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IN THE DISTRICT COURT
AT HAMILTON

I TE KŌTI-Ā-ROHE
KI KIRIKIRIROA

CRI-2018-019-003411
[2018] NZDC 26548

WORKSAFE NEW ZEALAND
Prosecutor

v

ALTRANZ (2008) LIMITED
Defendant Company

Hearing:	17 December 2018
Appearances:	L Moffitt for the Prosecutor B McCarthy for the Defendant Company
Judgment:	17 December 2018

ORAL JUDGMENT OF JUDGE M A MacKENZIE

Introduction

[1] was an employee of the defendant company. On 21 June 2017, he was fatally injured whilst at work. This was as a result of being trapped and crushed between the stabiliser legs of a container side loader as the legs were being stowed.

[2] was aged 18 years old. He had been working for the defendant for a period of five months. He was employed as a yard hand. On 21 June,

went to assist the operator of the side loader at another site. The operator and another employee had gone to the site to deliver two shipping containers. During the process of assisting the operator, . went into and remained within what is recognised to be a hazard zone. The tragic events I have just outlined then took place. The defendant acknowledges that was not at fault at all.

[3] As a result of the fatality, WorkSafe commenced an investigation which led to the prosecution of the defendant under s 48 Health and Safety at Work Act 2015. The defendant has pleaded guilty to one charge of failing to ensure, so far as was reasonably practicable, the health and safety of its workers, including , and that failure exposed workers to a risk of death or serious injury arising from crushing in a Swinglift side loader. In particular, that it was reasonably practicable for the defendant to have:

(a) Ensured that the risk and hazards associated with the side loader were identified, including crush hazards involving the stabiliser legs;

(b) Ensure that effective controls for managing these risks and hazards were implemented and monitored;

(c) Developed and implemented a comprehensive safe operating procedure that covered all aspects of the side loader functionality, including:

(i) A procedure for the safe operation of the side loader when people are in close proximity;

(ii) That exclusion zones are established and adhered to, including exclusion of people from any crush zones associated with stabiliser legs;

(iii) An effective means of communication between all workers when operating a side loader, and

(iv) An effective procedure for stowing the stabiliser legs.

Guideline judgment – *Stumpmaster v Worksafe New Zealand*

[4] In terms of the approach to sentencing, there is a recent guideline judgment for sentencing under the relevant section, s 48, and that is *Stumpmaster v WorkSafe New Zealand*.[1] The High Court confirmed a four-step process:

(a) I am to assess the amount of reparation to be paid to the victims, in this case ' parents and sister;

(b) Fix the amount of the fine by reference firstly to the guideline bands and then having regard to aggravating and mitigating factors;

(c) Determine what further orders under ss 152-158 Health and Safety at Work Act are required; and

(d) Make an overall assessment of the proportionality and appropriateness of the combined packet of sanctions imposed by the preceding three steps. This includes consideration of ability to pay and also whether an increase is needed to reflect the financial capacity of the defendant.

[5] The purpose of the Health and Safety at Work Act is important. The main purpose of the Act is to secure the health and safety of workers in workplaces. Workers should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work as is reasonably practicable.

[6] *Stumpmaster*; and indeed the Health and Safety at Work Act itself, confirms that the principles and purposes of the Sentencing Act 2002 are applicable. The purposes in this case include:

(a) To deter and denounce the defendant's conduct and this type of conduct generally;

(b) To hold the defendant accountable;

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[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.

(c) To promote in the defendant a sense of responsibility; and

(d) To provide for the interests of the victims by making an order for reparation, but also acknowledging that for the family an improvement in safety procedures by the defendant is very much a desired outcome. In terms of reparation, I start there, as indicated by *Stumpmaster*.

[7] is survived by his parents and sister, . I have read the victim impact statements provided by :

The family think of him every day. It is the little things they miss. As they say, he was a kind, selfless and caring young man. The death of their much-loved son and brother has had a profound effect on the family. This was a devastating life event, being the hardest thing the family has had to deal with. The sense of loss is raw and palpable. Mr family are grieving the loss of a young man taken too soon, at the start of his journey into adulthood. It is the loss of a future which shines through the victim impact statements, as well as an understandable wish that lessons are learnt from this tragedy. Mr mother hopes that his death has meaning, in the sense, to prevent similar tragedies happening in the future.

