

IN THE COUNTY COURT OF VICTORIA
AT LATROBE VALLEY
CRIMINAL DIVISION

Revised
Not Restricted
Suitable for Publication

Case No. CR-23-01119
CR-23-01120

DIRECTOR OF PUBLIC PROSECUTIONS

v

DENNIS JONES

-and-

DENNIS JONES ENGINEERING PTY LTD

JUDGE: Her Honour Judge Hawkins
WHERE HELD: Latrobe Valley sitting at Melbourne
DATE OF HEARING: 2 October 2023
DATE OF SENTENCE: 9 November 2023
CASE MAY BE CITED AS: DPP v JONES & ANOR
MEDIUM NEUTRAL CITATION: [2023] VCC 2054

REASONS FOR SENTENCE

Subject: Criminal Law – SENTENCING
Legislation Cited: *Occupational Health and Safety Act 2004* s2(1), s4, s21(1), s21(2)(a), s32, s144(1); *Sentencing Act 1991* s5(2)(b), s5(6), s6AAA; *Crimes Act 1958* s22, s23
Cases Cited: *DPP v Frewstal Pty Ltd* (2015) 47 VR 660; *Orbit Drilling Pty Ltd v R* (2012) 35 VR 399; *Di Tonto v The Queen* [2018] VSCA 312; *DPP v Vibro-Pile (Aust) Pty Ltd* [2016] VSCA 55; *DPP v Kent Bedford and Underwater Inspection Services Pty Ltd* [2023] VCC 1047; *DPP v Fergusson and Jacbe Builders Pty Ltd* [2017] VCC 1276; *DPP v E. & O. Lagondar Nominees and Lagondar* [2021] VCC 1024; *VWA v Valley Sweep Pty Ltd and Anton Zakic* (Latrobe Valley Magistrates' Court, 2 October 2020); *DPP v Amcor Packaging Australia Pty Ltd* (2005) 11 VR 557; *DPP v Coates Hire Operations Pty Ltd* [2012] VSCA 131; *Veen (No 2)* (1987) 164 CLR 465; *Worboyes v The Queen* [2021] VSCA 169; *R v Denbo Pty Ltd* (Supreme Court of Victoria, Teague J, 14 June 1994)
Sentence: Dennis Jones Engineering Pty Ltd sentenced to a fine of \$2,100,000; Dennis Jones sentenced to a fine of \$140,000 and a five-year Community Corrections Order

APPEARANCES: Counsel Solicitors

For the DPP

Ms M Tittensor SC
Ms A French

Office of Public Prosecutions

For the Accused

Mr R O'Neill
Ms A Dickens

Russell Kennedy Lawyers

HER HONOUR:

- 1 Dennis Jones Engineering Pty Ltd ('DJE'), you have pleaded guilty to:
 - 1 charge of recklessly endangering persons at a workplace contrary to section 32 of the *Occupational Health and Safety Act 2004* ('OHS Act'), which carries a maximum penalty of 20,000 penalty units or \$3,634,800.¹

- 2 Dennis Jones, you have pleaded guilty to:
 - 1 charge of being an officer of a body corporate that failed to provide and maintain safe systems of work, contrary to sections 21(1) and subsection (2)(a) where that contravention was attributable to the officer's failure to take reasonable care, contrary to section 144(1) of the OHS Act which carries a maximum penalty of 1,800 penalty units or \$327,132.²

Circumstances of Offending

- 3 The circumstances of your offending and that of the Company are set out in the Summary of Prosecution Opening for Plea dated 3 October 2023, the accuracy of which you accepted through your counsel.

- 4 I provide a summary of the circumstances of the offending:

- 5 DJE is a machine shop. The shop contains several items of plant that perform machining processes such as drilling, milling, threading, and turning.

- 6 Mr Jones, you are now and were at the time of offending, the sole director, shareholder, and manager of DJE.

¹ 20,000 penalty units @ \$181.74

² 1,800 penalty units @ \$181.74

7 At the time of the offending, Mr Byron Foley was a second-year apprentice employed by DJE.

8 At the time of the offending, Mr Jacob Vuilermin and Mr Justin McQuillen were both full time machinists employed by DJE.

The Relevant Work

9 A lathe is a piece of plant used in machining. It rotates a workpiece, such as a length of bar or pipe, about an axis to perform various operations with tools applied to the workpiece to create an object with a symmetry about that axis.

10 A CNC (Computer Numerical Control) lathe is a modern lathe which uses computer control systems to make precise cuts and exact shapes. One of the functions that a CNC lathe can perform is to thread the ends of pipes.

The Risk Posed

11 Mr Foley had been trained to thread the ends of short lengths of pipe using a CNC lathe.

12 Mr Jones, you and Mr Vuilermin would check the CNC lathe before Mr Foley could use it and would supervise and stay with him until you were both confident he could do the job on his own.

13 Mr Foley was not allowed to work on pipe longer than 1500mm alone, as longer lengths protruded from the back of the machine and required extra support.

14 Mr McQuillen stated that working with long sections had 'a higher risk level, as the protruding sections of the pipe that extend past the rear of the machine spindle can wobble and bend or throw the machine out'. He noted this was a well-known risk in the industry.³

³ Justin McQuillen Statement dated 13 October 2021

- 15 A former long-term employee of DJE, Mr Paul Makepeace, also said that the risk posed by overhanging pipe was a well-known safety risk as the pipe ‘can bend or whip and strike anyone that is standing too close’.⁴
- 16 Mr Makepeace stated that you, Mr Jones, had specific experience with this exact risk around 10 to 12 years earlier. No one was injured at the time.
- 17 Mr Makepeace recalled that at the time of this incident, there was a freestanding purpose built “steady” at the workplace. The purpose of the steady was to support long work pieces that protruded from the rear of a lathe to prevent those pieces from whipping.
- 18 Mr Vuilermin stated he had used lathes at DJE to thread long pipes several times a year with the assistance of Mr Edwards, a formerly employed trades assistant. They would use either a hand-held bung to steady the protruding section of the pipe, or a ‘G clamp’ was used to secure a bung to a table which was supporting the length of protruding pipe. There was also a bracket steady welded into the wall for work pieces long enough to reach.
- 19 Mr Edwards stated that he was taught at TAFE that ‘if the work piece is too long (protruded past the spindle), the overhung section must be supported in a “V block” or a steady. While the lathe was in operation, the area around the overhung section needed to be kept clear and we had to block off that section to all persons’.⁵
- 20 When working with Mr Edwards, you used the “V Block” steady, a heavy duty portable steady, and you held a plastic bung and stood at either the end of, or the side of the pipe to steady the overhung section. Mr Jones, you never explained to Mr Edwards why you occasionally directed him to hold a plastic bung instead of using a steady.

