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<http://www.legislation.govt.nz/act/public/1989/0024/latest/DLM155054.html>

**IN THE YOUTH COURT
AT NORTH SHORE**

**I TE KŌTI TAIOHI
KI ŌKAHUKURA**

**CRI-2019-244-000089
[2019] NZYC 520**

**NEW ZEALAND POLICE
Prosecutor**

v

**[RC]
Young Person**

Hearing: 30 October 2019
Appearances: Sergeant N Herd for the Prosecutor
J Malcolm for the Young Person
Judgment: 30 October 2019

ORAL JUDGMENT OF JUDGE A J FITZGERALD

[1] [RC] has admitted a charge of careless driving causing injury to [XM] on [date deleted] 2019. That morning, [RC] drove from his home in [location A] to collect a trailer and a jet ski from [location B]. An acquaintance of [RC]'s hooked the trailer to [RC]'s ute. The trailer did not have a warrant of fitness nor a factory-fitted safety pin. [RC] did not know that, but he did not check to see either. It was in that respect he was careless.

[2] When driving home from the beach later that day, the trailer uncoupled from the ute as it crossed a bridge, veered across the road and struck [XM] who was walking along a footpath with her sons, aged seven and 12 at that time. She was pinned to a concrete power pole by the trailer and suffered serious physical injuries; broken femur, tibia, collarbone, eight broken ribs and a punctured lung. She has undergone three surgeries and requires more. She spent one month in hospital and is still recuperating. Her leg and collarbone are permanently disfigured. Apparently, the trailer also hit several parked cars causing damage to them. I will return to that later.

[3] [RC] admitted the charge at a s 247(b) "intention to charge" family group conference held on 1 July 2019. He was supported there by his mother and stepfather. [XM] attended too supported by her lawyer, Ms George. The plan formulated at the family group conference provided firstly for [RC] to serve a six month voluntary ban from driving, which he has been doing and will continue to do until 1 January 2020. Secondly, [RC] was to complete a defensive driving course, which he has done. He made a verbal apology to [XM] and provided a written one too.

[4] Reparation was not agreed. [RC] and his family offered to mow lawns and keep books to support [XM] and her family, but the family group conference record indicates that the offer was gratefully declined.

[5] Given the non-agreement regarding reparation the charge was laid at Court. This hearing has been arranged for me to determine what reparation [RC] should pay. In fact, [RC] has already paid \$500 to the police as emotional harm reparation and

they are holding that sum. That is an amount that [RC]'s youth advocate, Ms Malcolm, considers appropriate. So too does Sergeant Herd for the police.

[6] The hearing today has proceeded on the basis of me considering all of the documents on the Court file and that includes a joint memorandum provided by Ms Malcolm and Sergeant Herd. As well as that, I have been provided with up to date victim impact details from [XM].

[7] Although the submissions have been made on the basis that the reparation should be paid for emotional harm, the material provided from [XM] in her victim impact statement is such that I firstly need to address the issue of reparation generally.

[8] I begin by acknowledging that [XM] and her family have suffered enormously in various ways as a result of this accident. She and her husband run an [industry deleted] business. ACC only covers 80 percent of [XM]'s salary. Other people have been paid to do her job when she has been unable to. Her husband has had to take time off work to support her and that has included travel to and from the hospital when she was there with parking expenses, amongst other things. There have been legal fees to pay as well as doctors and physio costs which are not covered by ACC for some reason. There was non-refundable overseas travel not able to be taken. In relation to a trip that the family did go on, costs were incurred to upgrade the seats necessary to accommodate the way [XM] needed to sit because of her badly injured leg.

[9] At the end of her victim impact statement [XM] says, "We have asked for reparation both in relation to actual monetary loss and the emotional harm. I am currently receiving psychological treatment and a breathing specialist who is helping me with anxiety and other post-traumatic related issues. The emotional and physical permanent damage he caused to me and my family is unquantified. I can quantify the loss in my wages and doctors' costs and legal fees is just over \$10,000. The unquantifiable costs of our business are thousands and thousands more."

[10] It is important therefore to explain that in the Youth Court, reparation can only be ordered for direct loss. Section 287 of the Oranga Tamariki Act 1989 provides that cost of replacement and cost of repair is all that the Court can order. Any loss of a

consequential nature cannot be ordered. Therefore, consequential losses of the type I have mentioned that [XM] has suffered I cannot make a reparation order for. The law does not allow it. There is also no evidence of direct loss from [XM].

[11] I am told that the damage caused to the parked cars by the trailer is approximately \$20,000. That is direct loss for which [RC] is liable. Apparently, insurance companies have indicated that they will pursue civil action against him in relation to that damage.

[12] I am however able to make an order for emotional harm reparation and that can be such sum as I think fit.

[13] So far, I have only touched on some aspects of the physical and financial harm suffered by [XM]. She has also suffered significant emotional harm, as have members of her family. For someone who was fit, healthy and active, the loss of physical wellbeing has been very hard on her, as has the disfigurement to her leg and collarbone, which is understandably distressing. Her two sons were very traumatised by the accident and that great stress is something which [XM] with the help of her husband and her parents have had to manage. This will have been difficult on all of them.

[14] My approach to deciding whether to order emotional harm reparation, and if so how much, must be guided by the provisions of the Oranga Tamariki Act. It is not necessary to refer to all of the purposes and principles, both general and specific, but I have them firmly in mind. Perhaps the most relevant in these circumstances are the four primary considerations in relation to Youth Court matters:

- (a) [RC]'s wellbeing and best interests.
- (b) The public interest, including public safety.
- (c) The interests of any victim, being [XM] and her family are victims too.
- (d) [RC] being accountable.

