IN THE DISTRICT COURT
AT MANUKAU

I TE KŌTI-Ā-ROHE
KI MANUKAU

CRI-2020-092-002050
[2023] NZDC 26308

BETWEEN	WORKSAFE NEW ZEALAND Prosecutor
AND	CULHAM ENGINEERING COMPANY LIMITED First Defendant
AND	RIGWELD ENGINEERING SERVICES LIMITED, in Liquidation Second Defendant
AND	LEIGHS CONSTRUCTION LIMITED Third Defendant

Coram:	G A Andrée Wiltens
Hearing:	9 November 2023
Appearances:	Mr Finn and Ms Simpson for the Prosecution Mr Harris for the First Defendant Ms Smith for the Second Defendant Ms Welch for the Third Defendant
Judgment:	27 November 2023

RESERVED DECISION OF JUDGE G A ANDRÉE WILTENS

A. Introduction

1. On 22 February 2019, a young rigger of limited experience, Mr Levarn Nathan-Nasmith, was seriously injured while working on the construction of a large industrial building at East Tamaki, Auckland.

2. The overall construction project was in the hands of Leighs Construction Limited ("Leighs"), who had contracted with the site owners to undertake the work. Leighs had sub-contracted the steelworks part of the project to Culham Engineering Company Limited ("Culham"), a well-established and experienced company specialising in such work. Culham, in turn, sub-contracted the erection of the steel skeleton of the building to Rigweld Engineering Services Limited ("Rigweld"), a firm Culham had previously worked with successfully.

3. Mr Nathan-Nasmith was directly employed by Rigweld as a junior rigger.

4. At the time of the accident, Mr Nathan-Nasmith was part of a small Rigweld team joining together two steel beams, one of some 3 metres in length, and the other of some 30 metres in length and weighing some 4 tonnes.

5. The joinder of the beams took place on the ground to minimise risks for the workers. The process adopted involved the laying of the longer beam in an upright position, with the end to be bolted to the shorter beam held 2 – 3 metres above ground on a load support known as a stye. The stye was a wooden structure, made of numerous lengths of timber of variable dimensions.

6. To construct a stye, two or three pieces of timber were laid on flat ground, with a second layer on top comprising two or three further pieces of timber laid at right angles to the first layer. Thereafter, further layers were stacked on top, each at right angles to the immediate lower level, until the appropriate height was attained.

7. Culham provided the timber used for the construction of styes on site. Rigweld staff were primarily responsible for the construction and siting of the styes.

8. There was no safe operating procedure or specific job safety analysis relating to stye design or construction, or load supports generally.

9. On or before 22 February 2019, the stye holding up the longer steel beam was constructed by Rigweld staff. The stye was 9 levels high.

10. At around 2.45pm on 22 February 2019, a Rigweld staff member choked a chain on the shorter beam, which was then raised by crane to the correct height. Mr Nathan-Nasmith was then instructed to reach under the 30-metre beam, pull a chain through from the other side of the beam, and to then pass the chain up to that Rigweld staff member.

11. Just as Mr Nathan-Nasmith reached under the beam, the timber stye holding it collapsed, pinning Mr Nathan-Nasmith underneath. The beam fell across his shoulder to his hip. Mr Nathan-Nasmith suffered several "life-threatening injuries" which caused him to be hospitalised for approximately 2 weeks. He was admitted suffering from:

- fractures of the distal left fibula, right 4th to 8th ribs, left 2nd, 3rd, 5th, 6th and 7th ribs, right T10 thoracic vertebra, L1 to L3 vertebra, and displaced fracture of the L5 vertebra;
- displaced right 12th rib;
- haematoma overlying the right pelvic brim;
- bilateral pneumothoraces and pleural effusions;
- air in the left upper abdomen;
- loss of blood supply to the middle aspect of the left kidney, leading to infarction of part of the kidney, as well as a left kidney laceration;
- near collapse of the lower left lung, due to haemorrhaging; and
- subcutaneous emphysema up to his neck.

12. Medical evidence suggests it is likely that he will experience permanent impairment in his lung function, and possible on-going pain in his lumbar spine. The effects of the accident were detailed in Mr Nathan-Nasmith's Victim Impact Statement ("VIS"), read to the Court by his older brother.

13. The failures of all three companies involved related to the assembling and rigging of load supports for the steel beams. The collapse of the stye revealed shortcomings in the health and safety systems of each company, namely in respect of planning, communication, execution and oversight.