⁴ Paul Makepeace Statement dated 9 November 2022

⁵ Josh Edwards Statement dated 30 March 2022

21 Mr Edwards did this work with you approximately ten times over the six years he was employed by DJE. Mr Vuilerman did this work several times a year.

The Incident

22 On 13 October 2021, you and Mr Foley were threading lengths of 33.5mm stainless steel pipe ranging in length from 200mm (20cm) to 6000mm (6m). You had programmed the lathe so that Mr Foley could then thread a number of short lengths of thread on his own.

23 After about an hour, Mr Foley approached you so that you could assist him with working on the longer lengths of pipe, of over 1500mm.

24 At around 2:46pm, Mr Foley took a video on his mobile phone which showed a short section of already threaded pipe, as well as a longer section of pipe in the lathe, extending out from the rear spindle. Mr Foley said he took this video as he had not completed the task before. Mr Foley cannot remember anything else with respect to the events leading up to the incident.

25 At around the time Mr Foley approached you for assistance with working on the longer lengths of pipe, you asked Mr McQuillen to locate the portable steady. It was located about 10 metres away from the lathe, and Mr Foley and Mr McQuillen carried it over to the work area. The portable steady was then placed at the side of the lathe.

26 The steady had a plastic insert sleeve, or “bung”, that was too small for the pipe. Mr McQuillen told Mr Foley to machine out the insert so that the pipe would fit. Mr Foley tried to machine out the insert, however it was still too tight, so Mr McQuillen instructed Mr Foley to machine it out by a further 5mm, which he did.

27 At that point, you walked past and said, ‘come on, let’s go machine these pipes’.

28 Mr McQuillen assumed that the steady with the sleeve prepared by Mr Foley would be used. Inexplicably, this was not the case.

- 29 Instead of securing the pipe within the sleeve on the steady, you operated the lathe and directed Mr Foley to stand at the end of the pipe protruding from the lathe, hold onto the plastic sleeve that encased the pipe and manually steady it while it rotated. You and Mr Foley threaded the ends of approximately 10 lengths of pipe in this manner.
- 30 When it came to the eleventh length of pipe, after threading the first end, you noted that 'the pipe was wobbling a little bit. Wasn't too bad'. The pipe then had to be turned around so that the other end could be threaded. When the second end was being threaded, the pipe bent and whipped. The pipe came to rest at an almost 90-degree angle and was scraping along the ground. As the pipe bent and whipped, Mr Foley was struck to the left side of the head, either by the pipe or by his head striking something else when he was flung to the side after contact with the pipe.
- 31 Mr Jones, you applied pressure to Mr Foley's head wound and directed Mr McQuillen to call an ambulance. Mr Foley was subsequently placed into an induced coma and was airlifted to the Alfred Hospital.
- 32 After the incident, WorkSafe inspectors attended the workplace. It was noted by the inspectors that the pipe involved in the incident was 2.72 metres long and protruded 1.46 meters from the rear spindle of the lathe.
- 33 One of the inspectors who attended, Mr Ooi, observed that:
- (a) the length of pipe protruding from the rear spindle was unsupported;
 - (b) there were no physical barriers preventing a person from approaching the pipe while it was rotating; and
 - (c) the steady was located approximately two metres away from where it needed to be positioned to support the pipe.

- 34 When asked about the incident and how it had occurred, you said that you were not sure whether the plastic sleeve being held by Mr Foley had slipped from the end of the pipe, or whether there was a bit of a wobble in the pipe which caused Mr Foley to let go.
- 35 You said that it appeared Mr Foley turned and tripped and hit his head, perhaps on a bin a few meters to the side of where he had been standing, and that he ended up in a position where he was lying flat on his back.
- 36 When you were asked why the nearby portable steady had not been used, you said words to the effect of 'good question- probably just- probably didn't get a bung out for that'. You said that there was no reason why the steady was not used and indicated that it was your practice to start with shorter lengths of pipe extending from the lathe, and if things were going okay you would continue in this way, only bringing out the steady if there were issues. You informed the inspectors that you had a number of steadies at the factory.
- 37 Following this, Senior Investigator Steer made a video recording during which you explained the task being performed and the incident. In this recording, you reiterated that you had told Mr Foley to ask for help before he started working on the longer lengths of pipe.
- 38 When you were asked to describe how another person was able to provide extra support for the longer pipes, you said 'I know this is a bit agricultural, but we just hold a plastic bung on the end just to steady it, but we're not spinning super fast, so it's only – it's only going slow'.
- 39 You said that you would manually adjust the speed of the lathe depending on the wobble, and you would ask Mr Foley if the pipe was wobbling too much. You said that you had done tests with the lathe running at around 700 revolutions per minute (rpm), and you estimated that it was running at around 300 to 400 rpm at the time of the incident.

