IN THE DISTRICT COURT
AT PALMERSTON NORTH

CRI-2014-054-000732

WORKSAFE NEW ZEALAND
Informant

v

WOODS CONTRACTING SERVICES LIMITED
Defendant

Hearing: 23 July 2014

Appearances: D M Brabant for the Informant
R Flinn for the Defendant

Judgment: 23 July 2014

NOTES OF JUDGE D G SMITH ON SENTENCING

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[1] Woods Contracting Services Limited has pleaded guilty to a charge brought under s 18(1)(a) and s 50(1)(a) Health and Safety and Employment Act 1992. The maximum penalty in respect of this charge is a fine not exceeding $250,000.

[2] The charge arises out of an incident on 15 September 2013. The defendant company was engaged by KiwiRail to supply plant and plant operators to assist the replacement of old wooden railway sleepers with new concrete railway sleepers on the railway tracks through the Manawatu Gorge.

[3] The defendant company employed a digger driver, a Mr Joseph, who had been with them for about five months but he had about eight years experience as a digger or excavator driver.

[4] On Sunday 15 September last year, Mr Joseph was working on the Manawatu Gorge railway line when a hydraulic hose on a Komatsu CD60 dump truck ruptured. The defendant engaged Mobile Mechanical Services Limited to repair the hydraulic hose. Mobile Mechanical Services Limited was the employer of Murray Searle, an on-call mechanic. Mr Searle got to the site at approximately 11.00 am that Sunday.

[5] The broken hydraulic hose was located beneath the dump truck and it had to be lifted to enable Mr Searle to access and repair the blown hose. Initially jacks were used but they could not raise the truck sufficiently to enable Mr Searle to work safely underneath it.

[6] Mr Searle and Mr Joseph considered their options and believed that lifting the back end of the dump track with a Caterpillar 312 DL digger and to place wooden railway sleepers underneath would be sufficient to provide Mr Searle with enough safe space to work under the dump track.

[7] Mr Joseph reversed the 250 kilo bucket on the digger to use it as a face shovel to lift the back of the dump truck. When the back of the dump truck was lifted Mr Searle believed that it was holding the load of the dump truck safely and he moved forward and started to place railway sleepers under the tracks of the dump truck.

[8] As Mr Joseph started to lower the dump truck onto the railway sleepers the bucket came loose due to the loss of pressure in the ram and it fell off its quick-hitch point, falling onto Mr Searle.

[9] As a result, Mr Searle suffered serious harm. He suffered three fractures to his pelvis and he was in hospital for 12 days. Mr Searle relates the pain that he felt when he was hit on a scale of one to 10 as a 15. His initial thought was that he had been paralysed. It was not possible to give him pain relief until such time as he was airlifted to hospital.

[10] Now nearly a year later he still gets aching and pain in his lower back area, thought to be from his sciatic nerve. It is a slow process on the road to improvement.

[11] The impact on Mr Searle is not just one of physical pain. At the time that the accident happened he had recently sold a business and needed to clear out the workshop and carry out repairs on the premises, he was not able to do that and as a consequence was unable to rent out the premises. He was on 80 percent ACC compensation and he continued obviously to receive bills that related to the business property and his family were forced to live off his wife's part-time wages. Even now he can only work a maximum of 30 hours a week, but he is being topped up to 100 percent by his employer.

[12] Mr Searle's belief is that the accident has cost him and his family about $20,000 in lost wages, lost income, and all the extras that went with not being able to do up the rental business property and to lease it or sell it.

[13] The effect on him is beyond that though. Prior to the accident, Mr Searle was training for the Taupo Cycle Challenge and it was only his fitness that he believes that has enabled him to recover as quickly as he has. The effect has not only just been on Mr Searle. It has been on his family and in particular his wife and children who have suffered both financially and emotionally.

[14] Mr Searle had to live at his parents' home for a month after the accident; he was confined to a wheelchair which was not able to be used in his own home as it had stairs. When he returned home he was on crutches. He found the time difficult, not just from his own physical impediments, but also for not being able to participate fully in family life. It was of concern to him that he was not even able to dig a hole to bury their family pet when it was run over.

