IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2020-004-002625
[2020] NZDC 21437

WORKSAFE NEW ZEALAND
Prosecutor

v

NEW ZEALAND DEFENCE FORCE
Defendant

Hearing: 16 October 2020

Appearances: B Finn for the Prosecutor
S Turner and M Mercer for the Defendant

Judgment: 16 October 2020

NOTES OF JUDGE E P PAUL ON SENTENCING

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[1] Because I am delivering this sentencing decision immediately after hearing submissions from counsel, I reserve the right to expand on or clarify the reasons for my decision today.

[2] On 25 March 2019 Zachary Yarwood and five other divers, who were all enlisted members in the New Zealand Navy, were taking part in the Able Divers Course, training to be Navy divers. At around 9.45 pm during the third dive of the day Mr Yarwood was found unresponsive on the seabed and later died.

[3] The defendant, the New Zealand Defence Force, appear for sentencing having pleaded guilty to a charge of contravening s 36(1)(a) and s 48(1) and (2)(c) of the Health and Safety at Work 2015 Act which carries a maximum penalty of a fine not

exceeding $1.5 million. The contravention is as follows, being a PCBU, business having a duty to ensure so far as is reasonably practicable the health and safety of workers who work for the PCBU while the workers are at work in the business or undertaking, namely while undertaking dive training at the Devonport Navy Base, did fail to comply with that duty and that failure exposed any individual, including Zachary Yarwood, Mr V, Mr W, Mr X, Mr Y and Mr Z to a risk of death or serious injury.

[4] Particulars. It was reasonably practicable for New Zealand Defence Force to:

(a) Ensure that the divers were effectively supervised during training diving operations including by ensuring the correct number of supervisory staff were present.

(b) Ensure that all divers, including instructors, had certificates of competence for diving.

[5] The agreed summary of facts to which the New Zealand Defence Force has pleaded to is extensive and will be released to the media following this hearing. I intend summarising those facts. On 25 March 2019 six divers who were taking part in the Able Divers Course were on day 1 of endurance week which was designed to test their ability to operate safely while under controlled pressure and sustained fatigue. They did 300 minutes of diving over two dives earlier in the day. The third dive, which is referred to as the 25 March dive, was a night dive, involved the six divers being split into two groups of three. Each group was positioned either side of a pontoon where supervisors were stationed. Two divers in each group dove along jackstay lines on the seabed at a depth of approximately seven to nine metres. While holding a snag line and the third diver moved between them. Mr Yarwood was the rover diver in his group. Each diver had a surface float attached by a lifeline. I believe the surface floats were illuminated.

[6] Ninety minutes into the dive, the float of a diver, not Mr Yarwood's group was caught and so all divers were called to the surface. As a diver in Mr Yarwood's group was attempting to meet his two team members before they surfaced together, he found

Mr Yarwood unresponsive on the seafloor. An emergency drill was undertaken by that diver and the supervisors took Mr Yarwood back to shore on a safety boat to a medic onshore. Mr Yarwood died later in hospital from a brain injury due to oxygen deprivation to the brain.

[7] WorkSafe's investigation identified the following matters. The trainee divers would do a gas switch trick which was very dangerous, hypoxia could occur, around five to 10 minutes into the gas switch trick and this was unknown to the defendant. This trick allowed the divers to dive for longer periods. Observations of Mr Yarwood's rebreather post-incident suggested Mr Yarwood was doing this trick on the 25 March dive.

[8] What the investigation also uncovered was on the 25 March dive, there should have been four supervisory staff present, there were only two. A diving activity was only to take place if authority had been given. The Authorisation to Dive form for the 25 March dive listed that one dive attendant was to be there, however he could not come and no updated authority dive form was submitted. It was common practice for there to be only two supervisors and a medic for dives of this size, that is no attendants present. I enquired of the Defence Force's solicitor today as to the explanation for this behaviour and it appears it was a practice that had been occurring for some time. I have already indicated to the Defence Force's counsel that practice does not sit comfortably with me.

[9] A standby diver was to be located on the surface as close as practicable, with all necessary equipment prepared. The standby diver on the 25 March dive was not prepared as required. He was positioned on the pontoon in a wetsuit with a jersey on. His other gear was ready in the safety boat. When the incident occurred, the standby diver had just returned to the pontoon from getting something to drink from a nearby building.

