IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

CRI-2018-096-002772
[2022] NZDC 10178

WORKSAFE NEW ZEALAND
Prosecutor

v

WASTE MANAGEMENT NEW ZEALAND LIMITED
Defendant

Hearing:	31 May 2022
Appearances:	S Bishop, T Bain and S Leonard for the Prosecutor P White and E Harrison for the Defendant
Judgment:	31 May 2022

NOTES OF JUDGE B DAVIDSON ON SENTENCING

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[1] The defendant company, Waste Management Limited ("Waste Management"), appears for sentence on a charge under s 48 of the Health and Safety at Work Act 2015 ("the Act") of failing to ensure, as far as reasonable practicable, the health and safety of its workers and as a result exposing them to the risk of death, serious injury or serious illness.

[2] The charge covers a 7 month period from January 2017 to late August 2017 as over this period hazardous waste containing mercury solution and sludge was stored and treated at its Seaview site inappropriately and unsafely.

[3] As I will soon describe by the afternoon of 22 August 2017 the building at the Seaview site specifically designated for treating hazardous waste containing such heavy metals had become a fatal gas chamber.

[4] One of Waste Management's employees, James Gideon, who was valued, liked, skilled and trusted and who had worked there for 9 years died from hydrogen sulphide toxicity. The levels in him were many, many times greater than those permissible under Waste Management's resource consent.

[5] The deceased is survived by his wife, siblings, grandchildren and other whānau members. All have been deeply affected financially, emotionally and psychologically by his death. Waste Management paid his widow $150,000 in January 2019, 17 months after his death and several months after charges were laid. His widow says this voluntary reparation is not enough to compensate her and her family for his life and their loss.

[6] Waste Management offer a further reparation payment today of $100,000 paid by the company's own resources and not by its insurer.

[7] A fellow employee of the deceased, his supervisor, was also emotionally affected by the events but suffered no physical injury.

[8] WorkSafe's investigation resulted in charges being laid in August 2018. This charge was an alternative to a more serious charge under s 47 of the Act alleging reckless conduct on the part of Waste Management. Waste Management always indicated a willingness to plead guilty to this charge which carries a maximum penalty of a fine of $1.5 million.

[9] It successfully defended the recklessness charge during a long judge-alone trial before another judge in November and December 2020. An appeal by WorkSafe against that dismissal was unsuccessful.

[10] Ideally this sentencing should have been conducted by the judge who presided at the judge-alone trial, but he is no longer available having taken up an overseas judicial posting.

[11] Waste Management does not plead financial hardship. This is not surprising. It was recently reported as having been sold for $1.9 billion.

[12] Its Seaview facility treats liquid and hazardous waste, preparing it for environmentally safe disposal. Much of the waste processed through the facility is not hazardous but a small proportion is, particularly waste containing heavy metals. Such waste is treated chemically. This is not done daily but nevertheless fairly regularly.

[13] It is carried out in a designated building where there are two 18,000 litre ground pits. In these pits heavy metal waste is neutralised by a variety of chemical processes. This involves adding and mixing various chemicals to the waste, monitoring and checking toxicity levels and eventually removing the neutralised waste for disposal.

[14] To legally do this, Waste Management has an appropriate resource consent from the local regional council. This sets contaminant discharge levels and requires constant monitoring of toxic gases such as hydrogen sulphide and hydrogen cyanide.

[15] There are 2 gas sensors in the building. They detect levels of hydrogen sulphide and hydrogen cyanide. When levels of hydrogen sulphide exceed a concentration of 10 parts per million (ppm) a siren and strobe lighting alarm system is activated. Once activated it can be manually reset when concentration levels fall.

[16] The sensors were not ideally located in the building. Toxic gases are heavier than air and concentration levels are higher towards ground level. When the sensors were installed professionally in mid-2016 there was some discussion about the location but at no stage was Waste Management put on a formal notice or requirement that they be better located.

[17] Hand-in-hand, of course, with such an alarm system is a requirement that Waste Management properly train its workers, provide and ensure the wearing of

proper protective equipment and have clear processes in place to deal with any alarm activation.

[18] Waste arrives at the site in large drums and pails. These drums should be clearly marked as to their contents. They should be inspected by a site chemist. There were often delays in this inspection process as the chemist also worked at other sites.

[19] Sometimes to get around this, waste was pre-identified by customers or Waste Management staff with a risk of mislabelling and later mishandling and mistreatment.

