IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI 2008-404-000322

BETWEEN	BIG TUFF PALLETS LTD Appellant
AND	DEPARTMENT OF LABOUR Respondent

Hearing: 3 February 2009

Appearances: Craig Langstone and Erynn Tompkins for Appellant
Mark Harborow for Respondent

Judgment: 5 February 2009

JUDGMENT OF HARRISON J

In accordance with R540(4) I direct that the Registrar endorse this judgment with the delivery time of 3 pm on 5 February 2009

SOLICITORS
Jones Fee (Auckland) for Appellant
Meredith Connell (Auckland) for Respondent

Introduction

[1] Big Tuff Pallets Ltd (BTP) appeals against the quantum of a sentence of reparation imposed in the District Court at Manukau. The company pleaded guilty to a charge of failing to take all practicable steps to ensure the safety of an employee, Mr Charles Kwan, who was injured in a workplace accident: s 6 Health and Safety in Employment Act 1992 (HSE Act). Mr Kwan lost parts of three fingers on his right hand as a result.

[2] The fine of $15,000 imposed by Judge Andrée Wiltens is not under challenge. However, BTP, through its counsel, Mr Craig Langstone and Ms Erynn Tompkins, submits that the reparation amount of $40,000 is excessive. They submit that the Judge erred in principle.

Facts

[3] The relevant facts are agreed. At all material times Mr Kwan was employed by BTP in a manual capacity. On 11 October 2007 he was sweeping the floor in the company's sawmill. He had volunteered for this task after completing his allocated work early.

[4] While doing the sweeping work, Mr Kwan assisted a planer operator by removing a jammed piece of wood from a planer machine. The operator had stopped the machine for that purpose. However, the machine jammed again shortly afterwards. In accordance with industry practice, the operator attempted to clear the jam with a push stick while the machine was still operating. Mr Kwan approached from behind the operator and reached his hand into the planer from the side in an attempt to assist. Mr Kwan placed his hand in underneath the guard and into the cutter blade. He suffered soft tissue and bone injury to the second, third, fourth and fifth fingers of his right hand. Parts of three of those fingers were later amputated.

[5] BTP admitted a breach of its statutory obligations by failing to ensure that Mr Kwan was not exposed to the risk of a rotating blade on the machine. This plea was consistent with the company's remorse. It has since made some attempts to

support Mr Kwan and his family emotionally and financially, despite its difficult financial circumstances. Mr Kwan was immediately entitled to, and was paid, accident compensation while off work. The company paid small sums of money and assisted the family with groceries. Significantly it also offered to create a new position for Mr Kwan as a health and safety officer, in recognition of his valued services. However, Mr Kwan declined the offer which still remains open.

District Court

[6] Judge Andrée Wiltens dealt relatively briefly with the question of reparation as follows:

> [5] The big factor there for me, is the actual injury to Mr Kwan. The most recent victim impact statement indicates he has now, and will continue to have, a limited use of his right-hand. The two middle fingers have been severely damaged. The damage is of a long-term nature and will require further surgery.
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> [6] He has been absent from work since the day of the accident, and while work has been offered to him by his employers, the earlier victim impact statement indicated that he was uncertain whether he would take up that offer because of his psychological situation.
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> [7] Mr Kwan is a right-handed person and has on-going problems with his home life as a result of the injury, which will continue. Those are set out in the victim impact statement.
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> [8] The other factor that comes into play in terms of reparation is the fact that the company will not be paying it, it is an insurance policy that will be paying it. To me it seems that reparation is the biggest issue for the Court to assess for Mr Kwan, and the amount of the reparation that I assess ought to be paid to him is $40,000.

[7] The Judge fixed the amount of the reparation payment without requiring a report. It is common ground that the Judge was not obliged to commission a report: s 33(2) Sentencing Act 2002. I shall return to this subject later.

