IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2022-004-008494
[2023] NZDC 19203

WORKSAFE NEW ZEALAND
Prosecutor

v

OJI FIBRE SOLUTIONS (NZ) LIMITED
Defendant

Hearing:	7 August 2023
Appearances:	A Everett for the Prosecutor G Nicholson and O Welsh for the Convicted Company
Judgment:	7 August 2023

NOTES OF JUDGE K MAXWELL ON SENTENCING

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[1] The defendant, Oji Fibre Solutions (NZ) Limited, has pleaded guilty to one charge of contravening s 36(1)(a), s 48(1) and (2)(c) of the Health and Safety at Work Act 2015. The charge carries a maximum penalty of a fine not exceeding $1.5 million.

[2] Oji Fibre Solutions (NZ) Limited, as a person conducting a business or undertaking (PCBU) under the Health and Safety at Work Act, the exact nature of the duties breached will be addressed in the course of this sentencing but, in short, Oji Fibre Solutions (NZ) Limited accept that it was reasonably practical to have:

(a) ensured the first press area of the machine was adequately guarded (to the standard described in AS/NZS4024 or better) so as to prevent access to hazardous roller nip points; and

(b) ensured that it monitored and reviewed the effectiveness of the safety features of the first press area of the machine, including by conducting an effective risk assessment of the machine.

[3] I want to acknowledge in Court today the representatives of the company. I thank them for taking the time to attend Court.

[4] I start first with the facts surrounding the charge. Oji Fibre Solutions (NZ) Limited is a limited liability company. They produce pulp paper and other fibre-based packaging. Mr "W" was employed by the company. By December of 2021, Mr W had worked for the company for approximately 20 years and for over 10 years as a paper machine operator.

[5] The machine involved in this incident is a paper-making machine. The machine was shut down at the time of the incident. This means that the rollers were moving slower than if it had been fully operational. It was moving at crawl speed which means it was running at approximately 33 metres per minute rather than the operating speed of 350 to 700 metres per minute.

[6] On the day in question, Mr W had picked up a Scotch-Brite pad and degreaser to clean a roller in another part of the machine. As he was walking along, he noticed "pitch build-up on the felt edge of the suction pickup roll" and decided to clean this off. According to the summary, he placed the Scotch-Brite pad close to the edge of the felt of the suction pickup roll. The rollers caught the end of his glove and pulled his hand from his thumb to the third finger into the rollers.

[7] The area of the machine where Mr W was injured was not an area where workers would normally need to undertake work or interact with the machine. Oji Fibre Solutions had provided training to Mr W to clean the felt rollers when he first began working at the site. The usual process for cleaning the felt on the rollers was to

climb to the upper level of the machine, stop the machine and remove the guards before cleaning the felt, usually with a water blaster.

[8] As a result of the incident, Mr W suffered severe injuries. He spent ten days in hospital undergoing three surgeries under anaesthetic to treat his injuries. The pulp of his left thumb was removed. His index finger was crushed and lacerated, leading to the loss of the tip and nailbed. He also suffered lacerations to and an amputation of the tip of his middle finger. Alongside permanent flexion deformity to his middle finger there was impairment to his left hand which was expected to last approximately 20 months.

[9] While Mr W's injuries are severe, there was also a real risk of death. This is because there were no safety systems in place to shut down the machine if there was an obstruction and he may have been pulled further into the machine. The general risk of entrapment in nip points had been identified by the company as it did have guards on other parts of the machine and Mr W had warned a new colleague not to put their hands near the nip point. This part of the machine, however, was not an area the company had identified as needing guarding and there was no guarding in place.

[10] The company should not have just relied on the safe operating procedure or previous practice that no one would go near the machine. No physical protections were in place to stop Mr W or other workers attempting to reach in and clean the machine at that point. The company should have installed guards so no workers had access to the nip point. Guarding the nip point was proven to be reasonable given the guarding that had subsequently been implemented.

