

**MAGISTRATES COURT OF SOUTH AUSTRALIA
(INDUSTRIAL OFFENCES JURISDICTION)**

HILLMAN, Roger Lyall

v

NORMETALS PTY LTD

JURISDICTION: Prosecution

FILE NO/S: 1900 of 2008

HEARING DATES: 25 March 2009

JUDGMENT OF: Industrial Magistrate S Lieschke

DELIVERED ON: 30 April 2009

CATCHWORDS:

Prosecution - Guilty Plea - Fatality - Failure to ensure so far as reasonably practicable the safety of a person whilst at a workplace under the management and control of the defendant - Failure to ensure Safe Operating Procedures were in place for unloading and loading trucks - Driver of delivery truck fatally crushed when bundle of steel tubes fell on him - Forklift driver had dislodged the bundle while lifting adjacent bundles on other side of truck - Held: Conviction and fine of \$52,000 - Compensation of \$20,000 awarded to family members of deceased - S 22(2)(a) Occupational Health Safety and Welfare Act 1986 - S 53 Criminal Law (Sentencing) Act 1988.

REPRESENTATION:

Counsel:

Complainant: Ms Z Thomas

Defendant: Mr D Edwardson QC

Solicitors:

Complainant: Crown Solicitor's Office

Defendant: Iles Selley Lawyers

- 1 This prosecution arises from a workplace fatality on 7 December 2006 when Brian Murphy was killed on the premises of Normetals Pty Ltd. Mr Murphy had just delivered a truckload of steel tubes to Normetals premises. He was crushed by an unexpected falling bundle of steel tubes that was dislodged by a Normetals forklift operator.
- 2 Mr Murphy was employed by Verdons Transport Pty Ltd, which was contracted by Onesteel to deliver its products to Normetals. Normetals received a truckload delivery from Onesteel on a semi-trailer on a weekly basis.
- 3 Normetals did not have any of its own Safe Operating Procedures in place for the loading and unloading of trucks at its workplace. That is, procedures directed towards controlling people and plant and load movements, and in particular controlling its own employees and the employees of any contractors involved in such work.
- 4 This was Mr Murphy's first visit to Normetals premises and the first delivery by Verdons for a couple of years.
- 5 Following an investigation by SafeWork SA, Normetals was charged with one breach of s 22(2) of the *Occupational Health, Safety and Welfare Act 1986*. Normetals was alleged to have failed to ensure so far as was reasonably practicable, that Mr Murphy was safe from injury and risks to his health whilst he was at a workplace under its management and control.
- 6 The full particulars of the charge are as follows:

“Particulars:

- 1.1 At all material times the defendant was an employer involved in the distribution of steel tubing and the recycling of scrap metal at Ottoway in the said State ('the workplace').
- 1.2 On 7 December 2006 Brian Murphy, an employee of Verdons Transport Pty Ltd, was present at the defendant's workplace for the purpose of delivering a load of steel tubing.
- 1.3 On 7 December 2006, Brian Murphy sustained fatal injuries at the workplace of the defendant during the unloading by employees of the defendant of the steel tubing he had delivered.
- 1.4 The defendant failed to ensure, so far as was reasonably practicable, that Brian Murphy was safe from injury and risk to health while at the workplace under the management and control of the defendant, in that it failed to ensure there were

safe operating procedures in place for the loading and unloading of trucks at the workplace.”

