IN THE DISTRICT COURT
AT WHANGAREI

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

CRI-2022-088-001101
[2022] NZDC 23982

WORKSAFE NEW ZEALAND
Prosecutor

v

DONOVAN GROUP NZ LIMITED
Defendant

Hearing:	1 December 2022
Appearances:	K Sagaga for the Prosecutor B Harris for the Defendant
Judgment:	1 December 2022

NOTES OF JUDGE D J McDONALD ON SENTENCING

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[1] The defendant, Donovan Group Limited, on 5 September 2022 entered a plea of guilty to a charge laid under ss 48(1), 48(2)(c) and 36(1)(a) of the Health and Safety at Work Act 2015 laid by WorkSafe. WorkSafe specified in their charging document that the company being a PCBU, had a duty to ensure so far as reasonably practicable the safety of its workers, failed to comply with that duty in respect of a worker, Mr Yeripalli, who was at work operating an Amada Press Brake machine. The company failed in its duty thereby exposing that worker to a risk of serious injury.

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

[3] I need to briefly set out the facts.

[4] There is no dispute as to the facts although a different take in one portion of them is made by the defendant company.

[5] Donovan's has a manufacturing facility located on the corner of Hewlett and Fraser Streets here in Whangārei. The factory creates prefabricated building kit sets from raw steel that can be erected on site.

[6] At the relevant time Donovan's owned and operated three press brakes, a Scallion, Dye and the machine we are concerned about here the Amada. They were all located in the same area of the factory. At the time of the incident Mr Yeripalli was employed by the company as a machine operator and welder. He was also a qualified forklift operator and in gantry crane operations. He was operating the Amada on the day of the incident.

[7] The Amada is a hydrolytically powered press brake. It was the smallest of the three press brakes that the company operated. It consisted of a press that holds a sheet of metal firm while an arm rises and bends the sheet to programmed dimensions.

[8] Creasing the bend operation are controlled by a foot pedal. When the pedal is held down the bottom blade of the press known as the "B" block moves upward, closing with the top blade bending the metal. Releasing the foot pedal opens the press. There was no guarding on the front of the Amada at the time of the incident.

[9] On 16 June 2021 Mr Yeripalli commenced work at 4 pm. Initially tasked to another part of the factory partly because that part was not working, he was redirected to the Amada. The Amada had already been set up by another senior member of the team to make DB15 brackets.

[10] Some two hours from 4.30 pm to 6.30 pm Mr Yeripalli worked on the Amada making the DB15 brackets then took a half hour break. When he returned he indicated to the supervisor that he had completed the task in relation to the DB15s. The supervisor then set up the machine to make a heavier larger bracket known as a DB25.

[11] Mr Yeripalli was to continue to work on that machine. He approached the Amada and placed a DB25 bracket on the press to start folding the bracket. He was

off balance due to the size and weight of the bracket. It slipped from his hand through the Amada onto the backside of the Amada. As Mr Yeripalli regained his balance, he placed his left hand on the Amada; there was a 50 to 60 millimetre gap between the front of the Amada and where he was standing, his right leg was already on the pedal. The Amada was activated when he inadvertently pressed down on the pedal. He was unable to pull his hand out in time, it slipped into the Amada and the Blocks of the Amada raised and cut his left index finger and middle finger.

[12] Mr Yeripalli was seriously injured. He was taken to Whangārei Hospital and in the early hours of the following morning transferred to Middlemore by helicopter where he underwent surgery. He lost the top part of his left index finger, 30 per cent of his nail bed on his middle finger and spent three days in hospital. He was off work for two months and has continued with therapy to assist his recovery.

[13] From those facts I find that it was an accident which caused the event to occur. It did not occur during the normal operating phase of the machine. That is in no way to lessen the seriousness of what occurred. The machine should have been set up in such a way that even with an accidental moving of a hand into the machine it would not operate and cause injury.

[14] I accept this was an older type of machine that has since been retired or to use the proper phrase I suppose "decommissioned".

[15] There are a number of matters that I must take into account under s 151 of the Act. Exposure to risk. I accept what has been set out in WorkSafe's very helpful submissions at paragraphs [618] and [619] as to risk. There was an obvious risk that with this type of machine that limbs and objects may be caught. As WorkSafe have pointed out both in their written submissions and orally to me today the company knew of this risk; it had done a risk assessment dated 3 December 2019.