[11] The company kept incident and accident reports from other overseas facilities in the Oji Fibre Solutions group of companies. There were other resources available, including the WorkSafe risk assessment guidance together with the WorkSafe safe use of machinery best practice guidelines (May 2014).

[12] The summary concludes by observing that the company has co-operated with WorkSafe throughout the investigation. That the company has one previous health

and safety conviction from 2013 when the company operated under both a different name and different ownership.

Approach to sentencing

[13] The sentencing criteria under s 151(2) of the Act apply to this offending. The Court must apply the Sentencing Act 2002 and must have particular regard to the following:

(a) sections 7 to 10 of the Sentencing Act;

(b) the purpose of the Act;

(c) the risk of, and the potential for, illness, injury, or death that could have occurred;

(d) whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred;

(e) the safety record of the person including, without limitation, any warning, infringement notice, or improvement notice issued to the person or enforceable undertaking agreed to by the person to the extent that it shows whether any aggravating factor is present;

(f) the degree of departure from prevailing standards in a person's sector or industry as an aggravating factor; and

(g) the person's financial capacity or ability to pay any fine to the extent that it has the effect of increasing the amount of the fine.

[14] I have been assisted by detailed submissions filed by both WorkSafe and counsel for the company. Both refer me to *Stumpmaster v WorkSafe New Zealand* where the Court affirmed previous authority that sentencing in a health and safety context will generally require significant weight to be given to the purposes of denunciation, deterrence and accountability of harm done to the victim. The

sentencing criteria which I have identified are relevant to the current offending.[1] The parties agree that the approach identified in *Stumpmaster* is relevant in this case where the Court outlined a four-step approach to sentencing:

(a) assess the amount of reparation;

(b) fix the amount of the fine;

(c) consider orders under s 152 to s 158 of the Act; and

(d) make an overall assessment of proportionality and appropriateness of penalty.

Reparation

[15] I start first with the issue of reparation. Section 7(1)(d) of the Sentencing Act 2002 states that one of the purposes of sentencing is to provide reparation for harm done by the offending. A sentence of reparation may be imposed under s 32 of the Sentencing Act.

[16] On behalf of WorkSafe, Mr Everett submits that an order of emotional harm in the range of $30,000 may be justified. In support of that submission, he refers to three cases, all of which involved injuries and partial amputations to fingers. These authorities are *WorkSafe New Zealand v Alliance Group Ltd*, *WorkSafe New Zealand v Alto Packaging Ltd*, and *WorkSafe New Zealand v Donovan Group NZ Ltd*.[2] In each, awards slightly higher than $30,000 were ordered. I note that in *Alto Packaging Ltd*, additional authorities are referred to at para [22], all of which involved emotional harm orders of over $30,000.

[17] Mr Everett submits that, notwithstanding the absence of a victim impact statement, such an order can be made.

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

[2] *WorkSafe New Zealand v Alliance Group Ltd* [2015] NZDC 21538; *WorkSafe New Zealand v Alto Packaging Ltd* [2022] NZDC 6148; and *WorkSafe New Zealand v Donovan Group NZ Ltd* [2022] NZDC 23982.

[18] On behalf of the company, Ms Welsh submits that the amount proposed by WorkSafe is too high in the absence of evidence about the emotional harm suffered by Mr W. In support of that submission, she refers to *Maritime New Zealand v Oceans Fisheries Ltd* where the District Court considered the issue of reparation to victims who had not provided victim impact statements.[3] There the Court made reparation orders but adjusted them by some 50 per cent. In short, Ms Welsh submits that a similar approach should be adopted in this case and that an order should be made in the sum of $15,000.

Discussion

[19] Reparation is compensatory in nature and is designed to recompense an individual for loss. It is an intuitive exercise as intangible harm is incapable of a tariff case. Ordinarily, the Court relies on victim impact statements. That said, there are cases where the Court has made orders in relation to emotional harm in the absence of a victim impact statement. It should be noted that there is no requirement for a victim to file a victim impact statement for the purposes of sentencing.

