IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2020-004-010004
[2021] NZDC 25741

WORKSAFE NEW ZEALAND
Prosecutor

v

ARCHITECTURAL WINDOW SOLUTIONS LIMITED
Defendant Company

Hearing:	17 December 2021
Appearances:	T Braden for the Prosecutor (via AVL) D Vautier for the Defendant Company (via AVL)
Judgment:	17 December 2021

NOTES OF JUDGE E P PAUL ON SENTENCING

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[1] Before commencing my decision in this prosecution brought by WorkSafe against Architectural Window Solutions Limited, I note a request was made for the victim Chloe's parents and grandfather to attend this sentencing today by way of VMR. I have before the sentencing commenced approved that request and if in fact Chloe's parents and grandfather are present, they are most welcome.

[2] Representing WorkSafe today is Mrs Braden. Appearing on behalf of the defendant company is Ms Vautier.

[3] I have received in advance of this hearing extensive submissions from both WorkSafe and the defendant company. I have also had access to the victim impact statement prepared by Chloe's parents and I will refer to that shortly.

[4] By way of introduction, the defendant Architectural Window Solutions Limited, referred to as AWSL, appears for sentence in respect of offending against the Health and Safety at Work Act 2015, hereinafter referred to as HSWA. AWSL pled guilty to one charge of contravening ss 36(2) and 49 of the HSWA which has a maximum penalty of a $500,000 fine.

[5] That charge records on or about 9 December 2019 at Auckland, being a PCBU, that is a person conducting a business or undertaking, having a duty to ensure so far as reasonably practicable that the health and safety of members of the public, including Chloe Simpson, is not put at risk by work carried out as part of a business or undertaking, namely remedial construction works at 118 Gladstone Road, Parnell, did fail to comply with that duty. Particulars - it was reasonably practicable for AWSL to have:

(a) Ensured that containers used for hazardous substances on site were properly labelled and did not resemble containers used for food or beverages.

(b) Provided adequate training, instruction and supervision to its workers in the safe handling of hazardous substances.

[6] The facts of the offending are helpfully summarised at paragraph 2 of the prosecutor's submissions. I am required to now refer to those facts.

[7] ASWL, trading as Miller Design, was engaged as a subcontractor by Canam to supply, install and glaze new exterior aluminium joinery at the Gladstone Apartments. In 2019, Mrs Monique Simpson lived at apartment 6A of the Gladstone Apartments with her husband and children. Her apartment was one of those undergoing remedial work as part of the work at Gladstone Apartments. One of her children, Chloe Simpson, the victim in this case, was three years old at the time.

[8] On the morning of 9 December 2019, Mrs Simpson sent a text to the site manager asking works be undertaken in their apartment. That was arranged. At 10.30 am that morning, Mrs Simpson and the children left the apartment. Workers entered to do the work on the defects subject of the remedial work. At around midday, Mrs Simpson and her children returned to the apartment. By then the workers had left. Mrs Simpson began preparing lunch. While doing that, at approximately 12.10 pm, Chloe came into the kitchen choking and vomiting carrying a transparent liquid that appeared similar to water. Mrs Simpson made Chloe spit out everything she could and took the unlabelled bottle from her. She noted it smelt like turpentine. Chloe was taken to hospital and attended to by doctors. It was diagnosed she had accidentally ingested solvents. Chloe was released from hospital at 7.11 pm that night.

[9] Later enquiries revealed the substance ingested was a solvent known as Glasscorp Solvent Cleaner 7803. The solvent was in the unlabelled drink bottle left in the apartment that day. That solvent is classified as a hazardous substance under the Hazardous Substances (Classification) Notice 2017. It is classified as actually toxic and may be harmful, aspiration hazards, listed as harmful to human organs or systems.

[10] Both Canam and AWSL, the defendant company, carried out internal investigations into what happened. It is noted that AWSL signed an SSSP for the Gladstone Road property specifically identifying the hazardous substances that would be brought on and agreeing to how those would be handled safely.

[11] In an interview carried out by AWSL, the worker, Mr Ricohermoso, admitted carrying the solvent in the drink bottle. He said he had also had with him a second unlabelled drink bottle containing the same solvent given to him by a manager Mr Banswell who I understand is an employee of AWSL. An interview was carried out with Mr Banswell. He said he was aware Mr Ricohermoso was using drink bottles filled with chemicals, that that was wrong, and that everyone on site was doing it so he did not really think about it. He said he had not read the task analysis or the SSP for the site and that he had only been on the site for two weeks.