[10] The investigation also revealed the standby diver's certificate of competence for diving had expired on the previous year, 15 May 2018, further Mr Yarwood did not yet hold a certificate of competence, the certificates being requirements for the dive.

[11] Before I move further, as I said at the break, I am a 56 year old father and I have had to sit here this afternoon and listen to two 56 year old men and other family members speak of the loss and no one would be immune to that loss that we have heard today. It would do a disservice to those family members who have read their statements today to attempt to repeat them. However, I do wish to refer to each member's statement and just a small portion of that for the purpose of this decision today.

[12] Julie Parr and Steven Parr, I note these comments: "Since Zach's passing there hasn't been a day that has gone by without thoughts of Zach. He was to be our son-in-law, someone we truly cared for and loved deeply. The grief we have suffered was and is vast." Elizabeth Yarwood: "These are huge for me, since I lost my son I have suffered a number of both physical and psychological symptoms. High anxiety, panic attacks, major sleep disturbances, shaking, racing heart, stomach pains, nausea, fear."

[13] Christopher Yarwood said this: "The navy will appear in court today and will be fined. They will walk away and promise they will do better. Their reputation will be damaged but within a few short months it will be forgotten and Admiral Proctor will enjoy his retirement and his family. I have been sentenced to life, carrying this grief with me to the day I die. Each Christmas, birthday, anniversary and birth will always have something missing and nobody can repair this."

[14] Miss Emily Parr said this: "The navy are given the repercussion of a fine but I am the one left with a life sentence." Mr Thomas Yarwood has joined us by VMR from Melbourne, are you still present with us Mr Yarwood? Yes, thank you. He said this: "The mental, emotional and physical health impacts caused by the death of my brother have and will continue to challenge me for the rest of my life."

[15] Max Yarwood, who chose not to address us today, said this: "Directly after the navy's failings, I fell into what I now understand as a depression, something I have never experienced before and even doubted existed. After Zach's passing, I completely changed as a person. Now, I no longer find excitement waking up each day ready to tackle life. I feel emotionless and monotone, working through life like a

checklist. There is nothing I want to strive for or become. I will never have the love for life I once did."

[16] Frances Melody, the partner of Mr Christopher Yarwood, made this comment: "Knowing that the rest of our lives will be tinged with a deepness sadness is hard and incredibly sad. The joy and comfort of knowing our children are safe will never be again. I know that Zach will be foremost in everyone's thoughts and his loss will be felt more keenly, if that is possible, when milestones and events happen in the family that should be the most joyous and happy occasions.

[17] Mr Ben Harding, a close friend of Zach's, filed a victim impact statement and he said this: "Every day I wake up knowing that my best friend's physical existence is no more. He lives now only in my memory when there should have been more memories made."

[18] Leslie Taylor, also a close friend said this, after receiving the news of Mr Yarwood's death. "I then called my kids and told them their Uncle Zach had passed away, a moment that crushed me, a moment that I never want to repeat again. The preceding few days are all a blur, shattered with a whirlwind of emotions, anger, shock, not wanting it to be true, wishing that I would wake up from a bad dream and have my best friend back. This never happened."

[19] WorkSafe have succinctly summarised their submissions today and did so in their written submissions. They record reparation is not sought as the evidence does not establish a causative link between the defendant's failures and Mr Yarwood's death. The defendant's offending should be categorised as around the middle of the medium culpability band which they say should be a fine of $450,000.

[20] WorkSafe say there should be an uplift of 10 per cent to reflect the aggravating feature of the defendant, that is the New Zealand Defence Force's, previous health and safety offending. The prosecutor acknowledges the defendant will be entitled to a reduction for co-operation, guilty plea, and Mr Finn has orally addressed me today on a small discount for remedial steps taken by the navy of up to five per cent and in

terms of reparation and remorse, including attending the restorative justice conference, suggests perhaps five to 10 per cent.

