

**IN THE DISTRICT COURT  
AT AUCKLAND**

**CRI-2017-004-009639  
[2018] NZDC 11132**

**WORKSAFE NEW ZEALAND**  
Prosecutor

v

**TOLL NETWORKS (NZ) LIMITED**  
Defendant

Hearing: 25 May 2018

Appearances: A Longdill and E Jeffs for the Prosecutor  
G Christie and L Kenney-Perkins for the Defendant

Judgment: 25 May 2018

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**NOTES OF JUDGE E P PAUL ON SENTENCING**

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[1] Toll Networks (NZ) Limited has pled guilty and been convicted of an offence pursuant to ss 36(1)(a), 48(1) and (2)(c) Health and Safety at Work Act 2015. The maximum penalty for this offending is a \$1.5 million fine.

[2] Toll as a defendant has no prior convictions.

[3] In terms of the facts of the offending, I intend going through those shortly. However, before I proceed further, I acknowledge the presence of the deceased's wife and his family members here today. Some of their number have elected to address the Court orally. I will return to that shortly.

[4] Equally, I should acknowledge the presence of Toll Networks' directors and managers in Court here today.

[5] The defendant Toll Networks (NZ) Limited operates a large freight business across New Zealand. As confirmed today, it employs approximately 600 workers. The Toll metro operational area within the Auckland depot in Onehunga is where line haul freight is received for redistribution to the Auckland metropolitan area. Freight wagons are shunted in and parked in the metro canopy, a large covered open-ended structure that encloses a rail siding. The wagons are unloaded by forklift operated by the defendant company's employees and the freight is then largely moved on into the adjacent enclosed shed area for sorting and collection by trucks.

[6] Toll had a contract to transport Harraway oats throughout New Zealand. On Friday, 23 September 2016, 38 pallets of Harraway's oats, each containing 400 kilograms of oats, were loaded by forklift at the Toll's Dunedin depot onto KiwiRail's ZHC 3356, a curtain sider rail wagon bound for the defendant's Auckland depot. I am going into some detail in terms of the facts because it is relevant to the events that subsequently occurred at the metro site in Auckland.

[7] This type of wagon features curtains which slide along a track at the top edge and are secured by curtain buckles at the bottom edge. The roof of the wagons are supported by 2820 millimetre long roof poles. The roof poles have a hinged knee from the bottom which are bent to release the tension so they can be moved to provide unimpeded access to freight for loading and unloading.

[8] In this instance, Toll's forklift operator in Dunedin noticed an issue with one of the roof poles on the specific wagon. It could not be secured into position because of the positioning of the pallet and could not be removed because it was attached by the webbing. The defendant had no procedures or instructions regarding how to deal with this situation. The operator simply elected to lift the roof pole and place it horizontally on top of the pallets before dispatching the wagon to Auckland.

[9] On Monday, 26 September 2016, that wagon was shunted into the metro canopy at Toll's Auckland depot. The curtains on that wagon were opened by Toll's team leader who observed the roof pole on top of the stack but failed to inform the forklift operator, [employee 1]. [Employee 1] attempted to unload the six pallets, a double stack, using a forklift. He encountered difficulties as the back stack, that is the

three pallets, was caught by the roof pole. The roof pole finally came clear of the wagon but was still attached by its webbing.

[10] The [deceased], , a site caretaker employed by Toll, arrived at the end of the metro canopy at this point. His work involved cleaning areas across the site, including the canopy. [Employee 1] was still manoeuvring the double stack of pallets. The roof pole fell to the ground. [The deceased] approached the wagon and roof pole lifting the roof pole to a vertical position. [Employee 1], operating the forklift, reversed the rest of the way out of the wagon and as the load cleared the edge of the wagon it shifted with the back stack of three pallets weighing 1.200 kilograms tipping off the fork hoist tines striking [the deceased] resulting in his fatality. Those are the facts.

[11] The WorkSafe investigation conducted which followed this fatality revealed systemic failures on the part of Toll. There are failures to not specifically identify or assess as hazards and risks of pedestrians being hit by freight falling from forklift tines. Not assessed the specific risk associated with roof poles being caught up in freight. Not assessing the task of unloading wagons into the metro canopy with the higher risk activity, then unloading of trucks.

[12] WorkSafe identified there was an absence of specific procedures for barricading off the unloading area within the canopy and noting in their submissions and today there were temporary barriers employed elsewhere but not in this location. Not installing temporary signage to notify people of the forklifts operating in the area, the unloading of oats from wagons and identifying situations where stacks were more hazardous. There was no defined pedestrian walkway in the relevant area and WorkSafe identified in their submission ambiguous, contradictory and insufficient controls to ensure workers' safety, site specific hazard risk identification and controls stipulating a two metre exclusion zone around the forklifts not well understood and, as has been revealed, still placing workers at risk. There is also this critical rule 4 in terms of where workers should be at a 10 o'clock/2 o'clock position in front of forklifts and, as can be seen from this tragedy, that clearly was inconsistent with safety.

