

**IN THE DISTRICT COURT
AT WAIHI**

**I TE KŌTI-Ā-ROHE
KI WAIHĪ**

**CRI-2021-079-000437
[2022] NZDC 16895**

WORKSAFE NEW ZEALAND
Prosecutor

v

JTK TRUSTEE LIMITED
Defendant

Hearing: 29 August 2022

Appearances: A Simpson for the Prosecutor
No appearance by or for the Defendant

Judgment: 29 August 2022

NOTES OF JUDGE W LAWSON ON SENTENCING

[1] JTK Trustee Limited faces one charge. The charge relates to events on 28 December 2020. The charge is that being a PCBU. The defendant JTK Trustee Limited failed to comply with safety obligations whilst operating a land-borne inflatable recreation slide and, therefore, exposed users to the risk of death or serious injury.

[2] The particulars detailed in the charging document of the failures are that JTK Trustee Limited failed to ensure that the slide complied with required safety standards and electrical standards. Secondly, that the JTK Trustee Limited failed to develop, implement and monitor effective safety mechanisms for the operation. Thirdly, it failed to ensure the adequate supervision of people riding the slide.

[3] JTK Trustee Limited is a limited liability company. Mr Eric Gerritsen, is the sole director of the company as far as I can tell from the information that I have before me.

[4] There have been multiple attempts to contact Mr Gerritsen during the course of this proceeding. This matter was proven on 11 April 2022, by formal proof after Mr Gerritsen, or a representative of JTK Trustee Limited, was invited and indeed encouraged to be present to represent the company. There was no appearance and the matter was formally proven.

[5] So, today is for JTK Trustee Limited to be sentenced. Rather than sentence the company on 11 April 2022, out of an abundance of caution I wanted to give the company an opportunity to be heard at sentencing so the matter was adjourned. There have been communications between Mr Gerritsen and the Court when I asked the registry to get a message to the email contact listed for the defendant, that the matter would proceed to sentencing today in the Waihi District Court. There was a response from an email which appears to be from Mr Gerritsen. The email is from eric@eventfun.co.nz. The email is somewhat unusual and says the following:

Public Trust action 2001, s 148, do understand your rights as a fiduciary, I will now give you your rights and they are all liabilities, debts, charges, duties and obligations. Anything you say or do can be held against you in a Court of law. By not producing the injured party you have acquiesced to the fact that you are operating in equity, therefore, you have fiducial obligations to the trust. I do not consent to anybody administering the trust and our records show there has been no consent to administer the trust by any third parties. Have a happy day.

[6] The communication I read out in full because of its unusual nature but it identifies that Mr Gerritsen was aware that sentencing was to proceed today. That is particularly important because sentencings for this type of offence can identify significant mitigating circumstances and, in some cases, with the filing of appropriate financial information, affect the level of the fine. I have seen nothing that I could properly consider in mitigation nor any financial records that could affect the outcome of this sentencing.

[7] I proceed on the basis of the summary of facts. The charge was proven, as I have said by formal proof. There was more than enough material to prove the charge

and I am satisfied that the summary of facts appropriately reflects the formal proof of this matter.

[8] The relevant facts are as follows:

- (a) JTK Trustee Limited, the defendant, provided amusement equipment at the Whangamata Summer Festival. One piece of equipment was a land-borne, inflatable slide known as the Mammoth Slide.
- (b) On 28 December 2020, the victim was a paying customer on that slide. The victim was at the top platform of the slide when the slide suddenly deflated causing the victim and 11 others to fall to the ground. The slide, itself, has a height of 14.6 metres above the ground to its highest point. The height of the platform that the victim was standing on was 12 metres, according to the summary of facts.
- (c) The slide is inflated by blowers to maintain its shape and integrity.
- (d) The slide was operated by the defendant company using at least two people, in this case. One was an operator who was standing at the top of the slide on the platform with a second person who was taking the tickets standing at the bottom.
- (e) The summary of facts details that the control and management of the slide included the person at the top regulating the numbers of people on the platform by informing the person down the bottom who could be let onto the slide. The slide should have no more than five people at the top of the slide at any given time.
- (f) In the early afternoon a staff member left to arrange meal breaks. The person at the top of the slide left their position and there was no replacement of that person.
- (g) Just prior to the deflation incident there was approximately 12 people at the top of the slide.

