IN THE DISTRICT COURT
AT NAPIER

I TE KŌTI-Ā-ROHE
KI AHURIRI

CRI-2019-041-000478
[2019] NZDC 18776

WORKSAFE NEW ZEALAND
Prosecutor

v

THE PALLET COMPANY (HAWKE'S BAY) LIMITED
Defendant

Hearing:	17 September 2019
Appearances:	K Williams for the Prosecutor L Castle for the Defendant
Judgment:	17 September 2019

NOTES OF JUDGE B M MACKINTOSH ON SENTENCING

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[1] The Pallet Company (Hawke's Bay) Limited appears for sentence today, having pleaded guilty to one charge, under s 36(1)(a) and s 48 Health and Safety at Work Act 2015. Essentially, breaching a duty to ensure the health and safety of an employee, Mr Halton, at work, by exposing him to risk of serious injury, by failing to ensure a Holytek Band Resaw was adequately guarded, in accordance with the AS/NZS 4024, or similar standard, to prevent access to moving parts.

[2] What happened was this. On 3 March 2018, while working as a forklift machine operator, Mr Halton was assisting a colleague, by operating a bandsaw. He was using his right hand to push a length of timber through the bandsaw when the timber jammed and, in an attempt to clear the jammed timber, he pushed it with a second piece of timber. When it failed, he pushed the jammed timber, firstly, with his

left hand, and then with his right hand. As he was pushing the timber his right hand slipped off the timber and went underneath the shield, making contact with the moving sawblade. As a result his thumb was partially amputated. He required surgery and had a partial amputation and revascularisation. Essentially, that means that his thumb was reattached.

[3] I have no victim impact statement. The company would have gone to restorative justice but the victim, Mr Halton, has not wished to engage with anything. I do know that he required surgery. I do know that he spent some time in hospital. I do know that he had six months off work and I do know, from my own experience in dealing with these kinds of cases and from other victim impact statements that I have read, and from other cases that I have read where these kinds of accidents do happen, that there is not insignificant emotional harm attached to such an event and it stems from the disruption to family life, the lack of being able to work, often a lack of self-esteem that flows from being unable to carry out the normal daily tasks. In this particular case I note that it did protract on. Even though the thumb was able to be reattached there was a six month period where he was off work and receiving ACC.

[4] In that regard the company, of course, was not unsympathetic to his circumstances. They made a financial contribution towards the costs of his receiving medical treatment in Wellington, by way of a lumpsum payment, of $2000. That has already been paid and was paid upfront. In addition, there is no argument in this case that there is an amount to be paid for ACC top-up, which was the difference between what he was receiving in ACC and what he would have had had he been working.

[5] It is against that background that I will have to assess the amount of emotional harm reparation that is to be paid, and I will come to that in a moment.

[6] By way of background, the defendant company bought this business in 2012. It included the purchase of the bandsaw and, at the time, it was fitted with sideguards which did not meet the relevant Australian and New Zealand standards.

[7] In August 2016 a risk assessment was carried out. That resulted in a shield being added to the front, to prevent someone from pushing their hand into the blade. This, also, was not compliant, in terms of the Australian and New Zealand standards.

[8] Staff did receive training at the time though, in relation to this, and they were trained to push the timber through with an open hand so they would hit the shield before they reach the blade.

[9] As far as the company itself is concerned, it has been prosecuted for a previous incident, back in 2015, where there was also a failure to guard machinery adequately.

[10] At the time of the incident, in March 2018, it is not disputed that the bandsaw did not have adequate guarding. The guarding was non-compliant with the relevant Australian and New Zealand standards. The side door was unable to be secured to stop workers being exposed to moving parts, and two of the side guards, at the top of the bandsaw, were unable to be secured.

[11] I bear in mind in this sentencing process, of course, the relevant purposes and principles of sentencing, that are clearly set out in the Health and Safety at Work Act and also in the Sentencing Act 2002. The approach to sentencing is now well established and it requires the Court, firstly, to assess the amount of reparation, then the amount of the fine, determine whether or not there are any other orders necessary, and then make an overall assessment of proportionality and appropriateness. It is not being suggested in this case though that this company is unable to pay a fine.

[12] Looking at the quantum of reparation, and I have been given a number of cases, both by the prosecution, helpfully, and by the defence, and they do give the Court some broad guidelines as to where reparation would sit in a case like this. The prosecution seek an award of somewhere between 15 and 20,000. The defence, at the outset, were suggesting an award of somewhere around 5000, possibly up to $10,000.

[13] I note in this case it is somewhat difficult because, other than what I can take from the information that has been provided to me about the nature of the accident and the nature of the injury, I do not have a victim impact statement from the victim

himself, so I am not aware of what his current circumstances are, other than I do know, and have been told by counsel, that he has left his employment.

[14] However, what did happen was that the thumb here was surgically able to be reattached, thank goodness, so there was not a full amputation of the thumb and, while it seems that there may have been some limited movement, I have no information before me to suggest that his thumb is not functioning in a relatively normal fashion. But reflecting on the time spent in hospital, the obvious inconvenience, distress, and discomfort that is caused by such an incident, it seems to me that an appropriate award of reparation would be one of $10,000, and I do not believe that the defendant company is taking any real issue with that.

[15] It is accepted, also, that there are payments of ACC top-up, of $3456.36, so those awards have been made. I note also, and have already referred to the fact, that $2000, essentially for economic loss, has already been paid to the victim, and that is over and above any awards that are made by the Court today.

[16] Now as far as the setting of the fine is concerned, it is agreed by both counsel for the prosecution and the defence that this case falls within the medium culpability band in *Stumpmaster v WorkSafe New Zealand* on starting points between 250,000 and up to $600,000.[1] The prosecution say that it should sit in the medium to high end of that range, looking for a starting point of somewhere around $450,000. The defence say it sits more comfortably within the range of a starting point of around about $350,000 so, whilst they are not on all fours with each other and there is some gap, it would not be fair to say that both counsel for the defence and prosecution are not poles apart.

