ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF WITNESS/VICTIM/CONNECTED PERSON(S) PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html

IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2022-004-006696
[2023] NZDC 29218

WORKSAFE NEW ZEALAND
Prosecutor

v

GROUTING SERVICES NZ LIMITED
Defendant

Hearing: 12 December 2023

Appearances: V Veikune for the Prosecutor
J Cairney for the Defendant

Judgment: 12 December 2023

NOTES OF JUDGE C H BENNETT ON SENTENCING

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[1] I would like to start by acknowledging the victims of this accident. Aidan Paszczuk was 21. He went to work on 5 October 2021 to do a job that he loved. Tragically he did not return home that night, instead his parents received a knock on the door at 5.30 in the evening to be greeted by a sight and situation any parent would dread. Police had come to their house to advise them that their much-loved son had been killed in a workplace accident.

[2] The summary of facts runs to some 11 pages which I do not intend to recite due to the length of it; however, I direct that a copy of the agreed summary of facts be annexed to my sentencing notes. I adopt instead the sentencing summary from the prosecution submissions at 1.1 to 1.4.

[3] On 5 October 2021, Mr Aidan Paszczuk, the victim, was fatally injured when undertaking the removal of steel waler beams at a commercial construction site. A visual assessment of the last waler beam had been undertaken and concluded that the three corbels holding up the waler beam were welded to it. This was incorrect, as only the central corbel had been welded to the beam and was therefore the sole means of supporting the beam. Following this assessment Mr Paszczuk proceeded to complete the cut of the central corbel whilst standing on a pallet stack directly below the waler beam. While completing the cut the waler beam fell onto him and he suffered fatal crush injuries.

[4] A subsequent WorkSafe investigation identified failures on the part of Grouting Services New Zealand Limited, the defendant, as a person conducting a business or undertaking PCBU to comply with the statutory duties under the Health and Safety at Work Act 2015. The defendant appears for sentencing having pleaded guilty to a charge of contravening ss 36 subs (1), 48 subs (1) and 48 subs (2)(c) of the Health and Safety at Work Act which has a maximum penalty of a fine not exceeding 1.5 million dollars.

[5] The defendant Grouting Services is charged with being a PCBU having a duty to ensure so far as was reasonably practicable the health and safety of workers who work for the PCBU, including Mr Aidan Paszczuk, Mr Stewart Malcolm and Mr Honetama Wikaira while at work in the business or undertaking namely deconstructing waler beams did fail to comply with the duty and that failure exposed workers to a risk of death or serious injury arising from a falling waler beam. Particulars it was reasonably practicable for Grouting Services New Zealand to ensure it provided a safe system of work in respect of deconstructing the waler beam including by undertaking an effective risk assessment and by providing a system to arrest the relevant beam's fall.

[6] In preparation for the sentencing hearing I have considered the following documents. I have read all of the submissions filed by both the prosecutor and the defence, various memorandum filed by counsel, all the authorities submitted by both sides and a victim impact statement from the mother of the victim, ████████. I acknowledge that there are other victims that I have not heard from namely Aidan's brother ██, his brother ████ and his brother ███. The effect of the loss of their brother has had such an impact on them that even now two years on they do not feel strong enough to provide their views. I am however satisfied that they have been impacted emotionally, relying on their mother's impact statement.

[7] A reparation order is sought in joint favour of █████████ and ███ The figure has been the subject of much discussion between counsel. At the last hearing of this matter on 24 November they had reached an agreed position that the appropriate figure for reparation was $110,000 to be apportioned equally between Aidan's family members. I want to make the point that this order is exclusive of any reparation that may or may not be ordered in the future in respect of the co-defendant, █████. The prosecution submit that the court should make further orders being a fine with a starting point of $600,000 with discounts totalling 45 per cent. They seek an order for costs in the sum of $5,379.74.