[13] It would appear that the rules to live by that are relied on by Toll also had requirements to cease when pedestrians were present within the operating zone. This was not followed.

[14] In terms of the sentencing I am required to carry out, I must first consider reparation. Before I move to the victim impact statements that I have read, the further oral submissions today, I record a restorative justice conference was held between Toll representatives and family members on 27 March this year. The Court has received a report as a result of that conference.

[15] That conference recorded in summary the following four matters:

- (a) All Toll representatives apologised and this was not accepted by the family as they felt Toll had engaged in minimalisation. One comment was it was an 80 percent apology.
- (b) Reparation was discussed. Toll offered the sum of \$110,000. That was declined and the family wish that left to the Judge. Ultimately that is my responsibility.
- (c) There was acknowledgement Toll had made extensive changes to try and prevent this tragedy occurring again.
- (d) Toll and the family agreed to make a media release with Toll accepting responsibility for [the deceased's] death.

[16] Ultimately, given the contents of that restorative justice conference and how matters have subsequently developed for the family, I have got to say that restorative justice conference outcome was less than satisfactory.

[17] In terms of emotional harm reparation due to the family, the Court is informed by the victim impact statements we have received. One cannot help but be affected by the oral submissions made on behalf of [the deceased's first son] by his mother, by [the deceased's wife] personally, by [the deceased's second son] and finally, [the deceased's third son]. One would be less than human not to appreciate the loss, grief,

frustration and anger experienced by this family. Going to [the deceased's wife], in terms of her suffering it manifested itself in illness, loss of employment and loss of her life partner. For [the deceased's first son], who lives in Melbourne, I note his pain knowing that his children do not have the opportunity to meet with their grandfather.

[18] [The deceased's second son] spoke to us, I have got to say, quite proudly of his Scottish ancestry. I think most of us in this room share some Scottish ancestry, sir, but what [the deceased's second son] shared, which I recorded, was the difficulty in quantifying the grief and sadness he has experienced as a result of his father's passing. He was able to, however, despite that grief, champion a number of his father's achievements and perhaps things that were yet to be achieved referring to the Chinese dictionary and, as [the deceased's wife] said, her husband was a multilinguist.

[19] [The deceased's third son] then addressed the Court. I certainly got a strong sense of anger and frustration from [the deceased's third son], particularly his awareness of his father's previous disciplinary hearing and his expectation his father would be kept safe and his knowledge that it was well-known his father perhaps put himself in places he should not and the perhaps guilt [the deceased's third son] feels he would have stopped him from going to work if he knew. There are a number of other matters [the deceased's third son] raised in terms of his frustration as to how matters have progressed for the family in terms of their interaction with Toll. I do not intend attempting to repeat those. They were said here and they were heard.

[20] There are other family members who have shared their victim impact statements. [The deceased's first daughter] has written to the Court and her natural feelings of guilt as the last time she saw her dad they had a fight. We have heard from [the deceased's second daughter] as well in terms of her written submission and the profound effect his loss has had on her family and she has pointed out to the Court that the [deceased's family] as a family are private folk who do not share their emotions and it has been extremely difficult for them as a family to do that as a result of their father's death. We have also received a statement from [the deceased's mother], who just talks about her son.

[21] In fixing reparation for emotional harm, some guidance perhaps can be sought from the High Court where they have commented, “Imposing reparation for emotional harm is an intuitive exercise. Its quantification defies finite calculation.”

[22] As already referred to by counsel today but I think it bears repeating is the case of *WorkSafe New Zealand v Department of Corrections*,<sup>1</sup> Chief Judge Doogue observed:

Determining reparation for loss is by no means an easy task. It involves placing a monetary value on that loss which can only ever fall short of truly reflecting the grief felt. Reparation gives a measure of recognition to the loss in the best way Courts are capable of doing. We are never capable of doing it to the extent that the family feels is necessary.

[23] The task of setting a reparation for emotional harm in a case such as this does not simply involve ordering the same amount given in other cases involving death. Each case is to be judged on its particular circumstances. I of course have been supplied with other cases involving fatalities where awards have been made to families. That gives me some broad indication of an appropriate figure but ultimately that is all. WorkSafe, who brings this prosecution, have submitted an award of \$110,000. Toll for its part does not dispute that figure. On the information I have, certainly that would be at the upper end for this type of case.

