

Case learnings – September 2023

Facts of the case

An individual was the sole owner and operator of a towing company.

In February 2019, the operator of the tow truck agreed to assist in towing a vehicle that had experienced mechanical difficulties. In the process of loading the vehicle, the operator left the vehicle suspended on the raised tilt tray and walked away.

It was around the same time that the driver of the vehicle being loaded walked behind the tow truck. As the driver walked behind the tow truck, the bull bar, which was used by the tow truck operator to winch the vehicle onto the tilt tray, gave way. This then caused the loaded vehicle to roll back down the raised tilt tray and hit the driver. The driver, who was the tow truck operator's customer, died instantly.

A subsequent investigation discovered that the operator had failed to undertake the following to ensure the safety of his transport activities:

- Failed to lower the tilt tray prior to securing the rear wheels;
- Failed to attach the winch cable to the axle or hanger springs; and
- Failed to keep the driver of the retrieved heavy vehicle in line of sight at all times or to exclude him completely from the area.



The charge

The operator was charged with a Category 1 offence under the *Heavy Vehicle National Law* ('HVNL') namely, that he engaged in conduct relating to his safety duty that exposed another to the risk of death, serious injury or illness, being reckless to that risk. This meant that he was aware his conduct may expose another to the possibility of death or serious injury, but proceeded regardless.

Following a trial in the Magistrates Court and a successful prosecution appeal to the Supreme Court, the operator pleaded guilty to the Category 1 offence.

The sentence

In September 2023, a Magistrate sentenced the operator to 10 months' imprisonment which was reduced to 6 months on account of his early guilty plea. This period of imprisonment was then suspended on the condition that the operator be of good behaviour for a period of two years.

In addition, the Magistrate issued a Prohibition Order prohibiting the operator from engaging in any heavy vehicle loading for a period of 12 months.

In the sentencing remarks, the Magistrate stated the following:

- That the court can only impose a sentence of imprisonment if it is necessary for general deterrence and if it is the only appropriate sentence;
- The penalty must serve as a deterrent to others; and
- The offending was objectively serious in that the operator was aware of the risk and proceeded anyway.

This sentence is significant in that it is:

- The first guilty plea received for a Category 1 offence under the HVNL;
- The first sentence for a Category 1 offence; and
- The first sentence of imprisonment for any HVNL offence.

Key takeaways

Considering the potentially significant consequences of non-compliance with your primary duty, it is important that you review loading guidelines and ensure you are doing everything reasonably practicable to eliminate or minimise the risks associated with your transport activities.

Below are some takeaways from this case:

- Risk assessments should be completed prior to undertaking all loading tasks;
- Ensure that your loading method complies with your loading obligations under the HVNL and the Master Code;
- Ensure that all parties are aware of the risks posed by transport activities, even if parties have previously been warned of the risk, or the risk appears obvious.
- Conduct regular training to ensure persons engaged by you are following correct loading procedures.
- The *Heavy Vehicle National Law* is concerned with potential harm, not actual harm. **An accident or fatality does not have to occur for charges to be brought.**



Guidance for operators

The case provides some reasonably practicable measures operators can take to reduce or minimise the risks associated with the loading of heavy vehicles, including ensuring that:

- Company policies and procedures are compliant with the loading requirements as set out under the HVNL and the Master Code;
- Risks are identified and policies and procedures are in place to minimise those risks;
- These policies and procedures are regularly updated, monitored and reviewed; and
- All Company equipment is compliant and in good, working condition.

These reasonably practicable measures are just examples of potential controls that you can implement and should be read in conjunction with those outlined in the registered industry [Master Code](#).

For more information:

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