[20] In 2016 Waste Management received waste from a client who had undertaken clean-up work of the Haywards Power substation in the Hutt Valley. The clean-up work involved the use of a sodium sulphide solution to treat mercury, a process which gives off hydrogen sulphide.

[21] A few days after this clean-up process was undertaken, there was flooding at the substation. Stormwater waste with low levels of mercury also had to be processed by Waste Management.

[22] The waste arrived at the Seaview facility in late January 2017. It was placed in a holding area awaiting inspection. Although it should have been inspected by the site chemist it never was. One of the supervisors dealt with the waste in a way I will soon describe on the basis of some sort of understanding that he could do so for certain waste without the requisite inspection.

[23] A month after the waste was received Waste Management issued a destruction certificate. This is required by the client before payment for storage and destruction. However, the waste had not been destroyed and remained on site until the events of 22 August 2017.

[24] On 22 August 2017 a supervisor decided to deal with the Hayward Substation waste. As I have noted it had not been inspected by the site chemist. The supervisor believed the waste was stormwater with low levels of mercury. The deceased, his supervisor and another worker began the treatment process. Waste was put in to the

processing pit, pH levels were tested, chemicals were added to ensure the pH level was right.

[25] The deceased and other staff wore half-face respirators. Portable gas sensors were available but not used. As the process continued hydrogen sulphide gas was released causing the alarms to sound on several occasions. When the alarm sounded work ceased until gas levels fell to permissible levels.

[26] At one stage the supervisor checked with the chemist and was instructed to add lime or calcium hydroxide, and leave the mixture for some indeterminate period of time.

[27] After lunch work resumed. Sometime around 3.00 pm Mr Gideon collapsed, most likely while releasing citric acid into the pit. Despite emergency medical intervention and treatment he died soon after in hospital from hydrogen sulphide toxicity. His detected levels were many, many times greater than those permitted under the resource consent, at least 500 ppm; 50 times above the alert level.

[28] WorkSafe's investigation revealed that the alarms activated 5 times that day. As the work developed that day it must have been clear that gas levels were constantly excessive and that the chemical process was unstable. The investigation revealed that Waste Management's planning, storage, handling and processing of the waste was inadequate. Although the drums were on site for several months and were labelled as hazardous, they did not show as containing a sulphide solution.

[29] A destruction certificate, as I have mentioned, was wrongly issued. The waste was not properly recorded in a site register. Workers had inadequate instruction in processing and treating such waste. All this led workers to believe they were treating waste less toxic and hazardous than it actually was.

[30] Waste Management's failure included:

(a) lack of a system to ensure that the composition of the waste was properly identified and recorded;

(b) not undertaking a thorough risk assessment of the waste;

(c) ineffective and inappropriate systems for the safe use, handling and storage of waste;

(d) inadequate monitoring of gas levels;

(e) failing to ensure workers had and used appropriate protective equipment;

(f) failing to provide proper supervision and training.

[31] These failures clearly led to a risk of death, serious injury or serious illness. In blunt terms, highly toxic waste was not properly identified when it was received, stored, handled and treated. It was done in an ad hoc fashion that exposed workers to gas poisoning.

[32] I have read all of the victim impact statements; all were read in court. They are powerful. It is impossible and unnecessary for me to fully recount each. As I have already mentioned all have been deeply affected.

[33] Mrs Gideon in her victim impact statement says this:

> What I saw when I got to Jim was half his body was black from the chest up. The whites of his eyes were red, bloodshot red and he was gasping for breath. Gasping. They did CPR on him a few times while I was in the front and my heart was sinking.

[34] One can only imagine what it must have been like for her to watch her life partner dying in such a fashion in front of her very eyes.

[35] About 17 months after her husband's death, Waste Management paid her $150,000. WorkSafe say I should regard this as compensation for the earnings shortfall between her ACC payments as a widow and her husband's net potential earnings for the five years between 2017 and 2022.

[36] For reasons which I will come to later, I do not see this as reparation for consequential loss.

[37] The purposes and principles of sentencing in such cases are derived from both the Sentencing Act 2002 and s 150 of the Health and Safety at Work Act. In essence, regard must be had to the purposes of the legislation which includes the protection of workers from harm, the nature of the risk identified and its likely consequence, the degree of departure from safe practices, denunciation, deterrence and impact on victims.

[38] Reparation is front and centre in such sentencing. Assessing reparation is the first step in the sentencing process. As has often been observed, assessing reparation is an inherently intuitive process. The assessed amount just has to feel right to the judge tasked with making that assessment.