[17] It is necessary, of course, to make a culpability assessment. The defendant agrees that it failed to take reasonably practicable actions by ensuring that the bandsaw was guarded in accordance with the relevant standards. The defendant accepts that the consequence of the hazard was severe injury, but not death, and that is also agreed. It is also obvious that there could be injury, not only to the operator but also to a bystander or assistant. It is also correct in this case that the cost involved in adequately

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[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881.

guarding the bandsaw certainly could not be described as prohibitive and it seems now that a suitable solution, and one that is compliant, has been worked out.

[18] I note that prior to this incident there had been some review of the guarding of the machine, there had been some discussions and, as I say, modifications made, however, it is accepted that they were not good enough basically. It is also accepted here that the risks associated with unguarded machinery are well known and they should have in this case, really, have been apparent to a business the size of the defendant's company.

[19] The company had been aware, as early as 2016, about issues in terms of this piece of machinery. They had done something about it, but it is acknowledged that it was not good enough. It seems, also, that there has been ongoing communications and involvement with WorkSafe. A number of improvement notices have been issued over time so, clearly, it is something that is constantly subject to review and reflection.

[20] Insofar as culpability is concerned though, it is also correct to say that we here are dealing, not with an unguarded machine or there being no guard, but it was an inadequately guarded machine. Basically, the company had tried but what they had done was simply not good enough, and that is not shied away from.

[21] In 2016 the new safety operating procedure was created. The guarding was installed. There was training given. The defendant considered that the employees were adequately protected as a result of that, however, they accept that they were wrong in relation to that.

[22] During the period leading up to this incident, the defendant company was working closely with WorkSafe and a number of inspections, as I have already mentioned, resulted in a number of improvement notices.

[23] In terms of assessing the starting point, cases have been referred to me, such as *WorkSafe v Eurocell Wood Products Limited, WorkSafe v Allflex Packaging Limited, WorkSafe v Wallace Murray Electrical Limited, WorkSafe v Niagara Sawmilling Company Limited, WorkSafe v Insulpro Manufacturing Limited,*

WorkSafe New Zealand v Alliance Group Limited, WorkSafe v Atlas Concrete Limited.[2] These cases have varying starting points, ranging from the $300,000 mark up to the $500,000 mark.

[24] While in this case it is accepted that there was a departure from industry standards it does seem to me, that in assessing the overall culpability for the starting point, that it is relevant that the charge here did not include any additional failing to train, supervise, or provide a safe system of work.

[25] I agree with the defence submission, that the single failing to comply with the standard, by having inadequate guarding, which allowed access to moving parts, supports a starting point of $350,000.

[26] There needs to be an uplift because of the previous matter which has been referred to and because that, of course, is an aggravating feature to the starting point. The uplift is five percent, which is agreed by counsel. That gets us to $367,500.

[27] Matters of mitigation. It is accepted that the company was co-operative. It is also accepted that the company is remorseful. It is also accepted that the company can pay reparation. Each of those matters would warrant a five percent discount in my view. The reparation in this case that ultimately is being awarded is relatively modest and it can be paid. I am of the view that a five percent discount for that is appropriate.

[28] There has been some debate today about whether or not the company should be given any further discount for any remedial steps taken. Up until today I did not really have detail of that and it had been my view that had we been in a situation here, where simply all that had occurred was that the relevant machine had been fixed and what really was going on was simply an attempt to correct the deficit that was there in the first place, and that nothing above and beyond that had happened, then it would

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[2] *WorkSafe New Zealand v Eurocell Wood Products Limited* [2018] NZDC 21568; *WorkSafe New Zealand v Allflex Packaging Limited* [2018] NZDC 23262; *WorkSafe New Zealand v Wallace Murray Electrical Limited* [2019] NZDC 5675, [2019] NZHSE 7; *WorkSafe New Zealand v Niagara Sawmilling Company Limited* [2018] NZDC 3667; *WorkSafe New Zealand v Insulpro Manufacturing Limited* DC Dunedin CRI-2009-012-007301, 27 April 2010; *WorkSafe New Zealand v Alliance Group Limited* [2018] NZDC 20916; *WorkSafe New Zealand v Atlas Concrete Limited* [2017] NZDC 27233.

not be appropriate to award any credit for remedial steps. However, I am told and I have received a letter here, and I do note that this is not included in the summary of facts and it is something that perhaps should have been able to be debated by counsel prior to today, I do acknowledge that, but it does seem to me that there is now evidence before me that further steps have been taken. There is ongoing work with a Mr Strickland, who was engaged by the company to assist them with making sure their machinery is safe. The Auckland plant also has had an assessment done of all its machinery there. That, itself, has also been at considerable cost to the company and they are working through improvements there and also, of course, the obvious changes that needed to be made at the Napier plant. So, in the circumstances, I am prepared to give the five percent discount there for remedial steps that have been taken. That gives a total discount for mitigating features of 20 percent.

[29] So that, from a starting point of $367,000, that reduces it back down by $73,000, less a further 25 percent for the guilty plea that has been entered. In addition, there will be an award of $10,000 for reparation, $3456.10 for ACC, $322,000.09.

[30] When I look at this overall it seems to me that the ultimate award being made by the Court is proportionate, in response to the incident that occurred, and it is an appropriate award to make in the circumstances of the case.

[31] So that is a total fine of $220,800, plus the awards, as I have set out, $10,000 reparation, $3456.10 for ACC, $3222.09 for costs.

B M Mackintosh
District Court Judge