[20] In *WorkSafe New Zealand v Essential Homes Limited*, the Court considered reparation for emotional harm in the absence of a victim impact statement.[4] There the Court made the observation that:

> [20] … in such cases, the description of what happened and any physical injuries that may have been sustained, will often make it easy to infer not only that emotional harm has been suffered, but as to what extent.

[21] Similar observations were made in *WorkSafe New Zealand Ltd v Tree & Forest Ltd* where the Court determined that in the absence of a victim impact statement, emotional harm could be inferred from the injuries sustained by the victim.[5] There the victim had been hit by a felled tree, lost consciousness for 15 to 20 minutes, was diagnosed with concussion, and was off work for two days. The Court observed "as a matter of logic, there would have been emotional harm suffered", and in the circumstances awarded $2,000.

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[3] *Ocean Fisheries Ltd v Maritime New Zealand* [2021] 3 NZLR 443.
[4] *WorkSafe New Zealand v Essential Homes Limited* [2020] NZDC 5873.
[5] *WorkSafe New Zealand Ltd v Tree & Forest Ltd* [2019] NZDC 25406.

[22] In *WorkSafe v Pallet Company*, one of the cases referred to on behalf of the company, albeit in a slightly different context, the Court also allowed emotional harm reparation in the absence of a victim impact statement.[6] There, the victim was operating a bandsaw and subsequently his thumb was partially amputated. Fortunately, it was able to be reattached. The Judge stated that she had no victim impact statement, but that she knew that the victim required surgery, spent time in hospital and had time off work. She observed that there is not insignificant emotional harm attached to such an event, 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.

[23] In this case the victim sustained serious injuries. These are clearly set out in the agreed summary of facts. In the restorative justice report, whilst the issue of emotional harm was unfortunately not canvassed at any significant detail, it is apparent that there was a significant toll on the victim. He refers to the recovery being long, that he went to a few different hand specialists and did some operations. He states: "The impact was more so the time it took, the delays, the appointment to appointment and the emotional impact that came with it".

[24] Having regard to the available authorities and taking into account the injuries sustained by the victim, I am of the view that a payment of emotional harm in the sum of $30,000 may be justified. There is no order for consequential loss as none is sought.

Fine

[25] A fine differs from reparation. It is essentially punitive in nature. The standard sentencing methodology applies to the determination of a fine. First, a starting point should be arrived at by reference to the culpability of the offending and, second, adjustment should be made for relevant aggravating and mitigating factors relevant to Oji Fibre Solutions (NZ) Limited. Both counsel agree that the following factors must be taken into account:

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

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[6] *WorkSafe v Pallet Company* [2019] NZDC 18776.

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

(c) the degree of departure from standards prevailing in the relevant industry;

(d) the obviousness of the hazard;

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

(f) the current state of knowledge of the risks and of the nature and severity of the harm which could follow; and

(g) the current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence.

[26] Both counsel agree that culpability fits within the medium band where a fine of between $250,000 and $600,000 is available.

[27] WorkSafe submit that Oji Fibre Solutions' culpability requires a starting point in the order of approximately $450,000. As to discounts for mitigating factors, they accept that there are discounts available in the order of 40 per cent. Finally, WorkSafe seeks a contribution towards legal costs together with the costs for an expert.

[28] On behalf of Oji Fibre Solutions (NZ) Limited, Ms Welsh submits that the culpability justifies a starting point of around $350,000. She submits that discounts of 60 per cent are available by way of mitigation. No issue is taken with the legal costs or the costs of an expert.

Operative acts or omissions

[29] These are clearly set out in the particulars of the charging document.