- (h) It is clear from the material that I have read that there were no signs which detail the rules and there was no appropriate management for the use of the slide.
- (i) Given the number of people that were on the slide at the top, the platform became unstable and started to collapse. The collapse occurred very quickly and the result was that the people at the top of the slide, including the victim, fell to the ground.
- (j) There were a number of children as well as the victim on the slide. The children were treated for minor injuries. The victim sustained serious leg injuries. In fact he was flown to Waikato Hospital and underwent three surgeries.
- (k) The following is a general description of his injuries but I have heard from the victim today, having read his seven-page victim impact statement, I will come back to that in a moment, but the short position is the victim suffered a compound left distal tibia and fibula fracture and a right closed distal tibia and fibula ankle fracture.
- (l) The matter was investigated because of the injuries that were sustained. It became clear from the investigation that there were a number of failures on the part of the defendant.
 - (i) The slide itself had a number of issues. The anchorages were in poor condition and untested.
 - (ii) The stairs were suitable for children under one metre in height the operator was allowing adults up the stairs and I note that the victim who read his impact statement today is significantly more than one metre in height.

- (iii) Added to that there were air leaks or holes in the seams such that the blowers could not maintain the structural integrity of the slide.
- (iv) There were problems with the electrical supply equipment as it was non-compliant with the safety regulations.
- (m) The reality is rather than recount all of the failures contained within the summary of facts, it is very clear that the failures were multiple.

[9] As I mentioned a moment ago the victim has read his victim impact statement today. It is clear that in lay terms he has suffered two significant broken legs. The right ankle, according to the victim impact statement, was broken in three places and the right leg and the tibia and fibula of the left leg was broken. I do not intend to go into the details of the fractures, but I have seen photographs which show what appear to me to be significant injuries to both legs, compound fractures which must have been severely painful.

[10] I am told that the victim has had to undergo a total of 10 surgeries to repair the damage. He has suffered from infections and as a result has suffered all manner of negative effects, including affecting his work visa that allowed him to work in New Zealand. There has clearly been increased stress and anxiety on his family including his wife and children because of the loss of his ability to work and the suffering that he felt as a result of these injuries.

[11] The reality is there has been significant pain, significant emotional hardship and financial loss, over and above what ACC compensated him.

[12] I am required to undergo a sentencing process following a methodology that has been identified by *Stumpmaster v WorkSafe New Zealand*¹:

- (a) I must assess the amount of reparation.

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

- (b) I must fix the fine by reference to the bands and the aggravating and mitigating features.
- (c) I must determine whether any other orders are required under the Health and Safety at Work Act 2015.
- (d) Make an overall assessment of the proportionality of what fine and reparation is appropriate in the circumstances.

[13] I turn firstly to assessing the reparation. This is a situation where the injuries were severe. There were serious leg injuries on both legs, compound fractures, with 10 surgeries required, as I have mentioned. There was infection that was suffered and the victim continues to suffer the effects. The bone on his left leg is still not properly healed and he is going to have to manage ongoing issues probably for the rest of his life. He has had to be on medication for an extended period of time. The emotional toll has no doubt been significant both to the victim and his family.

[14] Significantly, I note that he feels like he has let his family down including his responsibility as a husband and a father and it is hardly surprising given what he has suffered.

[15] I have considered the victim impact statement and the cases that Ms Simpson has provided for me. I have read those cases and considered all of the factors. It is always very difficult to make an assessment or put a monetary amount on suffering for emotional harm in these circumstances. I am satisfied that an appropriate reparation sum without taking into account consequential loss, should be set at \$40,000.

