards*

[45] JCPL's submission is that while acknowledging the existence of guidelines, there is no suggestion that they have wilfully departed from such standards and that its failure was that it should have been aware of such guidelines.

[46] JCPL's ignorance of the guidelines most likely arises as result of inadequate health and safety procedures. Had the proper systems been in place it would have been aware that the interaction between personnel and moving plant is the subject of a number of guidelines including:

1. Approved Code of Practice for Training Operators and Instructors of Powered Industrial Lift Trucks (Forklifts) – Department of Labour, May 1995 which lists the main causes of forklifts accidents as including not looking at the direction of travel, poor stacking procedures, inadequate operator training and travelling with the load raised.
2. Safety Standard for Low Lift and High Lift Trucks (NZ/ANSI/ITSDF B56.1:2005) - Nov 2004. These standards establish safety requirements relating to the design, operation and maintenance of low lift and high lift trucks.

[47] The Standards and the Approved Code of Practice provide PCBUs must not allow anyone to stand or pass under the elevated portion of any forklift whether empty or loaded and elevate the load except during stacking; and conversely must travel with the load low.

[48] Both the Standards and the Approved Code of Practice recommend that forklift drivers be retrained when their performance is unsatisfactory. Additionally, there are guidelines which outline that forklift operators must include a risk assessment of loads

and the effects on stability that the given vehicle/load may present, and also sets out checks at the beginning of a shift an operator should make.

[49] In March 2016 WorkSafe issued the factsheet “Workplace Traffic Management”, which records that the layout and traffic flow of a workplace is important in keeping people and plant safe as they move around. The factsheet has a photograph of a physical barrier to separate plant and pedestrian areas and notes that arrangements can be of a temporary or permanent nature, depending on the site.

[50] A further WorkSafe factsheet “Keeping Safe Around Mobile Plant” also contains information that applies to work sites using forklifts. Suggested control measures include the development of a traffic management plan with the specific controls that include:

1. isolating vehicles from the people working on the site,
2. using fences, barriers, barricades, safety rails, exclusion zones to separate workers from mobile plant,
3. using audible reversing alarms, flashing lights and reversing cameras,
4. ensuring workers wear high visibility clothing, and
5. providing worker training, namely to provide instruction and training on the traffic control measures to all workers and visitors on site.

[51] JCPL failed to properly educate itself of the prevailing standards for the interaction between personnel and moving plant. Its departure from the prevailing standards was significant.

#### *The obviousness of the hazard*

[52] JCPL accepts that having personnel in close proximity to moving plant clearly poses a risk, but also submits that had the car body been lifted in accordance with its standard operating procedure, forklift tines through the windows, then it would not have been so obvious that someone would be injured or killed.

[53] This submission misses the point. It presupposes that employees will act in a particular way, in this case the manner in which the load is lifted. Experience shows

that anticipating that employees will act in a particular way is inherently unreliable. Here the hazard was an obvious one.

*The availability and cost effectiveness of the means to avoid the hazard*

[54] JCPL acknowledges that it could have developed and implemented an adequate traffic management plan and a safe system of work for lifting and moving loads by forklift. It also acknowledges that costs associated with implementing such systems would not have been onerous or cost prohibitive, especially when compared with the level of risk.

**Discussion**

[55] On the level of culpability, the prosecutor's submission is that JCPL's offending should be categorised as falling in the high culpability band of *Stumpmaster*, attracting a starting point of \$650,000. A number of cases were cited in support of that submission.<sup>7</sup>

[56] JCPL's submission is that its culpability level should be assessed at the high end of the medium level culpability band with a starting point of between \$450,000 to \$500,000.

[57] JCPL has sought to distinguish the cases relied on by the prosecutor and submits the facts of *WorkSafe New Zealand v Kuehne & Nagel Limited* provides a useful guide and that a similar level of culpability should be found in respect of JCPL.

[58] In *Kuehne & Nagel*, the defendant had inadequate traffic management procedures in place and it failed to induct visiting truck drivers on its procedures in a systematic way. The injured worker was struck by a reversing fork hoist and suffered leg fractures and lacerations. The risk was obvious and well-known and a widespread

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<sup>7</sup> *WorkSafe New Zealand v Cardinal Logistics Limited* [2018] NZDC 19686, *WorkSafe New Zealand v Toll Networks (NZ) Limited* [2018] NZDC 11132 and *WorkSafe New Zealand v PBT Transport Limited* [2019] NZDC 2327.

one with the potential for serious injury and there was a departure from prevailing standards. A starting point in the middle of the middle band was adopted.<sup>8</sup>

[59] In 2016 JCPL engaged the services of a Health and Safety Consultant so that there were practices and procedures in place which should have identified the risk areas of its business and ensured that its employees were able to undertake their roles without risk of death or serious injury.

