

**ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING
PARTICULARS OF THE PARTIES AND THE CHILD(REN).**

**IN THE DISTRICT COURT
AT TAURANGA**

**I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA**

**CRI-2021-070-000468
[2022] NZDC 17610**

WORKSAFE NEW ZEALAND

v

WEALLEANS BAY OF PLENTY LIMITED

Hearing: 7 September 2022
Appearances: K Sagaga for the Prosecutor
N Beadle for the Defendant
Judgment: 13 September 2022

REASONS FOR SENTENCING DECISION OF JUDGE P G MABEY KC

[1] In my reserved liability decision of 1 June 2022 I convicted the defendant, Wealleans Bay of Plenty Limited (the company), of a single charge brought under s 48 of the Health and Safety at Work Act 2015 (the Act) which provides:

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.

[2] The company was charged that:

...on or about 5 February 2020 at Tauranga Eastern Link Road, State Highway 2, Tauranga

Being a PCBU having a duty to ensure, so far as is reasonably practicable, that the health and safety of other persons, including Susan Joyce Walmsley, [REDACTED]

[REDACTED] is not put at risk from work carried out as part of the conduct of the business or undertaking, namely ground spreading of ground lime fertiliser, on Pahtuna dairy farm (the site).

Particulars:

It was reasonably practicable for Wealleans Bay of Plenty Limited to:

- i. Undertake an effective risk assessment specific to the site to identify and manage the risks.
- ii. Implement, monitor and review an effective safe system of work for the activity of ground spreading of ground lime fertiliser on Pahtuna dairy farm.

The maximum fine is a fine not exceeding \$1.5 million.

The facts

[3] The company is well known for its work in the Waikato/Bay of Plenty area in ground spreading fertiliser on farms. On 5 February 2020 the company was engaged to spread lime at the Pahtuna dairy farm near Te Puke. The paddocks to be fertilised were adjacent to the Tauranga Eastern Link Road (TEL) which is part of State Highway 2.

[4] The wind forecast for that day was for south west/westerly winds which, as a matter of fact, would blow across the paddocks to be fertilised with lime towards the TEL.

[5] Despite that forecast, which was known to the company's management, ground spreading commenced.

[6] It was clear from the evidence I heard that the company's practice was to check the weather on a day-to-day basis but unless conditions were so extreme to prevent operating the final assessment was left to the truck driver on site.

[7] The driver arrived at Pahtuna farm on the morning of 5 February 2020 and made an assessment that conditions were such that spreading could commence. She therefore began spreading without any issue until such time that she noticed a cloud of lime was being blown towards the highway. She immediately stopped work.

[8] It was also clear from the evidence that although there may have been no wind at the time spreading commenced, the wind did rise from the south west/westerly direction, uplifted lime from the surface of the paddocks and created the lime cloud.

[9] Lime is a particularly dusty substance and is susceptible to the effects of wind. This was well known not only to the company management but also the driver.

[10] On the morning of 5 February 2020, at the time the dust cloud travelled towards and across the TEL, Mrs Walmsley was travelling west towards Tauranga. Shortly before 7 am she collided with the rear of another motor vehicle driven by [REDACTED] who had with him his two year old son as a passenger, and a matter of seconds after

that a third vehicle driven by [REDACTED] impacted the rear of Mrs Walmsley's vehicle. She never regained consciousness and died in hospital on 8 February 2020.

[11] In prosecuting the charge WorkSafe contended that four practicable steps could have been, but were not, undertaken by the company. I rejected three out of four of those alleged practicable steps but readily concluded that it was established beyond reasonable doubt that the company did not make adequate use of the available weather forecast which predicted prevailing south west/westerly winds. It nonetheless allowed spreading to commence.

[12] The decision to permit the driver to go to Pahtuna farm that morning and rely upon her own judgment as to whether spreading should commence was wrong. That was clearly demonstrated as by the time she stopped spreading it was too late. Lime had gathered in a cloud and was already over the TEL by the time she stopped her truck. The company made no allowance for human error when permitting spreading to commence and took the risk that the wind would not develop as forecast or if it did the driver would be able to make the appropriate decisions to avoid any adverse consequences.