[16] The second step requires an assessment of the quantum of the fine. I must consider the aggravating and mitigating factors. I say from the outset I cannot see any mitigating factors nor have any been pointed out to me but there are clear and obvious aggravating features here.

[17] The first and most obvious one is that the steps available to rectify these problems would have been relatively simple. It is remarkable that in the circumstances this slide was not maintained, the electrical equipment to support it was not properly managed and there was, what appears to be, penny-pinching in relation to the staff oversight because there clearly were not enough staff members to support the operation of the slide leaving the top platform unmanned to manage the appropriate number of people on the slide was remarkable in the circumstances.

[18] It is clear that this combination of factors which have occurred together have caused the damage here, or the risk. It was obvious that there were too many people at the top of the slide and that should have been managed. It should have been obvious to the operator the appropriate numbers were exceeded and that the size and height of the people going onto the slide was exceeded.

[19] Those failures, to me, identify on the part of the defendant, a totally lax attitude to safety in the circumstances and the attitude demonstrates a significant departure from the appropriate safety standards.

[20] Having considered those factors I should say that I agree with the aggravating features identified in Ms Simpson's submissions which are detailed and very helpful, Ms Simpson has said that this offending falls into the medium culpability band and I agree entirely, it could not in any set of circumstances, be described as low culpability given the number of aggravating features that are present.

[21] The medium band for culpability sets a fine from \$250,000 to \$600,000. As I mentioned I have no evidence at all as to the financial position of the company and its ability to meet a fine so that the amount of fine that I appoint cannot be in any way reduced by financial capacity.

[22] This was a fall which was from 12 metres in height. It seems to me that the fall was entirely avoidable with some simple management and maintenance. I am aware that the director, Mr Gerritsen, has previous convictions for breaches of health and safety obligations. Those convictions are not convictions against the company, they are against Mr Gerritsen himself so I cannot take those into account except to the

extent that it identifies that Mr Gerritsen ought to be aware of risks in relation to matters of health and safety. But I do not adjust the fine upwards because of Mr Gerritsen's previous convictions.

[23] It is my view that an appropriate fine, taking all of the circumstances into account would be \$400,000.

[24] The question then becomes how I adjust that overall, given that I intend to award the \$40,000 sum for emotional harm reparation plus a consequential loss reparation.

[25] Consequential loss is clearly available. The law is very clear that the ACC payments can be topped up. I asked Ms Simpson to make an updated calculation because when this matter was originally set to proceed on 11 April 2022, the amount was significantly lesser. The material provided by Ms Simpson in support of the consequential loss is entirely appropriate and she has made a calculation updating the material through to today. So I intend to make a consequential loss award in the sum of \$12,958.98.

[26] Taking into account the fact that I intend to make those two awards I do intend to make an overall adjustment and that is out of an abundance of caution having not heard from the company and taking into account that there are significant reparation awards being made. In the end:

- (a) I will adjust the fine to \$350,000. The fine will, therefore, be formerly ordered at \$350,000.
- (b) There will be emotional reparation in the sum of \$40,000 and an order for consequential loss in the sum of \$12,958.98.
- (c) I also intend to award costs.
- (d) I have to say that Ms Simpson has been very generous in her position in relation to costs. The original costs were identified for the proceeding set at 11 April 2022.

- (e) I have invited Ms Simpson to provide me with additional information. I am prepared to award the costs of \$1,835.22, but in the circumstances given the failure to respond by the defendant and the situation that Ms Simpson has found herself in, I leave open the opportunity for her to provide me with additional material for a period of 10 days.
- (f) If Ms Simpson provides me with additional material within that 10-day period I will certainly consider increasing the costs based on the material she provides to me.

Addendum

[27] I have now received additional submissions in relation to updated costs from counsel for WorkSafe. The memorandum identifies that the prosecution costs calculated to the end of the matter amount to \$4337.77. I make an order for costs in the amount of \$4337.77.



Judge W Lawson
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 07/09/2022