- 40 When you were asked how the pipe came to be bent, you said ‘that’s the question’. You noted that you had already completed one end of the pipe, and ‘if there was a drama, it would have happened on the first end... he was standing here and then the next minute – second, he – I just saw him trip and he’s down there. And then ‘cause he let go – and I don’t – I’m not – I can’t say whether he let go ‘cause that – but that shouldn’t have started wobbling;’.
- 41 On 14 October 2021, WorkSafe inspectors again attended the workplace and issued an improvement notice in relation to the use of the lathe. The notice referred to the risk to employee health and safety from being struck or entangled by the rotating workpiece being machined which could result in serious injury.
- 42 When inspectors attended the workplace a month later, on 17 November 2021, it was observed that external covers had been placed over the rear spindle of the lathe which prevented long lengths of pipe from being machined. You informed inspectors that long lengths of pipe would not be machined on CNC lathes and that a dedicated threading machine would be used for the task. Consequently, it was determined that the business had complied with the improvement notice.
- 43 Two experts were engaged by WorkSafe to provide their opinion with respect to industry practice concerning the use of CNC lathes to thread pipe, and in particular, threading pipes that extended past the rear spindle.
- 44 Mr Peter Elovaris completed his five-year apprenticeship in 2006 and is currently employed by Kangan Institute as a Sessional Teacher and Engineering Trade Assessor. Mr Elovaris said that upon viewing the photograph of the bent pipe in the machine, it was immediately obvious to him what had occurred. He noted that a workpiece whipping during rotation due to inadequate support was a well-known safety concern of which any qualified tradesperson would be aware. He said this is something that is taught to first and second year apprentices.

- 45 Mr Paul William Fowler is the Managing Director of Dimac Tooling and has over 40 years' experience in the industry. He noted that in addition to providing adequate support to any overhanging pipe, it is necessary to provide an effective cage or barrier to prevent persons from accessing the danger area around the spinning work piece.

The OHS Act – Objects and Duties

- 46 The OHS Act imposes several duties on people involved in work and workplaces. Those duties are to be interpreted in light of the “objects” of the OHS Act⁶ and the “principles of health and safety protection”.⁷
- 47 The OHS Act requires people involved in work and workplaces, as far as is reasonably practicable:
- (a) To secure the health, safety and welfare of employees and other persons at work; and
 - (b) To eliminate, at the source, or reduce, risks to the health, safety or welfare of employees and other persons at work.
- 48 The OHS Act proscribes general duties relating to health and safety and contains various offence provisions:
- (a) Section 21(1) of the OHS Act imposes a duty on employers to provide and maintain for its employees, a working environment that is, so far as is reasonably practicable, safe and without risks to health. Section 21(2)(a) provides that an employer contravenes section 21 if it fails to provide or maintain systems of work that are, so far as is reasonably practicable, safe and without risks to health.

⁶ OHS Act s2(1)

⁷ *Ibid* s4

(b) Section 32 of the OHS Act imposes a duty on persons (be they a body corporate or a natural person) not to recklessly engage in conduct that places or may place another person who is at the workplace in danger of serious injury. Offending against section 32 involves a person:

- (i) Having foresight or awareness that the conduct (to be) engaged in will probably have the consequence that another person at the workplace is placed, or may be placed, in danger of serious injury; and
- (ii) Proceeding with that conduct, indifferent to or in disregard of whether or not that consequence occurs.⁸

49 Section 144(1) of the OHS Act imposes liability on officers of bodies corporate in circumstances where a body corporate has contravened a provision of the OHS Act (or regulations), and the contravention is attributable to an officer of the body corporate failing to take reasonable care. In accordance with s 144(4), an officer of a body corporate may be convicted or found guilty, whether or not the body corporate has been convicted or found guilty of the offence, in this case, offending against sections 21(1) and subsection (2)(a), committed by it.

Maximum Penalties

50 I have set out above the maximum penalties which may be imposed for the offending before the Court. In 2016, Parliament saw fit to increase the maximum penalty for a section 32 offence, such that it is now the second highest penalty under the OHS Act, ranking below the newly introduced offence of Workplace manslaughter. Parliament's intention was outlined in the Second Reading speech to the Bill that increased this maximum, where the Minister stated:

“The offence of reckless endangerment requires a far greater degree of culpability than an offence against section 21, which requires an employer to provide and maintain a working environment that is safe and without risks to the

⁸ *Orbit Drilling Pty Ltd v R* (2012) 35 VR 399 at [21] – [24] (*‘Orbit Drilling’*).

health of their employees... Where a body corporate recklessly places a person in their workplace in danger of serious injury, it should be treated as the most serious offence under the Act".⁹ The scheme of the OHS Act is important when considering the gravity of the offending before the Court.

Sentencing Principles for OHS Offences

51 In *DPP v Frewstal Pty Ltd*,¹⁰ the Court of Appeal enunciated the principles by which a sentencing court should be guided¹¹ when sentencing offenders for breaches of the OHS Act with respect to duties to ensure the health and safety of persons in the workplace.

- (a) First, an accused will be punished according to the gravity of the breach of duty owed under the OHS Act, and not according to the result or consequences of the breach.
- (b) Secondly, the gravity of the breach will be measured by two factors:
 - (i) The seriousness of the breach itself (that is, the extent to which the accused has departed from its statutory duty); and
 - (ii) The extent of the risk of death or serious injury which might result from the breach.
- (c) Thirdly, an assessment of the extent of the risk involves the consideration of two factors:
 - (i) The likelihood of the occurrence of an event as a result of the breach endangering the safety of employees or others; and

⁹ Second Reading Speech by the Minister for Training and Skills, Steven Herbert, *Treasury and Finance Legislation Amendment Bill 2016*, 5 May 2016 [emphasis added]. Note, this was prior to the introduction of the Workplace manslaughter offence.

¹⁰ (2015) 47 VR 660

¹¹ *Ibid* at [127]

- (ii) The potential gravity of the consequence of such an event (in particular, whether there is a risk of death or serious injury).
- (d) Fourthly, the fact that the breach in any particular case resulted in death or serious injury is relevant only in the sense that it might manifest or demonstrate the degree of seriousness of the relevant threat to the health or safety resulting from the breach.
- 52 That is, these offences are “risk based”, rather than “outcome” based. The injuries suffered by Mr Foley, are relevant to demonstrate the potentially catastrophic consequences of the identified risk crystallising, which will then be relevant to the objective gravity of the offending.