- 7 Normetals has pleaded guilty to the charge and is now to be sentenced.
- 8 Normetals had no formalised procedures for loading and unloading trucks at its site. According to Normetal employees, drivers would sit in their cabs or would wander off. Normetals had no established procedure, written or oral, telling a driver where he should or should not be or when unloading can be safely commenced by the Normetals employees. The point at which loading or unloading is to begin, and the driver is to exit the area in the vicinity of the trailer was not defined and there was no clear process to ascertain that.
- 9 Mr Murphy had been employed full-time with Verdons for about six months following an eighteen-month period of casual employment. The principal of Verdons Transport, Mr Verdon, described Mr Murphy as being very good at his job and that he exhibited great common sense.
- 10 Mr Murphy had undergone some OHS training at Verdons Transport. This included an instruction that he was not to go around the opposite side of the truck whilst it was being unloaded. Mr Verdon indicated that the correct procedure in his company was for his drivers to roll up and put away any load restraining straps straight after untying the loads.
- 11 In September 2006 Mr Murphy underwent relevant OHS training with Onesteel. This included his specific acknowledgment that he was not permitted to stand on or beside the truck during unloading and he was not to enter a restricted area alongside the truck without permission of the floor person. He was also to remain in sight of the driver of the forklift at all times, and to not be on the opposite side of the forklift movement under any circumstances. Onesteel’s procedure for dealing with load restraining devices was that they should only be packed away after the unloading process had been completed.
- 12 On 7 December 2006 Mr Murphy reversed his truck into the loading area under instructions from Shane Wollaston, a supervisor at Normetals. Mr Murphy then gave his paperwork to Mr Wollaston and proceeded to unstrap the webbing load restrain binders.
- 13 The trailer was loaded with bundles of tubing products, stacked three high, with three bundles side-by-side on the top level. The stacks were tapered in a triangular shape for better stability. Side gates were not used on the trailer.

- 14 Mr Wollaston saw Mr Murphy undo the binders on one-side and walk around the other side and then undo them. Mr Wollaston was already sitting on his forklift near the rear of the trailer when he told Mr Murphy he was about to unload the trailer. At that time Mr Murphy was towards the rear of the truck on the passenger side, which was the opposite side to that which the forklift would unload from. Mr Wollaston says that Mr Murphy was looking at him at the time and Mr Wollaston accordingly had no reason to think that Mr Murphy had not heard him or had not understood him. Mr Murphy then turned to walk away and Mr Wollaston drove the forklift around to the driver's side of the trailer to commence unloading.
- 15 Mr Wollaston started unloading after assuming Mr Murphy had left the area, but without knowing exactly where Mr Murphy was. When describing the incident Mr Wollaston said:

“I was already on the 5-tonne forklift. I then went and intended to start unloading the trailer on the right-hand side. I don't know where he went. I don't know where he went then, but obviously he has gone towards the front of the trailer”.
- 16 Another employee of Normetals, Darren Henwood saw Mr Wollaston start the forklift on the right-hand side and at that time he also saw Mr Murphy standing near the drive axle on the left side of the trailer. Mr Wollaston then attempted to lift, with the tines of his forklift, two of the three bundles on the top layer that were closest to the driver's side. Mr Wollaston did not realise that the tines had been placed partially under the third bundle. This meant that as he lifted the intended load the tines dislodged the third bundle so that it rolled off the passenger side of the trailer.
- 17 There is also a possibility that the bundle's stability may have been impaired before it was touched by the tines, either by some failure of the load's bearer or by inappropriate loading. The possibility this could happen highlights the dangers of the unloading process. But this possibility is not unforeseeable, and is not a contributing factor to this offence.
- 18 The bundle weighed 1,700 kilograms and comprised 32 eight-metre lengths, which were each 53 kilograms. The bundle struck Mr Murphy in the head, chest and abdomen, killing him instantly.
- 19 Another Normetals employee, Cory Davenport, was standing near the forklift at this time. He heard Mr Wollaston say something like “are you out the way mate?” and “are you alright?”.