Assessment of the nature and seriousness of the risk of harm occurring as well as the realised risks

[30] On behalf of WorkSafe, Mr Everett submits that the risk involved with unguarded rollers is that a worker's hand or arm could be drawn into the unguarded nip point and crushed in the uncovered rollers of the machine, that Mr W suffered serious injuries which could have been significantly worse.

[31] On behalf of Oji Fibre Solutions Limited it is accepted that there was the potential for serious harm to be caused in the event workers were exposed to inadequately guarded parts of the machine, but it is submitted that the actual risk of harm posed was less due to the extensive guarding already in place on the machine at locations where operators were expected to interact with it, that there were established procedures in place for cleaning the felt on the machine, and the absence of any requirement for workers to interact with the machine in the area where the incident occurred. Emphasis is placed on the lack of operational need for Mr W to have accessed the part of the machine where he was injured.

[32] That said, the company accepts, by its guilty plea, that it should have done more to ensure the safety of the machine, including by continuing to review and challenge previous reviews and assessments of the identified hazards and risks present on the machine and the effectiveness of guarding already in place. That this has been a key lesson for the company arising out of the incident.

Degree of departure from prevailing industry standards

[33] Similar submissions are advanced in relation to this issue that the risks associated with unguarded machinery are well known, and it was submitted on behalf of WorkSafe that the company's conduct significantly departed from industry standards and guidelines for the safe use of machinery. Again, that they had taken some steps to guard other parts of the machine but failed to guard all parts to the known standard, allowing Mr W's hand to be caught.

[34] On behalf of the company, Ms Welsh acknowledges that the machine was not fully guarded. However, she submits that this was not a conscious omission on the part of the company. To the contrary, the company had engaged engineering experts to review and assess the potential guarding risks and implemented what it believed were all necessary guarding solutions to control those risks.

Obviousness of the hazard

[35] WorkSafe again make the point that the risk arising from exposure to moving parts of machinery is well known in the manufacturing industry and documented in guidance and standards. In short, that the hazard was obvious.

[36] On behalf of the company, it is submitted that the hazard was not obvious for the following reasons:

(a) The company had undertaken several guarding reviews and risk assessments on the machine to identify relevant risks. Extensive guarding had been installed to address those risks.

(b) There was a longstanding established safe work practice in place for cleaning the felts on the machine which did not require any interaction between operators and unguarded nip points. Workers, including Mr W, were trained in this procedure.

(c) There was no operational need to access the area of the machine where the incident occurred.

(d) There had been no previously reported instances of workers accessing the nip point involved in the incident or reports about safety concerns in this area. That said, the company accepts that in hindsight more could have been done to ensure the safety of the machine.

Availability, cost and effectiveness of the means necessary to avoid the hazard

[37] On behalf of WorkSafe, Mr Everett observes that the company has been able to comply with the required standards and guard other parts of the machine, that guarding was readily installed following the incident. That it is clear that the costs of installing this further guard were not cost prohibitive, especially bearing in mind the risks involved.

[38] The company accepts the submission made by WorkSafe, but again emphasises that at the time of the incident it was not apparent to the company that additional actions were necessary to address the risks.

[39] I should observe that to support the submissions advanced by the company, an affidavit has been filed by Mr Bendikson who is also present in Court this afternoon. He was the general manager of the Penrose mill up until 2022 and is currently engaged by Oji Fibre Solutions as a consultant on special projects. He was authorised to make the affidavit on the company's behalf.

Comparison with other cases

[40] I have been referred to several authorities. These were annexed to the submissions filed on behalf of WorkSafe and on behalf of the company. WorkSafe relies on the following three authorities: *WorkSafe New Zealand v Skyline Buildings Ltd*, *WorkSafe New Zealand v Alto Packaging Ltd* and, finally, *WorkSafe New Zealand & Kimberley Tool & Design NZ Ltd v John Brian Parker*.[7] In these cases, starting points of between $400,000 and $550,000 were adopted.

