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

**IN THE DISTRICT COURT**
**AT INVERCARGILL**

**CRI-2017-025-000802**
**[2018] NZDC 4498**

**WORKSAFE NEW ZEALAND**
Prosecutor

v

**MARSHALL INDUSTRIES LIMITED**
Defendant

Hearing: 27 February 2018

Appearances: S Backhouse for the Prosecutor
J Lil for the Defendant

Judgment: 27 February 2018

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**NOTES OF JUDGE M J CALLAGHAN ON SENTENCING**

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## Charge

[1] Marshall Industries Limited pleaded guilty to a charge that on or about 16 May 2016 at Invercargill, being a PCBU, failed to ensure so far as reasonably practicable the health and safety of workers who worked for the PCBU including [the victim] while the workers were at work in the business or undertaking, namely operating a punch or forming pressure, and that failure exposed the workers to a risk of death or serious injuries arising from exposure to a crushing hazard.

[2] The particulars of that charge were that it was reasonably practicable for Marshall Industries Limited to have an effective system in place to manage and monitor risks presented by the press, isolate the moving parts of the press by adequately guarding the press, adequately maintaining the press, and having an effective process for clearing jams on the press.

[3] This charge is laid under ss 36(1)(a), 48(1) and (2)(c) Health and Safety at Work Act 2015. The maximum penalty prescribed is a fine not exceeding $1.5 million.

[4] [The victim], the victim, is present in Court today and I acknowledge his presence, along with his partner.

[5] Mr Marshall from Marshall Industries is also present at Court today.

[6] I say at the outset that a restorative justice meeting has taken place, that the company have apologised to [the victim], and that they have made some contributions to his financial situation. I will come back to that shortly.

**Summary of facts**

[7] The defendant business is a manufacturer of roofing materials and sheet metal, and in the installation of roofing. It operates a manufacturing plant.

[8] [The victim] was a worker for the defendant on a casual employee basis.

[9] The machine being operated was used to manufacture roofing iron tray clips. They operated a Hordern Mason and Edwards punch forming press. The press is operated by pressing a lever which engages the clutching course of the press and each stroke of the press operates in two stages. Firstly, a metal strip is cut and then it is flicked into another part of the die to be formed into a clip shape. The trap clip is ejected by pressing a button which is next to the lever on the operator controls. The tray clip then slides down a shoot onto the floor. There is a gap between the interlock guard and the shoot, which is approximately 7.5 centimetres wide. The distance between the guard and the cutting face is 23 centimetres. The press is used approximately one day every six to eight weeks.

[10] On 16 May 2016 [the victim] was instructed to make clips. After he had made approximately 70 tray clips the metal material being punched jammed in the die. It was unable to be moved from the first part to the second part of the die. [The victim] attempted to free the jammed tray clip using some welding wire. When this did not

work, he reached up through the outlet shoot with his right-hand. While doing this, his stomach inadvertently made contact with the controls and the press activated. The ramp came down and amputated the tips of his right forefinger, index finger, ring finger, and thumb. The amputation of the fingertips is serious injury. An automatic stop did not activate, which would have happened if the guard had opened.

[11] The defendant's conduct departed from industry standards and guidelines for safe use of machinery, and there is in existence long-standing guidance available for the safe use of punch and forming presses. These guidelines include ensuring the power supply to the machine is completely off before any maintenance, cleaning or repairs are carried out.

[12] The defendant had not identified the risk presented by the hazard of accessible moving parts on the press. The press was not on a defendant's hazard register; the defendant had carried out monthly machinery checks but the press was not included as it was used infrequently. The press had an interlock guard which cut off the power supply to the electric motor, however the interlock guard did not stop the flywheel moving. Due to the momentum of the moving flywheel the ram could be operated by engaging the clutch. As a result, all moving parts of the press did not instantly stop when the guard was opened.

[13] The interlock guard was also insufficient as workers were able to fit their hands through the opening of the guard near the shoot and access moving parts. This exposed operators to the risk of crushing between the tool and the die of the press. Management were usually informed of the jamming issues verbally by workers, but there was no record of the press being checked and maintained.

[14] The defendant had a duty to ensure the health and safety of workers, and did not have an effective system in place to manage and monitor the risks presented by the press, and had not isolated the moving of the press adequately by the guarding system. They had not adequately maintained the press and did not have an effective process for clearing jams on the press. Since the incident, the defendant has taken steps to ensure that no repeat occurs and has issued an operator guide.