- 20 Mr Murphy was found under the steel just next to the rear wheels of the prime mover, and next to the front load restraint strap, which was still unrolled.
- 21 It is not clear why Mr Murphy was standing there at the time. He could have still been walking out of the area, he could have left the area and re-entered the danger zone adjacent to the trailer, or he may have not yet left the area and was intending to roll up the webbing straps before he did so.
- 22 Whilst Mr Murphy had been trained where not to be during unloading, his training also indicated that his role in preparing the truck for the unloading had not yet been completed, according to Mr Verdon.
- 23 Normetals had no procedure, written or oral, to check the driver's position before and during unloading and to enforce his exclusion from the danger zone near the trailer. It also gave no instructions to its forklift driver as to how to ensure that no one was in the danger zone during unloading or loading.
- 24 A simple safe operating procedure that should have been in place would have contained the following elements:
 1. It would ensure the drivers are in a safe zone, before the unloading commenced and during the course of the unloading;
 2. It would have a marked exclusion zone around the truck as a reminder to drivers of the dangers posed by the risk of a falling load; and
 3. It would include some form of physical barrier to prevent entry by people.
- 25 These are simple and inexpensive measures that were reasonably practicable. This was a safety measure that was basic and obvious. If it was in place it is likely Mr Murphy would not have been killed at work.
- 26 The prosecutor has alleged that Normetals' prior OHS compliance and attitude was of a poor standard. In addition to there being no procedures for loading and unloading trucks, Normetals could not produce any induction or OHS training records for its employees, or any records of any hazard inspections, despite the regular use of forklifts, drop saws, grinders, bandsaws and oxy cutting gear. Normetals did not have an appointed or trained responsible OHS officer. During a visit to the premises by an inspector some two months after the incident, sixteen improvement notices were issued. They were all since satisfied and lifted.

- 27 Normetals did have some written OHS policies dating back to March 2002. However they were not reviewed as they said they would be or updated. The policy appears not to have been put into practice. For example it said there would be an OHS Committee and elected representatives but there was no such thing.
- 28 Normetals placed some reliance on the fact that a few weeks before the incident it had been assessed by Onesteel and deemed acceptable. There was however no evidence of the content or form of that assessment, or of its specific purpose. That process failed to identify the complete absence of any Safe Operating Procedures for unloading Onesteel's products from its contracted carrier.
- 29 Normetals disputes that its previous approach to OHS was unsatisfactory. It points to 25 years of operation without a prior major incident, together with Onesteel's assessment of the premises as being acceptable to it. Normetals was also aware of Verdons training of its employees and of the Onesteel training Mr Murphy had undergone, although it had not identified the inconsistency between the two policies about when the driver should pack away the load restraints, and it did not extend any similar training to its own forklift operator.
- 30 In my view these matters are not evidence of a satisfactory approach to OHS by Normetals. The good injury record, whilst a positive consideration, is not on its own evidence of OHS compliance. Any reliance by Normetals on suppliers or contractors taking responsibility for some of its OHS obligations is misplaced.
- 31 Similarly, Mr Edwardson's submission on behalf of Normetals that Verdons had the ultimate responsibility as Mr Murphy's employer, to provide adequate training in respect of OHS and in particular the way in which these trucks should be unloaded, is also misplaced. The short answer to this submission is that different entities have overlapping responsibilities with respect to the occupational health and safety of any particular work activity. So just as Verdons had a responsibility to provide adequate training for its employees, and just as employees have an obligation to take due care for their own safety, Normetals had a significant responsibility with respect to the unloading process here. It was the Normetals driver who operated the forklift and who directed the unloading on its premises. Mr Murphy was not in control of the work process. Furthermore, Verdons cannot be expected to set up safe operating procedures that are binding on Normetals' employees in Normetals premises. As the charge states, the workplace was under the management and control of Normetals.
- 32 Normetals submitted that the risk of injury to a driver in Mr Murphy's position could not be eliminated if the driver chose to ignore his training

and instructions. Mr Edwardson said “short of physically restraining him the incident could not have been avoided”.