B. Charges

14. The First Defendant, Culham, was charged pursuant to Ss 36(1)(a), 48(1), and 48(2)(c), of the Health and Safety at Work Act 2015 ("HSW"), namely having breached its statutory duty as a PCBU towards its employees, to ensure the health and safety of workers so far as is reasonably practicable, in respect of undertaking the assembling and rigging of load supports and steel loads at the site, which breach exposed workers to a risk of death or serious injury.

15. Culham was convicted after trial.

16. The maximum sentence set out in the legislation is a fine of up to $1,500,000. For sentencing purposes, I rely on the findings at trial as set out in my reserved decision of 8 August 2023.

17. The Second Defendant, Rigweld, was charged pursuant to Ss 36(1)(a), 48(1) and 48(2)(c) of HSW, namely failing so far as reasonably practicable to ensure the safety of workers on site while assembling and rigging load supports and steel loads, which exposed the workers to a risk of death or serious injury.

18. Rigweld pleaded guilty to that charge. The maximum sentence set out in the legislation is a fine of up to $1,500,000.

19. However, no agreed summary of facts was tendered to the Court. In sentencing submissions Ms Smith for Rigweld confirmed that the facts set out in the Summary (pertaining to Leighs) are "…generally agreed" by Rigweld. For sentencing purposes, I will also rely on the findings at trial and I note some were referred to by Ms Smith in her sentencing submissions.

20. The Third Defendant, Leighs, was charged pursuant to Ss 34(1) and 34(2)(b) of HSW, namely failing so far as reasonably practicable to consult, co-operate and co-ordinate activities on site with Rigweld and Culham in relation to assembling and rigging load supports and steel loads.

21. Leighs pleaded guilty to that charge. The maximum sentence set out in the legislation is a fine of up to $100,000.

22. An agreed summary of facts has been tendered to the Court for the purposes of sentencing.

C. Principles

23. I take note of s.151 of HSW, which requires the Court to apply the Sentencing Act 2002 ("SA"), in particular Ss 7-10, and to have particular regard to the purposes of HSW, the risk of injury/death, and whether serious injury/death occurred. The previous conduct of a defendant must be considered, as must the degree of departure from prevailing standards and the defendant's financial capacity.

24. The purposes of HSW, as set out in s 3(1) importantly include protecting workers against harm by eliminating/reducing risks arising from work, securing compliance, and providing a framework for continuous improvement and progressively higher standards of work health and safety.

25. Ss 7 – 10 of SA set out the principles and purposes of sentencing as well as the aggravating and mitigating factors Courts must take into account when sentencing. The provisions most apposite to this case are to hold the defendants accountable for the harm done, provide for the interests of the victim, and denunciation and deterrence. The gravity of the offending, the seriousness of this type of offending and the effects on the victim are further mandatory considerations.

26. The leading authority on the sentencing of health and safety cases is *Stumpmaster v WorkSafe* [2018] 3 NZLR 881. The full Court stipulated that the recent amendments to HSW requires Courts to now place more weight on aggravating than mitigating features.

27. The indicated approach to sentencing involves the following:

- Firstly, assess the amount of reparation;

- Secondly, fix the level of any fine by reference to the guideline bands, having regard to the aggravating and mitigating factors;
- thirdly, determine whether any additional orders are required; and
- fourthly, a methodical assessment of the overall proportionality and appropriateness of the sanctions package, including ability to pay any fine and/or need for an enhanced penalty to account for substantial financial capacity.

28. It is accepted by Culham and Rigweld that there are four broad categories set out in *Stumpmaster* for establishing a starting point in s 48 cases:

    a. Low culpability: a fine between $0 and $250,000;

    b. Medium culpability: a fine of between $250,000 and $600,000

    c. High culpability: a fine of between $600,000 and $1,000,000

    d. Very high culpability: a fine between $1,000,000 and $1,5000,000.

29. It is also accepted by Leighs that there are similarly four categories for establishing a starting point in s 34 cases, as can be gleaned from the authorities of *WorkSafe v Bulldog Haulage Ltd* [2019] NZDC 12202, *WorkSafe New Zealand v Armitage Williams Construction Ltd* [2021] NZDC 16630 and *WorkSafe New Zealand v Fulton Hogan Limited* [2022] NZDC 22731:

    a. Low culpability: a fine between $0 and $15,000

    b. Medium culpability: a fine of between $15,000 and $30,000

    c. High culpability: a fine of between $30,000 and $60,000

    d. Very high culpability: a fine between $60,000 and $100,000.