Reparation

[8] Reparation and fines have separate purposes. Reparation is compensatory in nature. Its purpose is to mark and acknowledge loss and emotional harm. It is not an exact science and each case falls to be determined in its own context and circumstances. Reparation in no way is an attempt to put a value on a human life. No amount of reparation will ever compensate the family for their loss, and this was very ably put by Chief District Judge Doogue in another WorkSafe prosecution case, *WorkSafe New Zealand v Department of Corrections*[2] when Her Honour Judge Doogue observed:

> "Determining reparation for loss of life is by no means an easy task.[3] It involves placing a monetary value on that loss which can only ever fall short of truly reflecting the grief felt …."

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[2] *WorkSafe New Zealand v Department of Corrections* [2016] NZDC 24865.

[3] *Department of Labour v Icepack Coolstores Ltd* DC Hamilton CRI-2009-019-011343, 15 December 2009 at [43]; *Department of Labour v Sir Edmund Hillary Outdoor Pursuits Centre of New Zealand*

[9] 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 a family may feel necessary. The task of setting reparation for emotional harm in a case such as this does not simply involve ordering the same amount given in other cases involving a fatality. Each case must be judged on its particular circumstances. Whilst certain cases may give a broad indication of an appropriate figure, it is unhelpful to pick apart those decisions and try to air particular features with a particular level of reparation. There is not and cannot be a tariff for the loss of life or grief.

[10] The prosecutor, Ms Moffitt, has provided the Court with a schedule of reparation orders in cases involving fatalities. I wish to underscore the point made in other cases that each case is different. Broadly speaking, the cases indicate a range of reparation between $75,000 and $140,000. A case *WorkSafe New Zealand v Coda Operations Ltd Partnership*[4] is instructive in that regard also because the presiding Judge undertook something of an assessment of reparation figures in that case.

[11] In written submissions, both the prosecutor, Ms Moffitt and Ms McCarthy, submit that a reparation order in the vicinity of $100,000 could be made in the case, given the significant and grave emotional impact on the family. In order to recognise the significant emotional impact on Mr family arising from the tragic loss of a young life, including that he died at the outset of his journey into adulthood, I consider that an overall reparation order in the sum of $105,000 is warranted. I say that because I have to make an order apportioning that reparation figure and I have settled upon $105,000. So that it is to be divided equally between . That means there is to be a payment of $35,000 to each of the three of them and, as I say, that in no way is any attempt to place a dollar value on a human life, it is simply a recognition of the grief and loss that you have suffered and the best thing that I can do is be consistent with reparation figures imposed in other cases, bearing in mind that no two cases are the same.

[2010] DCR 26 at [85].

[4] *WorkSafe New Zealand v Coda Operations Ltd Partnership* [2017] NZDC 18902.

The fine

[12] Turning to the fine, the purpose of a fine is punitive in nature. The purpose of a fine is to meet the sentencing needs of accountability, deterrence and denunciation. The correct approach is to determine which culpability band, as set out in *Stumpmaster;* applies, fix a starting point and then adjust for personal, aggravating and mitigating factors. As was held in *Stumpmaster;* the increased penalties in the Health and Safety at Work Act reflected the legislature's view that the level of sanction under the Health and Safety in Employment Act 1992 was inadequate to achieve the statutory purposes so the maximum sentence was increased. Section 151 Health and Safety at Work Act sets out sentencing criteria, including applicability of the Sentencing Act and other factors the Court must have particular regard to. In *Stumpmaster;* the High Court said that all of the s 151 factors are covered by one or more of the *Hanham* considerations; therefore, the factors set out in the guideline judgment under the predecessor legislation, the *Department of Labour v Hanham & Philp Contractors Ltd,*[5] should still be applied. The Court also noted that what actual harm occurred is a relevant and important feature in fixing placement within the bands. Both counsel contend for culpability falling within the high pulpability guideline band of *Stumpmaster* which has a range of $600,000 to $1,000,000. The key difference is where in the band the offending falls. Ms Moffitt submits that the Court should adopt a starting point of $800,000, having regard to the *Hanham* factors and three comparator cases she has supplied the Court with. Conversely, Ms McCarthy, for the defendant, admits that the appropriate starting point is in the region of $600,000-$700,000 on the basis that the defendant's culpability is comparable with, but lower than, the culpability of the defendant in a case *WorkSafe New Zealand v Oceana Gold (New Zealand)*[6] which had a starting point of $700,000.