[16] On this machine, the Amada, that risk assessment by the company was:

> This press has no laser guard that protects against limbs or objects getting caught within the press. This issue should be looked into for additional safety measures which could prevent or reduce the hazards in this area. Currently there is no protection against getting caught in the "B" Block (Dia).

[17] WorkSafe also has a number of guidelines for this type of machine. It sets out what can be done to make the machine safer so that people are not caught and thereby serious injuries eventuate. It is by a fixed guard, or an interlocked guard, or a light or presence sensing system.

[18] Donovan's by their plea were aware of the dangers of this machine, it did not mitigate that danger to ensure the safety of its workers.

Sentencing approach

[19] Both counsel are agreed as to the approach to be taken in sentencing in this area.

[20] The guideline for sentencing under s 48 is *Stumpmaster v WorkSafe New Zealand.*[1] The High Court confirmed that there are four steps to the sentencing process.

(a) Assess the amount of reparation to be paid to the victim.

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

(c) Determine whether further orders under ss 152 to 159 are required.

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

[21] I will follow those steps.

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

Assess the amount of reparation

[22] What is sought is a payment for emotional harm. Emotional harm is a payment that can be made under s 32(1)(b) of the Sentencing Act 2002. WorkSafe have referred me to *Big Tuff Pallets Ltd v Department of Labour*.[2] I have regard to that.

[23] What is primarily considered at this point is the victim impact statement. That statement was taken by a WorkSafe investigator and is dated 23 November 2022. The statement was read to the victim and it was signed by the investigator.

[24] Mr Yeripalli came to New Zealand on a special work visa in late 2008 or 2009 specifically as a machine operator. The victim impact statement tells me that Mr Yeripalli has lost around 80 per cent of his grip strength on his left hand, no grip strength at all on his index finger which makes it difficult to lift and grab. The pain is bearable but constant and worse in cold weather.

[25] Emotional harm he points to is that he can no longer play cricket, that was one of his passions. He and his son would play together. Since the injury he has not been able to play because of the damage to his left hand. He now can only watch. When he came to New Zealand, he learned how to fish, that is something that he and his family would do together. Again, that is now difficult because of the loss of grip. He tells me he does not do it anymore.

[26] He says he used to be more active around the home helping his wife. Now he gets frustrated knowing that his wife has to do more work around the home because he cannot anymore; difficulty mowing the lawn, difficulty driving. He is embarrassed at times with the injury to his hand.

[27] He finishes his victim impact statement that he hopes the prosthetics and the work he is doing in physio will help him get back closer to normal so he can do the same things he did before his accident. Whether that eventuates or not remains to be seen.

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

[28] Ms Sagaga for WorkSafe has referred me to four cases. Mr Harris for Donovan's one further, *WorkSafe v Locker Group (NZ) Ltd.*[3] WorkSafe submit the reparation order of $32,000 for emotional harm would be appropriate having regard to the cases cited by her. Mr Harris submits having regard to those four cases and the one he provided that $30,000 is appropriate.

[29] In my view, having a look at the cases I consider a reparation figure of $31,000 is appropriate.

Consequential loss

[30] There is no consequential loss, that is accepted by WorkSafe. The amount already paid by Donovan's offsets consequential loss that Mr Yeripalli might suffer.

Fine

[31] I now move to the second step which is the fine assessment. As this is a criminal prosecution normal sentencing procedure is to be followed. That requires me to first set the starting point for the offending.

[32] *Stumpmaster* sets out the full culpability bands. Both WorkSafe and Mr Harris submit that Donovan's offending falls within the medium culpability band. That has a range of fine $250,000 to $600,000.

[33] Ms Sagaga submits a start point of $450,000 is appropriate. Mr Harris $400,000.

[34] I take into account the following matters. Practical steps, Donovan's accepted that the old Amada press brake could have been better guarded but did not do so. I accept it did take other steps for other parts of that machine to improve its safety, but not the front part to the obviousness of the hazard. It was blindly obvious that a machine of this type was dangerous if not operated correctly or if some mishap or accident occurred that there was a danger to the operator.

[3] *WorkSafe v Locker Group (NZ) Ltd* [2018] NZDC 26802.

[35] In its own risk assessment as I have said highlighted that this was a dangerous machine that needed further protection measures to make it safer.

[36] There is a degree of departure from the industry standards. As I have already set out the company did depart from best practice because of the age of the machine, the most recent guidelines would not fully cover this type of plant. The cost of work to avoid the hazard, WorkSafe say $5,000 to $20,000, Mr Harris on behalf of the company $20,000 plus.