[21] Conventionally, restorative justice attendance and the outcomes would perhaps attract a higher discount but as Mr Finn has pointed out, it is clear that the payments and the apologies have not been accepted and I have had an opportunity to read the restorative justice conference report and it would be fair to say it records the outcome but I think Mr Finn's characterisation of it is fairly accurate.

[22] Once the Court reaches the fine, WorkSafe are seeking a prosecution costs order of $2,629 that being 50 per cent of their legal costs in bringing this prosecution and no issue is taken with that by the Defence Force. Also there is no issue that the Defence Force has the means to pay any fine that I might impose today.

[23] The Defence Force have summarised their position again and like WorkSafe have pointed out that the Court has no jurisdiction to impose reparation today because the actions or failings or omissions of the Defence Force did not cause the death of Mr Yarwood. They have referred to step 2 in the sentencing process where I need to set the level of fine. They say the offending here falls at the low end of the medium culpability band and submit a fine of $300,000. In terms of reductions, there are various mitigating features that they have pointed to. They accept they must pay their share of the prosecution costs and consent to a direction that the summary of facts is released at the completion of this hearing. They formally record the New Zealand Defence Force is in a position to pay any fine and monetary costs imposed today.

[24] The approach I am required to follow in this sentencing is well known and it is set out in the judgment guideline of *Stumpmaster v WorkSafe New Zealand.*[1] What that requires is a four step process:

(1) An assessment of reparation to be paid, that does not arise here.

(2) Fixing the amount of fine by reference first to the guideline bands and then having regard to aggravating and mitigating factors.

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

(3) Determine whether further orders are required.

(4) An overall assessment of the proportionality and appropriateness of any financial sanctions the Court may wish to impose.

[25] In terms of step 1, although having no ability to impose reparation today for the reason I have already enunciated, I do note compensatory payments have been made to Mr Yarwood's parents and Ms Parr, his fiancé and it perhaps does represent an awareness and acknowledgement of the grief, loss and harm that has resulted from Mr Yarwood's death. I do take WorkSafe's point that the insurance pay out cannot be considered in that, as the estate must have been entitled to those monies in any event.

[26] I also make the point which a number of victims have made, but I believe was made eloquent by Mr Yarwood senior, such payments can never equate to the loss of a life, that must be true, and the reality is nothing this court has authority to do today is ever going to meet the cost of that life.

[27] The *Stumpmaster* decision I have already referred to sets four bands for culpability and what we mean by culpability is the Defence Force's degree of fault or blameworthiness in this case. Low culpability would attract a fine of up to $250,000. Medium culpability would attract a fine between $250,000 and $600,000. High culpability would attract a fine up to $1 million and finally, very high culpability would attract a fine in excess of $1 million.

[28] WorkSafe in their submissions have identified various factors. Firstly the operative acts or omissions and practicable steps it was reasonable for the Defence Force to take. They say the Defence Force failed to take the following reasonable practical actions, firstly ensuring the divers were effectively supervised including the correct number of supervisory staff. Only a supervisor and standby diver were present, the two required attendants were not present. They were required to effectively monitor and all supervisors, including the standby diver should have been as close as practicable to the diving operation as it occurred.

[29] Secondly, the Defence Force should have ensured all divers including instructors had the Certificates of Competence required. Mr Yarwood and the standby diver should have had current Certificates of Competence.

[30] WorkSafe say all six divers, trainee divers, were exposed to risk of drowning or oxygen deficiency. The likelihood of this risk arose because it was a night dive, the trainee divers were using rebreathers which were relatively new dive sets for trainees and there was a reliance on supervisors to communicate with and ensure the safety of the trainees by active supervision of their floats.

[31] In terms of whether death or serious injury occurred or could reasonably be expected to occur, WorkSafe say it is reasonable to expect death or serious injury could have resulted from the lack of supervision. In terms of the degree of departure from prevailing standards, WorkSafe say the Defence Force's conduct departed from industry standards including their own dive instructions. Again, and I seem to be repeating myself, the starting point is two attendant divers were required and not present. Also, divers were required to have the Certificates of Competence. Any deviation from those requirements required a commander to approve. No approval was sought or obtained.

[32] It is instructive that WorkSafe obtained the opinion of Mr Taylor, a dive expert, who confirmed four supervisors allows for reasonable surface support, for reasonable surface conditions, this was the absolute minimum.