[13] The company was well aware that lime was a dusty product and that even a slight breeze could risk a cloud developing and that that cloud would inevitably be carried by the prevailing wind. The proximity of the farm to the TEL clearly risked the health and safety of individuals using the TEL, and in particular Mrs Walmsley, [REDACTED], his child and [REDACTED].

[14] The company did not take the practicable step of heeding the weather forecast and directing that spreading not commence.

Submissions

[15] On 7 September 2022 I heard submissions from counsel as to the appropriate penalty. Ms Sagaga addressed the *Stumpmaster* steps submitting that appropriate reparation amounts are:¹

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

- (a) Mrs Walmsley's family, \$150,000 apportioned between:
 - (i) her husband \$85,000;
 - (ii) her daughter \$32,500;
 - (iii) her son \$32,500.
- (b) ██████████ \$35,000;
- (c) ██████████ \$35,000.

[16] She referred to the victim impact statements filed by all victims. Mr Walmsley understandably has suffered incredible loss and now battles with a major depressive disorder. Her children have lost their mother in tragic circumstances.

[17] ██████████ the driver of the first vehicle, is anxious when driving. He is inclined to blame himself for his reaction when entering the lime cloud which he described as a complete white out. He slowed; an understandable reaction, thus causing Mrs Walmsley to collide with the rear of his vehicle. His child suffers ongoing trauma.

[18] ██████████ feels equally guilty about his part in the collision. His visibility was zero at the point that he collided with Mrs Walmsley and now has symptoms of PTSD.

[19] Ms Sagaga referred me to a number of authorities to support her reparation assessment and also seeks consequential loss payments as:²

- (a) Mr Walmsley, \$14,500 actual costs plus approximately \$80,000 shortfall in Mr Walmsley's ACC entitlement arising from his wife's death;

² *Big Tuff Pallets Ltd v Department of Labour* (2009) 7 NZELR 322; *WorkSafe New Zealand v Department of Corrections* [2016] NZDC 24865; *Ocean Fisheries Ltd v Maritime New Zealand* [2021] NZHC 2083; *WorkSafe New Zealand v Crafar Crouch Construction (Picton) Ltd* [2019] NZDC 8209; *WorkSafe New Zealand v Sunday Hive Company Ltd* [2018] NZDC 20796.

(b) Mrs Walmsley's daughter, \$8805;

(c) ██████████ \$4169.40;

(d) ██████████ \$1174.89.

[20] Ms Sagaga then addressed the quantum of the appropriate fine. She placed the company's liability at the bottom of the *Stumpmaster* high culpability band. She identified the practicable step of proper use of weather forecasts as a plainly obvious step to be taken. She agreed with my assessment that leaving onsite observations to the driver risks human error which clearly occurred in this case. The driver missed the impact of the rising breeze on the lime and when she stopped it was too late to avoid the catastrophe that occurred on the TEL.

[21] She said further that given the proximity of the farm to the TEL the potential risk to motorists must have also been obvious.

[22] She then submitted that there was a high degree of departure from prevailing industry standards noting that the WorkSafe safety manual, the Safety Data Sheet for lime and the Fertiliser Association all refer to the risk of wind drift when spreading lime when wind is above five kilometres per hour.

[23] She referred to the company's own hazard register which identifies the risk of fertiliser drift as a result of wind.

[24] She referred to a number of authorities to support her submission that a start point of \$650,000 is appropriate.³ She acknowledged a discount for reparation but submitted that no credit should be granted for cooperation with the prosecution as that is a statutory obligation.

[25] Finally, she sought prosecutor's costs of \$23,929.27.

³ *WorkSafe New Zealand v Crafar Crouch* (ibid); *WorkSafe New Zealand v Sunday Hive* (ibid); *WorkSafe New Zealand v Arthur Ernest Britton and Britton Housemovers Ltd* DC Hastings CRI-2014-020-001539, 21 October 2014; *Department of Labour v Fume-it Ltd* DC Napier CRN2020006981, 27 September 2022.

[26] Mr Beadle was in general concurrence with the quantum of reparation but made alternative suggestions as to how the payments should be allocated.

