IN THE DISTRICT COURT
AT CHRISTCHURCH

I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI

CRI-2018-009-001333
[2019] NZDC 14449

WORKSAFE NEW ZEALAND
Prosecutor

v

PETER FLETCHER TRANSPORT LIMITED
Defendant

Hearing:	24 July 2019
Appearances:	M McClenaghan for the Prosecutor J Lill for the Defendant
Judgment:	24 July 2019

NOTES OF JUDGE R E NEAVE ON SENTENCING

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[1] On 28 February 2017, Mr Anthony Moore was killed in a terrible accident at his workplace, controlled by his employer, Peter Fletcher Transport Limited. This matter has had some delays in reaching today's hearing, primarily due to discussions and arguments about the financial position of the company, which was highly relevant to the fine that would ultimately be imposed. I have previously issued, and I confirm suppression orders of any information relating to the financial position of the company, those orders to last until either the undertaking of the company is sold, and/or the company is placed in liquidation, both of which are on the cards.

[2] Because of that position having been reached, it is not necessary to continue with the financial investigations that had been undertaken and, in my view, it is important to resolve this matter today. I know this has taken the family by surprise,

but it seems to me in their interests, apart from anything else, that the sooner we bring this issue to a close, the better for all concerned. Mrs Moore, I know is struggling, to find it difficult to move on and that is going to be impossible the longer this proceeding hangs around. I think I have also previously supressed personal information relating to the directors of the company which were contained in the affidavit and those suppression orders are continued because they are not relevant to the exercise I am undertaking, except in one limited sense I will discuss in a minute.

[3] That terrible accident to which I have referred has brought devastation on his family, particularly his wife of 30 years. Nothing that is done today or anything that can be said today will bring him back and nothing will fill the void left by his death. It is important that I acknowledge today the presence of his wife and also at earlier hearings the presence of his mother and sister, and it is impossible not to be moved by the accounts of their loss.

[4] As a result of the accident, the defendant has been charged with and pleaded guilty to one charge under the Health and Safety at Work Act 2015 in that they failed, so far as it was reasonably practicable, to ensure the health and safety of workers.

[5] The summary of facts records that the company was founded in 1994 and employed approximately 45 workers. It was in the business of general transport and was based in Hornby. The services of the company included warehousing, distribution, container transport, crane hire, general cartage, and relocation. Mr Moore was a worker for the defendant and had worked there since 2010 and was employed as a workshop manager, driver, trainer and mechanic.

[6] The defendant had moved the premises in Hornby following the 2011 earthquake. The incident took place in an open yard annexed to the external warehouse and one of the four entrances or exit ways into that warehouse. Steel pipes had been stored onsite for a customer for approximately four years and were not part of the defendant's usual storage and distribution business. It may well be it was this inexperience which led to the tragic events, although that does not justify or excuse the actions or inactions of the defendant.

[7] There were no specific shelving arrangements for the pipes and they were either stacked on the external wall or throughout the yard and held in place by wooden bearers. Some were stored in close proximity to an access doorway used by both vehicles and pedestrians.

[8] The accident occurred in February 2017, as I have said, when an order had been placed for steel pipes. Each bundle of the steel pipes weighed between one and a quarter and one and a half tonnes and the work involved unloading and the storing of these pipes and preparing them to be transported. They were stacked next to a shipping container and at the time of the incident were the same height as the container when that was fully stacked. The total weight of the pipes was 15 tonnes.

[9] At about 9.00 am, Mr Moore received an order to pick up five bundles of steel pipes to be delivered to a site in Christchurch. He began the de-stacking process and the bundle of pipes were placed on wooden bearers so that they could be picked up by a forklift. Mr Moore completed the work it seems in relation to de-stacking the necessary pipes and was in the process of cleaning up around the remaining stack of pipes. He was on his knees, cleaning the area in front of the pipes, when for some reason the stack appeared to drop slightly and fell forward, trapping Mr Moore under the cascading pipes. It would seem likely that he died instantly, with heavy crush injuries to his face, neck, chest, limbs and abdominal organs contained by the pipes which had landed on him.

