EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT MANUKAU

I TE KŌTI-Ā-ROHE
KI MANUKAU

CRI-2017-092-006209
[2018] NZDC 20761

WORKSAFE NEW ZEALAND LIMITED
Prosecutor

v

KUEHNE & NAGEL LIMITED
Defendant

Hearing: 1 October 2018

Appearances: A Longdill for the Prosecutor
B Alcorn for the Defendant

Judgment: 1 October 2018

NOTES OF JUDGE R J McILRAITH ON SENTENCING

---

[1] Kuehne & Nagel appears for sentencing having pled guilty to one charge of contravening s 36(1)(b) and s 48 of the Health and Safety at Work Act. That charge carries a maximum penalty of a fine not exceeding $1,500,000.

[2] The charge is that Kuehne & Nagel, being a PCBU, failed to ensure so far as was reasonably practicable, the health and safety of a worker, [the victim], whose activities in carrying out work were influenced or directed by Kuehne & Nagel while he was carrying work collecting freight from the Kuehne & Nagel site and that that failure exposed [the victim] to a risk of serious injury.

[3] The particulars alleged were that Kuehne & Nagel failed to:

(i) Develop, implement, and communicate to forklift operators and truck drivers and monitor compliance with a safe system of work for loading trucks at its site, and

(ii) Enforce compliance with the requirement that truck drivers remain in driver safe zones, whether permanent or temporary, while their trucks were being loaded until loading was completed.

Background

[4] In terms of the background facts I adopt for this purpose the summary provided by Worksafe in its submissions. I do not understand Kuehne & Nagel to take any disagreement.

[5] Kuehne & Nagel operates a distribution centre and transitional centre for sea and import freight in Mangere. It is a busy site with more than 100 trucks coming to deliver or collect goods each day. Those include the defendant's own contractor truck drivers from Tom Ryan Cartage Limited and drivers from other trucking companies that attended on an ad hoc basis, including Storage and Distribution Specialists Limited, which attended at the site up to three times per week.

[6] Storage and Distribution Specialists Limited employed [the victim] who had been attending at the site since 2013.

[7] Kuehne & Nagel had only inducted its own contractor truck drivers on to the site, not truck drivers who attended on an ad hoc basis.

[8] On Wednesday 1 June 2016 [the victim] arrived at the site driving his curtain-sider truck to collect goods. He interacted with the defendant's [fork hoist operator] regarding loading of the freight into his vehicle. Whilst loading was taking place, [the victim] adopted his usual practice, and the practice of a number of other truck drivers at the site, of remaining next to his truck to check the loading. [The victim] noticed

an empty space in front of his truck where another waiting truck could be loaded so walked to the rear of his truck to signal the driver waiting in line to come forward.

[9] As he walked back to the front of his truck [the victim] was struck by the reversing fork hoist driven by [the fork hoist driver]. The fork hoist pinned [the victim]'s leg and foot to the ground. He was freed by other workers and taken to hospital by ambulance where he remained for six days. He sustained seven fractures to his left foot and required just under three months off work.

[10] Worksafe was notified of the incident on the day and began an investigation. That investigation identified the following:

(a) Kuehne & Nagel had inadequate procedures in place to address the identified risk of drivers walking around the yard while loading and unloading trucks. While the defendant had created a permanent safety exclusion zone in December 2015, with associated signage, it did not enforce the use of that zone and some drivers including [the victim] were unaware that the zone existed.

(b) Kuehne & Nagel allowed truck drivers to direct loading if required next to their truck whilst loading was taking place. However, it had no specific curtain-side truck safe operating procedures to clearly set out the steps required from both fork hoist operators and truck drivers.

(c) In the absence of safe operating procedures for such loading, unsafe practices developed including truck drivers following the fork hoist operators around during loading, and truck drivers standing in other locations without a clearly understood safe system of work to manage the interactions between the truck driver and the fork hoist operator.

Approach to sentencing

[11] I have received extensive written submissions from both Worksafe and Kuehne & Nagel. There is common ground with respect to the approach to sentencing. The full Court of the High Court has recently issued a guideline judgment for such sentencing, *Stumpmaster v Worksafe New Zealand.*[1] The Court confirmed that there are four steps which I ought to follow:

> (a) Assessing the amount of reparation to be paid to [the victim].
>
> (b) Fixing the amount of fine by reference first to the guideline bands and then having regard to aggravating and mitigating factors.
>
> (c) Determining whether further orders are required under ss 152 through 158 of the Act.
>
> (d) Making an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.

Reparation

[12] The first step is the assessment of the appropriate quantum of reparation. I have received a victim impact statement from [the victim]. I do not propose to go into great detail regarding what he has suffered. It is clear that the suffering has been significant. He suffered seven fractures to his left foot, over 40 stitches to either side of his shin, nine stitches to the bottom of his foot and large contusions to the front of his shin. As I noted earlier he was in hospital for some six days. When released home he has had to be on ongoing medication for a considerable period of time. While he was able to return to work some three months after the incident he still suffers ongoing effects and those effects have predictably affected both his work and personal life.

