NOTE: PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF COMPLAINANT(S) PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE PARA [50] http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF WITNESS/VICTIM/CONNECTED PERSON(S) PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html

IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2022-004-007441
[2023] NZDC 18533

WORKSAFE NEW ZEALAND
Prosecutor

v

VISY GLASS OPERATIONS (NZ) LIMITED
Defendant

Hearing:	8 August 2023
Appearances:	T Braden for the Prosecutor T Clarke for the Defendant
Judgment:	8 August 2023

NOTES OF JUDGE S J LANCE ON SENTENCING

---

[1] (MISSING AUDIO PRIOR TO 15:44:25 – audio begins at 15:44:25) penalty of a fine not exceeding $1.5 million, and it is set out as follows in the prosecutor's submissions:

> Being a person conducting a business or undertaking (PCBU) having a duty to ensure, so far as is reasonably practicable, the health and safety of workers who work for the PCBU, including [redacted], while workers were at work in the business or undertaking, namely using trollies to transport blanks used in the process of glass bottle manufacturing, did fail to comply with that duty and that failure exposed workers to a risk of death or serious injury.

[2] The particulars listed are as follows:

(a) It was reasonably practicable for Visy Glass Operations (NZ) Limited to have:

(i) undertaken an adequate risk assessment in respect of the trollies used to transport the blanks;

(ii) ensured the provision of effective information, training, instruction and supervision necessary to protect workers from risks to their safety in handling the blanks and transporting the blanks on trollies;

(iii) ensured that the trollies were fit for purpose and safe to use.

[3] There is an extensive summary of facts which I will not traverse on a word-for-word basis but as requested, I make that summary of facts available to anybody who wishes to view it.

[4] The facts are summarised in the prosecution's submissions as follows:

[5] The defendant is a glass packaging manufacturer producing glass bottles and jars. The manufacturing site based in Penrose is the only glass manufacturing facility of its type in New Zealand.

[6] At about 6 am on 2 November 2021 [redacted], a bottle machine operator, was in the process of finishing the nightshift. [redacted] was asked to assist the job change team with a blank changeover in the glass forming section called "the hot end." A 'blank' is half a steel mould that the glass is formed inside when glass bottles

are manufactured. The blanks are changed when production is to begin on a different shape and size bottle.

[7] During the blank changeover, the blanks are removed from the forming section while still hot and placed on a hand trolley. The blanks weigh around 12 kilograms each. Blanks were placed onto the trolley over a 20 minute-period and once the trolley was full was tasked with moving the trolley out of the way. Emptying that trolley was last task for the shift.

[8] Another worker driving a lifting buggy asked to move the trolley out of the way so the buggy could pass. was in the process of taking the blanks off the trolley. There were still around 10 hot blanks on the trolley but those were all now at one end and the other end having been emptied, accordingly, the trolley was now unbalanced. The remaining blanks on the trolley would have weighed around 120 kilograms total and the trolley weighed around 40 or 50 kilograms. It is estimated the temperature of the blanks would have been between 130 and 170 degrees centigrade at the time. pulled the trolley backward, and after a metre or so the trolley suddenly tipped over onto him. The trolley pinned his lower legs so he was unable to move and the hot blanks landed on his torso and legs.

[9] The trollies had been manufactured inhouse prior to the defendant taking over the site. The defendant did not hold any records for service maintenance or repairs for the trolley involved in the incident. had received no training on trolley use and was not aware the trollies could only be pushed and not pulled. No risk assessment had been done on the trollies and the trolley that used was not meant to be used on a job change.

[10] The trolley falling on fractured his tibia bone just below the knee. started to throw the hot blanks off himself as they were starting to burn him, in the process his welding gloves came off. The blanks were then too hot to touch. He shouted out to other workers and other workers heard him. The CCTV indicates the blanks would have been on him for approximately 22 seconds before the

first respondent arrived to assist and knocked the blanks away from him. The trolley was pulled away from his legs. [redacted] was taken to Auckland Hospital.