[60] The design of the dismantling area was such that there was significant interaction between personnel and forklifts which created an obvious risk of death or serious harm. Given the obviousness of this hazard and the seriousness of death or serious injury, JCPL needed to have made themselves familiar with the guidance documentation that was available in terms of the industry standards for interaction of personnel and forklift.

[61] JCPL's failure to establish a separation zone between forklift and personnel, its failure to establish a proper procedure for the moving of vehicles and its failure to ensure loads were secure before and while being moved created a high risk workplace area.

[62] Steps could have and should have been taken to develop and implement an adequate traffic management plan which would have involved marking allocated work areas, exclusion zones, walkways, entries and exits. Barriers should have been put in place to separate pedestrians and forklifts. Practices should have been adopted to ensure that loads being lifted, were secured.

[63] A safe system of working should have addressed such matters as

- i. an assessment of the condition of the forklift prior to use and recording and reporting faults;
- ii. prior to lifting and moving a load conducting a risk assessment of the condition of the vehicle body and the type of vehicle to

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<sup>8</sup> *WorkSafe New Zealand v Kuehne & Nagel Limited* [2018] NZDC 20761.

be lifted and moved to determine the appropriate forklift attachment to secure the load;

- iii. keeping the load as close to the ground as possible;
- iv. if the operator could not be seen over the load then to reverse the forklift with the operator looking in the direction of travel;
- v. forklift operators being trained in the safe work systems
- vi. a system of monitoring and enforcement for compliance purposes; and
- vii. regular and ongoing reviews of the effectiveness of the safe work system being established.

[64] Given these failures JCPL's culpability falls in the low end of the high culpability band with a starting point of \$600,000.

#### **Aggravating and mitigating factors**

[65] There are no aggravating factors.

[66] There are a number of mitigating factors that can be taking into account. JCPL has confirmed that it is in a position to pay reparation and the indication at the date of hearing was that the undisputed reparation amount would be paid to Mr Esera forthwith.

[67] JCPL had offered to attend a Restorative Justice Conference. For reasons unrelated to JCPL no such conference took place.

[68] JCPL had advised Mr Esera that it would pay the shortfall between Mr Esera's ACC payments and what his wage had been, as they arose. That offer was rejected by Mr Esera.

[69] For these reasons a 7.5% reduction is to be applied to the starting point.

[70] JCPL had fully cooperated with WorkSafe throughout the course of its investigation. A further 5% reduction is given for this reason.

[71] JCPL is able to call upon its previous good safety record, WorkSafe having never previously been involved with its operation. A reduction of 7.5% is given for this reason.

[72] A number of remedial steps have been undertaken by JCPL. On 17 February 2018 JCPL engaged the services of an external safety expert. It is submitted changes have been made to the way it operates, so as to ensure that not only does it comply with the prevailing standards but seeks to set an example of industry best practice.

[73] JCPL has retained the services of a health and safety consultant in an ongoing role seeking for its health and safety processes, practices and work place culture, to evolve to a higher level. JCPL has also completed health and safety introductions/inductions with all staff and has engaged all workers in initiating risk assessments to develop safe work procedures.

[74] JCPL has created a traffic management plan which includes a pedestrian only walkway. Lanes have been marked for safe forklift movement operations. Forklifts now have attached a blue light to the rear of each forklift which provides a visual warning to employees of the forklift's approach.

[75] It has introduced new safe work procedures to all relevant areas of its work. A health and safety committee has been created with monthly meetings with all staff. A compliance register which measures worker performance has been established. There is a written maintenance schedule to monitor plant and vehicles. Regular evacuation drills are conducted. There is now an incident and investigation reporting process in place with quarterly health and safety audits being undertaken.

[76] While it is acknowledged that JCPL has reformed its safety practices and polices, when they are considered on a totality basis they are best described as steps

which go toward addressing deficits which should not have existed. Accordingly, there is no additional discount for the work that has been undertaken by JCPL following the accident on 14 February 2018.

[77] From a starting point of \$600,000, a 20% reduction provides for a provisional fine of \$480,000.

### **Guilty plea**

[78] JCPL's first appearance on this charge was on 7 February 2019. Following several consent adjournments a guilty plea was entered on 2 May 2019. Given the circumstances of this type of case it is a plea which has been entered at the first reasonable opportunity and accordingly attracts a 25% discount.

[79] From a provisional fine of \$480,000, there is a further reduction of \$120,000 leaving a final fine of \$360,000.

### **Step three - making any other orders under the Act pursuant to s 152(1) of the Act**

[80] Costs are sought in the sum of \$1,861.54, being 50% of the prosecutor's legal costs. JCPL does not oppose an award of costs. There will be an order made pursuant to s 152(1) of the Act that JCPL is to pay the prosecutor costs of \$1861.54.