[37] WorkSafe have referred me to three cases. They primarily rely upon the *Skyline* case.[4]

[38] Mr Harris referred me to one further case, *Locker*.[5] Mr Harris relies primarily on *Skyline* and submits that that is the closest factually to the current prosecution for reasons that he has set out in paragraph [51] of his written submissions. He submits $400,000 as a start point is appropriate.

[39] Having read and considered the cases, my view of the start point of $400,000 is appropriate.

[40] I now look at personal mitigating factors. It is accepted by WorkSafe that there are no personal aggravating factors. I accept the company's remorse is genuine. At the very time of the incident up until the time Mr Yeripalli left their employ they have been doing all they can to assist him and supported Mr Yeripalli both monetarily and working alongside him to assist his recovery and return to work.

[41] They sought to go to restorative justice. Mr Yeripalli decided not to do that, that is his absolute right and I do not criticise him for it. Every victim has the right to say "no I do not wish to do that".

Remorse

[42] I also have regard to operation of the company with WorkSafe inspectors which WorkSafe say co-operation can never be a mitigating factor. There is an obligation

[4] *Worksafe New Zealand v Skyline Building Limited* [2020] NZDC 10681.
[5] *Worksafe New Zealand v Locker Group (NZ) Limited* [2018] NZDC 26802.

under the Act, and this being a strict liability offence for companies such as this to co-operate fully with investigators. Failure to do so can lead to other criminal offending and charges being laid.

[43] But here I find that the company did more than some might otherwise do. They were proactive, have gone the extra step. In my view one factors that into remorse as co-operation is a type of remorse and I allow a 10 per cent discount for that. Reparation has been ordered and can be paid immediately. There is no financial bar to that, I give five per cent for that. Counsel are agreed that the full 25 per cent for a guilty plea should be given and I agree with that assessment. This was at the first available opportunity.

[44] Ms Sagaga submits that good character of a defendant should not attract a further discount. She submitted that it is the absence of an aggravating factor. If they did have previous convictions that would call for an uplift. If there are no previous convictions then that is neutral. Mr Harris submitted it can be a mitigating factor in conventional sentencing if I can call it that, offending against the provisions of the Crimes Act 1961 previous good character of an offender before the Court can bring that into account as a mitigating factor.

[45] I can see no logic as to why that cannot be the case in WorkSafe prosecutions. The company has no previous convictions, has a good safety record. I allow a further five per cent for that.

[46] Those discounts amount to 45 per cent off a fine of $400,000, that takes it down by $180,000 to $220,000.

Legal costs

[47] Legal costs have now been quantified and a memorandum was filed this morning. No issue is taken by Mr Harris as to those. So will award legal costs of $3,873. I accept that is not WorkSafe's full cost of this prosecution, it does not include expert costs and the costs of investigation. Those legal costs are appropriate.

Proportionality

[48] I then look at proportionality assessment, in my view reparation and fine are proportionate to the seriousness of the offending.

[49] Therefore, the result is there will be an emotional harm reparation payment to the victim in the sum of $31,000. The company Donovan's will be fined $220,000. There will be legal costs of $3,873 and court costs of $130.

[50] I now move to the question of suppression. Ms Sagaga seeks suppression of the victim's name. There is nothing in the Health and Safety Act 2015 that deals with suppression, therefore it must be dealt with under the Criminal Procedure Act 2011.

[51] Section 200 and following sets out how suppression should be approached. Mr Yeripalli's name is not automatically suppressed which occurs for a victim of sexual abuse or where the victim is a youth. Nothing is put before me through WorkSafe except that the victim wants his name suppressed. He is an adult.

[52] I see no good reason under the Criminal Procedure Act as to why his name should be suppressed. An important tenant of the democracy in which we live and the way our courts operate is that they operate in public; that any person can walk off Bank Street and into our court building in the criminal and civil jurisdiction and sit at the back of court and listen. To exclude the public or to suppress requires specific legislation such as when a victim alleging sexual abuse has automatic suppression and an automatic right to have the court cleared.

[53] The press are here today. They are the eyes and ears of the public. There is no valid reason advanced by WorkSafe as to why Mr Yeripalli's name should be suppressed. I refuse to do so.

[54] I direct that a copy of the summary of facts be made available to the press if they seek it.

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Judge DJ McDonald
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 17/02/2023