**Previous history**

[15] The defendant cooperated with the investigation and has no previous convictions.

**Restorative justice meeting**

[16] The restorative justice process which occurred sets out that the defendant company is a family operated business and two of the principals attended. [Ms B] attended with [the victim].

[17] The defendant company took responsibility at that meeting for the accident, and have done so again by their guilty plea. They apologised to [the victim] and offered worked at the company if there was anything suitable, and they accepted that the injuries had been a significant impact upon [the victim]'s life as a result of the accident.

**Victim impact statement**

[18] [The victim] today read his victim impact statement in Court. It was clear from that statement that he has been severely affected by the accident.

[19] In summary, the accident has affected him because he is right-hand and the right hand is the one that has been injured. This has affected nearly everything he does. Prior to the accident he was what could be classed as 'a handyman' but now, because of the pinch grip being missing from his right-hand, he is not able to even do normal household maintenance, nor normal personal matters like doing buttons up.

[20] [The victim] used to assist others around the area where he lives with horses and shepherding, but is unable to carry out those tasks because he cannot do the mundane things that one would expect when dealing in particular with horses. He has also not been able to carry out normal farm repairs which he was doing. He has an interest in horses and is not able to continue with that interest because he cannot do basic matters with the horses, and his training of race horses has been curtailed.

[21] In the written material it is said that he has lost 40 percent of the strength in his right-hand, and his right-hand - he said today - is now very sensitive to the cold. It becomes stiff and difficult to use when it gets cold.

[22] He has also talked about the fact that he had to make a choice in May of 2017 as to whether or not he would continue to receive the ACC payment or he would receive his pension. He opted to continue receiving the ACC payment and instructed the ACC to inform that his pension should be stopped. It was not, and there was an overpayment of $3854.91 which he is now liable for. When his ACC expires in May 2018 that money will be reclaimed by the superannuation, so it may be some time before he gets payment reinstated.

[23] He has also not been able to carry out his ongoing work as a shepherd which he was doing for a freezing works, and also working for Marshall's in the off season which is what he was doing when this injury occurred.

[24] He has also said that the injury has, in effect, changed his life. He has been stressed by various factors, he suffers from sleepless nights, and he suffered on occasions from depression. He has felt let down by the lack of support that he sees from Marshall's, but nonetheless acknowledges that they did attend the restorative justice conference.

[25] He has also had to give up some of his favourite pastimes, including indoor bowls which he was very good at. He is still struggling to come to terms with that. He summed it up by saying that he "felt frustrated, helpless and fearful of the future".

**Approach to sentencing**

[26] My approach to sentencing is that I have read the submissions filed by both the prosecution and the defence.

i. The first task is that I have to assess the reparation that should be awarded to [the victim].

ii. After that assessment is carried out, I have to then fix the level of fine.

iii. Next I must consider any ancillary orders that may be appropriate.

iv. Finally, I am required to do an overall assessment to determine whether or not the reparation and the fine are proportionate and appropriate in all the circumstances.

**Informant's submissions**

[27] In terms of the prosecution submissions, they say that the Court has to have specific regard to s 7 and 10 of the Sentencing Act 2002, as directed by s 151 Health and Safety at Work Act 2015. I have to consider the purpose of the Act; the risk of and the potential for illness, injury or death that could have occurred, and whether death or a serious injury or a serious illness occurred and could reasonably have been expected to have occurred; and the safety record of the person to the extent that it is an aggravating factor; the degree of departure from prevailing standards in the person's sector or industry and whether or not that is an aggravating factor; and 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.

[28] The prosecution submit to me that there is a four step process under the Act: I assess the reparation, I fix the amount of fine, I make any other orders, and then do the overall assessment.

[29] As to the assessment of the culpability of the defendant in fixing the fine, the prosecution submits that a low culpability fine would be up to $400,000; medium culpability between $400,000 and $800,000; high culpability between $800,000 and $1.2 million; and the extremely high culpability would be the fine up to the maximum. They say that those bands are appropriate in the context of the Health and Safety at Work Act 2015, being relatively new legislation. They also point out that I can make other orders under the Act such as the costs for the prosecution, or adverse publicity, or other matters.

**Defence submissions**

[30] The defence in their submissions point out that because the offences carry a maximum of $1.5 million as a maximum penalty, the Courts have to be careful in not just carrying out a purely mathematical assessment by applying bands that have been prescribed in the *Department of Labour v Hanham & Philp Contractors Ltd*[1] case and, in effect, doubling them, because that is what Parliament has done to the fines.