[11] He suffered a fractured upper tibia just below the right knee. This required surgery to insert a plate and pins. He also suffered severe burns to his shoulder, upper arm, hip and lower leg and required about 10 skin grafts. He was in hospital for seven days. [redacted] has returned to full-time work for the defendant after a stay/return process. He was off work from 2 November 2021 to 31 May 2022. [redacted]

[12] I also should add to that summary that the defendant took over the premises in August 2020 and the accident occurred, as I have said, in November 2021. Prior to that another company operated and owned the plant and factory.

[13] The sentencing criteria are set out in the submissions. Again, I will not set them out in full but I need to take heed of s 151(2)(b) of the Health and Safety at Work Act 2015. I also need to note ss 7 to 10 of the Sentencing Act 2002. I take these factors and the principles and purposes of sentencing into account.

[14] The approach to sentencing is agreed between the parties and is now well established. It is set out in the wellknown case of *Stumpmaster v WorkSafe New Zealand*.[1]

[15] There, the Court confirmed that there are four steps in the sentencing process. The first is to assess the amount of reparation to be paid to the victim. The second is to fix the amount of the fine by reference first to the guideline bands and then having regard to aggravating and mitigating factors. The third is to determine whether further orders under ss 152 to 159 of the Act are required, and lastly I make an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps. This includes consideration of the defendant's financial capacity if pleaded by the defendant. That is not pleaded in this case.

---

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

[16] Firstly, in relation to reparation it is said that this is an intuitive exercise. When arriving in court today, I was presented with a victim impact statement from

But he sets out his physical injuries which have been listed in the summary of facts.

[17] He notes that after the operations, he was in a wheelchair for the first week and then using crutches and a moon boot to move around, he could not bear any weight on his right leg for several weeks. He needed the bandages over his injuries changed daily for around a week and then every second day for two weeks and then once a week after that. He attended physiotherapy. He could not work for about two months while he was still recovering and then when he did return to work, he returned only gradually.

[18] The long-term effects he says are permanent scarring of the injuries where he had the burns. The failed skin graft on the right thigh left a crossed type of pattern on it and he does not walk properly like he used to due to the plate and pins in his leg. He acknowledges Visy has paid $45,000 to date in the costs that were associated with his recovery treatments and doctors' appointments were also taken care of. He refers to the emotional harm that it has inflicted. He says that he cannot play with his nieces and nephews like he used to, he can no longer run. He has to think ahead and plan activities carefully. He used to go tramping but he cannot now. If he walks more than a couple of hours his right leg becomes painful. He considers himself mentally strong and thanks his mental strength for dealing with the incident.

[19] He says the incident in his view was 100 per cent avoidable as Visy had known that the trollies were unstable for years, nothing had been done about it. He says:

> It annoys me that it was only after the incident happened that Visy decided to implement the changes that could have been done and prevented the incident and everything I had to go through.

[20] Those are his views contained in the victim impact statement.

[21] I note that from the outset , the defendant would like to formally apologise to for the pain and suffering arising out of the serious injuries. They

acknowledge that the injuries are serious and that a value could not be put on his suffering. I also noted that in the affidavit that was supplied in support of the submissions from Mr David Brown, that he, also stressed that the company apologised to [redacted] for his suffering and their failure to ensure that he was protected from risk of harm, and he attaches letters that date back to July 2022, where from the outset the company accepted responsibility and did not shirk.

[22] So, I turn first to the first step which is the reparation and this is an issue that is not disputed between the parties. [redacted] has received the sum of $45,000. That was a payment of $40,000 in emotional harm and $5,000 as consequential loss. I also note that when he left the company because [redacted] he was paid out in relation to all payments due under his contract.

[23] So, I take that part of this equation no further. I have no issue with what the parties have agreed that the $45,000 total emotional harm reparation and consequential loss is an appropriate sum.

[24] I then turn to the quantum of the fine. Again, both parties are not far apart in relation to what they assess as an appropriate starting point. Both parties agree that this is a case that is unique and no other cases are particularly analogous .

[25] But I will go through the process as set out in *Moses v R* and calculate firstly a starting point fine considering aggravating and mitigating features and then establish an appropriate discount for credit that is personal to the offender.[2]

[26] In *Stumpmaster*, the guideline bands were established. There were four of them in relation to culpability in offending under s 48. Low culpability attracts a starting point of up to $250,000, medium culpability $250,000 to $600,000, high culpability $600,000 to $1 million and very high culpability $1 million and above.