- 33 I reject this submission because it disregards Normetals’ responsibility to control its own work practices in its own business premises. Having a safe operating procedure with the elements discussed above, would go a long way towards reducing the risk even if it could not be eliminated completely. A simple instruction from Normetals to its own driver to not start unloading if he did not know exactly where the driver was, would have prevented the incident, if followed.
- 34 It is also not clear in this case that Mr Murphy chose to ignore his previous training. The training begs the question of precisely when Mr Murphy’s unloading work ended and the unloading work of the Normetal employee should commence. The submission also assumes that Mr Murphy had heard and understood Mr Wollaston’s instructions that he was about to commence unloading. I agree that Mr Murphy may have ignored his training, by wrongly thinking that the far side of the truck was a safe place to stand during the unloading process. He may have believed that he still had a couple of minutes to roll up the binders before the unloading would start, and that Mr Wollaston was aware he would do so.
- 35 However it is foreseeable that employees may, for whatever reason, not promptly leave or may re-enter the exclusion zone alongside the truck and thereby place themselves at risk during an unloading or loading process. That risk could have been eliminated or reduced by Normetals developing and adopting its own safe operating procedures.
- 36 In response to the incident Normetals promptly developed a fully complying safe operating procedure, as part of a comprehensive traffic management policy. This correctly includes a warning against assuming that forklift traffic management is a matter of common sense. It says: “Forklift traffic management is about minimising risk through the application of systematic controls supported by clearly defined and enforced ‘rules of the road’”.
- 37 The new SOP includes the following features. An exclusion zone was marked on the ground around the area in which trailers are unloaded. A physical barrier system was installed in the unloading area to make it clear that drivers and other people are not to enter that area. A written instruction was provided to all drivers as to where they can and cannot go. New signs incorporating these procedures were installed. A room for drivers to wait in was installed just outside the loading area. The new procedure requires the driver to be in the truck cabin, in the lunchroom or with a Normetals employee in the safety zone, until called upon by the forklift operator on completion of loading or unloading. The safety zone

is indicated to be outside the marked exclusion zone and where a driver can see and be seen by the operator, and clear of potential falling product. The forklift driver now must know the whereabouts of the driver at all times.

- 38 Mr Murphy's death, at age 33, has had a devastating impact on his family. Mr Murphy's eldest son, Brenton Murphy, was 14 years old at the time and lived with his mother Leigh Murphy interstate. Mr Murphy had been in a loving relationship with his life partner Cynthia Fielding for ten years. Mr Murphy was father to Ms Fielding's child John, then sixteen years, and their child Sean, then seven years.
- 39 Ms Fielding provided a victim impact statement that provided a deeply moving account of the impact of Mr Murphy's sudden and unexpected death on their family. Ms Fielding speaks of deep grief, much suffering but also much love for their children. Ms Fielding has received some workers compensation payments in respect to loss of her spouse.
- 40 Victim impact statements have also been submitted by some members of Mr Murphy's family. His father John Murphy was very close to him. He has suffered greatly since. Kathleen Murphy is the stepmother of Mr Murphy. She has also suffered a significant adverse grief reaction. Mr Murphy had four sisters, including Erin Murphy, Tracey Reeves and Susan Gallina. They were also very close to their brother. They too have suffered greatly.
- 41 Mr Murphy's death also significantly affected many other people including his colleagues and Normetals' own employee Mr Wollaston. As Mr Wollaston put it:
- “I saw the load was across his head. That is one image I will never forget. I held his arm and felt the need to help him but in the end I knew I could not help him. I just walked back out of the shed. All I could think about was my own family; what am I going to tell my kids? What about him if he had kids?”
- 42 The members of Mr Murphy's family have applied for compensation in accordance with the scheme set out under s 53 of the *Criminal Law (Sentencing) Act 1988*. That provision allows a court to award a maximum of \$20,000 in respect of an offence, with that maximum able to be divided between multiple claimants, if relevant.
- 43 Normetals indicated it would not resist an order for compensation out of genuine concern for those who have been hurt as a consequence of this tragic incident. Accordingly I propose to make an order for compensation.