[31] Rather, the defence says that I should look at and assess the culpability of the offence and the criminality involved, and then fix a starting point for the fine. As to the culpability, the defence say this is a case of serious injury, not death, and therefore I must use that when I am making the assessment that I am required to make.

[32] There have also been referenced to me of a number of cases but importantly the decision of *Worksafe New Zealand v Rangiora Carpets*[2] in which Judge Gilbert used a six band approach. Those six bands he set out in that decision being a series of bands that were - firstly for low between $150,000 and $350,000; then medium between $350,000 and $600,000; higher medium between $600,000 and $850,000; and the high to $850,000 to $1.1 million; and extremely high culpability anything over $1.1 million and above.

[33] The role of the District Court, however, is not to set guideline bands. That is for the High Court to do. Eventually a higher Court will reassess the *Hanham & Philp* decision and make specific new bands. My task is to apply the law as it stands under the *Hanham & Philip* approach, but I can usefully use the bands that have been suggested by Judge Gilbert because they assist when one is fixing the culpability, and then assessing whether or not something fits into a particular band at the bottom, medium or upper level.

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[1] *Department of Labour v Hanham & Philp Contractors Ltd* (2008) 6 NZELR 79.
[2] *Worksafe New Zealand v Rangiora Carpets* [2017] NZDC 22587.

*i Assessment as to reparation and consequential loss*

[34] I now turn to the reparation question. The prosecution submitted that reparation of $30,000 for emotional harm, and a total amount of approximately $31,000 for consequential loss under s 32 Sentencing Act, would be appropriate.

[35] The defence in their written submissions submitted that a $20,000 amount would be appropriate but both the prosecution and defence have acknowledged that the defendant company has paid $25,000 in two separate amounts by way of a contribution towards reparation.

[36] Consequential loss falls into two separate amounts. The first is $18,677.70 which is the amount of the ACC payment from the time that [the victim] began receiving ACC up until the time that it will cease, namely 16 May 2018. There is also a claim for the loss of his pension because he had to make a choice in May of 2017 to accept ACC and not the pension. The superannuation amount for a 12 month period would be $12,895.20. The prosecution seek that I make both those awards, as well as a reparation award.

[37] The defence in their submission say that I should not be making these consequential awards because of the employment factor, that it was not a full-time job and that the defendant, given his age, was only working on a limited basis. They submit that Marshall's should not be liable for the loss of pension, and the fact that there was a lost pension is not a factor that should be taken into account as a consequential loss. As to the shortfall payments for the period suggested, the defence did argue that it was unreasonable to expect Marshall's to cover that shortfall because of the short time of his employment.

[38] In my assessment the loss of the tips of three fingers and thumb resulting in a 40 percent loss of the use of the right arm is, as I say, serious injury. It is compounded by the fact that [the victim] has lost the pinch grip of his right-hand, he being a right-handed person. The emotional effects of the loss as outlined earlier have meant a complete change in lifestyle for [the victim].

[39] Carrying out the assessment is always a difficult matter for the Court, but because of the physical and emotional distress caused by this accident I believe that the reparation figure should be fixed at $35,000. It is acknowledged that Marshall's have paid two lots - one of $15,000 and the other of $10,000 - and I must give them a discount because of those two amounts, so the amount of reparation for emotional harm as a result of those payments is fixed at $10,000.

[40] As to the consequential loss suffered as a result of the loss of pension because of the option to take the ACC, I am of the view that it would be contrary to public policy that I should be called upon to reimburse [the victim] for pension for a 12 month period, when Parliament has seen fit to make it for someone in his circumstances to have to opt to either accept his ACC payment or his superannuation. It seems contrary to public policy that the Court should then be asked to intervene and circumvent what Parliament has decreed. I therefore decline to make any award in respect of the superannuation amount of $12,895.20.

[41] As to the top up for the ACC, however, I believe that it is appropriate that the company should be paying the full amount of the wage. While I accept that he was not employed on a full-time basis, nonetheless he can expect to receive by law the Accident Compensation payments for a period for two years and should not be put in a position where he has to suffer. I therefore consider it appropriate that the company pay an additional amount by consequential loss of $18,677.70.