Gravity of the Offending

Dennis Jones Engineering – Section 32 Offence

- 53 In *Orbit Drilling* the Court of Appeal concluded that section 32 offending is a “high culpability offence” and, an offender’s culpability is determined by considering their awareness in respect of:
- (a) The degree of probability that the worker would be placed in danger of serious injury (which involves consideration of both the likelihood that serious injury would result, and the degree of seriousness of the injury that would be suffered if the risk eventuated); and
- (b) The nature of the probable danger thus foreseen.¹²
- 54 By its plea of guilty, the company acknowledges that at the time Mr Jones required Mr Foley to hold onto a plastic sleeve that encased the end of a pipe, protruding from a lathe by nearly 1.5m, and rotating at a speed of between 300-400 rpm, the company, via attribution of the conduct of Mr Jones, was aware that requiring him to do so would probably place him in danger of serious injury, in the event that he

¹² Orbit Drilling at [49]

became entangled with the pipe, or as a result of the pipe whipping out of control. Despite being aware of that risk, the company nonetheless proceeded to require Mr Foley to perform that task, indifferent to or in disregard of whether or not the consequence arose.

55 The incident involved a single failure to work safely over a short period of time.

56 I accept that the offending is objectively very serious and the DJE's culpability is very high because:

- (a) The risk posed by a pipe protruding from an operating lathe is well known in the machining industry;¹³
- (b) The risk was specifically depicted in signage on the lathe very near to where a pipe would be protruding;
- (c) Mr Jones, as a company director, was explicitly aware that protruding pipes needed to be supported;
- (d) The company was aware of a prior incident in 2012 where a protruding bar had snapped or sheared off;
- (e) Workers would not have been asked to steady a pipe if there was no risk of it deviating from its axis;
- (f) The risk of a pipe deviating from its axis would be increased by a sudden or involuntary human movement;
- (g) The company was aware of and had previously employed methods to support and steady overhanging pipes which avoided the need for a worker to be in the vicinity;

¹³ Expert evidence of Mr Elovaris referred to in the Summary of Prosecution Opening for Plea dated 3 October 2023 at [35]

- (h) Just prior to Mr Foley being required to engage in the task of threading lengths of pipe which protruded from the lathe, Mr Jones had requested that a steady be brought over, ostensibly for the purpose of using it to steady the overhanging pipes. Inexplicably, despite the steady being brought over and preparations made for its use, it was not used;
- (i) There was an appreciation that the likelihood of movement or whipping by a pipe would increase with its length;
- (j) In all the circumstances, there was a reasonably high likelihood that a pipe of the dimensions involved in this case, would whip out of control and in so doing a solid piece of metal would make contact with any person working in proximity to it; and
- (k) The potential consequences if such a risk eventuated were grave, involving the risk of death or serious injury, as evidenced by the extent of the injury suffered by Mr Foley and the uncertainty as to whether he would survive at all.

57 Defence made no submissions seeking to demur from this characterisation of the gravity of the offending.

Dennis Jones – Breach of Section 144(1)

58 Mr Jones, your liability arises in circumstances where DJE's contravention of sections 21 subsections (1) and (2)(a) of the Act is attributable to your failure to take reasonable care.

59 The contravention by DJE consists of a failure to provide or maintain a system of work in which;

- (a) External covers of the rear spindle of the lathe were fixed in place to prevent lengths of pipe that protruded from the rear spindle from being threaded using the lathe; or

(b) A fixed steady was used to support lengths of pipe that protruded from the rear spindle of the lathe; and

(c) An exclusion zone was established restricting access to the danger area around the length of the pipe.

60 The breach of duty was directly attributable to your failure, Mr Jones, to take reasonable care. You were aware of the risk involved in the undertaking and of the simple, readily available means to control the risk. You were personally responsible for directing Mr Foley in undertaking the task in the manner he did, placing him in danger of death or serious injury.

61 Whilst an offence under section 21 involves a lesser degree of culpability than an offence under section 32, for the same reasons as those involving the company, the gravity of your offending, Mr Jones is similarly objectively very serious.

Interrelationship Between the Company and Mr Jones

62 Mr Jones, your failure to take reasonable care is closely linked to the contravention in respect of which DJE is pleading guilty. Although you are the sole director and owner of DJE, the two entities are distinct and must be treated as such. While drawing this distinction, I note that the Court of Appeal in *Di Tonto v The Queen*¹⁴ commented that the fact that the owner and director of a company will suffer the financial penalty imposed when the two fines are combined is not irrelevant.

Victim Impact

63 In respect of an offence against section 21 (and hence section 144 here), an accused is to be sentenced based upon the gravity of the breach of the duty owed, and not the consequences of the breach if there is a resulting death or injury. The same provision applies in respect of section 32. However, as required by the *Sentencing Act 1991*,¹⁵ I take into account 'the impact of the offence on any victim

¹⁴ [2018] VSCA 312 at [29]

¹⁵ Ss 5(2)(daa) and (db) ('*Sentencing Act*')

of the offence' as well as 'any injury, loss or damage resulting directly from the offence'.¹⁶

64 Mr Foley, his mother Rachel Foley and his grandfather Allen Kelly all made victim impact statements which were read aloud in Court and describe the profound impact this incident has had not only on Byron, but the whole family. Mr Foley courageously read out parts of his statement to the Court. He sustained a traumatic brain injury in the incident and continues to experience speech aphasia, seizures, his hand doesn't work and he has walking and balance issues. He has had a skull reconstruction with a titanium plate. He described how he finds daily life difficult and how much has been taken from him. One quote describes his feelings: "I watch my friends every single day live the life I want to be living. My life now revolves around my medical issues, constant appointments, fear and stress'.