- 44 Ms Fielding and the dependent children are not entitled to any Sentencing Act compensation in view of their workers compensation entitlements. Lee Murphy, the mother of Brenton, is not entitled to compensation in view of the remoteness of her relationship with Mr Murphy at the time of his death and the lesser impact it had on her. The remaining claimants are entitled to an award. That includes Brenton Murphy as he had no workers compensation entitlements, Mr John Murphy, Kathleen Murphy, Erin Murphy, Tracy Reeves and Susan Gallina.
- 45 Next I must assess the amount of compensation each claimant is entitled to. The only material before the Court is that contained in the Victim Impact Statements for each claimant. They set out personal details of the grief suffered by each applicant and details of the nature of their relationship with Mr Murphy. In assessing compensation I have considered that each claimant would be entitled to a far greater amount than that available to be shared under the Sentencing Act. I have also been required to make some relative apportionment between the six claimants, but having done so I observe that some amounts of resulting compensation are little more than symbolic. In assessing respective compensation I have taken into account the nature of the relationship with Mr Murphy, and the details of the claimants adverse grief reactions. Taking these factors into account I determine compensation as follows:

Brenton Murphy:	\$8,000.00
John Murphy:	\$4,000.00
Kathleen Murphy:	\$2,000.00
Erin Murphy:	\$2,000.00
Susan Gallina:	\$2,000.00
Tracy Reeves:	\$2,000.00

- 46 The owner of Normetals, Norman Schueler attended the sentencing hearing. His lawyer expressed a public apology for the offence to Mr Murphy's family.
- 47 Normetals entered a relatively early guilty plea in the context of clarification of the charge and some particulars being withdrawn. It was not however a guilty plea at the earliest opportunity. A grace period is not granted for negotiations over charges such that a defendant can then still expect to get the same full discount for a guilty plea that is entered at the first hearing of that same charge. Normetals has expressed its contrition and had cooperated with Safework. For these factors I will

afford Normetals a reduction of 20% of the fine that I would have otherwise imposed.

- 48 The defendant does not have any prior offences. The maximum penalty it faces is a fine of \$100,000.
- 49 In assessing the penalty to be imposed on Normetals I have taken into account the personal references in respect of Mr Schueler. They describe Mr Schueler as a generous community minded citizen who is concerned for the welfare of others. This is consistent with Mr Schueler's provision of psychological counselling for his employees, and an offer to reimburse Ms Fielding the cost of a pre-booked family holiday.
- 50 I accept that Mr Schueler and his company were concerned for the welfare of their employees prior to the incident and that a number of positive initiatives have been implemented in the months following the incident to ensure full OHS compliance.
- 51 The circumstances that gave rise to the incident were not due to a momentary lapse of an otherwise complying system of work. The absence of its own safe operating procedures for the loading and unloading of trucks is a serious breach of its obligations to protect the safety of an invitee in Normetals' workplace. This is against a background of far from adequate OHS efforts. In these circumstances the principles of general deterrence are paramount.
- 52 I have also considered whether the penalty I propose to impose ought to be reduced on account of the order for compensation. In some circumstances that may be appropriate, but in my view not in this case. That is because it involves a fatality of a worker who was also a father, husband, son, brother and uncle. To do so would also detract from the important general deterrent effect of the monetary penalty.
- 53 In all the circumstances I determine the appropriate monetary penalty is to be based upon a starting point of a fine of \$65,000, which after the reduction becomes \$52,000.
- 54 I impose a conviction on Normetals.
- 55 I also order the following legal fees, courts costs and victims of crime levy to be paid.

Summary

56 The penalties are as follows:

A conviction is imposed.

Fine of:	\$52,000.00
Court Costs:	\$131.00
VIC Levy:	\$70.00
Counsel Fee (payable to the Crown)	<u>\$800.00</u>
TOTAL:	<u>\$53,001.00</u>

28 days to pay.

Compensation is as follows:

Brenton Murphy:	\$8,000.00
John Murphy:	\$4,000.00
Kathleen Murphy:	\$2,000.00
Erin Murphy:	\$2,000.00
Susan Gallina:	\$2,000.00
Tracy Reeves:	<u>\$2,000.00</u>
TOTAL:	<u>\$20,000.00</u>

28 days to pay.