IN THE DISTRICT COURT
AT NELSON

I TE KŌTI-Ā-ROHE
KI WHAKATŪ

CRI-2018-042-000778
[2020] NZDC 26288

WORKSAFE NEW ZEALAND
Prosecutor

v

TALLEY'S GROUP LIMITED
Defendant

Hearing:	8 December 2020
Appearances:	B H McCarthy and V S K Veikune for the Prosecutor J H M Eaton QC for the Defendant
Judgment:	8 December 2020

NOTES OF JUDGE G P BARKLE ON SENTENCING

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[1] Talley's Group Limited has pleaded guilty to one charge of failing to ensure the safety of workers carrying out work at their Motueka plant in the half shell mussel area, and thereby exposed Mr Sheng Tan ("Mr Tan") to a risk of serious injury arising from an unguarded nip point on the water bath conveyer belt. The charge is brought by WorkSafe pursuant to ss 36 and 48 of the Health and Safety at Work Act 2015. It carries with it a maximum penalty of $1.5 million.

[2] The defendant takes no dispute with the summary of facts provided to the Court by the prosecutor. In that summary the Court is advised that Talley's has processing plants throughout New Zealand, including a mussel processing plant at Motueka. That plant includes a pack out area in its half shell mussel department. The machinery in

that area includes a conveyor belt which carries half shell mussels and which is submerged in a water bath during production.

[3] During production, when the belt is submerged in the water bath, the sides of the bath prevent access to the inward running nip points on the conveyor belt. That belt is required to be cleaned frequently to prevent biological contamination, especially from the listeria disease.

[4] During that process of cleaning, a wire is used to raise the water bath conveyor to allow access to the belt. When it is raised, workers cleaning the belt are exposed to the inward running nip points of the conveyor belt.

[5] The general cleaning procedure for the conveyor belt in the plant is as follows:

(a) Pre-clean: the conveyor system is hosed down to clear any loose debris while the conveyor is running.

(b) Clean: all machinery is stopped, before it is covered in foam and scrubbed manually while it is locked out.

(c) Final clean: the lock outs are then removed and the conveyor system is turned back on, and hosed down and sanitised while it is running.

[6] The hosing and scrubbing were carried out by the same person.

[7] The injured person in this case was Mr Tan who is a Malaysian national, and at the material time was in New Zealand on a working holiday visa. He began working at the Talley's Motueka plant on 29 April 2017 on a 90 day trial. He was working on the night shift from 4.30 pm to 1 am on the day of the incident, 14 June 2017.

[8] At approximately 3 am, at the conclusion of his work shift, Mr Tan was cleaning the water bath conveyor belt in the half shell department. He had only cleaned the area once before, being the previous night shift, but had experience in cleaning other similar areas. He was shown how to clean the sides and under the water bath conveyor belt by another mussel opener and cleaner at the plant.

[9] In the first instance Mr Tan hosed the debris away while the conveyor belt was not running. He was then instructed by his fellow worker that the debris stuck inside the conveyor belt could be removed more effectively while the belt was turned on and running. He did that, and hosed the belt. Mr Tan then saw some debris still stuck in the conveyor belt, and reached into the moving belt with his left arm to try and pull the debris out. While doing this, his glove was caught in the exposed inward running nip point, trapping his left arm.

[10] The conveyor belt machine was stopped in response to Mr Tan's calls for assistance. His trapped arm was removed from the belt. Mr Tan sustained fractures to both bones in his left forearm. He required surgery to insert plates, and the advice was that it would take him six weeks to recover from the surgery.

[11] WorkSafe were notified on the day of the incident, and its investigation identified:

(a) Mr Tan knew not to put his hands near the rollers while they were on, as he had been cautioned not to touch moving conveyors during his induction and to speak to a supervisor before doing anything with the machinery.

(b) The control for the water bath conveyor belt had a lock out device in place but that was not locked out at the time of the incident.

(c) It was not the usual practice to lock out the water bath conveyor belt during cleaning. Instead, the conveyor belt was turned off and on as needed by the cleaner.