[41] On behalf of the company, Ms Welsh has addressed the authorities relied upon by WorkSafe and referred to additional authorities. In short, her submission is the three authorities relied upon by WorkSafe are of limited assistance, that the facts are either materially different or involved more significant failings. I do not propose to go into the facts of those three authorities. Whilst each case must be determined on

[7] *WorkSafe New Zealand v Skyline Buildings Ltd* [2020] NZDC 10681; *WorkSafe New Zealand v Alto Packaging Ltd* [2022] NZDC 6148; and *WorkSafe New Zealand & Kimberley Tool & Design NZ Ltd v John Brian Parker* [2019] NZDC 16489.

its own facts, I accept the submission that the authorities relied upon by WorkSafe would appear to involve a higher degree of culpability.

[42] Ms Welsh has referred to a number of additional authorities in support of the submission that a starting point in the order of $350,000 may be justified. The first of these is *WorkSafe New Zealand v Insulpro Manufacturing Ltd*.[8] The facts of that case appear to be broadly comparable to those before the Court and so I propose to refer to them briefly.

[43] On 28 June 2016, Mr Ngaluafe was working as a process operator. On that day, him and another employee attempted to remove residual white fibre from a machine. Initially, they were standing to the right-hand side of the outfeed conveyor belt of the cross lapper using a fibre gun to pick out the residual white fibre. That was the standard practice. Notwithstanding the use of the fibre gun, a clump of white fibres were continuing to drop from the cross lapper onto the black material exiting the machine.

[44] Mr Ngaluafe then went underneath the outfeed conveyor belt and into the body of the machine in an attempt to clear the clump of white fibres from the cross lapper. The cross lapper was not shut down prior to him doing so. He initially tried to use the fibre gun to clear the white fibres from underneath the machine. When that did not work, he used his hand to pull the white fibre out while the machine was paused between direction changes. He did not get his hand out of the belt in time and as a result, his arm and wrist were broken and required surgery.

[45] In that case WorkSafe sought a starting point of $500,000 and counsel on behalf of Insulpro submitted that the appropriate starting point was $300,000.

[46] The Court referred to the cases which were relied upon by both parties and considered that the cases referred to by WorkSafe were in one way or another more serious. The Court also took the view that the hazard was not obvious in light of the information that was before the Court which involved a number of reviews which had

[8] *WorkSafe New Zealand v Insulpro Manufacturing Ltd* [2019] NZDC 4843.

been carried out by experienced people who had not identified the particular hazard which had led to the injury occurring.

[47] The Court considered the facts to be similar to *WorkSafe New Zealand v Nutrimetics International (New Zealand) Ltd* where the Court found that "there was a safe operating procedure in place for the cleaning of the machine, risk assessments had been conducted and this was not a company taking an irresponsible approach in its workplace".[9] The Court considered that adequately described the situation before it and adopted a starting point as a fine in the sum of $350,000. Whilst Mr Everett sought to draw some distinctions between this case and the facts in *Insulpro* in that the victim there had climbed into the machine, in my view the facts remain broadly similar.

[48] Ms Welsh has also referred to three additional authorities, *WorkSafe v Pallet Company*, *WorkSafe New Zealand v Fletcher Steel Ltd*, and *WorkSafe New Zealand v NZCC Ltd*.[10] In these cases, starting points in the order of $350,000 were similarly identified. Again, I do not propose to go into the detail of each of those cases.

[49] In this case I accept that ordinarily the hazard of unguarded nip points is obvious. The company agree that in this case, with the benefit of hindsight more could have been done to address this issue. That said, a summary of what occurred can be drawn from the affidavit filed by Mr Bendikson. At paragraph [33] he observed as follows:

> When the incident occurred Oji FS was surprised and shocked. Even now we find it difficult to understand how or why the incident occurred and how Mr W was injured where he was. This is because there was no operational need for Mr W to interact with the machine where he did and he hasn't been able to explain why he deviated from the usual way cleaning happened in that area. There had been no reports or observations about workers accessing this area of the machine in an unsafe way before the incident. The summary of facts records that this was Mr W's understanding too and he never attempted to do what he did on the day of the incident before. The incident has been a big wakeup call for Oji FS and one which the business and I have taken very seriously.