[27] In this case, both parties consider this offending fall into the medium culpability band which is, as I have just said, is a starting point fine in the range of $250,000 to $600,000.

---

[2] *Moses v R* [2020] NZCA 296.

[28] The prosecution refers to *Stumpmaster* which states that it is likely under the new bands that a starting point of $500,000 to $600,000 will be common.

[29] Having reviewed the facts in comparable cases, I agree that the medium culpability band is the appropriate one and I note the factors to be assessed as follows. These are helpfully set out in the submissions.

[30] In relation to the operative acts or omissions, the prosecution note that the hazard involved in this incident is that the defendant failed to take the following reasonably practicable actions:

(a) undertaking an adequate risk assessment in respect of the trolleys used to transport the blanks;

(b) to ensure the provision of effective information, training and instruction and supervision necessary to protect workers; and

(c) ensuring that the trolleys were fit for purpose and safe to use.

[31] I do not think there can be any issue taken in relation to those factors.

[32] However, I accept as set out in the defence submissions that Visy are a responsible company. I accept that they take safety seriously and that in this instance it was not a scenario where they deliberately ran a risk. Rather there was oversight where they had failed to take heed of the hazard that the trollies could cause. It was not a case of deliberately 'closing of their eyes'.

[33] Mr Brown in his affidavit at paragraph 32 said:

> While Visy Glass became aware of the risk that a hand trolley could tip over, the possibility this could cause blanks to land on a worker had not been specifically identified as a critical risk. Therefore, the trollies did not receive the same attention and urgency as the higher rated critical risks. Visy Glass had to prioritise the most obvious critical risks and there were a number of them that they were addressing upon taking over what was an old factory and plant.

[34] With hindsight of course those risks should have been identified and perhaps in my view, it was not so remote given the poor design of the trollies and the fact that they were not fit for purpose. The issue should have been something considered and recognised earlier than it was i.e., after the accident.

[35] In relation to the nature and seriousness of the risk, here the parties agree that the defendant accepts that the risk of a trolley tipping and pinning a worker down and the harm that may be suffered from this risk, burning and crushing injuries, is potentially very serious. In this case the harm was realised. ██████ suffered significant crushing and burning injuries resulting in a fractured upper tibia, burns to his shoulder, upper arm, hip and lower leg.

[36] The next matter to be assessed is the degree of departure from standards prevailing in the relevant industry, and here the defendant is the only glass manufacturer of its kind in New Zealand. There is no industry standard for the transporting of blanks in the glass industry.

[37] The next factor is the obviousness of the hazard. Here, as I just alluded to, Visy acknowledged that with the benefit of hindsight the hazard posed by the transporting of hot blanks on trollies was an obvious hazard. As the prosecution have said, trollies were clearly a significant tool used in the glass manufacturing process. There were 131 trollies at the site, and it was reasonably practicable for the defendant to have identified and prioritised trollies and trolley use as a risk to the health and safety of the workers. The trollies were heavy; they weighed around 40 or 50 kilograms and when loaded with hot blanks, each weighing around 12 kilograms, the risk to workers when moving unsecured blanks around is (according to the prosecution and I think a degree accepted by the defendant) obvious.

[38] The next factor is the availability cost and effectiveness of the means of avoiding the hazard. Again, here Visy accepts that it could have carried out a risk assessment and modified or replaced the trollies to minimise the risk of the trolley tipping and hot blanks landing on a worker's body. Corrective measures have now been taken and Visy has modified some of the trolleys and replaced all other trolleys at a total cost of $121,889. As noted, at a broader level Visy has also spent $29 million

in demolishing the existing furnace , and building a new furnace, as well as another $1.6 million investing in safety at the plant.

[39] The prosecution refer to the fact that no training was given to workers regarding safe use of the trollies, blanks were not secured while being transported, and the risk I have already referred to in relation to heavy trollies in carrying those hazardous materials. The prosecution accept that the defendant has now spent a significant sum on safety. They say that this risk was not prioritised and perhaps it should have been. Again, that is all with the benefit of hindsight.

[40] In relation to deterrence, I accept the defendant's submissions that this is not a case where particular denunciation or deterrence is necessary given that it was not a case of wilful disregard for safety by Visy and given that they acquired a plant that was over a hundred years old. They were working on trying to make it as safe as possible. I accept Visy takes it health and safety responsibility seriously and I accept that it has a good safety record.