(d) Whilst the nip points of the moving water bath conveyor belt were effectively guarded during production by the sides of the water bath, the process of raising the conveyor belt and operating it during cleaning meant that cleaners were directly exposed to the nip point hazard.

(e) Whilst cleaners were exposed to the hazard during the cleaning, it was necessary to have the water bath belt operating to allow for effective cleaning and removal of debris.

(f) Without the effective cleaning of the water bath conveyor belt there was the risk of listeria contamination.

(g) In practice, the cleaning process used for the water bath conveyor belt did not match up with Talley's general cleaning procedure due to the lack of effective communication, training, monitoring, and supervision of that cleaning process.

[12] On 27 June 2017 WorkSafe issued an improvement notice in relation to exposed nip points during cleaning, recommending that guarding be fitted to prevent access to the exposed nip points.

[13] In response to that notice, Talley's fitted a fixed guard to prevent access to the exposed nip point of the water bath conveyor belt. In addition, since the incident, Talley's have increased signage, reinforcement of the correct operating procedures, and increased staff awareness of the ongoing risks.

[14] The risks associated with operating and controlling a conveyor belt machine are well known and the subject of industry guidance. Particularly, there was a departure from reg 17 of the Health and Safety in Employment Regulations 1995, Industry Standards and Guidelines for Safe Use of Machinery on the basis that the procedure that was required to be followed was not followed on every occasion to which it applied.

[15] There are also outlined in the summary of facts a number of WorkSafe publications and New Zealand Standards that deal with machinery risk assessment and ensuring that dangers are adequately controlled and considered.

[16] The reasonably practicable step that Talley's has conceded was available and not complied with was to monitor and enforce the implementation of safe systems at work.

[17] In the previous matter that I dealt with this morning with respect to Ms Lee's workplace accident at the defendant's plant in Blenheim in April 2016, I set out the purposes of sentencing in s 7 of the Sentencing Act 2002 and principles that are to apply and to be taken into account from s 8 of the Act in a matter of this nature. I also record that I have had regard to *Stumpmaster v WorkSafe New Zealand* in which the High Court set out the four steps in the sentencing process and also identified four guideline bands for culpability in offending under s 48 of the Health and Safety at Work Act 2015.[1] In *Stumpmaster* the Court stated that the factors set out in the 2008 High Court case of *Department of Labour v Hanham & Philp Contractors Ltd* still had relevance to sentencing in this area.[2]

[18] In summary, I accept that the fixing of the level of the fine involves an assessment of culpability, the aggravating and mitigating factors, and the proportionality and appropriateness of the fine. While I accept that involves an assessment of prior comparative cases, the Court of Appeal, particularly most recently in *Zhang v R*, has reminded courts that sentencing is an evaluative exercise requiring consideration of the individual case and individual circumstances of the defendant.[3]

[19] It is of some relevance to this matter that, following the serving of the improvement notice, litigation was undertaken with respect to whether or not the notice was appropriate. Talley's had obtained a specialist's engineering report from a Christchurch firm that questioned the utility of the improvement of fitting a guard in light of the risk of listeria in the mussel processing plant. Listeria is a food-borne pathogenic bacterium.

[20] The thrust as I understand of Talley's position in that litigation was that the reduced safety risk to their employees was in direct competition with the risk that the

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[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881.
[2] *Department of Labour v Hanham & Philp Contractors Ltd* (2009) 9 NZELC 93,095 (HC), (2008) 6 NZELR 79 (HC).
[3] *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.

guard will prevent the listeria biohazard from being adequately eliminated by the proper cleaning processes.