Appeal

[8] Mr Langstone submits that Judge Andrée Wiltens erred in a number of respects, principally by (1) taking account of the fact that any award of reparation

would be paid by BTP's statutory liability indemnifier; and (2) failing to take account of the compensation received by Mr Kwan from the Accident Compensation Corporation and BTP's offers of amends. Mr Langstone also submits that the figure of $40,000 is excessive when compared to other sentences imposed for similar offences.

[9] The Department of Labour, represented by Mr Mark Harborow (who did not appear in the District Court), accepts that Judge Andrée Wiltens made substantive errors of principle and procedure, principally in determining the appropriate level of quantum without sufficient information. Mr Harborow accepts that the appeal should be allowed but says the proceeding should be remitted to the District Court for orders directing a reparation report and invoking the consequential procedure: ss 33 and 34 Sentencing Act.

Decision

[10] The power to impose a sentence of reparation, either on its own or in addition to any other sentence, is well settled: s 12 Sentencing Act 2002. An express purpose for which a Court may impose a sentence is 'to provide reparation for harm done by the offending': s 7(1)(d) Sentencing Act. Reparation has assumed a principal focus in sentencing for offending under the HSE Act: *Department of Labour v Hanham & Philp Contractors Ltd* HC CHCH CRI 2008-409-000002 18 December 2008, Randerson and Panckhurst JJ at [40]. It is axiomatic that a Court must give reasons for imposing a sentence of reparation: s 31(1) Sentencing Act. That obligation must extend to providing reasons for the actual quantum of the sentence.

[11] The jurisdictional basis for imposing a sentence of reparation was present in this case; the offence committed by BTP caused Mr Kwan to suffer emotional harm and consequential financial loss: s 32(1)(b) and (c) Sentencing Act. However, Judge Andrée Wiltens did not explain how or why the figure of $40,000 was reached. Nor did he apportion the sum between emotional harm, the principal component of the sentence, and financial loss.

[12] The fact that BTP's underwriter would meet the reparation is irrelevant (the existence of indemnity cover for statutory liability cannot operate as a factor favouring reparation or the amount, given that the means to pay were not in dispute). Also irrelevant is the nature and extent of Mr Kwan's actual injury unless it is related directly to the element of emotional harm. Furthermore, the quantum of the reparation itself is inconsistent with other sentences imposed in the District Court; awards for emotional harm in excess of $40,000 are rare, and are normally reserved for cases of death or severe physical injury.

[13] Mr Harborow acknowledges that the sentence of reparation must be set aside. The only issue is whether I should fix the appropriate award, as Mr Langstone submits, or remit the proceeding back to the District Court for that purpose, as Mr Harborow urges.

[14] Mr Harborow's argument proceeds on an unusual premise. He submits that Judge Andrée Wiltens did not have sufficient information on which to impose a sentence of reparation. He says that the Court should commission a comprehensive reparation report, leading to a negotiated resolution by the parties of the appropriate figure.

[15] Mr Harborow accepts the irony inherent in this submission. The Department as prosecutor must have known that reparation would be a live issue at sentencing, yet it failed to request the District Court to commission a report. The Department is now in effect attempting to rectify the consequences of its earlier omission by requesting that the sentencing process be repeated.

[16] Mr Harborow places particular weight on *Smith v Police* HC ROT CRI 2006-463-001 7 March 2006. Mr Smith appealed against a sentence of reparation of $10,000 imposed following his plea of guilty to a charge of careless driving causing death. Priestley J allowed the appeal on the ground that the sentencing Judge had insufficient information about the circumstances of the dead man's seven year old son, for whom the reparation payment was to be held in trust. The Judge, with apparent reluctance, remitted the sentencing to the District Court for re-

determination in order to obtain a professional assessment on the impact of the father's death upon his son.