[8] An order is sought for release of the summary of facts with the appropriate suppression redactions and I will deal with that matter now. At the last hearing of this matter, at the conclusion of the hearing there was an application for suppression of the name of the mother of the victim. I suppressed also, at that time, the name of the deceased. Mr Gay, who I see is here today, did advise me that the horse has somewhat bolted because the name had been published in media reports previously. I understand the position now to be, and I would like to be corrected if I am incorrect, that suppression is only now sought for the name of ███████. I am advised that there is an application for final suppression by the prosecution in relation to the three brothers. There is no opposition to that order being made and I think it is appropriate in the circumstances given the emotional impact of this tragedy upon all victims. Accordingly, I formally make the order.

[9] As to the fine sought, there really is not any great disagreement as between the defendants and the prosecution as to the quantum of that fine. The prosecution seek a starting point in their written submissions of $600,000 but relax their position in relation to that at the oral hearing down to $550,000.

[10] Mr Cairney on behalf of the defendant company submits that even at $550,000 that fine is too high a starting point. In his submissions and also in the prosecution submissions a number of authorities were cited. Of course, the leading authority is the case of *Stumpmaster v WorkSafe New Zealand*.[1] In *Stumpmaster* four guideline bands were set out by the court:

low culpability: up to $250,000,

medium culpability: $250,000 to $600,000,

high culpability: $600,000 to $1 million,

very high culpability: $1,000,000 plus.

[11] In assessing culpability, the *Stumpmaster* decision referred to the relevant factors listed in *Department of Labour v Hanham & Philp Contractors Limited*.[2]

> *The Hanham factors are well known and little would be gained by re-wording them. the Hanham factors are well known and little will be gained by re-wording them. There is nothing in the Health Safety and Work Act that requires it.*

[12] The *Hanham* factors are as follows:

The identification of the operative acts or omissions at issue and the practicable steps it was reasonable for the offender to have taken in terms of s 22 of the Act.

The defendant of course has pleaded guilty that it failed to take the following

[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2190.

[2] *Department of Labour v Hanham & Philp Contractors Limited* [2008] 6 NZELR at [79].

reasonable practicable actions:

They should have ensured a safe system of work in respect of deconstructing the waler beam including by undertaking an effective risk assessment by providing a system to arrest the relevant beam's fall. The prosecution submits in short the defendant did not have a safe system of work for deconstructing waler beams. Workers were left to complete their work without a considered plan in place so on the day of the incident they devised an ad-hoc method rather than cease activity and speak with their supervisor regarding the issue that they were facing. If the defendant had undertaken an effective risk assessment that assessment would have identified the risks and informed a system to arrest the beam's fall. As a result of these failures Mr Paszczuk of course was fatally injured when the unsupported beam was cut and fell onto him;

The next factor is an assessment of the nature and seriousness of the risk of harm occurring as well as the realised risk.

The prosecution submit that the risks of an uncontrolled fall of the waler beam was significant and had obvious potential for serious injury or death as was realised. The defendant exposed the victim and workers who were with him to this risk. In *Stumpmaster* the court said:

Although necessarily the risk under s 48 prosecutions will always at least be of causing serious harm or illness it is still important to have regard to exactly what the risk was, how many people did it involve for example and might a worker have been killed. Also the realised risk component of this enquiry, that is the actual harm caused, similarly remains an important aspect in setting the placement within the bands. The degree of departure from standards prevailing in the relevant industry.

In New Zealand there is no industry guidance that is specific to the circumstances of this matter. The legislation requires PCBUs to manage risks associated with falling objects. The defendant should have undertaken an effective risk assessment for deconstructing the waler beams to prevent the waler beam from falling freely. If this was not reasonably practicable then it should have had a system in place to arrest the fall. An example of this is to cease work, talk to the workers working on the floor

above the waler beam, ask them to hold off putting up the wall until the waler beam could have been removed safely.

The next factor is the obviousness of the hazard.

The prosecutor submits that the hazard of working under and deconstructing a heavy waler beam by cutting it away from its corbel supports was very obvious. It is clear that by cutting the only corbel that was welded to the waler beam would cause the waler beam to fall, causing serious injury or death. The lack of an effective risk assessment to identify which of the corbels were welded to the waler beam and the lack of proper work progress and planning resulted in the victim's death, they submit;

The final factor is the availability, cost and effectiveness of the means necessary to avoid the hazard.