[33] The obviousness of the risk. Injury or death is well known from diving. WorkSafe say particularly in this case where the course is designed to put trainees under controlled pressure and sustained fatigue. The dive was in the dark, was up to nine metres, it required active supervision of the divers given the obvious risk. The risk was known to the Defence Force, as part of their own operation risk matrix carried out prior to the dive commencing.

[34] In terms of the availability, cost and effectiveness of the means necessary to avoid the hazard, those means were not cost prohibitive to ensure the appropriate supervisors were present and the divers had the current Certificates of Compliance.

WorkSafe have referred to the decisions in *WorkSafe New Zealand Limited v Cathedral Cove Dive Limited, R v New Zealand School of Outdoor Studies Ltd, Tony Te Ripo* and the case of *WorkSafe New Zealand Limited v Tree and Forest Ltd.*[2]

[35] WorkSafe have submitted failure to effectively supervise and failure to ensure those Certificates of Competence mean the offending falls in the middle culpability band and a fine of $450,000 should be awarded as a start. WorkSafe say the fine should be uplifted by 10 per cent for the past convictions by the Defence Force for health and safety breaches. They say the fact that there have been no previous convictions for diving incidents does not detract from the health and safety requirements which the Defence Force is subject to and therefore those convictions should be taken account. If I were to apply that, that would uplift the fine to one of $495,000.

[36] WorkSafe accept Defence Force cooperated, there was an early guilty plea and in terms of remedial steps, perhaps up to five per cent, in terms of reparation and attendance at restorative justice, perhaps five to 10 per cent and then there should be an order for their costs. They have also addressed me today on the separate application as to suppression and end up neutral on that. Should I impose a suppression order today, they invite me to impose that for the five other trainee divers who were victims in this offending.

[37] Ms Turner, on behalf of the New Zealand Defence Force, has likewise addressed the same factors, as she must. In terms of the acts and omissions, the Defence Force accepts there were insufficient supervisors but submit they had taken steps to manage risk, for example ensuring all trainees were medically and physically fit. In terms of the absence of the Certificates of Competence, they say that is a minor departure as both the standby diver and Mr Yarwood had completed the necessary prerequisites for the issue of those certificates if they had applied for them.

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[2] *WorkSafe New Zealand Ltd v Cathedral Cove Dive Limited* [2016] NZDC 14661; *R v New Zealand School of Outdoor Studies Ltd, Tony Te Ripo* [2016] NZDC 3081; *WorkSafe New Zealand Ltd v Tree & Forest Ltd*

[38] In terms of the nature and seriousness of risk and harm, the navy had recognised the risk hence their risk assessment in preparation for the dive training. In terms of whether death or serious injury could have occurred, Ms Turner makes the point that WorkSafe have acknowledged the Defence Force failures did not cause Mr Yarwood's death. They submit the standby diver had left the pontoon for a hot drink but was present when alerted to a problem with Mr Yarwood. That is true but what that submission tends to ignore is that in his absence there was only then one person supervising, one set of eyes on the pontoon for a total of six divers who were underwater in the dark.

[39] In terms of the defendant, the Defence Force's safety record, while acknowledging the three past breaches, makes the point none were related to diving in the Royal New Zealand Navy. Addressing the degree of departure from prevailing standards, the Defence Force have acknowledged their failures but they say it was neither out of ignorance or disregard of industry standards. In terms of the obviousness of the risk, they accept risks are well known with diving, against that they say they did take steps to mitigate that through the course of the training et cetera.

[40] In terms of availability and cost and effectiveness of the means to avoid this hazard, they accept it was not cost prohibitive and when I addressed Ms Turner directly on that, the explanation and the only explanation that has been tendered is it was a practice that had simply occurred as part of these trainings.

[41] Ms Turner distinguished the cases relied on by WorkSafe in terms of setting a fine, for example in the *Cathedral Cove* case there was a complete lack of supervision of a recreational diver, I believe, and inappropriate dive equipment had been issued to that diver which caused the fatality in that particular case.