[17] With respect, I agree with the course adopted in *Smith*; Priestley J was acutely sensitive to delicate issues relating to the child's family circumstances. However, that dimension is absent from this case. On the primary element of emotional harm, Judge Andrée Wiltens had a victim impact report prepared on 23 May 2008, some six months after the accident. It disclosed that Mr Kwan was hospitalised for three or four days after the accident; that he suffers ongoing pain and has to use panadol; that he is unable to perform some household chores and has difficulty driving; and that he is worried and uncertain about his financial future and that of the family following loss of his fulltime paid employment with BTP, and his subsequent receipt of an ACC benefit.

[18] A supplementary report prepared by a health and safety inspector confirmed that Mr Kwan will suffer long-term disability and inconvenience due to the nature of his injuries. He is likely to require further surgery and is currently undergoing hand therapy. He was naturally right-handed before the accident but now must learn to use his left hand. He has only minimal use of his right hand for writing. He will be unable to resume his previous occupation as a saw doctor.

[19] I am satisfied that a sentencing Court would not obtain meaningful benefit from provision of additional advice of an expert nature about Mr Kwan's condition. Fixing an award for emotional harm is an intuitive exercise; its quantification defies finite calculation. The judicial objective is to strike a figure which is just in all the circumstances, and which in this context compensates for actual harm arising from the offence in the form of anguish, distress and mental suffering. The nature of the injury is or may be relevant to the extent that it causes physical or mental suffering or incapacity, whether short-term or long-term.

[20] Mr Langstone does not dispute that Mr Kwan has suffered real emotional harm as a result of the accident arising from BTP's statutory breach and his consequential incapacity. Loss of three fingers and much of the use of a dominant hand must have caused Mr Kwan emotional pain, suffering, and distress. There is no

evidence, though, that it has led to any extreme or psychiatric disability. In my judgment, taking a broad view of the case, a figure of $20,000 is appropriate recompense for the emotional harm suffered by Mr Kwan as a result of the company's offending.

[21] I am also satisfied that an award for emotional harm at this level satisfies the statutory requirement of consistency in sentencing. Mr Langstone has supplied a comparative survey of reparation sentences imposed by the District Court in other HSE Act cases. In three comparable cases, where employees lost fingers after hands were caught in inadequately guarded machines, the District Court fixed reparation payments of $20,000 for emotional harm: see *Department of Labour v Matamata Piako District Council*, CRN 05039500129, District Court at Hamilton, 29 August 2005, Judge Clark; *Department of Labour v Textile Bonding Ltd*, CRI 2007-092-018578, District Court at Manukau, 11 April 2008, Judge Hole; *Department of Labour v Allberry House Ltd*, CRN 07070502280, District Court at Auckland, 27 March 2008, Judge Field. In this respect it is not insignificant that in the District Court in this case counsel were agreed that a sentence of reparation in the range of $15,000-$25,000 was appropriate.

[22] This leaves the subsidiary element of financial damage. The evidence available on sentencing was that Mr Kwan had suffered financial loss consequential upon his emotional harm of over $4,000 (for these purposes I am content to round the figure up to $5,000). There was nothing to suggest that he was then unable to return to work. Indeed, as noted, BTP had offered Mr Kwan a specially created position as health and safety officer. While I can understand Mr Kwan's emotional reluctance to return to the company's employment, which would inevitably involve some dealing with machinery of the type which caused his injury, Mr Kwan is under an obligation to mitigate his loss. It is to be hoped that he reviews BTP's offer in the light of this judgment.

[23] I am also conscious that remitting the proceeding to the District Court would re-open old wounds. Both the company and Mr Kwan would be forced to resume a process which all hoped and believed had reached its natural end in September 2008. Preparation of a report would require the parties to commit significant emotional

resources. There is no point in taking that step where I am satisfied that sufficient information is available for this Court to impose an appropriate sentence.

[24] Accordingly, BTP's appeal is allowed. The sentence of reparation imposed in the District Court at Manukau on 8 September 2008 is quashed. Instead I order BTP to pay Mr Kwan the sum of $25,000 by way of reparation.

[25] I am grateful to counsel for both parties for their assistance in determining this appeal.

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Rhys Harrison J