The cost of creating a safe system of work and undertaking a risk assessment for the deconstruction of the waler beams is not prohibitive particularly given the serious risk involved.

[11] The prosecutor submits that when considering the issue of cost His Honour Judge Gilbert in *WorkSafe v Stoneyhurst Timbers Limited* said at paragraph [23]:[3]

> The fact that there is moderate cost of remedying these issues is not an excuse. To suggest otherwise would be to sacrifice employee safety on the altar of profitability which is something that is clearly unpalatable.

[12] I wish to say something here about the response of the defendant company and its directors which I will touch on again later. The company has taken an exceptionally responsible approach to this prosecution. They have not disputed any of the facts in any great way and as Mr Cairney says, Grouting Services accepts what occurred should never have occurred. I have been impressed that on the last occasion and on this occasion representatives of Grouting Services have attended court. Although one of their number was not able to be present today, I observed the demeanour of each of

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[3] *WorkSafe v Stoneyhurst Timbers Limited* [2016] NZDC 17200.

the directors on the last occasion and it is fair to say that this incident has affected them markedly. That does not excuse what occurred, of course. I will come more to the actions taken by the defendants in just a minute.

[13] I now turn to the approach under the guideline judgment, being *Stumpmaster,* and identify each of the steps.

[14] Step one, assessing the amount of reparation that has been paid to the victim. As I have just touched on, the response of the defendant in relation to these matters in my view has been nothing short of exemplary. Mr Tunnicliffe, who is present, has sworn an affidavit setting out the steps taken by the company in relation to this matter. He commences by saying that the company operates on family values and always has. The loss of Aidan was felt personally as he was much-loved member of the team and a friend. Mr Tunnicliffe points out that in over 50 years this is the first serious accident that has occurred and the company is committed to ensuring it will be the last.

[15] Dealing with reparation, since the day of the accident Mr Tunnicliffe swears that the company has made every effort to support Aidan's family. They have contributed to the family income given that Aidan can no longer. They remain in close contact with his mother. In October 2021 Grouting Services paid $20,000 to Aidan's family to assist with funeral costs, a couple of months later there was another payment just under $700 to the funeral home for costs not covered by ACC. In November the company transferred $100,000 from a staff life insurance policy to Aidan's family. They continued to pay Aidan's wages and have continued to do that. At the time of the swearing of the affidavit the amount was $79,566.24. That was at 12 October 2023 so that figure would have increased by some $2000 or $3,000, I anticipate. The affidavit of Mr Tunnicliffe says that the pay will continue until the reparation is awarded and paid.

[16] After Aidan's death Aidan's mother asked if it might be possible to get some help in finding out if Aidan's vehicle which had been damaged in an accident some months previously could be repaired so that the family could keep that as something to remind them of the memory of Aidan. The company had their own mechanic repair the mechanical damage and hired a panel beating company to repair the other issues.

That was at a cost of $6,745.62. As at 9 November the total paid to or for the benefit of Aidan's family came to $206,970.58.

[17] Other ancillary assistance was given by providing things like credit for one of the brothers to put on his phone so that he could communicate with his family in their time of grief. A car was lent to ████ and ████ so that they could have transport to the funeral. Finally, Aidan's family was assisted by Grouting Services to get his KiwiSaver funds paid to the family. Additionally a memorial service was organised by the company and Mr Tunnicliffe says that the company proposes to keep Aidan's memory alive within the company and have asked his mother to present a new annual safety award that is to be named in his honour.

[18] What is remarkable in this case is that even though in excess of $200,000 has been paid for the benefit of Aidan's family no adjustment is sought to the reparation figure agreed. I cannot think of any further assistance the company could have undertaken and for the steps that they have taken and their approach to the victim's family they are to be commended.