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[9] *WorkSafe New Zealand v Nutrimetics International (New Zealand) Ltd* [2018] NZDC 4972.
[10] *Worksafe v The Pallet Company* [2019] NZDC 18776 *WorkSafe New Zealand v Fletcher Steel Ltd*; and *WorkSafe New Zealand v NZCC Ltd* [2019] NZDC 16662.

[50] He goes on to state:

> We now know that there was more we could have done and needed to do to ensure the safety of the machine.

[51] In all of the circumstances, the offending in this case falls in the medium band and in my view a starting point of $350,000 may be justified.

Aggravating and mitigating factors

[52] There are no aggravating factors relied upon in this case and so I turn to the issue of mitigating factors. The first of these is the plea of guilty. The plea was entered at an early stage, and I agree with both counsel that a discount of 25 per cent is available.

[53] In written submissions, Mr Everett on behalf of WorkSafe submitted that a further 15 per cent may be available to the company given that it had shown and remorse and support for the victim, co-operated with the prosecutor throughout the investigation and taken steps to ensure that a similar incident does not occur again.

[54] This afternoon, the issue of the 15 per cent was explored in further detail. Mr Everett submits that a discount in the order of 5 per cent may be available for remorse, 5 per cent for remedial steps taken and 5 per cent for support to Mr W. As to co-operation, he submitted that the company is under a statutory requirement to co-operate so there should be no additional recognition of that factor.

[55] On behalf of the company, Ms Welsh agreed that a discount of 5 per cent is available for remorse. As to co-operation, she submitted that 10 per cent was justified. She agreed that a further 5 per cent for remedial steps was justified and 5 per cent for a willingness to make amends and to pay reparation. In addition, she submitted that 10 per cent is available for previous good record.

[56] WorkSafe and Ms Welsh for the company are largely in agreement as to the appropriate discounts. Where there are some differences is as regards co-operation and the question of good record or good character. In my view a discount is available for co-operation, albeit in the range of 5 per cent. That would also appear to reflect

the discounts which were applied in the cases relied upon by both of the parties, albeit in respect of different issues. A company should be encouraged to co-operate, and a distinction should be drawn between one that does co-operate and one that decides not to.

[57] I agree that in the circumstances the company should also be acknowledged for its good record. Whilst there is a reference to a conviction from 2013, the summary of facts made it clear that at that time the company operated both under a different name and different ownership. In my view therefore, 5 per cent is available for that factor. That would leave an overall discount of 50 per cent for mitigating factors which falls between the discount identified by WorkSafe and by the company. Taking into account the reduction of 50 per cent for mitigating factors, that leaves a fine of $175,000.

Costs

[58] On the application of WorkSafe, the Court may order the company to pay WorkSafe the sum that it thinks just and reasonable towards the costs of the prosecution, including the costs of experts.

[59] There is no dispute that orders may be justified in the present case and the company accepts that costs should be awarded in relation to legal costs and expert costs.

[60] Section 151 of the Act requires me to take into account the financial position of the company and whether they are able to pay the fine imposed. There is no evidence to suggest that they would not be able to pay the fine and the costs. Standing back and having regard to the total monetary cost to the company, I do not consider it to be an unjust outcome or an inappropriate outcome in the circumstances.

Outcome

[61] By way of a summary:

(a) Oji Fibre Solutions (NZ) Limited is fined $175,000.

(b) I make an order for reparation in the sum of $30,000.

(c) Prosecution costs of $1,168.70 and a further $5,963 towards the expert report.

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Judge KH Maxwell
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 27/09/2023