[10] It is alleged that the defendant exposed him to a risk of death or serious injury because there was an obvious risk of the pipes collapsing in this fashion. It was alleged that there was a failure to provide adequate training or supervision in the exercise of stacking and de-stacking of the bundles. This is a well-known hazard and any movement, it would seem, can cause that pile to become unstable. There was a risk of what occurred if things were not carried out properly.

[11] There are no standards or guidelines for this kind of activity, but there was ready information available as to the controls necessary to prevent these pipes from collapsing and such controls were not prohibitively expensive. The nature of the risk I would have thought was obvious and an employer would have been or should have

been on notice of the need to ensure that all possible steps were taken to avoid this kind of incident. Steps should be taken to ensure that the items do not move of their own accord or by virtue of any external force, deliberate or accidental, move, flow, roll or collapse in a manner which would constitute a danger to someone in the vicinity. Clearly, it is important to make sure that if there is anything taken away from piles such as this, that not only is the storage facility appropriate to prevent this kind of collapse, but that appropriate steps are taken to ensure items are removed in a fashion which reduces risk.

[12] It is alleged that the defendant failed to ensure the health and safety of workers by failing to ensure that an effective risk and hazard assessment was undertaken, and the appropriate controls were implemented in respect of the storage, stacking and de-stacking of the pipes. It is further alleged the defendant did not develop and implement safe working methods in respect of this. There is also an allegation that they had not developed or implemented appropriate safe working methods and procedures, which seems to me a different way of saying the thing that the allegation just made.

[13] It is alleged that the company did not conduct regular monitoring of the stacked material to ensure it was stacked and stored safely, nor was adequate information, training or supervision provided. The defendant has no previous convictions.

[14] Furthermore, the summary notes that since the incident, the defendant has undertaken the following steps:

(a) Conducted weekly audits in the yards to assess the general work areas. There is an opportunity for any employee to be involved.

(b) Investigated and written formal policies regarding a number of different materials in the yard area. There is emphasis on where the stacking is to be placed, how high it is to be stacked and what ratings are on the stacking.

(c) Crates containing materials have been audited regarding vertical and horizontal storage.

(d) Empty wooden pellets are limited to height and positioning.

(e) Updated the hazard identification register for stacking and de-stacking bundled materials with a risk score and appropriate control measures.

[15] I am sure as far as Mrs Moore is concerned, this is too little, too late, but it does display a responsible attitude on the part of the company.

[16] This is clearly a case of an identified hazard that was not properly managed, nor appropriate strategies put in place when the time came to remove the hazard from the yard. The approach of the Court in sentencing matters such as this must be governed, (a) by the legislation, secondly, by the decision of the full Court in *Department of Labour v Hanham and Philp Contractors Ltd*, and thirdly, that decision as explained by a recent full Court decision of *Stumpmaster v WorkSafe New Zealand.*[1] I am also conscious of the decision of Venning J in *Oceana Gold (New Zealand) Ltd v WorkSafe New Zealand*, which was one of the reasons why this decision was delayed.[2]

[17] In assessing the culpability of the defendant, s 151 Health and Safety at Work Act requires a number of factors to be addressed. It is clear from *Stumpmaster*, amongst other things, that notwithstanding the element of chance involved, the consequences in any particular case will be a highly relevant figure. In other words, one needs to focus on the harm actually caused.

[18] The prosecution submissions originally prepared by Ms Brabant identify the factors between paragraph 7.7 and 7.27 of her submissions:

> 7.7 Given the nature of the steel pipes and the way that they were stacked the risk for injury or death was obvious as noted in paragraph 15 of the ASOF:

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1 *Department of Labour v Hanham and Philp Contractors Ltd* (2008) 6 NZELR 79 (HC); *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020.