[39] Reparation can include consequential loss under s 32(1)(e) of the Sentencing Act 2002. This lends itself to a greater degree of particularity.

[40] The further steps in the sentencing process, assessing the level of fine and then undertaking some global assessment of the financial sanction lend themselves to some more rigidity. This sentencing process is set out in a case decided a year after these events. That case examined sentencing in this area after increases in the maximum penalty to $1.5 million in 2016.

[41] That case set out the sentencing process I have briefly referred to and provided guideline bands to determine the level of fine to be imposed.

[42] One of the cases decided at the time, *WorkSafe New Zealand v Tasman Tanning Company Limited* concerned the only other known case of hydrogen sulphide poisoning.[1] A starting point of $700,000 for the fine imposed in the District Court was seen as too high and although recalibrated on appeal to a starting point fine of

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1 *WorkSafe New Zealand v Tasman Tanning Company Limited* [2017] NZDC 24398, [2018] DCR 914.

$550,000, the overall financial sanction imposed was not disturbed. It is important to bear in mind that this sentencing concerns events which occurred in 2017.

[43] The aggravating features of the offending are self-evident. Managing toxic waste is inherently dangerous and necessarily high standards are required and expected. Here there were several critical failures on the part of Waste Management. There was no clear plan around the receipt, storage and treatment of the waste. The waste was not properly identified, not properly inspected, and not properly treated because it was believed it was less toxic. On the day, although portable gas detectors were available, they were not used.

[44] The response to the alarm activations during the course of the day was ad hoc and unplanned. The instruction from the chemist when contacted was equivocal. The hazard was obvious and high. Three workers including the deceased were in the immediate vicinity. Others were nearby.

[45] The risk from low level gas is well known yet here high levels were revealed during the day. The smell was obvious and reported from people away from the site itself. As I have observed by the middle of the afternoon of 22 August 2017 the building became a gas chamber.

[46] Equally the mitigating features are obvious. Waste Management indicated from early on a plea of guilty and full credit should be afforded for that. They paid reparation to Mrs Gideon of $150,000 in January 2019 and today make an offer of a further payment, from its own resources, of $100,000.

[47] It has spent over $1 million in remedial steps although it could be said much of that should have been done beforehand.

[48] To the extent that a company can show remorse, it has done so. While WorkSafe may criticise its level of co-operation with the investigation it nevertheless did.

[49] On behalf of WorkSafe it is submitted that Waste Management's level of culpability sits on the cusp of high to very high with a starting point fine of $1 million. As I have mentioned the only other case involving hydrogen sulphide exposure involved a starting point fine of $550,000. WorkSafe says Waste Management's culpability is greater as in the other case there was an inexplicable departure by staff from the company's safety protocols.

[50] Here it is submitted there was a substantial systemic failure. WorkSafe says the hazard was obvious, the risks were obvious, the systemic failure was extensive. WorkSafe says emotional harm reparation of $200,000 should be awarded for apportionment among members of the Gideon whānau and a further sum should be awarded to the deceased's fellow worker.

[51] WorkSafe note that substantial emotional harm reparation awards could be fixed individually for the deceased's wife, children, siblings, grandchildren and other whānau members. WorkSafe submits they would readily aggregate to $200,000. WorkSafe say there should also be a recognition of the consequential loss to Mrs Gideon, the shortfall between ACC payments and her late husband's net wages of some $100,000.

[52] Waste Management submits that a fine with a starting point of $1 million would be one of the highest, if not the highest ever imposed in New Zealand and would be unjustified. It notes this would be nearly double that fixed in the *Tasman Tanning* case.

[53] It submits its level of culpability is similar to that of *Tasman Tanning* elevated to recognise that there was a death. It is submitted on behalf of Waste Management that the starting point fine therefore should be in the range of $650,000 to $700,000.

[54] It offers a further $130,000 in reparation made up of emotional reparation $100,000, reparation for consequential loss $30,000 and a small payment to the deceased's fellow employee.

[55] Waste Management emphasises that its culpability largely stems from a misunderstanding around the waste received, stored and treated. It was believed to be contaminated stormwater with low mercury levels. It was decided to treat the waste on 22 August 2017 on that basis and where the treatment process that was to be undertaken would be one approved following an inspection by the chemist.

[56] Once the process began on 22 August 2017 stopping work, checking gas levels, contacting the chemist for advice are all features that should be recognised at sentencing.