[15] As a result of the accident he has lost confidence and is no longer seeking to race dirt bikes or to engage in the other sort of activities that he did previously.

[16] These effects on Mr Searle could all have been avoided quite simply by the use of a pin. It was not used to attach the bucket to the hitch on the Caterpillar

digger. Safety pins, or pins were in Mr Joseph's utility vehicle which was not that far away.

[17] Mr Joseph stated that he would swap buckets on the digger approximately 20 times a day and that he did not use safety pins as that would require him to leave the cab of the digger in order to insert the pins and that would slow down his rate of work. Instead the bucket would be attached while Mr Joseph was still in the cab and he can move or wiggle the bucket around to ensure that it was seated correctly on the hitch.

[18] The digger had a lifting eye attached to the boom and this would normally be used to life objects. At the time of the accidently only a two ton chain would have been available to use on the site and that would not have been sufficient to lift the dump truck.

[19] Woods Contracting Services Limited did not have in place a standard operating procedure for the use of the Caterpillar digger or the use of the Caterpillar digger as a lifting machine. It has been put to me by counsel for Woods Contracting Services Limited that this was an unusual situation. Whilst it was not part of the common run of the mill day-to-day work as I commented to Mr Flinn for the company, breakdowns of machinery happens all the time. They are part and parcel of using machinery as anyone who owns a car would know. Provision should have been made for instances such as this.

[20] The hazards around not using a pin are well known. I have been provided with a copy of *WorkSafe's Best Practice Guidelines for Demolition*. I accept that this is not the industry that the company is in. It contains references about quick-hitches which are designed to facilitate the efficient connection and removal of attachments such as buckets. That document makes it clear that the unintentional release of attachment may cause injury to persons through attachments falling on personnel in the work area. The need for a pin for safety is made clear.

[21] Similarly, a document entitled *Hazards of Inadequately Securing Hydraulic Excavator Buckets When Using Quick Coupling Devices* provided by the

US Department of Labour makes it abundantly clear that the dangers of the upper bucket or similar becoming detached are well known worldwide.

[22] Section 6 Health and Safety in Employment Act 1992 requires every employer to take all practical steps to ensure the safety of employees while at work and in particular, to take all practical steps to provide a safe working environment and ensure that plant used by the employer is arranged, designed, made and maintained such that is safe for employees and other people to use and further, to ensure that while at work people are not exposed to hazards arising out of the use of things in their place of work.

[23] There is a requirement on employers to develop procedures for dealing with emergencies that arise while employees are at work. Those obligations continue even to those people who are not the direct employees of the company. It has been put to me that Mr Joseph was working as a kind of employee of KiwiRail and that Woods Contracting Services Limited relied, to some extent, on KiwiRail's safety procedures on site, it being a company based in Hamilton.

[24] The obligations of the company as is acknowledged by their guilty plea, extends to making certain that there is a safe environment and that they need to put in place steps to ensure that if they are in a situation such as this their obligations are carried out by KiwiRail or by anybody else who is on site.

[25] Section 51A of the Act sets out the sentencing criteria. In particular, this Court must apply the Sentencing Act 2002 having regard to s 7 to 10 of that Act; the requirements of s 35 and 40 of that Act relating to the financial capacity of the person to pay any fine or sentence or reparation imposed; the degree of harm that has occurred; the safety record of the person to the extent that it shows any aggravating features as absent; whether the person or company, as in this case, has pleaded guilty; shown remorse for the offence or any harm caused; co-operated with the authorities or taken remedial action to prevent circumstances of the kind that lead to the commission of the offence reoccurring in the future.

[26] It has been submitted by the prosecution that the practical steps that the defendant company failed to take were:

1. To have documented and implemented a detailed standard operating procedure for the operation of the Caterpillar 312D digger and its uses as a lifting machine or crane.

2. To provide the operator of the digger with appropriate equipment such as chains for lifting purposes to ensure the required task could be completed in a safe manner, and;

3. To have ensured that the safety pins were used when the bucket was attached to the quick-hitch point of the digger to ensure that it did not become disengaged.

[27] Mr Flinn on behalf of the company has submitted that those are inappropriate and that the real fault was that Mr Joseph should have refused to have lifted the machine at all. Whilst that would have not resulted in the accident once it was decided to do so, then the matters which the prosecution have put forward are, to my mind, pertinent.