2 *Oceana Gold (New Zealand) Ltd v WorkSafe New Zealand* [2019] NZHC 365.

"At the time of the incident, the steel pipes were the same height as a shipping container when fully stacked. When stacked the bundles were approximately 2½ metres high and a metre wide with a total estimated weight of approximately 15 tonnes."

7.8 In terms of de-stacking and the risks associated it is noted at paragraph 13 of the ASOF that each of the steel pipes weighed between 1¼ and 1½ tonnes.

7.9 It is accepted by the Defendant that there was a risk of death or serious injury. This is expressed at paragraph 30 of the ASOF:

"Stacking and de-stacking is a well-known hazard and movement can case the pile to become unstable. There was a risk of serious injury or death to any person in the vicinity of the stacked steel pipe bundles as it was a heavy load and not stored within a shelving unit or contained in any way other than the use of wooden bearers".

Whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred (s 151(2)(d), largely aligns with s 22(b))

7.10 The risk of death or serious injury when stacking and de-stacking steel pipe bundles is obvious and in this case was borne out. The Coronial Autopsy Report referred to in **paragraph 27 of the ASOF** noted that Mr Moore died after having received heavy crush injuries to his face, neck, chest, limbs and abdominal organs. These injuries were suffered as a result of the stack collapse.

7.11 The task of stacking and de-stacking steel pipe bundles creates movement and can cause an unsecured pile to become unstable and prone to collapse. The general requirements of section 30 of HSWA to assess and manage risk, and ensure workers are trained and supervised and provided with all appropriate information is well known.

7.12 There is ample material available on the internet about the requirement for PCBU's to make sure that their workers and others are provided training, information, instruction or supervision to protect them from risks to their health and safety.

7.13 OSH Guidance as to safe stacking and storage, as well as HSE Executive United Kingdom guidance on safety in storage and handling of steel and other metal stock is readily available on the internet generally and provides information with respect to suitable storage and restraint.

7.14 The risk of death or serious injury was self-evident and highly probable as the duty holder exposed workers to the hazard of stacked steel pipe bundles without conducting a risk assessment and ensuring the appropriate controls were in place to prevent the steel pipe bundles from collapsing.

The degree of departure from prevailing standards in the sector / industry as an aggravating factor (s 151(2)(f)), including:

i) ***What the person knows, or ought reasonably to know, about the hazard or risk and the ways of eliminating or minimising the risk (s 22(c));***

7.15 The Defendant ought to have known that the storage and handling of steel pipe created a significant risk to workers. The United Kingdom Health and Safety Executive's fact sheet "Safety in the storage and handling of steel and other metal stock" notes:

"Many accidents, some resulting in death and serious injury, continue to occur during the storage and handling of steel and other metal stock. They cause enormous social and economic cost over and above the human tragedy involved. It is in everyone's interest that they are reduced. Accident investigations often show that these injuries could have been avoided."

7.16 The Defendant ought to have known and appreciated that the task of stacking and de-stacking steel pipe bundles creates movement and can cause an unsecured pile to become unstable and prone to collapse.

7.17 The general requirements of section 30 of HSWA to assess ad manage risk, and ensure workers are trained and supervised and provided with all appropriate information is well known.

7.18 There is ample material available on the internet about the requirement for PCBU's to make sure that their workers and others are provided training. Information, instruction or supervision to protect them from risks to their health and safety (**see paragraphs 31-41 of the ASOF**).

7.19 OSH Guidance (**paragraphs 33-37 of the ASOF**) as to safe stacking and storage, as well as HSE Executive United Kingdom guidance (**paragraph 38 of the ASOF**) on safety in storage and handling of steel and other metal stick is readily available on the internet generally and provides information with respect to suitable storage and restraint.