[21] The District Court found that the defendant had not meaningfully assessed guarding options that could have achieved the dual purpose of protecting their workers, in terms of their health and safety at work, and consumers of mussels. Such alternative options could have been investigated had the defendant taken up the option of an on-site discussion. In particular, a guard that used interlocks or light curtains, along with a modified cleaning regime could have rendered the listeria hazard to a small, or very small, level.[4]

[22] Dobson J in the High Court heard Talley's appeal and held that the expert report from the Christchurch firm overstated to some extent the risk of listeria contamination which was possible rather than likely, and the report also incorrectly assumed that WorkSafe required an immovable fixed guard installed. The Court held that WorkSafe did not necessarily require the installation of such a fixed guard. The High Court held that the increased listeria risk that comes with non-fixed guards is insufficient to outweigh the improvement in employee safety that would be achieved. The appeal was dismissed.[5]

Prosecutor's Submissions

[23] Mr Veikune for WorkSafe accepts no reparation should be imposed as Mr Tan, the victim, has returned to his homeland.

[24] He submits that, in terms of liability, the appropriate band is the medium culpability one, at the lower end, of the *Stumpmaster* decision, and that a start point of $350,000 is appropriate.

[25] In terms of the cases that have been referred to by WorkSafe, the submission of the prosecutor is that *Worksafe v NZCC Limited* is the most analogous.[6]

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[4] *Talley's Group Ltd v WorkSafe New Zealand* [2017] NZDC 29068.
[5] *Talley's Group Ltd v WorkSafe New Zealand* [2018] NZHC 1565.
[6] *WorkSafe New Zealand v NZCC Limited* [2019] NZDC 16662.

[26] After the start point is set, Mr Veikune seeks an uplift of 10 per cent for Talley's prior convictions. In addition to the two particular convictions that were referred to in written submissions, the prosecutor also draws to the Court's attention the defendant's conviction in the Ashburton District Court earlier this year and the 2016 matter concerning Ms Lee that I have just sentenced Talley's in respect of.

[27] WorkSafe accepts that there should be credits for co-operation with the investigation and remorse, and now acknowledges that a 25 per cent for the plea of guilty is appropriate.

Defendant's Submissions

[28] Mr Eaton, on behalf of Talley's, submits that culpability is less than the Court determined earlier today for the Lee matter, and should once more be placed in the lowest band of the *Stumpmaster* decision. He states that Talley's was relying on industry norms, expert advice regarding listeria infection, and the unenviable position of attempting to balance the risks of wider public interest with risks at work for their employees.

[29] As I have already set out, litigation was undertaken in respect of this matter on a good faith basis by Talley's and in reliance on the expert advice that had been received. Mr Eaton stressed that there was, and still remains, a real and serious challenge faced by the defendant because of cleaning procedures to eliminate the risk of listeria, which has potentially fatal consequences for consumers of mussels. The defendant company had, prior to this matter, considered their internal processes, and there had been a WorkSafe inspection in 2016.

[30] Counsel emphasised that there was only the one admitted reasonably practicable step that was now included as a particular in the charge, that being of failing to monitor and enforce the implementation of the safe system. Mr Eaton also stressed that Mr Tan was aware that he should not have touched the moving conveyor belt.

[31] Again, counsel noted that the cleaning process had been in place for some years without incident, and staff were trained in that task. Less strongly than perhaps in the Lee matter, Mr Eaton's submission was that there should not be any uplift for prior convictions.

[32] Reductions should be available for remorse and remedial steps, co-operation with the investigation, and the guilty plea. In total, as I comprehend, the total credit sought would be in the region of 50 per cent from the start point arrived at by the Court.

Discussion

Reparation

[33] In *WorkSafe New Zealand v Qing Hong Company Ltd* the Court noted that assessing emotional harm reparation is not of any value if a complainant cannot be contacted and has not completed a victim impact statement.[7] That is the position in this case, and I accept no reparation should be ordered in these circumstances.

Fine

[34] Turning to the question of the start point of the fine to be imposed, the following factors have relevance in my view in terms of the culpability assessment:

(a) *The identification of the operative acts or omissions at issue*

It is accepted by the defendant it failed to monitor and implement a safe system of work. For the machine to be effectively cleaned, it needed to be turned on while the debris was cleared away. The general cleaning procedure only provided for the use of a hose, and employees were trained to not touch the machine when the nip points were exposed and running. However, Mr Veikune has underlined particularly that while an appropriate procedure was in place, in general in practice what was

[7] *WorkSafe New Zealand v Qing Hong Company Ltd* [2016] NZDC 10123.

occurring at the defendant's plant did not match up with this process. The temptation to remove debris by other means when the hose proved ineffective on the part of the defendant would have been obvious. There needed to be more vigilance on the part of the company, in my view, and a better system in place to prevent the incident that took place occurring.