[41] So, when it comes to a starting point, both counsel have referred me to various cases and both have said that none of them are particularly analogous. The prosecution refer to *WorkSafe New Zealand v Heinz* as perhaps the most analogous where a worker suffered burns on her feet when boiling brine entered her gumboots. A starting point there was $500,000.[3] They also refer to *WorkSafe v Alto* and *WorkSafe v Bakeworks* but those were the cases where accidents occurred in relation to machines not being suitability guarded.[4] I do not think they are particularly helpful although I note in both cases the starting point was $550,000.

[42] Defence provide me with the cases of *WorkSafe v AFFCO* and also *WorkSafe v North Island Mussels Ltd*.[5] In *AFFCO*, the total starting point was $472,500. In *North Island Mussels*, as I understood, the starting point was $450,000. So here the

---

[3] *WorkSafe New Zealand v Heinz Wattie's Ltd* [2019] NZDC 6388.
[4] *WorkSafe New Zealand v Alto Packaging Ltd* [2019] NZDC 14809; and *WorkSafe New Zealand v Bakeworks Ltd* [2023] NZDC 5236.
[5] *WorkSafe New Zealand v AFFCO New Zealand [2020] NZDC 13629; and WorkSafe New Zealand v North Island Mussels Ltd [2018] NZDC 20269.*

prosecution nominates $500,000 as a starting point, and the defendant nominate $450,000.

[43] As stated, ultimately sentencing is always a case specific exercise. It is difficult to compare cases and it is certainly not an exact science. I accept that [redacted] was provided with inadequate training for using the trollies. He was not aware that they could only be pushed and not pulled, and that the trollies were not safe and fit for purpose. But I also accept that the culpability of the defendant in this case is perhaps not as high as the cases mentioned by the prosecutor. I also acknowledge the defendant seems to be trying or have been trying their best to ensure the workers at this hundred-year-old factory were safe and that they are not cavalier in their attitude. There was a lot going on it seems at this plant. The consequences however were relatively serious and I intend to fix a start point of $470,000 which is approximately midway between what both counsel suggest.

[44] I accept that there are no aggravating features, so I now move on to mitigation.

[45] In relation to mitigation, the prosecution mentioned *Stumpmaster* who raised concerns about routine standard discounts that have "distorted the sentencing process by so reducing the starting points that outcomes become too low" and emphasised that "Proper analysis of the basis for credit is required." But again, here both parties are agreed on most of the mitigation that can be allowed. Firstly, both parties accept that the guilty plea discount which came at the first opportunity should be at the maximum which is 25 per cent. Both parties accept that the defendant has co-operated throughout the investigation, that the defendant, according to the prosecution, was open and honest with WorkSafe about the health and safety issues they faced and did not try and hide anything. So, another five per cent for their co-operation.

[46] Both parties accept that the defendant is remorseful, and I accept that remorse is genuine, they were willing to attend restorative justice and, as said by the prosecution, that dovetails into the reparation that was paid of $45,000 which, as mentioned by the prosecutor, was made at an early stage and meant that [redacted] had the benefit of that money right from the outset [redacted]

[redacted]. I acknowledge that and credit the company for what they have done in that regard.

[47] Then there is modest issue taken by the parties as to the remedial steps and whether a separate discount for previous good character should be allowed.

[48] In my view, the appropriate total discount should be 50 per cent. Twenty five per cent for the guilty plea, five per cent for the co-operation, 10 per cent for the remorse and reparation and then in relation to the remedial and safety record I would propose 10 per cent combined.

[49] So, from the start point of $270,000 that would make a final fine in this case of $235,000 which is obviously 50 per cent of the start point. I also note that what is not in issue is a payment towards the prosecutor's legal costs of $1,528.30.

[50] And then when I look at step four, in my view, this sentence, if I look at this in the round, it is proportionate sentence given the seriousness of the offending and taking into account the reparation that has already been paid.

[51] Lastly, I am asked to suppress the name of the victim, which I do, and any comments that have been made [redacted].

____

Judge SJ Lance
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhenga: 08/09/2023