7.20 The Defendant had agreed to store the steel pipe at its premises without adequately considering the risks associated with the storage and transportation of the pipe and without implementing appropriate racking systems and safe work practices.

ii) The availability and suitability of ways to eliminate or minimise the risk (s 22(d))

7.21 The Defendant at **paragraph 58 of ASOF** accepts that it was reasonably practicable to have:

(a) Ensured that an effective risk and hazard assessment was undertaken, and the appropriate controls were implemented in respect of storage, stacking and de-stacking steel pipes;

(b) Developed and implemented safe working methods in respect of storage, stacking and de-stacking steel pipes;

(c) Developed and implemented appropriate safe working methods and procedures.

(d) Conducted regular monitoring of stored stacked material in order to ensure it was stacked and stored safely; and

(e) Ensured workers were provided with adequate information, training and supervision in respect to safe stacking, loading an unloading of steel pipe.

7.22 The above practicable actions were available and able to be implemented at the time of and prior to the incident. The means to address the safe storage of steel pipe was also available. **Paragraph 50 of the ASOF** shows photographs of steel pipe stacking at various different PCBU's workplaces. The stacking has been done in accordance with industry standards. The photographs also show that suitable means to minimise the risk were available and should have been employed by the Defendant.

7.23 The stacking of the pipe at the Defendant's workplace (seen at Paragraph 18 of the ASOF) differed significantly from the industry standards. The heavy steal [sic] piles were held up by wooden bearers (**paragraphs 19 of the ASOF**) which were not suitable or appropriate for the risk of controlling pile collapse.

7.24 However, the Defendant under its primary duty had the responsibility to ensure that its workers or other persons were not harmed in the workplace and to ensure that the appropriate stacking systems were installed and that the risks associated with the stage and handling of steel pipe were controlled.

The cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk (s 22e))

7.25 It is submitted that the costs associated with managing the risk were not disproportionate to the risk of harm to workers.

7.26 When considering the issue of cost His Honour Judge Gilbert stated at [23] of his decision in the case of *Worksafe v Stoneyhurst Timbers Limited*[3]

The fact that there is a moderate cost of remedying the issues is not an excuse to suggest otherwise would be to sacrifice employee safety on the altar of the profitability which is something that is clearly unpalatable.

7.27 The prosecutor submits that the Defendant's culpability is at the **bottom end of the high culpability band,** so a starting point of up to $700,000 may be appropriate.

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[3] *Worksafe New Zealand v Stoneyhurst Timbers Limited* [2016] NZDC 17200.

[19] Her conclusion is, as will be apparent, that the prosecutor submits the defendant's culpability is at the bottom end of the high culpability band, so a starting point of up to $700,000 may be appropriate by way of a fine.

[20] The defence submissions prepared by Mr Gallaway, counsel who appeared at the earlier hearing, and Mr Lill, who appears today, do not take significant issue with the prosecution's start and those submissions are set out at paragraph 29 to 37:

> **Assessment of culpability**
>
> *Risk of serious injury and death*
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> 29 The PFT accepts that there was an obvious risk of serious injury and death related to the handling of steel pipes. PFT's senior management (including the deceased) had discussed the risk.
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> 30 The obviousness of the risk of the stack collapsing is not as clear as they had been stacked and managed by Mr Moore, a senior member of staff, without incident for four years. He was understood to be competent and experienced in handling steel.
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> 31 Further, PFT had carried out inspections after the earthquake in November 2016 to ascertain if there had been movement among the steel pipe bundles. It was satisfied at the time that there was no risk of the stacks collapsing following the earthquakes.
>
> 32 It is submitted there was a real risk of serious injury or death but that it should not be characterised as "highly probable" given there had not been any previous incidents or issues with the stacking of this steel pipe over a period of four years and through earthquakes.
>
> *Industry standards*
>
> 33 It is accepted that the system for storing the steel departed from best practice. While this was not part of PFT's core business it accepts that it should have taken further steps to satisfy itself that the method of storage and stacking was safe and appropriate.
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> 34 While its systems departed from industry practice regarding the storage of steel, PFT did have systems in place to recognise and address health and safety risks:
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> 34.1 it employed an [sic] manager to develop its health and safety system;
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> 34.2 it introduced the Mango IT system which is a health and safety software solution to help manage and record incidents;
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> 34.3 it was on track to achieve tertiary status with the ACC;

34.4 there was a health and safety committee that met regularly; and

34.5 there was a close-knit workplace culture where the directors were frequently present at the premises and had regular interaction with employees.