[13] In terms of the combined *Hanham* and s 151 factors, I set out my assessment as follows:

(a) The identification of the operative acts or omissions at issue and the practicable steps it was reasonable for the defendant to have taken. As

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[5] *Department of Labour v Hanham & Philp Contractors Ltd* (2009) 9 NZELC 93,095.
[6] *WorkSafe New Zealand v Oceana Gold (New Zealand)* [2018] NZDC 5274.

already referred to and set out in the agreed summary of facts, Mr was fatally injured as a result of the defendant's failures in three areas. It was reasonably practicable for the defendant to:

(i) Identify the risks and hazards associated with the side loader and in particular the crush hazard. In my review of all the material provided to the Court, the crush hazard is a key hazard;

(ii) Implementing and monitoring effective controls for managing these risks and hazards;

(iii) Develop and implement a comprehensive safe operating procedure.

As Ms McCarthy notes in her submissions, the defendant accepts the failings as set out in the summary of facts, given the plea of guilty to the charge. On behalf of the defendant, it is submitted that the defendant had thought that there were effective controls in place to manage the risks and hazards, but accepts that its belief in that regard was misconceived and that its processes were insufficient. The WorkSafe investigation identified serious deficiencies in relation to the risk and hazards of the side loader. An aspect of that was the operator was experienced in side loaders, he was inexperienced with respect to the Swinglift side loader itself, which was not fully appreciated by the defendant. It would seem also that the operator, Mr Govind, did not operate the side loader on that day in accordance with accepted industry standards, which were set out in the manual, which was present in the side loader.

(b) In terms of the hazard and the obviousness of the hazard, the hazard posed by the side loader was obvious, particularly as it involved man versus machine. The events of 21 June represent a significant departure from industry standards, which appear to be readily available and accessible. The most obvious matter is the proper identification of the

hazard zone and keeping people out of the area when the Swinglift side loader is operating. WorkSafe have identified significant industry information was available to manage the hazard, as per the information and documents referred to in Ms Moffitt's submissions. There is, in effect, an available and cost effective means for managing the hazard being adherent to safe operating procedures as set out in the operator's manual for the Swinglift side loader and other information.

(c) In terms of the risk of and potential for injury or death, this case involves not just the potential for serious injury or death, but tragically the risk was realised. The actual harm is a relevant factor, as I have already noted. The defendant accepts that neither Mr nor the operator had received sufficient training in relation to the safe operator of the Swinglift side loader and that such failure resulted in the fatality.

[14] In summary, the defendant failed to take practicable steps to identify and manage risks and hazards relating to the side loader in circumstances where the hazard was obvious, could have effectively been controlled and avoided, and resulted in a fatality.

[15] All three comparator cases Ms Moffit has provided to the Court were decided prior to *Stumpmaster*. That does not render them irrelevant, but by way of further comparison, I have considered three sentencing decisions which postdate *Stumpmaster*. Two of these involve fatalities and the third a crush injury from an unguarded knit point of a slitter machine. That case is *WorkSafe New Zealand v Allflex Packaging Ltd.*[7] The cases involving fatalities are *WorkSafe NZ v Sunday Hive Company Ltd*[8] and *WorkSafe New Zealand v Stevens and Stevens Ltd.*[9] In the latter, His Honour Judge Ingram would assess the starting point, in terms of culpability, to be $600,000 on the basis that it is a death case involving inherently dangerous machinery in respect of which some but not all practicable steps had been taken to minimise a substantial risk of death or serious injury. In *WorkSafe New Zealand v*

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[7] *WorkSafe New Zealand v Allflex Packaging Ltd,* DC Manukau CRI-2017-092-14520, 15 October 2018.
[8] *WorkSafe NZ v Sunday Hive Company Ltd* [2018] NZDC 20796.
[9] *WorkSafe New Zealand v Stevens and Stevens Ltd* [2018] NZDC 19098.