*ii Assessment as to fine*

[42] The next thing I have to do is assess the fine. The prosecution submitted that the culpability of the defendant is moderate and should sit at the top end of the proposed medium culpability band that they propose. The defence says that the culpability would be on the cusp of between low and medium band. The prosecution say that it is reasonably practical for the defendant to have an effective system in place to manage and monitor the risk presented by the press, the risk presented by the hazard of accessible moving parts had not been identified, the press was regarded as low priority in its audit process, and the moving parts had not been adequately isolated by the guards attached to the press. They also maintain that the press had not been

properly maintained and that they did not have an effective process for clearing jams in the press.

[43] The defence says that there was an internal audit in respect of the machine guard carried out in February 2015, and the priority to reviewing the machine because of its low usage and simple operation, and the established procedure in place for clearing the jams, the starting point should be right on the cusp of the low to medium band.

[44] The fact that the press did not completely cease to function when a jam occurred, resulting in the injuries to [the victim], shows that the process that the Marshall's had for protecting employees was not sufficient. Since the accident they have designed a safeguard which now ensures that the machine completely switches off if a jam occurs. The fact that the machine was working in a limited capacity at the plant is not an excuse. The fact that the machine jammed on a regular basis is also something which should have alerted the company to the fact that serious injury could have resulted by the operator of the machine in the event of a jam. There was also the falling below of the standard of requirements in the industry to ensure that no injury occurred in the operation of this machine.

[45] Referring to the guidelines that have been suggested, in my view this accident can be classed as being in the medium range because of factors of: actual injury caused; simple but not onerous methods of remedying the 'default' subsequently carried out by the defendant; and the decision by the company not to carry out an audit on that machine as a low priority simply because the machine was not used regularly. While classified as being in the medium range, it is near the bottom end of that range.

[46] Accordingly, I fix the starting point for the fine at $400,000. In fixing that starting point I have taken into account factors which the prosecution submitted in their written material as being aggravating. They are not aggravating, in my view; those factors go to the culpability in assessing the quantum for the starting point. There are no other aggravating features for the company.

[47] As to the mitigating factors, there are –

i. The amount of reparation being paid which justifies a reduction; for the reparation, a reasonable discount is available.
ii. The fact that Marshall Industries has no previous convictions;
iii. That they have a previous favourable safety record;
iv. They co-operated with the investigation; and
v. They have taken remedial action.

[48] That justifies, in my view, a total reduction of 30 percent. That then leaves a fine of $280,000.

[49] They are then entitled to a full discount for the guilty plea entered at the first reasonable opportunity, which would then leave the end fine at $210,000.

[50] The Court then has to consider the financial capacity of the defendant in relation to the fine. I have had material placed before me and the evidence is that the company may struggle to pay a fine of $210,000 immediately. It proposed in an affidavit to pay by way of regular reductions over a period of time. The prosecution then took steps to file information through an affidavit where they said that this material was not sufficient to warrant a reduction. As a result the two experts got together and have come up with a joint memorandum where they say that the fine somewhere between $100,000 and $250,000 could be managed by the company.

[51] I have read all of the material very carefully. I do not intend to go through the material in open Court, nor publish it in this judgment. However, because of the sensitive commercial reasons which are contained in the material, I am therefore prepared to reduce the fine of $210,000 down to $180,000.

*iii Other orders*

[52] I then have to consider whether any other orders should be made.

[53] The prosecution seek costs of $3206.31, being 50 percent of their legal costs.

[54] The defence say that the costs should only be vicinity of about $1000.

[55] The WorkSafe organisation is a Government funded organisation which is paid by the taxpayer. While the legislation allows me to make these orders for costs I believe that because the company is a paying taxpayer, to ask them to pay a further 50 percent of the legal costs, in my view, does not seem to be right. However, they should make a contribution towards the costs because they have offended against the legislation.

[56] Accordingly, I order that they pay $2500 towards the costs of the investigation.

*iv Overall assessment*

[57] The last aspect of this is that I then have to carry out an overall assessment of whether the total amount that I have ordered - namely $211,177.70 which includes the reparation, the consequential loss, the fine and the costs - is too high.

[58] I have carried out that assessment. I have already given a reduction of $30,000 because of the financial situation of the company. I am of the view that the amount that I have awarded is appropriate in all these circumstances and I am not prepared to adjust it any further.

**Result**

[59] Therefore, the overall result is as follows: the company is fined $180,000 and is ordered to pay costs of $2500.

[60] It is ordered to make an emotional harm reparation payment in the sum of $10,000, and a reparation sum for consequential loss of $18,677.70. Those last two amounts are payable to the victim.

M J Callaghan
District Court Judge