30. Establishing the level of culpability involves an examination of numerous factors, including:

- Identifying the operative acts or omissions at issue;
- Identifying the "practicable steps" which the Court finds it was reasonable for the offender to have taken in terms of s 2A HSE Act;
- Assessing the nature and seriousness of the risk of harm occurring, as well as the realised risk;
- Assessing the degree of departure from standards prevailing in the relevant industry;
- The extent to which the hazard was obvious; and
- Availability, cost and effectiveness of the means necessary to avoid the hazard.

D. Reparation

31. There are two heads of reparation to consider, namely for emotional harm and consequential loss.

32. There are no tariff cases dealing with emotional harm. Courts strive to achieve a just figure compensating for actual harm in the form of anguish, distress and mental suffering. The nature of the injury may be relevant to the extent it causes physical or mental suffering/incapacity, whether short-term or long-term: *Big Tuff Pallets Ltd v Department of Labour* HC Auckland CRI-2008-404-322, 5 February 2009.

33. Mr Nathan-Nasmith's VIS is informative. He remains unemployed since the accident, and is to be medically assessed again in December to see if there is any change. His colloquial description of his injuries and the past and continuing effects of them on his everyday life are compelling. He also recognised the effect of what has happened to him on his immediate family. Although extremely fortunate to have survived the accident, his life has necessarily had to turn in an another direction resulting in depression at lost hopes and dreams and the realisation of what is in store in the future. He has and continues to struggle physically and mentally, with no end in sight.

34. Mr Finn submitted that reparation for emotional harm be set at $45,000 to $55,000, a submission he supported with the similar cases of *Armitage Williams Construction*

Limited, *WorkSafe v Carter Holt Harvey Limited* [2018] NZDC 22605, and *WorkSafe v Lanyon & Le Compte Construction Limited* [2022] NZDC 25215.

35. He submitted further that consideration be given to "topping up" the shortfall between the weekly wage Mr Nathan-Naismith enjoyed at the time of the accident and the 80% compensation paid to him since then by ACC. He tendered an affidavit by a Chartered Accountant Mr Jay Shaw calculating this amount to $35,700. The calculation was not challenged by any of the defendants.

36. As well, Mr Nathan-Naismith has incurred 2 further sums to deal with his ongoing backpain issues, namely a gym membership ($2,042) and a new supportive bed ($2,998).

37. Accordingly, the total consequential loss reparation sought came to $40,740.

38. Mr Finn next addressed the respective culpabilities of the three defendants. He started off with accepting that Leighs' failures had not directly caused the accident. He noted that despite that, Leighs had made a voluntary payment of $10,000 to Mr Nathan-Naismith on 30 November 2020. Accordingly, he did not seek any reparation as against Leighs.

39. Mr Finn next submitted that Rigweld and Culham were equally culpable and therefore ought to pay the assessed reparation on a 50:50 basis. He submitted that such a result was warranted as:

- Rigweld employed Mr Nathan-Naismith and had direct responsibility for his training and supervision. Further, Rigweld had failed to carry out the relevant rigging work safely.
- Culham oversaw the work on site and was responsible for monitoring Rigweld's work practices. Further, Culham's failures relating to the use of load supports were similar to that of Rigweld.

40. Mr Harris for Culham accepted, on the basis that each PCBU had legal duties and responsibilities in respect of health and safety, that reparation ought to be split 50:50

between Culham and Rigweld. He submitted the appropriate sum of emotional harm reparation be set at $45,000 - $50,000.

41. Mr Harris did not dispute the calculations of Mr Shaw as to consequential losses. Although in his written submissions he was concerned about the gym membership and bed purchase, orally he confirmed he accepted those additional costs as appropriate.

42. Ms Smith for Rigweld accepted the range for emotional harm reparation should be set at $45,000 to $55,000. She also accepted the consequential loss should be set at $$40,740. However, she submitted Culham ought to be responsible for 75% of those sums as the principal contractor.

43. Ms Welch for Leighs agreed the $10,000 payment already made was sufficient, and that no further reparation should be ordered.

44. I set the total reparation at $50,000 for emotional harm and $40,740 for consequential losses; to be paid equally by Culham and Rigweld. I note that Ms Smith advised the Court that Rigweld was in a position to make some payment towards reparation.

45. There is no reparation order in respect of Leighs.

E. Fine

(i) Start Point

46. The three defendants' respective culpability are to be assessed by reference to stated factors, as set out in *Stumpmaster* and confirmed in *Armitage Williams Construction Ltd*.

47. In so far as these factors apply to the present case, I make the following observations:

- (i) Identification of the operative acts or omissions, bearing in mind the practical steps it was reasonable to have taken.