[12] In sentencing today, I have considered the purposes of sentencing, in particular holding the offender company accountable and providing for the interests of the child victim. Likewise, I have considered the principles of sentencing, in particular the gravity of the offending and the effects on the victim. Finally, I have turned my mind to the purposes of the Health and Safety at Work Act 2015.

[13] The approach to sentencing under the WorkSafe legislation is well-known. The guideline judgment is *Stumpmaster v WorkSafe New Zealand.*[1] Four steps are prescribed:

(a) assess the amount of reparation to be paid to the victim;

(b) fix the amount of the fine by reference to guideline bands and aggravating and mitigating factors;

(c) determine whether further orders are required; and

(d) make an overall assessment of the proportionality and appropriateness of the sanctions to be imposed under the first three steps.

[14] In terms of the amount of reparation, I first turn to how reparation is informed; that is by reference to the harm, in particular emotional harm, to the victim. Here the victim was Chloe Simpson, three years old at the time. Her parents describe she was limp, vomiting and struggling to breathe as a result of drinking the fluid, that she had to be taken to hospital for approximately six and a half hours and, as a result of that experience, has developed a paranoid fear of builders and persons in Hi-Vis vests, no doubt because the workers from the defendant company were in that role and wearing Hi-vis vests. That is a snapshot of the harm to the victim Chloe.

[15] The defendant company has offered to pay $10,000 by way of emotional harm reparation. I consider that is consistent with other cases and the defendant and prosecution have accepted that that is an appropriate level of reparation.

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

[16] I note today the prosecutor for WorkSafe does not seek a reparation order. Furthermore, Ms Vautier, for the defendant company, tells me she has instructed her accounts department today to make payment and anticipates that could be done as early as this afternoon.

[17] In the absence of a Court order and out of an abundance of caution, should that $10,000 not be paid within the next 28 days, I invite WorkSafe to file a memorandum advising me of the same and I will make a reparation order immediately.

[18] The next step is to determine the level of the fine. The bands to be applied for fines are set out in an earlier decision of *East by West Company Ltd v Maritime New Zealand*.[2] Relevant for our purposes today in terms of assessing culpability is the low band up to $85,000 and the medium culpability band of between $85,000 and $200,000.

[19] The prosecution in their submissions say the relevant factors when assessing culpability are the following:

(a) identification of the operative acts or omissions at issue and the practicable steps it was reasonable for the offender to take in terms of the act;

(b) the prosecutor says the reasonably practicable steps not taken by the defendants are set out in the particulars of the charge;

(c) it was reasonably practicable for the defendant company to have:

(i) ensured the containers used for hazardous substances were properly labelled and did not resemble sipper bottles or beverages;

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2 *East by West Company Ltd v Maritime New Zealand* [2020] NZHC 1912.

(ii) provided adequate training, instruction and supervision to ensure workers used the safe handling and use of hazardous substances.

[20] WorkSafe refer to an assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk. In this instance, they point to a child mistaking a water bottle filled with a clear liquid being a drink, she drinking it, which caused her to choke and vomit and required her to be taken to hospital.

[21] WorkSafe also refer to the degree of departure from prevailing standards. They say there is a responsibility on a PCBU with management in control of the workplace. They say any container holding a hazardous substance should be properly labelled. Where there are hazardous substances, decanted or transferred to another container. That container should not usually contain food or beverages and cannot be mistakenly identified as such.

[22] WorkSafe refer to the obviousness of the hazard and that cannot be in dispute. A Glasscorp solvent cleaner on any assessment would be harmful to humans. Also, WorkSafe point out the workers were well aware they were working in homes that were occupied by children and the obvious risks that that entailed if anything hazardous was left behind. WorkSafe point out it would have been a simple matter to properly label the product as required.

[23] In terms of the current state of knowledge of the risk, nature and severity of harm and the means available to avoid it, the risk of this substance as a hazard was recorded in the defendant's risk register and well-known to the defendant. There is no shortage of publicly available guidance about how to store and handle such hazardous items.