Personal Circumstances

Dennis Jones

65 Mr Jones, you were 54 years of age at the time of the offending and are currently aged 56.

66 You grew up in Bairnsdale. Your parents live in Traralgon and your sister lives in Queensland.

67 You have been married to Natalie for 24 years and have two children aged 12 and 13.

¹⁶ *DPP v Vibro-Pile (Aust) Pty Ltd* [2016] VSCA 55 at [195] ('*Vibro-Pile*')

- 68 Leaving school in year nine, you completed a four-year apprenticeship as a Fitter and Turner at Parken Engineering, working for the company for five years in Bairnsdale and Melbourne.
- 69 You moved to Morwell in 1988 to work at Latrobe Valley Machining where you became a leading hand. You trained and mentored numerous apprentices over the five years you were employed there.
- 70 While working at Latrobe Valley Machining, you had a small business that you ran from your shed working on go-kart engines and go-karts.
- 71 You established DJE in 1993 in a small workshop in Morwell. It has since grown and moved to larger premises.
- 72 You have been involved in the community through your involvement in local sporting and community groups. You are an active committee member of the Gippsland Go-Kart club. You participate in monthly meetings and working bees. You are an active participant on club days and provide monetary assistance to the club.
- 73 Prior to the incident your family was close to Mr Foley's family, attending family celebrations together over many years. Mr Foley commenced at the company by doing work experience and was then employed as a trade assistant/labourer, before becoming an apprentice. Relations between the families have understandably broken down since this incident.

Dennis Jones Engineering

- 74 DJE is a family-owned business that has been operating in Morwell for thirty years. The business machines parts for the power, paper, aeronautic, food and transport industries.
- 75 The business prospered between 2006 – 2014 with seven employees (including Mr Jones) machining parts for companies including Gippsland Aeronautics. Work

declined when that business reduced its operations. DJE continued to operate despite the challenges posed by the COVID-19 pandemic.

76 Mr Jones you have always had an apprentice working with you. Sometimes two or three apprentices at once, as well as numerous work experience students.

77 At the time of the incident, the company employed Dennis and Natalie Jones, together with three others including Mr Foley. DJE currently provides employment for the Jones family and one other employee.

78 Following this incident, you contemplated selling DJE and began the process of selling off machines. The business was formally closed at Christmas 2021 but has since reopened.

Financial Circumstances

79 DJE operated at a loss in financial year 2021 and made a net profit of \$800 in 2022. The company recorded a profit of \$23,751 in financial year ending 2023. It is a small company with little to no profit margin.

80 Mr Jones, your business supports your family. Your wife Natalie also earns an income from part-time teaching three days a week.

81 You earn an annual salary of approximately \$65,000 (weekly take home approximately \$1,250). In addition, you receive distributions from a family trust, which last financial year amounted to \$12,908.

82 If the company were to go into liquidation, you would lose this income.

83 Whilst your counsel submit that you and the company are able to pay a fine, they also submit that if a fine were to be imposed that resulted in DJE having to enter liquidation, it would be unable to continue to provide employment for its employees. I note, this may also result in any fine not being paid.

84 Whilst unstated, essentially the defence submission in this case, is that anything other than a modest fine will tip DJE into liquidation. I therefore consider it appropriate to have regard to sentencing cases where a company has already been placed in liquidation in an occupational health and safety context, such as *R v Denbo Pty Ltd*¹⁷. The approach taken by Teague J in that case was to fix a fine in an amount which would have been appropriate if the company had remained as thriving as it appeared to have been at the time of the contravention of the duty.

85 Whilst regard must be had to the financial circumstances of any offender, to place too much weight on the potential consequences of the sentence would not give appropriate weight to the objects of the OHS Act, and principle of general deterrence in cases where a significant fine is appropriate.

References

86 Twelve references from your family, close friends, colleagues and former employees were tendered to the court. They all speak of your strong character and your strong commitment to your community, particularly through your involvement in Sprintcar and go-cart racing and local sporting groups.

87 A number speak of your commitment to maintaining a safe working environment in your business.¹⁸

Psychological Reports

88 You were assessed by Dr Simon Kennedy, a psychologist, for the purposes of this plea.¹⁹

¹⁷ *R v Denbo Pty Ltd* (Supreme Court of Victoria, Teague J, 14 June 1994)

¹⁸ Exhibit 1 – Character References of Mr Robin Alimpic dated 13 September 2023; Mr Dennis Masut dated 14 September 2023; Mr Jacob Vuillermin dated 19 September 2023; Mr Graeme Monds dated 19 September 2023; Mr Bruce Barton dated 19 September 2023 and Ms Sarah Morgon dated 21 September 2023

¹⁹ Exhibit 1 – Report of Dr Simon Kennedy dated 18 September 2023

- 89 You have no history of abuse or trauma, nor have you had any substance abuse issues. Similarly, you did not have any pre-existing psychological conditions at the time of the offending.
- 90 Your wife, Ms Natalie Jones, says she feared for your mental well-being following the incident. She says she observed a change in your demeanour following the incident and says you and your family feel 'deep regret' over what has happened.
- 91 Mr George Morgan, with whom you share a business and personal relationship, notes that since the incident you have been 'noticeably introverted'. Mr Morgan notes that your business has suffered considerably as a result of the incident and describes the flow-on effect this has had on the various businesses that work with DJE.
- 92 Understandably the incident has had a significant impact on your mental health. In the initial aftermath of the offending, you felt significant psychological distress, shock, concern and anxiety.²⁰ You have anxiety going about your daily activities in town because you don't want to come across the family of Mr Foley and cause them distress.
- 93 You have lost friends, interest in hobbies, and your appetite.
- 94 In his report, Dr Kennedy opines that you meet the criteria for chronic Adjustment Disorder with mixed anxiety and depressed mood with post-traumatic stress features following the offending.

Plea of Guilty and Remorse

- 95 Mr Jones, you have personally, and on behalf of your company, apologised unreservedly to Mr Foley and his family for the incident and the significant harm that has resulted. Following the incident, you and your wife did what you could to assist Mr Foley and his family.