### **Step four - an overall assessment of reparation, other orders and fine to ensure it is proportionate and appropriate.**

[81] The fourth step requires an overall assessment in terms of the fine, reparation and any other orders so is to ensure the overall quantum is proportionate and appropriate. The combination of those three awards amounts to \$421,861.60. When I stand back and assess the factors that are all combined in respect of reaching that total I am satisfied that it represents an overall order that is both proportionate and appropriate.



### **JCPL's financial compacity**

[82] JCPL has filed evidence from its accountant to the effect that a reduction to the company's working capital of 5% per annum would hurt the company and that a greater amount would "disable" it. On that basis it is submitted that it would be able to pay a fine, in instalments over five years, of approximately \$125,000, but accepts that in all of the circumstances, it could meet a financial penalty of \$150,000.

[83] JCPL is a relatively young business comprising one director and two shareholders. It is clear from the information provided by the accountant that it has been reasonably profitable, although its net profit before tax on a percentage basis is relatively modest, being 3.9% for the year ending 31 March 2017, 5.04% for the year ending 31 March 2018 and 1.96% for the year ending 31 March 2019.

[84] Further, as a result of JCPL engaging a health and safety consultant and the involvement of Auckland Council, there have been three mandated items of work required at their premises involving significant capital expenditure. These are; the separation of the customer office area from the car dismantling yard, works for surface water drainage and filtering and the updating of tools and equipment. These projects are estimated to cost \$750,000 and are scheduled for completion in this financial year. To fund these mandated projects, long term loans have been raised, with both the assets and liabilities to be seen on 2020 financial statements. The servicing of these loans will have an impact on the company's working capital, reducing it by approximately 10%.

[85] While JCPL's accountant is of the opinion that over the years its financial position is steady with an average annual growth rate of 16% this has been driven from outside and is not internally motivated by idle capital. The company is described as "fragile". It is said to be a young business that needs the growth it has experienced to date, for its ongoing existence.

[86] The evidence provided by JCPL's accountant clearly establishes that there is limited financial capacity for the company to pay a fine at the level that has been reached. A fine at that level would crippled the company on the information that has

been provided. WorkSafe's position in respect of financial capacity is that it acknowledges there are financial capacity issues and leaves this assessment to the court.


[87] Given the evidence presented I am satisfied that the financial capacity of the company to pay a fine is limited. Accordingly, the fine of \$360,000 is reduced to \$175,000. The costs award is to remain.

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Judge J Bergseng  
District Court Judge

Date of authentication: 14/08/2019  
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.

## 48 Offence of failing to comply with duty that exposes individual to risk of death or serious injury or serious illness

**Legislation:** Health and Safety at Work Act 2015 (New Zealand)  | [View all PDF versions](#)  
**Document Path:** • [Employment Law](#) : [Health and Safety at Work](#) > [Health and Safety at Work Act 2015 and Regulations](#) > [Health and Safety at Work Act 2015](#) > [Part 2 Health and safety duties - \(s 30 - s 57\)](#) > [Subpart 4 Offences relating to duties - \(s 47 - s 54\)](#)

### LEGISLATION

#### CURRENT VERSION (APPLIES FROM 4 APRIL 2016)

#### 48 Offence of failing to comply with duty that exposes individual to risk of death or serious injury or serious illness

- (1) A person commits an offence against this section if—
- (a) the person has a duty under subpart 2 or 3; and
  - (b) the person fails to comply with that duty; and
  - (c) that failure exposes any individual to a risk of death or serious injury or serious illness.
- (2) A person who commits an offence against subsection (1) is liable on conviction,—
- (a) for an individual who is not a PCBU or an officer of a PCBU, to a fine not exceeding \$150,000;
  - (b) for an individual who is a PCBU or an officer of a PCBU, to a fine not exceeding \$300,000;
  - (c) for any other person, to a fine not exceeding \$1.5 million.

Compare: Model Work Health and Safety Act (Aust) s 32

### COMMENTARY

#### HSW48.01 Offence of failing to comply with duty that exposes individual to risk of death or serious injury or serious illness

Under s 48 a person commits an offence if:

- a) the person has a duty under subpart 2 or 3;
- b) the person fails to comply with that duty; and
- c) that failure exposes an individual to a risk of death or serious injury or serious illness.

Where a s 48 offence is committed by an individual, the maximum penalty is \$150,000 or five years imprisonment or both; where the offence is committed by an individual as a PCBU or an officer of a PCBU, the maximum penalty is \$300,000 or five years imprisonment or both; and where the offence is committed by a body corporate, the maximum penalty is \$1,000,000.