---

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

[13] In terms of the consequential loss suffered by [the victim], while he did initially suffer some financial loss, the defendant responsibly reimbursed him for that loss, including the shortfall in ACC payments during the period that he was unable to work.

[14] [The victim]'s employer was also prosecuted by Worksafe in relation to this accident and made an appropriate payment to [the victim] which was accepted and paid and needs to be taken into account in this process.

[15] Worksafe submits that an appropriate amount to be paid in reparation is in the vicinity of $18,000 to $20,000. For Kuehne & Nagel it is submitted that an appropriate amount is $18,000. In my view, the appropriate amount is $20,000.

Fine

[16] The second step is assessing the quantum of the fine. The High Court has set four guideline bands in *Stumpmaster*. Low culpability with a starting point of up to $250,000; medium culpability with a starting point of $250,000 to $600,000; high culpability with a starting point of $600,000 to $1,000,000; and very high culpability with a starting point of $1,000,000 plus.

[17] In *Stumpmaster* the Court referred to the well known list of relevant factors that had been discerned from the guideline judgment of *Department of Labour v Hanham & Philp Contractors Ltd* under earlier legislation.[2] Both counsel have taken me through those factors and their submissions in relation to them. In this decision I do not attempt to summarise every point that has been made in the written submissions but will make what I consider to be the most important points.

[18] The first factor is the identification of the operative acts or omissions at issue and the practicable steps that it was reasonable for Kuehne & Nagel to have taken. Worksafe submitted that the following reasonably practicable actions were not taken. Firstly the development, implementation, communication to fork hoist operators and truck drivers and monitoring compliance with a safe system of work for loading trucks at its site. Second, enforcing compliance with the requirement that truck drivers

[2] *Department of Labour v Hanham & Philp Contractors Ltd* - (2008) 6 NZELR 79

remain in truck safe zones whether permanent or temporary while their trucks were being loaded until loading was complete.

[19] Kuehne & Nagel accepts that those practicable steps were available to be taken. However it makes submissions appropriately that it had indeed taken a significant number of steps in relation to assessing this hazard and taking steps to prevent injury. As discussed with Mr Alcorn, however, the reality appears to have been, and this is accepted by Kuehne & Nagel, that what occurred here was that ad hoc drivers, in other words those not employed by Tom Ryan Contractors, somehow slipped through the process and were not protected.

[20] The second factor is the obviousness of the hazard, the availability, cost and effectiveness of the means necessary to avoid it, the current state of knowledge of the risk and the nature and severity of the harm which could result, and the current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence. There is no doubt here that the risks and hazards associated with fork hoist and pedestrian interaction are obvious and well known.

[21] The third factor is the risk of and potential of illness, injury or death that could have occurred. Once again there is no dispute taken here that the risk and potential for serious injury to have occurred was present.

[22] Worksafe takes a more nuanced view in relation to this factor than perhaps Kuehne & Nagel making the point that in this case the risk was widespread. There were more than 100 trucks and therefore truck drivers coming on to Kuehne & Nagel's site each day to deliver or collect goods. Unsafe practices had developed at the site including truck drivers following fork hoist operators around during loading. There was a very real potential for a fatal incident.

[23] The next factor is whether death, serious injury or serious illness occurred or could reasonably have been expected to have occurred. There is no dispute that what occurred here was serious injury.

[24] The next factor is the degree of departure from prevailing standards in industry. Worksafe has taken me through the departure from what are prevailing standards.

[25] The submissions by the parties placed the starting point in the medium band but with Worksafe placing it (to use Ms Longdill's words) towards the upper end of that band at $500,000 and Mr Alcorn placing the start point at $390,000 in the band. Counsel have referred me to a number of cases with which I am familiar and I have reread those this morning.

[26] It is never a precise science to fit culpability in one case in a matrix of precedent decisions. However, the most useful case in my view when I read through them was the *Worksafe New Zealand v Freight Haulage Limited* case.[3] There are distinguishing features, in my view, from the *Worksafe New Zealand v Nutrimetrics International (New Zealand) Ltd* case which was cited by Mr Alcorn and those have been identified by Ms Longdill.[4]

[27] In my view, the appropriate start point in this case is a fine of $420,000. That places the offending in the middle of the medium band.

[28] The next point that I need to consider is whether there are aggravating and mitigating factors. Firstly aggravating factors, I actually take a different view than both counsel. Kuehne & Nagel have a prior conviction in relation to a health and safety offence. That was an offence in March 2007. The limited information available in relation to that charge suggests that it involved a situation of an employee driving a reach truck which hit a concrete wall crushing her foot. The employee had not been trained and was not wearing safety footwear despite being told to.