²⁰ *Ibid* at 80 [23]

- 96 Dr Kennedy opines that your depressive symptoms, resulting from the incident, demonstrate that you are remorseful for and have clear insight into your offending.²¹
- 97 Mr Jones, I accept that your personal actions, early plea of guilty, and cooperation with WorkSafe’s investigation are genuine demonstrations of remorse.
- 98 Mr Jones, you and the company pleaded guilty at the earliest stage. In doing so, you avoided the need for a trial, saved witnesses the stress of giving evidence in court and avoided the use of public resources that would have otherwise been spent in conducting a trial. I also take particular note that, Mr Jones, you cooperated without hesitation with WorkSafe investigators on the day of the incident when you consented to being videoed and explained the events leading up to the incident.
- 99 I take your remorse and the utilitarian value of your plea of guilty into account in sentencing.
- 100 While the trial backlog in the County Court has now been reduced to pre Covid-19 levels, I accept that your plea has contributed to assisting the justice system in recovering from the effects of the pandemic. Although a term of imprisonment is not open to the Court in sentencing you for these offences, your guilty plea saved all parties from having to undertake what would have been a lengthy trial. Accordingly, you will receive a sentencing discount in accordance with the principles in *Worboyes’* case,²² in so far as they are relevant at this point in time.

Rehabilitation & Specific Deterrence

²¹ Exhibit 1 – Report of Dr Simon Kennedy dated 18 September 2023 at 82 [1], [3] and at 83 [1]
²² *Worboyes v The Queen* [2021] VSCA 169

101 Mr Jones this incident has had a significant impact on your mental health. You have been diagnosed with Adjustment Disorder with mixed anxiety and depressed mood with post-traumatic stress features²³ attributable to the incident and consequent social factors. You are willing to engage in therapeutic treatment.²⁴ Other than the fact that your condition is chronic, there is nothing which will likely impede your rehabilitation.²⁵

102 In a general *Verdins*²⁶ sense, I take these matters into account when sentencing you.

103 Rehabilitation is not a sentencing consideration for a company and, together with specific deterrence, has little role to play in light of DJE's lack of prior offending, good safety record and remorse.

Safety History

104 DJE has operated in a potentially high-risk industry for 30 years. Mr Jones, I acknowledge that this is the first time you or DJE has been prosecuted for offending, occupational health and safety related or otherwise.

105 While not a prior criminal conviction, DJE has been involved in a previous incident in which overhanging material had been snapped or sheared off.

106 Mr O'Neill and Ms Dickens, on your behalf submit that there is no evidence of disregard for worker safety over DJE's long history of operation. They point to a number of matters in this regard:

- (a) Numerous machines used at DJE use generic settings, keyboard, and button configurations. The tasks are often repeated using the programs stored on

²³ Exhibit 1 – Report of Dr Simon Kennedy dated 18 September 2023 at 82 [1], [3] and at 83 [1]

²⁴ *Ibid* at 83 [c]

²⁵ *Ibid* at 84

²⁶ *R v Verdins* [2007] VSCA 62

the computer. Although potentially high-risk machines, the machines do not change and the operation and safety considerations are simple;

- (b) All employees complete training through certified TAFE courses;
- (c) Training is provided by suppliers when machines are purchased. DJE has had approximately four training blocks on each different machine;
- (d) Essentially, employees have their own machines that they work and become familiar with. Each employee is qualified and trained in the machine that they use;
- (e) DJE has had regular workplace audits and no significant issues have been raised;
- (f) DJE has ensured risks such as forklift hazards, manual handling hazards, and cabling for the machines have been mitigated by undertaking appropriate safety precautions; and
- (g) The company has also spent approximately \$42,000 on safety improvements for the workplace. However, I am unclear over what duration and in what time period these improvements were made.

107 Since this incident, DJE no longer engages in any work that does not fit within the confines of the machines' spindle tubes. Therefore, there is no risk that this incident will be repeated. All improvement notices relating to other safety requirements were complied with in a timely and appropriate manner.

Punishment and Denunciation

108 Your Counsel's submission that "this is not a case where there is any evidence of a cavalier attitude toward health and safety" runs contrary to the accepted facts of this case. Mr Jones, the plea of guilty to both charges, recognises that both you and DJE did demonstrate a wanton disregard for the safety of your workers.

Accordingly, whilst not the principal consideration, punishment and denunciation are relevant sentencing considerations.

Criminal History

109 Mr Jones, neither you nor DJE have prior criminal convictions, nor do you have matters pending.

Current Sentencing Practices

110 Regard must be had to current sentencing practices in accordance with section 5(2)(b) of the Sentencing Act. Comparable cases will only be relevant where they are materially the same, or where they are instructively different.

111 Defence Counsel submit that the use of comparable cases in OHS matters is of limited assistance given the breadth of circumstances that may lead to a breach of the Act, and the very few cases prosecuted under section 32.

DJE - Section 32

112 Only two prosecutions have been completed in Victoria in respect of a body corporate contravening section 32 of the OHS Act.

113 I accept the Director's submission that *Orbit Drilling Pty Ltd v R*²⁷ is a relevant comparative case because:

- (a) *The person who was placed in danger was a young employee being instructed to undertake unfamiliar work;*
- (b) *The danger in which they were being placed was obvious;*
- (c) *The danger eventuated resulting in grave consequences;*
- (d) *There were simple measures available to avoid the danger;*

²⁷ (2012) 35 VR 399

(e) *The company pleaded guilty at an early stage; and*

(f) *The company did not have any prior convictions.*

114 In *Orbit Drilling*, the accused company was engaged to perform drilling works for a mining company. For the purposes of conducting this work, a Mack truck had to be driven over the crest of a hill and down a steep slope before stopping and reversing up onto a drill pad.

115 Expert evidence established that a qualified and properly trained driver, driving a properly maintained truck, would have been capable of performing the task.

116 The accused company failed to properly service the truck's brakes, which the accused's company site manager knew were defective.

117 On 9 December 2006, a 21-year-old employee, who had been working for the company for just over a week, was killed when he lost control of the truck while driving down the steep slope.

118 The Court of Appeal described the offending in *Orbit Drilling* as "a very bad instance of a very serious offence"²⁸ and upheld the fine imposed of \$750,000 which represented 77.5% of the available maximum penalty.