35 The departure does not reflect a failure to engage with health and safety or implement improvements across the wider business. PFT was (and is) aware of its obligations and is continuing to work to maintain the standards required in a dynamic industry and workplace.

Availability of ways to minimise risk and costs

36 It is accepted that there were methods available for storing the pipes which involved constructing appropriate racks or installing stanchions.

37 PFT has now decided not to store steel and, thereby eliminating the risk from its work-place.

[21] I think it is worth noting that of high significance is the risk of and potential for serious injury or death that could have occurred and whether or not there were easy ways of eliminating it are perhaps the two key factors and both of those are present to a pretty significant degree in this case.

[22] This was a significant hazard in any assessment. A stack of pipes which by their nature could easily roll and individually weighing in excess of one tonne are an obvious hazard. The consequence of them coming loose are easy to imagine and they are clearly highly likely to carry with them a risk of serious injury or death. It is important of course not to be overwise after the event, but nonetheless this was a hazard that was not properly identified and prevented.

[23] The *Stumpmaster* decision has modified the bands previously identified by the full Court in *Hanham and Philp*. The new guideline bands are set out at paragraph 53 and the two important ones I think are medium culpability is between $250,000 and $600,000 by way of a starting point, and high culpability between $600,000 and $1 million.

[24] The nub of the prosecution argument I think is paragraph 7.5 of Ms Brabant's submissions where she submits that the offending in this case is serious, given that it

involves an obvious risk of death arising out of a dangerous hazard which was not controlled according to industry practice, and I think that is a fair comment.

[25] Having accepted that, I also accept the prosecution submission that $700,000 is an appropriate starting point. The defence suggests $600,000 which shows they are not significantly far apart, but I think this was more than the very bottom end of that top band, but equally not one that needs to be placed at the very highest end.

[26] The next issue is to determine what credits are available to the company by way of mitigation. The *Stumpmaster* decision cautions us against what might be described as credit inflation, although it is equally important not to have fault inflation at the other end of the spectrum, it seems to me.

[27] Before making an assessment of the level of fine that can be imposed, it is also necessary to assess questions of reparation, both for actual financial and physical losses, as well as emotional losses. To a certain extent, that position has been rendered a little academic. The first is that a significant amount has already been paid in anticipation of today's hearing.

[28] The defendant did not wish to delay payment of reparation until the completion of the sentencing and began making payments in October of last year. Mrs Moore received the sum of $50,000 on 15 October, and on 9 April this year a further payment of $20,000 was made. At the same time as that second payment, there was a further figure paid of $62,424 comprising of $12,424 for consequential losses incurred as a direct result of the accident and a further $50,000 by way of compensation for the loss of pecuniary benefit from Mr Moore's income. An offer was made to the deceased's mother and sister, which was initially declined but subsequently accepted and further payments of $10,000 for each of those by way of emotional harm reparation has been paid. That is a total of some $152,000 by way of reparation.

[29] The purpose of reparation is to do what little can be done to make amends and restore, to the extent that it is possible, any person adversely affected to their pre-offending position. Obviously, it is simply not possible in a meaningful sense to

do that in a case such as this, but I have to give recognition of the principles in s 8 Sentencing Act 2002 of any offers or assistance in reparation made by a defendant.