(b) *An assessment of the nature and seriousness of the risk of harm occurring, as well as the realised risk*

The realised risk was significant, although fortunately not as serious as it may have been. The actual risk was that an employee could have suffered the amputation of a limb.

(c) *Degree of departure from industry standards*

The risks associated with moving conveyor belts, and the cleaning of them, are well known. If unguarded, then again the potential issues that arise are of course well known.

The conduct of Talley's was a departure from the *AS/NZS 4024 of Machinery Standard (series)* documentation. There are also, in a more general sense, a number of *WorkSafe* publications with advice that also was not complied with.

As I have already pointed out, reg 17 of the Health and Safety in Employment Regulations 1995 was also not followed.

I accept that Talley's did have a procedure in place, but their failure was to not ensure it was followed on every occasion. Both workers involved in the incident had been trained but, most particularly, Mr Tan had only been employed at the Talley's plant for a short period.

The operational system in place was plainly not the correct balance as there were potential solutions available that would have much

diminished the risk of employee injury while entertaining an acceptably low risk of listeria contamination.

I accept, as I have already said, that it is relevant, and to a degree a mitigating matter, the situation that Talley's was dealing with in terms of the balance between the listeria issue and the safety of employees. Nevertheless there were further steps available including installation of, in particular, guards. As I understand the evidence, there is no suggestion that the defendant sought advice on this particular matter prior to the accident taking place. That occurred after the matter had arisen, and then to some degree the defendant only narrowly investigated the risks and benefits of fixed guarding.

(d) *The obviousness of the hazard*

The hazard was obvious. The dangers related to nip points are well known, and a failure to guard against them has been described in prior decisions as being fundamental.

I am also of the view that it should not be overlooked that there had been a similar incident at the Blenheim plant on 20 April 2016 in which Ms Lee had her hand caught in the nip point of a conveyor belt during the cleaning process. In a general sense, that must be regarded as having put Talley's on notice regarding this type of hazard and, more particularly, that employees, despite training, may not comply with what is required of them when undertaking the cleaning of conveyor belts.

(e) *The availability, cost and effectiveness of the means necessary to avoid the hazard*

Following the incident the defendant had guards installed on the machine. The defendant also increased signage, undertook

> reinforcement of the correct operating procedures with staff, and also increased their awareness of the ongoing risks.
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> There would have been some costs associated with those matters and also increasing the means to avoid the hazard, but there has been no suggestion that such costs were greater than or disproportionate to the benefits of employee safety.

[35] As in the Lee matter, a number of cases have been referred to by the prosecutor. Without again reciting each of those cases, I have read and considered from the *Stumpmaster* appeal the comments relating to the Niagara Sawmill Company case. I also have considered *WorkSafe New Zealand v Furntech Plastics Limited* and *WorkSafe New Zealand v NZCC Limited*.[8] Each of those cases related to injuries arising through inadequate guarding and catching body parts in machinery. The start points were all in the medium culpability band of the *Stumpmaster* decision.

[36] Also relevant in some respects is the decision of this court in *WorkSafe New Zealand v Allflex Packaging Ltd.*[9] In that case there had been no safe lockout procedures had been developed in respect of the machine, the victim had no training or instruction in relation to the hazard, nor was his training or competence assessed. A guard had been removed and placed in a storeroom cupboard. In that case the start point was $480,000.

[37] In terms of setting the start point of the fine, Mr Eaton has strongly submitted that this case is less culpable than the Lee matter. That was because in this case the conveyor belt was required to be lifted out of the water bath and in addition the hosing down of the belt while moving was required, by contrast to the full lockout that could have been undertaken in the Lee prosecution.