[28] The full Court of the High Court in the Department of *Labour v Hanham and Philip Contractors Limited* (2009) 9 NZELC 93,095; (2008) 6 NZELR 79 (HC) addressed the approach to be taken under the Health and Safety in Employment Act 1992 following the level of penalties being increased to $250,000. I note that there is currently legislation going through the house which is going to increase that fine to $500,000 which emphasises the importance that Parliament puts upon this legislation. However, today's matter is dealt with under the current legislation.

[29] In *Hanham and Philip*, the Court summarised the approach for sentencing for offences. It noted that both s 51A and the Sentencing Act are relevant as I have stated. The Court said that the sentencing process involves three main steps:

1. Assessing the amount of reparation.

2. Fixing the amount of the fine.

3. Making an overall assessment of the proportionality and appropriateness of the total imposition of reparation and the fine.

[30] The High Court stated that the reparation and fines serve a discrete statutory purpose and that both should ordinarily be imposed. However, where a lack of financial capacity does not permit both the payment of the appropriate reparation and a fine the former is to receive priority. I will return to the question of financial capacity after I have determined the reparation and the appropriate fine.

[31] The first step is to fix reparation. It involves consideration of the statutory framework taking into account any offer of amends and the financial capacity of the offender. The second step is to fix the amount of the fine and this follows the methodology determined by the Court of Appeal mainly fixing a starting point on the basis of culpability for the offending, and then adjusting the starting point upwards or downwards for aggravating or mitigating circumstances relating to the offender.

[32] The assessment of the starting point for the fine involves an assessment of the culpability for the offending. The Court stated the starting point should generally be fixed according to the following scale;

- Low culpability, a fine of up to $50,000.

- Medium culpability, a fine between $50,000 and $100,000 and;

- High culpability, a fine between $100,000 and $175,000.

[33] It acknowledged that you could have fines in excess of $175,000.

[34] The starting point for the fine is then to be adjusted for any relevant, aggravating and mitigating factors relating to the offender. Reparation is then to be taken into account in fixing the fine and the financial capacity to pay the fine is also considered.

[35] The third main step is to assess whether the overall burden of the reparation and fine is proportionate and appropriate.

[36] I begin then by assessing the amount of reparation which should be paid to Mr Searle. The prosecution has submitted that the appropriate sentence for reparation for Mr Searle is in the range of $25,000 given the current financial circumstances Mr Searle finds himself in. Mr Searle's assessment was that he had a direct financial loss of $20,000. If that is so then the amount of $25,000 suggested by the prosecution is providing $5000 for the emotional harm caused by the injury. I am of the view that that figure of $5000 for emotional harm is too low. Not only has Mr Searle suffered emotional harm there has been a direct effect on his family life and furthermore, it will be ongoing.

[37] In discussion with counsel it became apparent that of that $20,000 a sum of $2560.23 was the actual cost over and above lost wages. I am unable to provide Mr Searle with the loss of wages between the 80 percent and 100 percent wages which he has suffered. That is because of the ACC legislation prevents me from re-adjusting those figures, irrespective of what I would have thought was appropriate. So I am restricted, therefore, to considering the actual losses over and above wages and an amount for emotional harm.

[38] In addition therefore, to the $2560.23, I need to look at what emotional harm reparation should be added to that sum. The defendant submits that the figure of $10,000 is appropriate. I have considered a number of cases which I raised with counsel. Reparation in other cases needs to be looked at with some caution. In some of the cases the amount of reparation for emotional harm reparation has been agreed, and the precedent value of that is low.

[39] In other cases the amounts set have been done by taking into account payments already made by the company involved and consequently the amount actually ordered by the Court has been between $8000 and $15,000 taking those payments into account.

[40] I am constrained, in my view, to achieve some form of consistency in the awards as best I can so I need to take into account those other levels that have been set.

[41] Taking those into account in total I set reparation at $22,560.23, being $20,000 for emotional harm and recompense of the direct losses of $2560.23.