[15] There are then the factors in s 284 of the Act which must be taken into account when making any order under s 283, which includes an order for the payment of emotional harm reparation.

[16] The first consideration is the nature and circumstances of the offending. I have described the events briefly already. Sentencing anyone for this particular charge of careless driving causing death or injury is perhaps the most difficult of all types of cases a Judge faces, for two main reasons:

- (a) First, the Court can never do justice in the sense that victims can never receive what they most want, which is the return of a loved one in the event of death or being restored to full health and happiness in the event of serious injury.
- (b) Secondly, the law requires that the sentence be decided by reference to the degree of carelessness, not the harm done. There is therefore often outrage when people facing such a charge receive a sentence that seems to be so completely inadequate when compared to the loss and harm victims have suffered. That is because such loss and harm is not the basis for deciding on penalty.

[17] Although I am only asked to decide the reparation issue, what I have just said in my view is relevant and applies in this situation.

[18] [RC]'s carelessness was not at the high end of the scale. He did not knowingly decide to take a risk that he was aware of. As the driver he should have checked the trailer the other person had attached to the ute but he did not. That is a less serious form of carelessness than someone who carries out a careless, irresponsible or risky manoeuvre, which would be at the high end. [RC]'s carelessness is perhaps higher than a situation where someone is suddenly blinded by sun glare or suddenly faced with a problem situation and in a split second chooses an option that on reflection was not the best one. Those sorts of situations are at the low end.

[19] Next consideration, [RC]'s personal history and characteristics and social circumstances. He is 17 years old. He was 16 at the time of this accident. At that time, he had [an apprenticeship]. As a result of this accident he has lost that and his health and wellbeing have deteriorated significantly. When seen by the youth forensic clinician on 16 October, the notes recorded in the feedback form include that [RC] endorsed symptoms of mood disorder and clinical depression. He was extremely upset due to internalising feelings of shame and guilt for the accident and its impact on the victim. He found it difficult to answer questions, arrange his thoughts and his speech was barely audible at times. He was constantly tearful and struggled to make eye contact. Although he denied risk to himself, he was not future focused and could not see himself at age 25. It was recommended that he be assessed for depression and treatment for PTSD symptoms because he had been experiencing flashbacks.

[20] [RC] has since been to his GP with his mother and it was confirmed that [RC] is suffering from PTSD as a result of the accident. He also expressed to the GP that he was as low as he could go, including wanting to die. He has been prescribed medication, recommended counselling and his mother has been given [duration deleted] paid compassionate leave from work to be with him.

[21] [RC] is extremely remorseful and continues to be distressed as a result of the accident. He has excellent family support and this has been very distressing for all his family who are very concerned about [RC]'s wellbeing.

[22] Neither [RC] nor his family are in a financial position to pay the \$10,000 [XM] seeks. [RC] has borrowed \$500 from his mother as payment for emotional harm and will repay his mother that money as he can afford to.

[23] In terms of the four considerations that I mentioned earlier that must be considered in relation to matters before the Youth Court:

- (a) The issues concerning [RC]'s wellbeing and best interests are apparent from what I have just mentioned. His age is an important consideration and, of course that is recognised by virtue of him being in the Youth Court and dealt with under the Oranga Tamariki Act.

- (b) In terms of public interest and public safety issues, [RC] acknowledges his carelessness in terms of not checking the trailer. He has completed a defensive driving course and is not likely to make the same mistake again. It is very clear that he continues to feel horrified by what happened and cannot forgive himself.
- (c) The interests of the victims are matters I have already touched on.
- (d) In terms of accountability, [RC] has now addressed all of the matters required of him from the family group conference plan. That, as well as going through the Court process and everything associated with it are sufficient as a means of holding him accountable for his behaviour.

[24] I should just add that as a result of amendments to the Oranga Tamariki Act that came into force on 1 July 2019, the Court is required to ensure that a young person's rights under the UN Convention on the rights of children must be respected and upheld. In that regard, it is relevant to note the latest general comment issued by the UN on 18 September this year. Their comments include:

Children differ from adults in their physical and psychological development. Such differences constitute the basis for the recognition of lesser culpability and a separate system with a differentiated individualised approach.

The reaction to an offence should always be proportionate not only to the circumstances and the gravity of the offence, but also to the personal circumstances (age, lesser culpability, circumstances and needs, including, if appropriate, the mental health needs of the child), as well as to the various and particularly long-term needs of the society.

A strictly punitive approach is not in accordance with the principles of child justice spelled out in article 40 (1) of the Convention. Where serious offences are committed measures should be proportionate to the circumstances including the gravity of the offence. Weight should be given to the child's best interests as a primary consideration.

[25] Having regard to all of those matters I have mentioned, I am satisfied that the \$500 payment [RC] has made to the police is sufficient as a payment towards the emotional harm [XM] has suffered. He simply cannot pay an amount approaching what [XM] is wanting nor will he be in a position to do so in the near future. His degree of his carelessness was not high and the amount he is offering to pay is in

keeping with what would be expected for someone in his situation facing such a charge. That is reflected in the agreement by the police and youth advocate that the payment is sufficient.

[26] I regret that this decision will be very disappointing and upsetting to [XM]. It is important to emphasise that the emotional harm payment I have approved is not in any way an indication or a measure of how I see the harm she has suffered. No financial payment would be enough for that. This is an order made in accordance with the law that I must apply on the facts of this particular case. The situation is tragic for all concerned. On behalf of the community that this Court serves, I express my sympathy to them all.

A J FitzGerald
Youth Court Judge