119 The second prosecution was *DPP v Kent Bedford and Underwater Inspection Services Pty Ltd*²⁹ which involved quite a different factual and legal matrix to the present case. In that case, the company pleaded guilty to four charges against section 32 which involved one worker being placed in danger of drowning on four separate occasions; and another worker being place in danger of drowning on two separate occasions. Mr Bedford had made representations to clients and workers that evidenced an awareness of the specific risks identified, and the company's

²⁸ *Ibid* at [64]

²⁹ [2023] VCC 1047 ('*Bedford*')

offending was aggravated by the fact that he lied to WorkSafe investigators about the workers' experience and training and he also instructed the workers to lie.

120 The Court in *Bedford* did not regard the risks to be "as culpable" as that which were present in *Orbit Drilling* and imposed a fine of \$150,000 on each of the four charges against section 32 with each individual fine representing 4.7% of the maximum available penalty. As the company was also charged with other offences under the OHS Act, totality was a relevant sentencing consideration.

121 While *Bedford* shares some similarities with the present case in that it concerned young, inexperienced employees being placed at obvious risk, the company pleaded guilty at an early stage and it did not have prior convictions, the case is also instructively different in that no worker was injured. To that end, the Director submits that the following passage from the Court of Appeal in *Orbit Drilling* is relevant, and the serious harm caused to Mr Foley should be factored into the Court's instinctive synthesis:

*"The distinctive character of the offence of reckless endangerment may mean that closer attention should be paid in sentencing to the actual consequences of the offence. As already discussed, the offence under s 32 involves the knowing exposure of a particular person (or person) to a probable risk of serious injury. As with other risk-based offences, the offence is committed at the point when the employee is knowingly exposed to the risk, and the fact that no injury is suffered in no way lessens its gravity. But, where the employer's reckless conduct does cause actual harm, the extent of the harm might be thought to be relevant to penalty, at least where what occurred was within the scope of the danger foreseen".*³⁰

122 Mr Jones, your Counsel submit that your case is quite different to either of these cases. Mr O'Neill submitted that *Orbit Drilling* is a far more serious case than yours particularly noting that it involved a fatality. He drew the analogy to sentencing

³⁰ Orbit Drilling at [63]

practices involving offences of conduct endangering life and persons pursuant to sections 22 and 23 of the *Crimes Act 1958*, which he submitted were similar to section 32 offences in a non-workplace context. He highlighted that charges brought under those sections demonstrate a real consciousness of placing someone at harm by the offender's conduct and submitted that this element was significantly reduced in your conduct. Mr O'Neill distinguished *Bedford*, in that it involved four separate incidents, with different workers.

123 In your case, while young, Mr Foley had worked for DJE for a number of years and was undertaking somewhat familiar work, although the fact that he took a video of the process he was about to undertake evidenced his unfamiliarity with the exact procedure. The danger he was placed in was obvious, and simple measures were available to avoid this danger. The danger eventuated resulting in grave consequences. DJE does not have prior convictions and pleaded guilty at an early stage.

124 While neither *Orbit Drilling* or *Bedford* are on all fours with your case, I conclude that *Orbit Drilling* is a case involving a similar gravity of offending to yours because of the reasons advanced on behalf of the Director. The similarities to the situation in *Orbit Drilling* are sufficiently close for this to be a relevantly comparable case to yours.

Mr Jones – s.144

125 In relation to you personally Mr Jones, the Director submits that the following cases involving the liability of a company director, are relevant comparators:

(a) *Orbit Drilling*;

(b) *DPP v Fergusson and Jacbe Builders Pty Ltd*; ³¹

³¹ [2017] VCC 1276('Fergusson')

(c) *DPP v E. & O. Lagondar Nominees and Lagondar*;³² and

(d) *VWA v Valley Sweep Pty Ltd and Anton Zakic*.³³

126 In each of these cases, the offender:

(a) Was the sole director of the offending company, other than Mr Lagondar, who was a co-director with his wife;

(b) Pleaded guilty (albeit at different stages); and

(c) Did not have any prior convictions.

127 In *Orbit Drilling*, in respect of the Director's liability, his lack of reasonable care meant that "the company had failed to maintain a safe working environment and failed to provide safe equipment and a safe system of work...which created the situation in which a death could occur in the circumstances in which it did".³⁴

128 In *Fergusson*:

(a) The accused company Jacbe Builders Pty Ltd was engaged to do the carpentry work for an apartment building being built in Caulfield.

(b) The owner-director of the accused company, David Fergusson, a registered builder, was working on the site.

(c) Mr Fergusson directed a crane driver to lift three packs of floor sheeting onto the second-floor trusses of the apartment building.

(d) Mr Fergusson and his 21-year-old apprentice were working on the second floor of the apartment building.

³² [2021] VCC 1024 ('*Lagondar*')

³³ (Latrobe Valley Magistrates' Court, 2 October 2020) ('*Zakic*')

³⁴ *Ibid* at [13]

- (e) The weight of the floor sheeting on the second-floor trusses caused the trusses to collapse onto the first floor, and then both floors collapsed onto the ground level.
- (f) Mr Fergusson and the apprentice fell with the debris to the ground, and the apprentice was killed.

129 In *Lagondar*:

- (a) The accused company owned a factory. The factory was used by Frontier Industries Pty Ltd to manufacture polystyrene packaging. Frontier's director was Mr Lagondar's son.
- (b) The factory was sold. Pursuant to the contract of sale, the accused company was required to remove everything below the roof truss line prior to settlement.
- (c) The deceased had been previously employed by Frontier and was friends with Mr Lagondar. He was informally engaged by the accused company to assist with decommissioning the premises.
- (d) Mr Lagondar, who was nearly 80 years of age, was operating a forklift. He did not have a licence to do so. The deceased was inside a steel stillage that had been elevated to a height of 4.5 metres by the forklift in order to oxy-cut steel beams that ran across the inside roofline of the premises.
- (e) The stillage became detached from the forklift and fell to the concrete floor below, resulting in the deceased suffering fatal head injuries.
- (f) The stillage had been built by the deceased many years earlier. It was found to be unstable and unable to be properly secured to the forklift. The work could have been performed through the use of a scissor lift.