[30] Mrs Moore has read a condensed version of her victim impact statement, which I have read in full, and I have also read the statements from the deceased's mother and sister, and as I have already noted, they are distressing reading. However, the very thing the Court must not do in all cases, let alone such as this, is to make decisions based on the emotional response that is generated. I have commented on other cases that it is a slightly distasteful exercise having to assess the value of a life in dollar terms and it is just as compelling in this case. I think it is worth noting the comments of Chief Judge Doogue, as she then was, in *WorkSafe New Zealand v Department of Corrections*, where she said:

> Determining reparation for loss is by no means an easy task. It involves placing a monetary value on that loss which can only ever fall short of truly reflecting the grief felt. Reparation gives a measure of recognition to the loss in the best way that Courts are capable of doing. We are never capable of doing it to the extent that the family feels is necessary.[4]

[31] On any view of it, in this case the deceased and his wife had spent a long time together and they had every expectation that that would continue for an equal length of time, if not more. They were not fortunate enough to have children and thus they only had each other, which of course makes the loss that much harder to bear for Mrs Moore.

[32] Clearly, they had had a good life and more was to be expected, and there is the loss not only of the financial consequences, of the loss of lifestyle and suddenly finding her on her own and left to her own devices, but there is the loss of companionship and emotional support. All those factors need to be taken into account.

[33] However, the figure of $152,000 is certainly consistent with many of the cases I have seen and could well be said to be at the upper end of the awards made by way of reparation. I think there is going to have to be a debate in the not too distant future as to the extent to which these reparation orders are now being used in exactly the same way as awards of general and special damages used to be in personal injury

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[4] *WorkSafe New Zealand v Department of Corrections* [2016] NZDC 24865, [2017] DCR 368.

cases. It seems to me we are rapidly heading in that direction. Fortunately, I am not required to undertake that sort of exercise today.

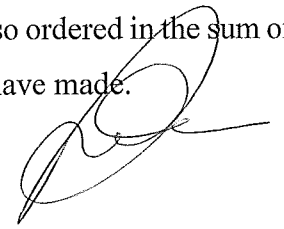
[34] Both parties are agreed that there are significant credits available to the defendant and I think both are agreed as to the quantum of them and that the factors which can be taken into account to the defendant's credit are allowance of five percent for its previous good safety record, five percent for remorse on the basis that restorative justice was offered by the defendant, and although Mrs Moore did not feel able to take it and felt the response was inadequate, I have information on the file in relation to the emotional position of at least the Principal Director and his wife which puts things into a rather different light. The amount of five percent is said to be offered for reparation, which I am inclined to think is possibly a little on the stingy side, but I am not going to alter it in the circumstances of this case, and five percent for measures put in place following the incident and a further five percent for co-operation.

[35] The total amount for mitigating factors, other than plea, is said to be 25 percent. I am sure it would be possible to adjust those figures slightly and to come to a slightly greater or lesser figure, but I do not think that is unreasonable, and given the measure of agreement amongst counsel and the financial factors in relation to the company, which I have already mentioned, I do not think it is necessary to be overanalytical.

[36] Starting from a figure of $700,000, that figure of 25 percent just as a credit of $175,000, bringing us down to $525,000. The defendant is entitled to a guilty plea credit of 25 percent because the plea came very promptly and that brings the total fine down to $393,750.

[37] Initially there was discussion about the means of the company and that is one of the factors that the Court needs to consider, both in terms of the Sentencing Act, but also in the approach described in *Hanham and Philp* of the need to stand back and look at the overall level of penalty. However, as it is highly unlikely because of the peculiarities of the company's financial situation that the fine may ever be paid, it means I can fix the fine at the appropriate level without adjusting it for questions of the company's means.

[38] Accordingly, the company is fined $393,750 and Court costs of $130. I do not need to make a reparation figure, given the amount already paid. Solicitor's costs are also ordered in the sum of $1500 and I just remind everybody of the suppression orders I have made.



R E Neave
District Court Judge