[24] I intend making an order for emotional harm reparation in the sum of \$110,000 today and I will simply be directing that is apportioned equally between the family members. There is no other way that I could address that. That award acknowledges to an extent the harm and loss suffered by this family but, again, it is unlikely to fully recompensate them for the loss they have suffered.

[25] I have been addressed on the issue of consequential loss. The prosecutor does not seek consequential loss for [the deceased’s wife], acknowledging the insurance payment. However, WorkSafe does seek consequential loss to each of the siblings as set out in their submissions. I do not intend identifying each sibling’s individual costs. That is disrespectful. We know the total amount is \$8020 and it is set out in counsel’s submissions. Again, the defendant does not oppose that payment and, accordingly, I

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<sup>1</sup> *WorkSafe New Zealand v Department of Corrections* [2016] NZDC 24865 [2017] DCR 368

will be ordering consequential loss in the sum of \$8020.10 to be paid as set out in the WorkSafe submissions to the relevant siblings.

[26] In terms of the fine, and that is the deterrence element of this sentencing, I am required to establish where Toll's culpability for this offending lies. Without wishing to go into the detail, it seems to me now it is accepted that there is a four band range of culpability and I intend adopting that approach today. The four bands commence at the lowest culpability, nil dollars to a maximum of \$400,000 fine, to extremely high culpability, 1.2 million to 1.5 million, the maximum fine available for this offending.

[27] WorkSafe have submitted Toll failed to take the following reasonably practical actions to avoid this fatality. Firstly, failing to develop, document, implement and communicate an adequate safe system of work for the unloading of wagons at that site including the possibility of pedestrians entering the loading zone. Secondly, providing temporary barriers. Thirdly, monitor and enforce compliance by workers with the safe systems of work. Fourthly, failure to effectively manage interaction between forklifts and pedestrians given the risk of death.

[28] Forklifts are lifting in excess of a tonne of weight to the height that those forklifts were would even be obvious to a layman the potential for risk to any pedestrian in the vicinity. It seems to me the fatal consequences were foreseeable.

[29] Also, there was a departure from the guidance material which emphasises the importance of physically segregating people from mobile equipment, forklifts. The defendant must have been aware of those hazards and the ways of eliminating them as it had the loading/unloading exclusion zones/guide-lines in its possession. Certainly, WorkSafe are critical and say there should be no issue of costs in terms of implementing what were readily practicable steps identified. It is disturbing to note that there were temporary barriers employed on this site but not in the area where the deceased was.

[30] WorkSafe have referred me to a decision of *Easton Agriculture Limited*. They say the offending here is more serious because Toll had produced safety documents which if followed placed workers at risk. Secondly, Toll had the guidance documents

which required segregation of pedestrians from forklifts and thirdly, and again perhaps disturbingly, workers at that very location routinely appeared to be close to forklifts as identified in CCTV footage of the previous 12 days before the death.

[31] Toll accepts for their part they have departed from some best practice in terms of reasonably practicable steps. Toll in their submissions to me have summarised areas of risk which were not previously identified in the freight industry in New Zealand. However, retreating to known industry practices does not in my view mitigate Toll's failure as identified by WorkSafe and the facts are the freight being unloaded in that metro canopy were unloaded at significant height. The potential for fatal injury if the freight fell from the forklift tines and hit a pedestrian was significant. This risk was not momentary. Here we know there are a number of workers being exposed to that very same risk in the proceeding 12 days as recorded by the CCTV footage.

[32] I am satisfied that the offending culpability here by Toll falls within the high category, that fine range being between \$800,000 and \$1.2 million. I fix the starting point for the fine at \$900,000.

[33] There is no dispute between WorkSafe and Toll as to the entitlements in terms of mitigation. Reparation will be paid; 15 percent should be deducted off the fine for that. Toll have co-operated with WorkSafe's investigation; a further 5 percent should be deducted off the fine for that and finally, as with any sentencing procedure, Toll have no prior convictions so can rely on their good safety record, so a further reduction by 5 percent. By my count that is a 25 percent reduction reducing the fine by \$225,000.

[34] It is accepted by all parties that Toll entered their guilty plea at the earliest opportunity and they are entitled to a 25 percent reduction off the fine for that. That would result in an end fine of \$506,300. Ancillary legal costs in the sum of \$6030 are sought by WorkSafe for external counsel. While not accepting they should pay, Toll have agreed to pay that amount and it will be ordered accordingly today.

[35] The final step I am required to embark on is to turn to the proportionality assessment. That is taking the total reparation order I am imposing today of \$118,020.10 plus the fine of \$506,300.00 plus the regulator's cost is that a

proportionate response to the seriousness of offending for what occurred here. I am firmly of the view it is. There will be no adjustment to those figures. I record Toll have the ability to pay and will pay. That is the end of my decision.

E P Paul  
District Court Judge