[19] In terms of fixing the fine, which is step number 2, I must fix it in reference first to the guideline bands and having regard to the aggravating and mitigating factors. Counsel are agreed that there in this case are no aggravating factors relating to the offending. I must also have particular regard to the Sentencing Act 2002 and also to s 7 to 10 of the Health and Safety at Work Act 2015, the purpose of that act and the risk of and the potential for illness, injury or death that could have occurred, whether serious injury or serious illness occurred or could reasonably have been expected to have occurred, the safety record of the person and to the extent it shows whether any aggravating feature is present, the degree of departure from the prevailing standards in the person's sector or industry as an aggravating factor and the offender's financial capacity or ability to pay any fine to the extent that it has the effect of increasing the amount of the fine. Given this is a sentencing exercise, naturally ss 7 and 8 of the Sentencing Act apply and the prosecutor identifies the purposes of sentencing as being holding the defendant to account, promoting a sense of responsibility in the defendant for that harm, providing for the interests of the victim, denouncing the conduct that occurred and deterring the defendant and more generally

those involved in the industry. The principles relied upon primarily, are the gravity of the offending including the degree of culpability, the seriousness of the type of offence indicated by the maximum penalty and the effects of the offending on the victim. Section 151 subs (2)(b) sets out the purposes of the Act. I do not intend to recite them here but they are to be included in my sentencing notes.

[20] The prosecution referred me to a number of decisions in submitting both the appropriate level of reparation and the appropriate level of fine. In *WorkSafe New Zealand v CNC Profiling Cutting Services*, case involving a gantry crane where material came loose which resulted in a partial amputation of the victim's foot and ankle, in that case starting point was $500,000.[4] *WorkSafe New Zealand v KNCC Limited*, in the *KNCC Limited* case a truck-mounted crane was tasked with lifting a stack of plastic construction sheets which were unsecured.[5] As it was being lifted the load touched another stack of material which caused it to sway, a sling to come out and the load to fall and strike the worker. The victim suffered concussion, facial lacerations and nerve damage requiring immediate and ongoing surgery. The reasonable practicable steps not taken were the failure to ensure a safe system of work for the use of truck-mounted cranes, failure to ensure the load was effectively secured, failure to provide proper supervision and training for the relevant activity and failing to ensure all equipment used lifting loads including the truck loader crane and the slings had a current certificate of inspection before being used. The court noted the obviousness of the risk and what it deemed were significant departures from relevant standards. In that case the appropriate starting point determined by the court was $550,000. Finally, *WorkSafe v Sullivan Contractors 2005 Limited*.[6] This is a forestry case where the victim was killed by a falling tree. There was no hazard and risk assessment undertaken for the site that had been worked on. The court determined the application starting point was $600,000.

[21] Mr Cairney on behalf of the defendant commented on the cases that were cited by the prosecution. In relation to the *Sullivan* case it was submitted that that exhibited

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[4] *WorkSafe New Zealand v CNC Profiling Cutting Services* [2021] NZDC 9794.
[5] *WorkSafe New Zealand v KNCC Limited* [2023] NZDC 13894.
[6] *WorkSafe v Sullivan Contractors 2005 Limited* [2020] NZDC 20648.

greater failings and higher culpability. In relation to *KNCC* there were multiple failures and a significant departure from industry standards. Mr Cairney sought to distinguish that from the case of Grouting Services, saying that there was the real life risk was only one element. He submitted that the culpability of Grouting Services ought to be less than *KNCC* and accordingly it would be inappropriate to impose the higher starting point. Finally, in relation to the *Sullivan* decision, Mr Cairney on behalf of the company submitted that the level of culpability in that case was much greater. Additionally, the company was convicted for failing to take six reasonably practicable steps. He submits that the *Sullivan* case is an example of greater failings and higher culpability. Having read all of the authorities, I tend to agree with Mr Cairney's submissions.

[22] Having reached that point, given the particular circumstances of the Grouting Services case, particularly that there was only one failing, in my view the proper starting point is one of $500,000. Mr Cairney on behalf of the company submits that there were a number of mitigating factors, the first and of course most obvious is the plea of guilty. He submits that the full 25 per cent *Hessell v R* discount should be applied.[7] The prosecutor takes no issue with that and indeed I take no issue with that. The company pleaded guilty at the earliest opportunity. In respect of the other mitigating factors Mr Cairney submits genuine remorse, reparation, good character, changes already made to workplace and health safety are present to a high degree. He submits that each of the following three factors warrant a five per cent discount: previous good record, co-operation with the prosecutor and genuine remorse. That is genuine remorse over and above the remorse generally indicated by an entry of a guilty plea. Further, Mr Cairney submits that the revision of safety procedures and remedial steps warrants a further 10 per cent and the significant efforts that I have already touched upon of the company to assist the family of the victim also warrants a further 10 per cent. As a result of the accident the following steps were taken by Grouting Services: hiring an external investigator to investigate the causes of the accident and assist with finding the best way to prevent accidents in the future, arranging for an independent audit of Grouting Services' health and safety procedures, hiring a full-time health and safety manager, joining an Australian safety training