[27] Furthermore he was in agreement with the proposed consequential loss payments and prosecutor's costs but took serious issue with the prosecutor's proposed start point for the fine.

[28] Rather than placing the company's liability at the bottom of the high culpability band Mr Beadle submitted its liability is properly positioned in the middle to upper half of the medium culpability band. He contended for a start point of \$450,000.

[29] To support that submission he analysed the various authorities referred to by Ms Sagaga, maintaining that on the facts they are distinguishable and more serious than the present case.

[30] In relation to the *Stumpmaster* culpability factors Mr Beadle pointed out that the company did not fail to undertake a risk assessment, as was the case in a number of the authorities referred to by the prosecutor, but made a judgment to leave matters to the "on the ground" assessment of an experienced and certified driver.

[31] He however acknowledged my assessment in convicting the company that a decision should have been made the night before not to start work at all thus entirely eliminating the risk of wind drift towards the TEL and also eliminating the risk of the truck driver's human error.

[32] He noted that the company is a market leader in the ground spreading industry and has developed a comprehensive health and safety policy including hazard management. Both the company and the driver are accredited by the relevant industry quality assurance body (Spreadmark).

[33] He submitted further that there was no flagrant taking of risk but that the company followed what it believed to be good practice based on its longstanding experience and in the absence of any prior similar incidents. He submitted that it was not only reasonable to trust an experienced driver to make an on the ground assessment

acknowledging however that in itself embodied the avoidable risk of human error. He submitted that this is not a case where a heavily deterrent fine is required and that an assessment of medium culpability is appropriate.

[34] He sought mitigating reductions for:

- (a) reparation;
- (b) cooperation with the prosecution;
- (c) remorse;
- (d) previous good character.

Analysis

[35] The assessment of reparation is an evaluative exercise against the hard reality that no amount of money can compensate for the loss resulting from death.

[36] I was generally in agreement with the reparation amounts proposed by counsel and also the proposed payments for consequential loss and prosecutor's costs.

[37] I did not accept Ms Sagaga's submission that the high culpability band is appropriate to the assessment of a start point for the fine.

[38] It is correct that some of the cases she relies upon, and other cases that I have considered, allocate high culpability to reckless or highly negligent actions involving such things as the failure to create or implement proper safety procedures, lip service to the need to protect employees or members of the public and a cavalier attitude to fundamental WorkSafe duties and obligations.

[39] The company did have a comprehensive health and safety policy and took care to obtain Spreadmark certification for itself and its drivers and had developed a practice of relying upon on the ground assessments of its operators. There had been no issue in the past in such reliance.

[40] What occurred here was an error of judgment with tragic effect but made in good faith by company management in the Waikato organising work in the Bay of Plenty. A close, after the fact, analysis makes it clear that it was practicable to direct that work not start at all until any forecast wind had changed direction but the error was neither flagrant, reckless nor highly negligent.

[41] I accepted Mr Beadle's submission of a start point of \$450,000 is appropriate.

[42] I agreed with Mr Beadle's categorisation of mitigating factors and arrived at a total of 20% being 5% for each thus reducing the fine to \$360,000.

Result

Reparation

- (a) Mr Walmsley \$80,000;
- (b) Mrs Walmsley's children \$35,000 each;
- (c) ██████████ \$30,000;
- (d) ██████████ \$30,000.

Consequential loss payments

- (a) Mr Walmsley \$14,500 plus \$60,000 contribution to ACC shortfall;
- (b) Mrs Walmsley's daughter \$8805;
- (c) ██████████ \$4169.40;
- (d) ██████████ \$1174.89.

Fine

\$360,000

Prosecutor's costs

\$23,929.27

[43] Finally, Ms Sagaga applied for suppression of the name of [REDACTED] his son and [REDACTED]. Mr Beadle did not oppose and the order is made.

[44] There is no suppression order in relation to Mrs Walmsley or her family as their names are already the subject of media coverage. The reporter in court advises that she has interviewed Mrs Walmsley's family who agreed to their names being published in previous articles and I anticipate will be referred to again.

Judge PG Mabey QC

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 13/09/2022