[29] While there is at first blush some similarity in those facts, there is really significant difference in terms of what occurred on this occasion and those points have been made by Mr Alcorn. I am also minded of the fact that this offending was some 11 years ago in circumstances of an extremely busy day-to-day operation. In my view there is no need to uplift from the start point of $420,000 for that prior offence. I am

---

[3] *Worksafe New Zealand v Freight Haulage Limited* [2016] NZDC 6600
[4] *Worksafe New Zealand v Nutrimetrics International (New Zealand) Ltd* [2018] NZDC 4972.

aware of the comments in *Stumpmaster* but I see this in a different light with one prior conviction and such a significant period of time between that and the current offending.

[30] Turning then to mitigating factors. Worksafe in reliance on *Stumpmaster* submit that mitigation in an amount of 15 percent should be provided for. That is on the basis of a discount of five percent for reparation and remorse, five percent for co-operation with the investigation and five percent for remedial steps taken.

[31] Ms Longdill has quite properly taken me through the guidance from *Stumpmaster* in terms of not being overly generous with discounts and to perhaps put it more accurately, being more focused on exactly what discounts are for, what the proportion of those discounts is and how they affect the overall outcome.

[32] In Mr Alcorn's submission 25 percent discount is available. He does, of course, have to accept that there can be no discount for prior good record given the earlier conviction that I mentioned. He submits, however, that a 25 percent discount taking into account reparation, remorse, co-operation and remedial steps is appropriate.

[33] Turning to each of those matters I note that with respect to reparation this is a situation where Kuehne & Nagel quite responsibly, in my view, has fronted up early on in the proceedings and sought to address [the victim]'s financial circumstances. It is often the case that employers for a range of reasons either are not able to do so or choose not to do so. It is to Kuehne & Nagel's credit that it has done so on this occasion. In my view, it is due a discount of five percent for the steps it has taken in reparation both those practical steps and, of course, its willingness to pay the reparation payment that the Court orders.

[34] In terms of remorse, I have no doubt that the remorse that has been referred to by Mr Alcorn is genuine. I note the presence of senior management of the company in Court today. Kuehne & Nagel was prepared to attend a restorative justice conference. That conference did not take place but representatives of Kuehne & Nagel have met with [the victim] in early October 2016 so as to express its remorse and

discuss his progress. It is appropriate, in my view, for there to be a distinct five percent discount for remorse.

[35] Turning to co-operation, there is no dispute that Kuehne & Nagel has quite properly co-operated with Worksafe's investigation. That has included assisting Worksafe in accessing and inspecting the site, interviewing employees, providing information and documentation and voluntarily attending interviews along with providing additional information. A distinct discount of five percent is appropriate.

[36] Turning to remedial steps, Mr Alcorn accepts that while some of the steps taken by Kuehne & Nagel since the accident can be considered corrective, it has nevertheless taken a number of steps in his submission that demonstrate a genuine taking of remedial steps. As he noted, Kuehne & Nagel's site is extremely busy and those truck drivers attending the site usually arrive without prior warning. Notwithstanding the ad hoc arrival of various truck drivers, since the accident Kuehne & Nagel has created a health and safety induction system and register which requires regular drivers to review the site specific induction material, undertake a test based on the information provided in the induction and complete regular update tests. Any unregistered drivers are identified, inducted and added to the same register when they attend the site.

[37] In addition, Kuehne & Nagel has implemented a computerised safe monitoring system and security programme for its fork hoists. This system sets out a safe operating procedure for each fork hoist before it can be used. It requires the operators to identify and work through the elements of the fork hoist safe operating procedures, triggering them to be doubly conscious of the safety procedures and operating guidelines before they begin operating fork hoists. In my view, a discrete discount of five percent is appropriate for remedial steps.

[38] The total discount for mitigating steps is accordingly 20 percent.

[39] From a start point of $420,000 deducting 20 percent for those mitigating factors takes me to a figure of $336,000. From that figure Kuehne & Nagel is, of course, entitled to a discount of 25 percent for its guilty plea. The gap in time between the laying of this charge and the time for sentence has been explained appropriately,

and I have no concerns that discount is appropriate. Deducting 25 percent takes me to an end fine of $252,000.

Ancillary orders

[40] Turning to the third step of ancillary orders. There is no dispute here that an order in favour of Worksafe in relation to costs it incurred of $4530 is appropriate.

Proportionality

[41] Turning to the final step, the proportionality assessment. I am satisfied that the final outcome of a reparation order in the amount of $20,000, a fine in the amount of $252,000 and a payment of $4530 costs to Worksafe is a proportionate response to the offending involved in this case and no further adjustment is required.

R J McIlraith
District Court Judge