[42] I move then to setting a starting point for fixing the fine. As stated, I need to look at the three levels of culpability. The prosecution submits and it is accepted by the defence that this falls into the medium band. The prosecution says that the starting point should be $100,000. The defence says it should be the bottom end of the scale of $50,000.

[43] In making my assessment I am to take note of the acts and admissions at issue, an assessment of the nature and seriousness of the risk of harm as well as the realised risk, the standard of degree of departure from standards prevailing in the industry, the obviousness of the hazard, the current state of knowledge of the risks and the nature and severity of harm that could result in the current and the state of knowledge of the means available to avoid the hazard or mitigate the risk.

[44] I also take note of the practical steps which I have referred to that the defendant failed to take. In particular, out of all these matters I take note that the risk was high. Mr Searle may well have lost his life. Inside the cab of the digger was a safety sticker which stated, "Warning, crush injury could cause serious injury or death. Always confirm that the quick couplet is engaged onto the pins, read the operator's manual." The industry and operational standard is that digger operators should have a safety pin put in place when using the digger as a lifter. These were provided and were available and he chose not to do so.

[45] From that lack of action due to what was an inconvenience to the digger driver; Mr Searle's life has been changed irrevocably

[46] I note the decision in the High Court recently by Brown J, in a prosecution against Briscoes. There a customer of Briscoes had fallen over two cases stacked in

the aisle and had caused damage and broke his hips. The starting point adopted by the High Court was $60,000.

[47] Mr Flinn on behalf of the company has submitted to me that the risk was so much more obvious there. I take the view that when you are lifting a vehicle that weighs over two tons the risk of injury were it to fall is blindingly obvious. I set the starting point on the basis of the injuries caused and noting those other cases such as Briscoes, at $75,000.

[48] It is accepted that there are no aggravating factors which would increase the starting point. It is also accepted by the prosecution that the defendant company is entitled to a reduction for the fact that this is the company's first offence, the remorse which has been shown, the company's co-operation and the fact that the company is required to pay reparation which I have set at $22,560.23.

[49] The submission from the prosecution is that a 20 percent reduction to the starting point is sufficient. I am of the view that it should be a 25 percent reduction in part because of the amount of reparation I have ordered. That reduces the starting point by $18,750. It is also accepted by all concerned that position of $56,250 is entitled to a further 25 percent reduction in accordance with the Supreme Court's decision in *Hessell v R* [2011] 1 NZLR 607; (2010) 24 CRNZ 966 (SCNZ). That reduces the fine to $42,187.50.

[50] I need to consider the company's financial position to make payment. I have had in the submissions provided to me by the defendant a copy of what are now confirmed as the accounts for the company to 31 March 2014 and a statement on a letterhead from chartered accountants, signed by a Mr Brown, a director of the accountancy firm, who does an analysis of the company's situation. He states that both 2013 and 2014 were difficult trading years resulting in a net trading loss respectively of $117,800 and $114,960 respectively.

[51] In previous years the company has performed profitably, but in latter years the profit position has deteriorated to the point that losses have been sustained. He

ends noting the company's debt servicing commitments has exceeded its current cashflow generated and that this is unsustainable in the long-term.

[52] When I look at the accounts I can see that the company has indeed made losses, but that on a cashflow basis, if depreciation is written back in, it would be in a cash positive situation were it not for the fact that its outstanding debtors has risen in the last year dramatically.

[53] Mr Flinn in his submission tells me that 95 percent of the work this company does is for KiwiRail. On that basis there should be no problem is collecting the payment of the outstanding accounts.

[54] On inquiry with his client Mr Flinn confirmed, subject obviously what the level was, that the company would be in a position to meet payment of the fine over a period of 12 months.

[55] On the basis of the information that I have in front of me, I am of the view that the company does have the financial ability to pay, provided that I provide for the fine to be paid over a period of 12 months.

[56] I have considered the total imposed, being $64,747.73, and I am of the view that that is appropriate and in proportion to the circumstances of the offending and the offender.

[57] The end sentence then is that the company will pay reparation of $22,560.23 and is fined $42,187.50. The fine may be paid over a 12 month period. The company is to make arrangements with the registrar for 12 equal monthly payments to meet that payment.

D G Smith
District Court Judge