[38] I do not accept that submission. No two cases are, of course the same but again what has transpired here is that a worker has, for one reason or another, determined

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[8] *WorkSafe New Zealand v Furntech Plastics Limited* [2018] NZDC 18150; and *WorkSafe New Zealand v NZCC Limited* [2019] NZDC 16662.

[9] *WorkSafe New Zealand v Allflex Packaging Ltd* DC Manukau CRI-2017-092-014520, 15 October 2018.

that material that was seen on the belt could be quickly removed while the belt was moving. That means immediately that the person is at risk of injury. What is also of concern in this matter, particularly as underlined by Mr Veikune, is that while the general cleaning procedure that had been mandated by the management of Talley's was not being complied with on a regular basis. Furthermore, there was a lack of effective communication, training, monitoring and supervision undertaken by Talley's. That, of course, must increase the particular risk when an employee such as Mr Tan has only been working at the plant for a few weeks prior to the incident taking place. It is incumbent on any employer to be particularly conscientious in ensuring that persons who are going to be placed at risk fully understand what is required in terms of the cleaning of moving belts, and that there is compliance. It would seem to me that was particularly lacking in this case.

[39] In addition, of course, as was shown by virtue of the improvement notice, there were again options that were available and indeed following the incident adopted by Talley's.

[40] Each of the cases that have been referred to are going to be factually different. However, I am of the view that this is a case that does fall at the lower end of the medium culpability band of the *Stumpmaster* decision, and set the start point for the fine at $280,000.

Aggravating Matters

[41] Dealing then with the situation of uplift for prior matters. There are the two particularly referred to in the prosecutor's written submissions from 2012 and 2014. There is then the Ashburton matter that was finally resolved in September 2020 and then the matter of Ms Lee from April 2016. The uplift for those matters will be one of 10 per cent which is the amount of $28,000.

Mitigating Matters

[42] Turning now to the matters of mitigation. There are, in my view, the three discrete matters to acknowledge and deal with. First is remorse. Mr N Howes, Group

Manager, Human Resources of the defendant company has set out in his affidavit the assistance provided to Mr Tan. Not only was that dealing with the immediate and ongoing care that was necessary but also, as I understand, Mr Tan was able to have his stay in New Zealand prolonged with the assistance of Talley's which meant that he received earnings of over $14,000.

[43] Next, there was co-operation with the investigation. Mr Eaton pitches that in this case as being beyond the normal, referring particularly to the litigation concerning the improvement notice providing assistance more generally for industry, and WorkSafe also in finding a balance between what steps should be taken to ensure machinery is safe coupled with the wider issues around food safety.

[44] Also counsel points to, beyond that, the remedial steps taken. There was the installation of the guarding. Then Mr Howes has set out in his affidavit wider measures that the Talley's Group have taken since this matter around health and safety generally.

[45] Without defining a particular percentage of reduction for each of those matters, that is remedial steps, remorse and co-operation with the investigation, the reduction for those three matters in total will be an amount of 20 per cent.

[46] Then there is the guilty plea. There is now no dispute as far as the prosecutor is concerned that 25 per cent is the appropriate amount of credit to be provided.

[47] That therefore means, in total, a deduction of 45 per cent from the figure of $308,000 which, by my calculation, reduces the start point fine by $138,600 to the amount of $169,400.

[48] The prosecutor seeks a modest amount of $282 pursuant to s 152 of the Act for costs of the prosecution. That sum is awarded.

[49] Finally, undertaking the last step required which is the proportionality assessment, once more there has been no suggestion that when one stands back that

the penalties imposed are inappropriate or too high. Accordingly, there will be no adjustment made.

[50] Therefore the penalties imposed in respect of this matter are:

(a) There will be no order for reparation.

(b) The fine will be the amount of $169,400.

(c) There will be costs payable pursuant to s 152 of the Act of $282.

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Judge GP Barkle
District Court Judge

Date of authentication: 22/12/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.