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[7] *Hessell v R* [2010] NZSC 135.

company Safety Hub who provide training videos and staff and formalising its existing health and safety procedures. Those matters are also touched on by Mr Tunnicliffe in his affidavit. Mr Cairney submitted that this was not simply a case of a company taking steps to correct defects that should never have existed in the first place, he says in the words of *Stumpmaster,* Grouting Services went the extra mile to ensure that this would be the last instance of serious harm in its workplace.

[23] I agree with the identified discounts for good safety record, co-operation and genuine remorse of five per cent. Additionally, I agree with the discrete discounts of 10 per cent for the remedial measures taken and I just pause there to say that there was some contest from the informant as to those remedial measures that they were simply bringing the company or the standards up to industry standard but in my view the steps taken were significantly in excess of that. I also agree with the 10 per cent discount for assistance to the family which I have already spoken of.

[24] Having found the starting point as being one of a $500,000 fine, if I deduct the identified discounts from that that would leave a balance of $200,000. Mr Cairney on behalf of the company further submits that I should round that down on a totality basis to $180,000. In my view having read all the authorities, this matter stands out as being an exemplar in terms of the response of the company. Again, it is an appropriate case where the totality principle should be applied. I accept that the fine ought to be adjusted to $180,000 to take into account all of those matters. Accordingly, I impose a fine of $180,000 in respect of the company.

[25] Before I formally announce sentence, I wanted to touch on the victim impact statement filed by the mother of Aidan. She said:

> That Grouting Services have supported me all the way through from the time of Aidan's death and are still there for me now. I'm very thankful for the way that they've treated me and continued to keep in contact. They've gone over and above what I had expected from them and for this I'm very thankful. I believe Grouting Services kept my son safe at work as they had all the health and safety regulations in place which I believe everyone followed. Aidan enjoyed his work as he felt included in a great team and he attended daily as he loved his job and hardly had any days off. The death of Aidan not only affected the immediate but also the wider family, his workmates and management of Grouting Services. I still feel Aidan's presence around me, he loved cooking and I often smell the herbs and spices he used to cook with. I

> believe he's still with me in spirit. I'm very grateful to Grouting Services and I cannot speak highly enough of the support I've received from them.

[26] This accident was an absolute tragedy. A young life was lost. No figure of reparation that I impose, can ever replace that or come anywhere near to it. I want to reiterate, that in terms of a response by defendant, I cannot actually think of what further steps the company could have taken. I hope that Ms Paszczuk and her boys can now move on from this terrible, terrible incident as I hope that company can, particularly you three gentlemen.

[27] The fine I impose is one of $180,000 and that is to be paid within 12 months. I impose prosecution costs of $5,379.74, reparation of $110,000 is to be paid immediately to be apportioned within the family as per a joint memorandum to be filed within seven days.

[28] Just out of an abundance of caution, as far as the release of the summary of facts is concerned I direct that the name of the company [redacted] should be redacted from the summary and Mr Gay has assured me that they for his part the organisation he works for would not publish the name of the co-defendant company prior to trial but I make that formal order. I make an order for suppression of [redacted] name in the summary of facts.

ADDENDUM:

[29] I made an order that counsel should file memoranda within seven days to reach agreement on the apportionment of reparation. Mr Veikune has just advised me that he has updated instructions and the prosecutor seeks that the court make a reparation order of 70 per cent to the mother [redacted], which works out to be $77,000, and the remainder, which is 30 per cent, to be ordered in relation to each of the sons, which will be $11,000 each.