130 In *Zakic*:

- (a) The accused company provided machinery and services for road construction and maintenance. It owned a fleet of trucks.
- (b) One of the water cart trucks had been purchased about two years prior to the incident and a certificate of roadworthiness was issued in that year.
- (c) Owner-director, Anton Zakic and an employee performed some maintenance for the fleet, although neither were qualified mechanics. All major services of the fleet were performed by qualified mechanics, however the water cart truck involved in the incident had not had a major inspection since the issue of the roadworthiness certificate.
- (d) A 21 year old employee lost control of the water cart truck, while descending a steep section of road, and died as a result of the serious injuries he sustained.
- (e) The truck's brakes were found to be in poor condition and the primary cause of the incident.
- (f) Mr Zakic had been made aware by his employees that they had problems with the trucks more generally but he did not appear to do anything about it. After the accident VicRoads inspected all of the company's vehicles and issued defect notices in respect of 13 out of 17 vehicles.

131 I accept the Directors' submissions that the abovementioned cases provide relevant comparators in relation to the seriousness of the offending, Mr Jones, in that:

- (a) The risks posed to an employee were readily foreseeable;
- (b) In *Orbit Drilling, Fergusson and Zakic*, the employee exposed to risk was young and inexperienced;

- (c) In *Fergusson* and *Lagondar* the offenders were personally involved in the events constituting the offending;
 - (d) The likelihood of the risk eventuating was high;
 - (e) The degree of harm that would result if the risk eventuated was very high (namely, serious injury or death); and
 - (f) There were obvious and readily available systems of work that could have reduced or eliminated the risks.
- 132 The company director in *Orbit Drilling* was convicted and fined an amount which was 62% of the maximum penalty applicable at the time;
- 133 Mr Fergusson was convicted and fined 69% of the maximum penalty;
- 134 Mr Lagondar was convicted and fined 43% of the maximum penalty; and
- 135 Mr Zakic was dealt with in the Magistrates' Court. The Magistrate announced that he was convicted and fined 52% of the maximum penalty, which was then reduced to the maximum penalty available in that jurisdiction.
- 136 Like *Orbit Drilling*, your lack of reasonable care meant that DJE failed to maintain a safe working environment which created the situation in which Mr Foley's death was only narrowly averted, and he is left with profound life altering injuries.

Disposition

- 137 In occupational health and safety matters, the objective seriousness of the breach constitutes the primary factor in determining the appropriate penalty, and mitigating factors that are subjective to the offender, such as a plea of guilty, remorse or previous good character play a subsidiary role.³⁵ Despite the objective

³⁵ *DPP v Amcor Packaging Australia Pty Ltd* (2005) 11 VR 557 at 565, [35]; and *DPP v Coates Hire Operations Pty Ltd* [2012] VSCA 131 at [79]

seriousness of the offence, it is important to note that imprisonment is not a sentencing option open to the Court in this case.

138 Here, general deterrence is the predominant sentencing consideration. While deterrence cannot be given such weight as to lead to a sentence which is disproportionate to the gravity of the offence³⁶ that is of no concern here given the very serious nature of the offending.

139 The Court of Appeal in *Vibro-Pile* emphasised that “...sentences imposed need to draw attention to the importance of workplace safety, and to send a message to employers that failure to eliminate or mitigate safety risks will attract significant punishment”.³⁷ That statement is entirely apt in this case.

Community Corrections Order

140 Mr Jones, your Counsel filed further written submissions seeking that you be placed on a Community Corrections Order, in accordance with the principles in *Boulton*.³⁸ I understand the prosecution does not object to such a course. Section 5(6) of the *Sentencing Act* provides that “A court must not impose a community corrections order unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by imposing a fine”.

141 In circumstances where the quantum of the fine to be imposed upon DJE will likely impact on your financial position, Mr Jones, the purpose for which the sentence is to be imposed on you personally will not be achieved by imposing a fine alone. I therefore consider it appropriate to both convict and fine you and place you on a community corrections order to perform unpaid community work. I understand you will consent to being placed on such an order.

³⁶ *Veen (No 2)* (1987) 164 CLR 465

³⁷ *Vibro-Pile* at [233]

³⁸ *Boulton v The Queen* [2014] VSCA 342; 46 VR 308

Sentence

142 DENNIS JONES ENGINEERING, on charge 1 on the indictment will be convicted and fined \$2,100,000.

143 DENNIS JONES, on Charge 2 on the indictment you are convicted and fined \$140,000; and

144 On charge 2 you are also convicted and sentenced to a Community Corrections Order which will last for 5 years and commence from today:

145 The conditions of this order are:

- (a) You must attend at Morwell Community Corrections Service within two clear working days of this order commencing;
- (b) You are required to perform 600 hours of unpaid community work as directed, over 5 years;
- (c) You must not commit an offence punishable by imprisonment during this order;
- (d) You must not leave Victoria without permission of Community Corrections;
- (e) You must let your Community Corrections Officer know within 2 clear days of changing address or a job;
- (f) You must comply with any lawful direction given by a Community Corrections Officer that is necessary to ensure you comply with the order; and
- (g) If you contravene this order by either committing further offences, or by failing to comply with the conditions then you can be brought back before this Court, fined and resentenced.

- (h) I have not included the order sought by the Prosecution that you undertake occupational health and safety courses as part of this CCO, as I have been informed these courses are not available.

Section 6AAA Declaration

- 146 Pursuant to section 6AAA of the Sentencing Act, I indicate that had you pleaded not guilty and been found guilty after trial, I would have convicted and fined DJE \$2,800,000 and Dennis Jones \$270,000.
- 147 Mr Jones, you have indicated your oral consent to this order, which I direct to be entered onto the court record.