Sunday Hive Company, the victim was killed when a vehicle lost traction on a steep hillside and rolled backwards down a hill. There was a significant departure from industry standards and the defendant failed to take a number of reasonably practicable actions resulting in a realised risk. The starting point was a fine of $700,000.

[16] I have taken into account the inexperience and vulnerability of Mr . and whilst factually different, I consider that the *Sunday Hive Company* is the most analogous recent decision because of the fact that in setting the starting point of a fine at $700,000, the Court took into account a significant departure from industry standards and the defendant's failure to take a number of reasonably practicable actions. Therefore, I have decided to adopt a starting point of $700,000 in this matter on the basis that it is in the high culpability band, but towards the bottom, given the factors relevant and similar to *Sunday Hive Company*, being the failure to take reasonably practicable steps and that there is, on my assessment, a significant departure from industry standards at play here.

[17] There is an issue about the defendant's ability to pay a substantial fine, but I will address that at the fourth step in this sentencing exercise, which is to undertake the proportionality assessment.

Mitigating factors

[18] I turn to mitigating factors. There are no aggravating personal factors requiring an uplift. A number of mitigating factors have been identified. Before I address these, I recognise that *Stumpmaster* has cautioned against routine, standard discounts. Proper analysis of the basis for any credit is required. The High Court held by way of general guidance that a discount in the vicinity of 30 percent is only to be expected in cases that exhibit all the mitigating factors to a moderate degree, or one or more of them to a high degree. A routine crediting of 30 percent without regard to the particular circumstances is not consistent with the Sentencing Act.

[19] In her written submissions, Ms Moffitt submitted that the discount available for mitigating factors should be 20 percent, reflecting five percent discounts respectively for reparation, remorse, co-operation with the investigation and the

defendant's good safety record. It may be that Ms Moffitt had not seen Mr Lahore's at that point about the steps taken to address health and safety matters.

[20] The defendant submits that the discount available is 30 percent, as there should be a further discount of 10 percent to recognise the significant remedial actions taken by the company over and above what was required. In this regard, I need to assess whether the reformative steps taken were the "extra mile", as it was put in *Stumpmaster*; or at the other end, merely correcting what were woeful deficits that should never have existed in the first place.

[21] An affidavit has been filed by Angus Lahore, the director of Altranz, addressing the steps taken to improve all health and safety aspects of the business. The defendant immediately instructed a specialist health and safety consultant experienced in the transport industry to provide recommendations to the defendant in order to address health and safety procedures. The defendant also engaged SafeWise, a health and safety consultant, to assist with drafting a suite of documents relating to improved health and safety procedures.

[22] The *Allflex* case is relevant here because there was an overall discount for mitigating factors given, with 10 percent being for remedial actions which included remedial steps above and beyond what was required, coupled with some assistance to the victim.

[23] I consider that credit is appropriate for the remedial actions taken by the defendant and the responsible attitude shown by the defendant following Mr tragic death in terms of an overarching review of health and safety procedures for the company. This was not simply lip service to health and safety matters. The affidavit evidence sets out clearly that Mr Lahore took his responsibilities towards the health and safety of his employees seriously by undertaking a wholesale review of safety procedures at the company, not simply in respect of the operation of the side loader.

[24] I have thought long and hard about whether the credit should be 10 percent, because the commendable steps taken are tempered to a degree by the fact that in my view, the crush hazard was an obvious one, which had not been particularly well

managed, but on balance, taking into account that I accept that the remedial actions went over and above what would be required, that they are a meaningful approach to health and safety at the company and that the defendant wanted to assist the family as much as they could following Mr untimely passing, that a credit of 10 percent is appropriate in this particular set of circumstances.

[25] I reduce the starting point by 30 percent for personal mitigating factors made up as follows. The remedial actions, as I have said, 10 percent for the reasons set out, five percent remorse, I accept that a discount overall and above what is inherent in a guilty plea is warranted. Whilst the defendant is a company, it is not a national or large organisation. Corporate remorse is difficult to conceptualise, but this is a case where there has been a longstanding personal connection between Mr Lahore and Mr father, and I have no hesitation in finding that Mr Lahore is deeply remorseful on a personal level for the serious harm caused to the family.