[57] Waste Management submits that around mid-afternoon there was a significant and unexpected spike in hydrogen sulphide levels. As a result it submits its culpability sits in the mid-range of the high band but could not be categorised as being very high.

[58] The work that was being done was not work which was done regularly and how it was done came about through a breakdown in communication.

[59] In my view what marks this case is the seriousness of the hazard. High levels of hydrogen sulphide are fatal. It is no real answer for Waste Management to say that the treatment of such waste is rare, after all this is its core business and to ensure that it is done safely it must meet a series of regulations and codes of practices.

[60] In reality in my view Waste Management only complied with the bare requirements of the resource consent and little else. By departing in several ways from the relevant codes of practice around the handling and treating of such waste its workers wrongly believed they were treating stormwater waste with low mercury levels when in fact they were treating waste with much higher and dangerous mercury levels.

[61] When subjected to the chemical process on 22 August 2017 the waste was capable of, and in fact, delivered fatal levels of hydrogen sulphide. The hazard was obvious. There could be no answer to say that the hazard is rare. It is a known hazard. Codes of practice were required to be met and they simply were not.

[62] As was observed in the *Stumpmaster v WorkSafe New Zealand* decision, when dealing with the position of *Tasman Tanning* there is ample material about hydrogen sulphide gas and its risks.[2]

[63] In my view Waste Management's culpability is greater than that of *Tasman Tanning*. It was a wholesale systemic failure which involved receiving, storing and treating the waste. Several codes of practice were departed from; an ad hoc treatment system had developed which meant on the day it was not know with certainty what was being treated.

[64] It was done without the site chemist's permission; it was done without contacting the site chemist until later in the day and despite several alarms it continued. The hazard was obvious and what occurred was dangerous. In my view this has to be seen towards the upper range of the high culpability band.

[65] I fix a starting point for the fine of $850,000.

[66] I turn to reparation. I cannot conclude that the $150,000 paid to Mrs Gideon in January 2019 should be regarded as reparation for consequential loss. It was described as emotional harm reparation paid and received on that basis. It seems to me only fortuitous and coincidental that the amount paid might be similar to her earnings shortfall over the 5 years since.

[67] I see that payment therefore as a voluntary emotional harm reparation payment and assess it alongside Waste Management's offer of further payments of $130,000 to $140,000, totalling $280,000 to $290,000.

[68] My sense, my tuition is that overall reparation of $350,000 is about right. To me it feels right. This reflects the shortfall on potential earnings at a time when savings capacity of a worker is well-known to be much higher. It reflects Mrs Gideon's view of reparation where she says:

> Reparation was not enough, $150,000 was not enough, not anywhere near enough. Jim's life is worth so much more. The amount I want to request now

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2 *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2190.

> is right to the top of the threshold $100,000 extra. That would be a fair amount, will then make me feel that justice in the monetary sense at least has been made.

[69] So coming back to the final constructions of sentencing. The starting point fine I fix at $850,000. I afford Waste Management the following discounts:

(a) A discount of 25% for its plea of guilty; a sum of $212,500.

(b) A discount for reparation paid and its offer of reparation today fixed at some 10%; $85,000.

(c) A further discount of 10% rolled up which recognises its remorse, its prior good safety records, the remedial steps taken since; $85,000.

[70] Those 3 discounts total $382,500 leading to a net fine of $467,500.

[71] For reasons which I will come to in a moment, I round that fine down to one of $450,000.

[72] I turn to reparation.

[73] Firstly, of course, I must recognise that the $150,000 paid to Mrs Gideon in January 2019.

[74] I order a further $200,000 to be paid to Mrs Gideon as the deceased's widow for herself and on behalf of other whānau members. For the sake of absolute clarity that figure is made up of emotional harm reparation $100,000 and reparation for consequential loss of $100,000.

[75] There will be a further reparation payment of $10,000 in favour of the deceased's supervisor Ryan Abrahams. That payment comes from the slight downward adjustment on the net fine I have already mentioned.

[76] I stand back and look at the overall financial sanction imposed including the voluntary reparation paid in January 2019. It totals $810,000. It is a significant sum,

but to me it sits comfortably with the degree of culpability of Waste Management noting that it is a company well capable of meeting such overall financial sanction.

[77] For the sake of absolute clarity the sentencing orders today therefore are:

(a) a fine of $450,000;

(b) reparation paid to Mrs Gideon of $200,000 for herself and on behalf of other whānau members;

(c) reparation $10,000 in respect of Mr Ryan Abrahams, the deceased's supervisor.

Judge B Davidson
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 09/06/2022