  Culham and Rigweld should have:

- Ensured that the hazards and risks associated with load supports and rigging of steel loads were adequately identified and assessed;
- Provided and/or ensured the provision of and maintenance of an effective system of work in relation to the construction of load supports and rigging of steel loads;
- Ensured load supports were safe and effective;
- Consulted, co-operated with, and co-ordinated activities with other PCBUs, i.e. each other and Leighs, in relation to assembling and rigging steel load supports and steel loads at the site.

As well, Culham should have provided an effective and task-specific load support design that would support the steel loads; and Rigweld should have provided a safe system of work including the supervision, monitoring and training of workers in the work of rigging loads.

The planning and risk assessment regarding load supports by both Culham and Rigweld was fundamentally flawed. This was a significant blind spot in their health and safety systems. This culminated in an ineffective load support collapsing, with unfortunate predictable consequences. The potential for collapse of a stye was readily foreseeable.

Leighs' failed to engage with Rigweld and Culham to ensure there was an effective safe system of work for assembling and rigging steel loads. There was no checking undertaken, and a failure to identify the risks posed when working around loads on wooden styes. There was a lack of appropriate supervision.

- (ii) Assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk.

The wooden stye collapsed, causing the steel girder to fall onto Mr Nathan-Naismith. His life-threatening injuries are set out above and the continuing effects of the accident have been traversed in the VIS.

- (iii) Degree of departure from standards prevailing in the industry.

Although the use of wooden styes as load supports was a common practice within the industry, there was a lack of planning and risk assessment as well as documented processes. This is only partly off-set by the lack of specific advice in ACOP. It is noted that Culham dictated the use of wooden styes; and further that despite policies to the contrary, Culham did not adhere to their own internal health and safety documents.

- (iv) Obviousness of the hazard.

To load a heavy steel girder on a wooden stye creates a very obvious hazard.

Also, Culham had the benefit of a prior warning resulting from the load support accident at Kinleith just a few years prior to this incident, but did not sufficiently take note of that.

- (v) Availability, cost, and effectiveness of the means necessary to avoid the hazard.

Steel load supports were a realistic safe alternative, and, given the number of steel girders to be joined together and installed, would have been cost effective.

Culham was in a position to easily supply steel load supports.

Planning and appropriate supervision are neither prohibitive nor disproportionate in terms of cost to the obvious risks of undertaking the work in the manner chosen.

- (vi) Current state of knowledge of the risks and the nature and severity of the harm which could result, and the means available to avoid the hazard or mitigate the risk of occurrence.

One of Rigweld's riggers had heard of a previous wooden stye collapse. Culham was also aware of the possibility of a collapse as a result of the Kinleith incident.

48. As a consequence of taking these matters into account, and with an eye to previous authority (see *WorkSafe v CNC Profile Cutting Services* [2021] NZDC 9794 and

WorkSafe v KNCC Ltd [2023] NZDC 13894) Mr Finn submitted the appropriate start point for the fines to be imposed on Culham and Rigweld was on the cusp of the middle and upper bands, in the range of $550,000 to $600,000.

49. Mr Harris accepted the authorities cited by Mr Finn, and compared in addition the authorities of *Lanyon & Le Compte* and *SharpEye Limited.* He submitted that in respect of Culham's culpability the start point for Culham's fine should be set at a lower level than that of Rigweld, and suggested it be between $400,000 - $450,000, submitting the lower end of that range to be most appropriate. His reasoning for this submission was that Rigweld was the direct employer and its obligations to its most junior staff member were greater than Culham's more general supervisory obligations.

50. Mr Harris for Culham, candidly admitted, on the part of his client, that Culham was able to meet any reparation ordered and, within reason, any fine set. He indicated however, that the overall penalty would still be significant for Culham.

51. Ms Smith for Rigweld, contended the 50:50 proposed split of culpability was misconceived as Culham was the principal contractor and therefore it's responsibilities were greater than those of Rigweld, which was a sub-contractor. She pointed to Culham dictating that wooden load supports would be used on site, and that the usual timber had been removed on the day in question resulting in Rigweld staff using alternative timber to construct the stye. This submission however overlooks the possibility of Rigweld, as the experts in rigging and slinging loads, declining to use timber and/or inappropriate timber and insisting on steel load supports.

52. Ms Smith submitted the fine should be set towards the lower end of the medium range as set out in *Stumpmaster*. However, she did not press the matter, as Rigweld is in no position to pay a fine, having been made insolvent on 23 September 2023. An affidavit by Ms S Manihera, which appended the Liquidator's initial report, supports that contention. It appears there are no assets, with several potential creditors including the IRD.

53. I do not accept Mr Harris' or Mrs Smith's submissions that Rigweld be treated differently to Culham in apportioning responsibility for the accident. In my assessment, they are equally culpable.