[26] The third matter is reparation. After considering *Stumpmaster*, I consider that a five percent discount is appropriate. As well as a formal reparation order, there was a contribution to the cost of the tangi and other financial assistance was offered, although not ultimately needed. The defendant has fully co-operated with the WorkSafe investigation and a discount of five percent is appropriate.

[27] Lastly, the defendant has a prior, unblemished safety record and in line with the authorities, there is a further five percent discount. Aggregated, that is 30 percent for those personal mitigating factors. That reduces the level of the fine provisionally from $700,000 to $490,000.

[28] I intend applying, therefore, the *Hessell v R*[10] 25 percent credit for the guilty plea. Whilst in one sense it did not come at the earliest opportunity, there is no quarrel from WorkSafe that the full *Hessell* discount is warranted in the circumstances, given that the plea was entered at the first reasonable opportunity. That means a provisional fine of $367,500.

[10] *Hessell v R* [2010] NZSC 135.

Proportionality assessment

[29] I then must undertake an assessment for proportionality and appropriateness of the total imposition of reparation and fine. I must have particular regard to the ability of the defendant to pay a fine in terms of the sentencing criteria set out at s 151(2)(g) Health and Safety at Work Act.

[30]

[31]

[32] Cases established that any fine must bite so as to meet the purposes of sentencing such as accountability and deterrence, but even so, as has been previously said in the District Court sentencing in the *Stumpmaster* case, it should not devour a company. In the High Court case of *Mobile Refrigeration Specialists Ltd v*

[11] *Department of Labour v Eziform Roofing Products Ltd* [2013] NZHC 1526.

The approach I intend to take is this. I am going to order a fine of $75,000:

(a)

(b)

(c)

(d)

(e)

Department of Labour, [12] Heath J is instructive as to the approach to be taken where financial capacity to pay a fine is in issue. Heath J noted the tension involved in exercising a discretion to reduce an otherwise appropriate fine for reasons of financial incapacity. On the one hand, as Heath J said, generally, the Court should impose a fine within the offender's ability to pay, but there is authority for the proposition that, in appropriate cases, fines may be imposed at a level beyond the company's apparent means. There may be cases where the offences are so serious that the defendant ought not to be in business. On the other hand, the potential effect of a fine putting a company out of business and the consequent effect on innocent parties such as employees might justify some reduction in the fine.

[33] This issue was touched upon in *Stumpmaster* when the High Court said at paragraph [9]:

> "With smaller entities the level of fine, if imposed in full, would result in the company failing, and so it is not uncommon to see an otherwise appropriate fine significantly reduced. This is likely to be more common with the recent legislative change and the need to revise sentencing levels upwards."

[34] This is a difficult exercise because in imposing a fine, I must be mindful of the principles and purposes of sentencing set out in the Sentencing Act, "A fine is punitive in nature. It must bite but not devour a company." On the other hand, s 151 Health and Safety at Work Act says that I must take into account the ability of a defendant to pay a fine.

[35]

[12] *Mobile Refrigeration Specialists Ltd v Department of Labour* (2010) 7 NZELR 243.

Outcome

[36] WorkSafe also seeks an award of costs in the sum of $3764.20. Therefore, in summary, I make the following orders and directions:

(a) I make an overall reparation order in the sum of $105,000 and that means a payment of $35,000 each to the defendant's mother, father and sister.

(b) I impose a fine of $75,000;

(c) I make an order for the defendant to pay to WorkSafe the sum of $3764.20 towards the cost of the prosecution.

[37] I make orders as sought in terms of suppression. Firstly, I make an order suppressing the name of as the victim in this matter, together with the names and details of the deceased's family members. This is on the basis of s 202 Criminal Procedure Act 2011. It would create undue hardship to the family if there was a publication. I also make an order for suppression of the financial information of the defendant. This is usual in these types of cases on the basis, and I accept, that there is significant commercial sensitivity if this information was in the public domain. The amount of the fine can be reported only. No information about the finances of the company or the accountant's evidence can be published. In terms of reporting, the starting point of the fine, the reasons, and the fact that there were mitigating factors, including what they were and that there was a reduction for mitigating factors and financial capacity to the end point of $75,000 can be reported.

M A MacKenzie
District Court Judge