[42] The Defence Force for their part rely on a decision in *WorkSafe New Zealand v Nutrimetrics International* and say a fine in the range of $300,000 is appropriate.[3] They submit any uplift for previous offending should be kept to a minimum of five per cent. They seek discounts for co-operation, guilty plea, remorse, remedial steps and Ms Turner has expanded on that, not only does she say the navy has addressed the

[3] *WorkSafe New Zealand v Nutrimetics International* [2018] NZDC 4972

steps necessary arising from this case, but also a general review of naval practices. She has also addressed me on the issue of the payments of reparation, seeking a 10 per cent discount and she submitted this is not a step in the process but a part of the genuine remorse felt by the New Zealand Defence Force in this case.

[43] It now falls to me to make my assessment in terms of the culpability of the New Zealand Defence Force in this case. As a preliminary matter I agree no reparation can be ordered today, that is very clear under the Sentencing Act 2002. In terms of culpability, the factors that I rely on to determine the Defence Force's culpability are these. Firstly, and obviously perhaps, the failure to have the necessary number of supervisors as close as practicable to the diving operation at all times to ensure effective monitoring and dive safety. The fact the standby diver and Mr Yarwood did not have Certificates of Competence is not in my view a significant factor as both had the necessary training and expertise if they had applied to receive those particular certificates at the time.

[44] The second factor is all six trainee divers were exposed to risk of drowning and oxygen deficiency in the circumstances of this dive. The circumstances being, it was conducted at night with relatively new rebreathers and an insufficient level of supervision. It follows risk of injury or death could have occurred in the absence of the necessary supervision.

[45] There is a clear departure from prevailing standards here, including the navy's own dive instructions. As I have already stated, any deviation from the required standards required a commander's approval, none was obtained. This departure went well below the minimum standards required in those circumstances and that is evidenced by the dive expert Mr Taylor's opinion. The risk is obvious and I do not intend elaborating on that.

[46] It was not cost prohibitive to have required or secured the necessary supervisors. The only explanation that has been tendered is this practice has crept in. It would not be unfair in my view to describe this practice an example of lax behaviour on the part of the navy and this lax behaviour obviously put trainee divers at risk.

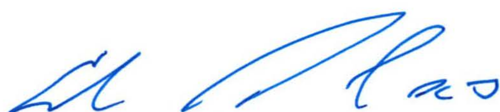
[47] The picture that is revealed by the summary of facts is a dive training exercise focussed on putting six trainee divers under controlled pressure and sustained fatigue. This exercise failed in a critical part of the exercise in that it failed to ensure the trainees' safety by having the necessary supervision of their safety. At one point we know the supervisor and standby diver went to assist the group, not Mr Yarwood's, that had a tangled float. By inference, it seems to me it is unlikely there was any supervision or monitoring of what was happening in Mr Yarwood's group at that time. Then we have the example of the standby diver being off pontoon having a cup of tea or a drink while the dive was underway, leaving only one set of eyes on six divers in the dark under the water.

[48] That picture combined with the factors I have already found present inform the starting point for this offending is near the top of the middle band which I would fix at $500,000. In terms of past convictions for the New Zealand Defence Force, despite Mr Finn's urging, I am satisfied a five per cent uplift in the fine is appropriate. That would take the nominal starting point to one of $525,000.

[49] The mitigating factors that are present here must be the Defence Force's co-operation, I would reduce the fine by five per cent. Also, despite the criticisms levelled at the Defence Force, voluntary reparations have been made and they are entitled to a five per cent discount for that. In terms of remorse and really more specifically the attendance of the parties including the Defence Force at restorative justice, I would extend a 10 per cent discount. There is no quarrel between the parties that the Defence Force pleaded guilty and accordingly they are entitled to a 25 per cent discount for that.

[50] I am not persuaded that the remedial steps undertaken by the New Zealand Defence Force attract any discount. It seems to me the standards that were already in place, if followed, it is unlikely we would be sitting here today. So I do not extend any discount for remedial action undertaken by the New Zealand Defence Force.

[51] That would result in an end fine of $288,750 which I order today against the New Zealand Defence Force. I further make an order for the cost of prosecution of $2,629. Counsel I believe that covers the sentencing aspect of this hearing. I now need to move to the suppression issue.



E P Paul
District Court Judge