54. I do not accept the appropriate fine start point is at the lower end of the medium range. In my assessment the criminal culpability established is at the upper end of the medium band.

55. Accordingly, the start point I adopt for both Culham and Rigweld is a fine of $500,000.

56. In respect of Leighs, Mr Finn pointed to the authority of *Fulton Hogan* as dealing with a more serious matter. He submitted that Leighs' failures involved inadequate oversight and awareness, both of which were basic and avoidable. This, he submitted, warranted a fine at the midpoint of the middle range, namely between $20,000 and $25,000.

57. Ms Welch submitted the start point be set at the cusp of the low and medium bands, namely at $15,000. She submitted that Leighs took numerous steps to ensure compliance with its health and safety obligations, but accepted that Leighs could and should have done more. She considered there was no need for particular deterrence or denunciation in the circumstances of this case.

58. Ms Welch advocated that the authorities of *Armitage Williams Construction Limited, WorkSafe v Sullivan Contractors 2005 Limited* [2020] NZDC 20648, *WorkSafe New Zealand v Bulldog Haulage Limited* [2019] NZDC 12202 were more apt authorities than *Fulton Hogan* and supported her suggested start point.

59. I agree with Ms Welch's analysis and set the fine start point for Leighs at $18,000.

(ii) Mitigation

60. Mr Finn properly conceded the $10,000 reparation payment by Leighs was significant. Further, that the payments by Rigweld to top up Mr Naismith-Nathan's ACC payments following the injury was also significant. He also accepted a discount was properly available for the prompt pleas of guilty by Rigweld and Leighs.

61. However, Mr Finn was less charitable in relation to steps taken post-accident to prevent recurrence as being mitigatory. His point was that the steps taken should have occurred prior to the accident. Further, Mr Finn submitted the fact that the defendants had co-operated with WorkSafe was of no moment. He submitted that such action was statutorily required.

62. Mr Harris sought to advance a number of points of mitigation, namely good previous record, co-operation with WorkSafe, subsequent numerous appropriate remedial actions, remorse, and a willingness to attend a restorative justice conference (which did not eventuate). His submission was that these factors warranted a 20% discount from the start point.

63. Ms Smith pointed to the assistance Rigweld provided immediately after the accident to Mr Nathan-Naismith and his family. She sought further mitigation be applied due to Rigweld's co-operation with WorkSafe, remedial steps subsequently taken, reparation (if ordered), previous good safety record and guilty plea. These factors in her submission merited a 45% discount from the start point.

64. Ms Welch sought 25% discount for Leigh's prompt guilty plea, with additional discounts for offers to make amends following the accident, co-operation with WorkSafe, remorse, remedial steps subsequently taken and good prior safety record.

65. I accept Mr Harris' submissions as to mitigation. In my view it is relevant that Culham co-operated with WorkSafe and immediately took steps to prevent a recurrence. I am prepared to reduce the fine for Culham by 20%, namely to $400,000.

66. I accept Rigweld did not take steps to evade it's health and safety responsibilities. It's retreat into liquidation was not at it's instigation. I accept it has no ability to pay a fine. Accordingly, as in the authorities of *WorkSafe New Zealand v Chuek* [2022] NZDC 14786 and *New Zealand v Portage Management Limited* [2020] NZDC 1545, I impose no fine against Rigweld due to it being in liquidation.

67. I set Leigh's fine at $10,000. That incorporates a 25% discount for the prompt guilty plea and a further almost 20% discount for the other mitigatory features.

F. Ancillary Orders

68. Mr Finn sought costs in the sum of $32,776.71 as against Culham; and in the sums of $1,554.77 as against Rigweld, and $1,664.09 as against Leighs.

69. Mr Harris accepted that an ancillary order was appropriate, but contended the order should be in the amount of $21,155 – that being a round $20,000 for legal costs plus $1,155 for Mr Leatherby's costs.

70. Ms Smith accepts Mr Finn's proposal, but points to liquidation making any such payment problematic. I agree.

71. Ms Welch accepts Mr Finn's submissions as to costs.

72. I consider the sums sought as just and reasonable in the circumstances.

G. Overall Assessment

73. Culham is to pay a fine of $400,000 and reparation of $45,370. It is additionally ordered to pay costs of $32,776.71.

74. Rigweld is to pay reparation of $45,370.

75. Leighs is to pay a fine of $10,000 and costs of $$1,664.09.

76. I am satisfied that these orders are appropriate and proportionate, as well as just, having regard to the respective culpabilities of the defendants and their abilities to meet these orders.

Judge G Andrée Wiltens
District Court Judge