[24] The prosecution in their submissions rely on the case of *Worksafe New Zealand v North Island Mussels Ltd*[3] and submit reliance on that and the factors I have already referred to, that this offending falls within the mid-point of the middle band accordingly attracting a starting fine of $140,000.

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3 *Worksafe New Zealand v North Island Mussels Ltd* [2018] NZDC 20269.

[25] The defence position essentially relies on the case in *Worksafe New Zealand v Asurequality Ltd.*[4] In that case, while cleaning a shed at a farm, workers were using the substance sodium hydroxide cleaner. The workers suffered minor or superficial burns. Asurequality did not adequately monitor or supervise staff, did not implement a plan or provide training for the workers or the necessary PPE equipment. There the culpability of Asurequality was assessed as low to low medium with a fine starting at $120,000.

[26] As defence have pointed out today, there were a number of workers who were exposed to burns as contrasted to the one victim in this case. Also, this company had clear policy prohibiting storage of hazardous substances. On that basis defence have submitted a starting point at the bottom effectively of the middle band of $90,000.

[27] It falls to me now to assess the culpability of the company in light of those matters. I find the defendant company's culpability at a lower point of the middle band on the basis although a child is the one victim, fortunately the injuries were not permanent, although clearly distressing for any parent at the time. The defendant company did have clear policy. It had been taking steps to ensure hazardous substances were not in sipper bottles or drink bottles.

[28] Standing back from it, what the facts of this offending discloses, and really it comes through the investigation of the workers, is that the workers themselves circumvented those measures put in place by the defendant company to ensure this very accident did not happen. The fact that it was a known practice among fellow workers seems to have been a feature of the practice continuing where drink bottles were used.

[29] Accordingly, I assess the starting point for the fine to be one of $110,000.

[30] There are no personal aggravating features relevant to the company. They come to the court as a first offender as I understand it.

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4 *Worksafe New Zealand v Asurequality Ltd* [2020] NZDC 23017.

[31] There are a number of personal mitigating factors in the company's favour which are not in dispute in this hearing. Firstly, the promptness of their guilty plea attracts a 25 per cent discount. Clearly the company co-operated with WorkSafe and that is exemplified by their own investigations of what happened here. The company as a first offender are entitled to good character. That means as a company they have not at least been prosecuted in the past by WorkSafe. Furthermore, they have agreed to pay reparation of $10,000 which would attract a 10 per cent discount. If I have not already stated it, the good character discount is five per cent. Furthermore, the company over and above their guilty plea have expressed remorse and again today counsel for the defence company has apologised to the victim and her family. But further to that, the defendant company was willing to attend restorative justice and the tangible example of their remorse is their willingness to pay reparation. So there will be a five per cent discount for that.

[32] After hearing from WorkSafe today, I am satisfied a further five per cent discount for remedial steps should be granted. The defendant company have set out 13 steps they have taken as a result of this offending. Even after a close analysis by WorkSafe, it is agreed at least three of the 13 steps are over and above what the company is lawfully required to do.

[33] That would take the total discount to one of 55 per cent by my count which would reduce the fine to one of $49,500.

[34] I then move to step 3, ancillary orders, and there is no dispute that the company must pay at least half of the prosecution costs of $1,823.58. That is quite conventional.

[35] So my overall assessment, the final step, is acknowledging $10,000 reparation will be paid, a fine of $49,500 and ancillary orders of costs of $1,823.58 and where the company acknowledged they are in a position to pay albeit the fine and ancillary orders over time, I do not intend interfering with those sums today.

[36] On that basis, the fine and ancillary costs are to be paid over a maximum of five years. They should be paid on a monthly basis commencing in a month's time.

[37] WorkSafe today have sought a suppression of the victim Chloe Simpson's name in this judgment and in any summary of facts that may be published. I am not prepared to do that today until I receive some authority for that course of action. WorkSafe tell me it is a practice in WorkSafe prosecutions, but subject to WorkSafe providing me with the necessary legal authority following this hearing, I will be prepared to make such effectively suppression orders albeit I cannot do that today.

[38] Furthermore, and as identified by Mrs Braden for WorkSafe, the summary of facts can be released, however that will be subject to my ruling on any suppression order.

E P Paul
District Court Judge