IN THE DISTRICT COURT
AT NEW PLYMOUTH

I TE KŌTI-Ā-ROHE
KI NGĀMOTU

CRI2018-043-002035
[2021] NZDC 17117

WORKSAFE NEW ZEALAND
Prosecutor

v

LOG 4 U HARVESTING LIMITED
Defendant

Hearing:	3 August 2021
Appearances:	D La Hood and M Shaw for the Prosecutor S Curlett and R Marchant for the Defendant
Judgment:	3 September 2021

RESERVED JUDGMENT OF JUDGE A S GREIG
(On Sentencing)

---

[1] Log 4 U, 'the company', are to be sentenced having pleaded guilty to two charges laid under the Health and Safety at Work Act 2015.

[2] The first charge is under s 48(1). It charges the company with failing to take the reasonably practicable steps necessary to protect their work staff from being exposed to the risk of death and serious injury by ensuring that one worker in particular, the deceased, was provided with the appropriate training, instruction and/or supervision necessary to operate a Komatsu D61 bulldozer. It carries a maximum penalty of a fine of $1,500,000.

[3] The second charge is under s 49(1); failing to ensure that all workers were subject to pre-employment health assessments in accordance with the industry standards. It carries a maximum penalty of $500,000.

[4] The company pleaded guilty in May 2020 but disputed three significant facts. A hearing to determine these disputed facts was required and was scheduled to last three days. After considerable delay, the hearing was set down to commence on 3 August 2021.

[5] On the eve of the hearing WorkSafe advised that their witnesses were not available and that they could not contest the three disputed facts.

[6] The disputed facts are significant because, on my view of the facts, they affect the level of the company's culpability, and therefore the level of fine that is to be imposed.

[7] The three disputed facts that were originally asserted, but later abandoned by WorkSafe, were the following statements:

(a) Log 4 U were aware that the victim was travelling across the ridge track, to the house via the zig-zag area;

(b) Log 4 U knew that the victim was operating the bulldozer in the zig-zag area (an area already identified as dangerous by another employee and by the FOMS operations manager);

(c) The company failed to enforce its own policy which would have required Mr Bourke to wear a seatbelt whilst operating the bulldozer.

[8] Each of those allegations was abandoned by WorkSafe as they accepted they were unable to prove those assertions, all of which are relevant to assessing the company's culpability.

[9] There later emerged a further issue. Paragraph 98 of the Summary of Facts reads as follows: "The defendant's failures resulted in the victim's death." That

statement in the summary of facts was not originally challenged by the company. It was not one of the disputed facts for which the hearing was arranged. Furthermore, in its submissions filed for the original sentencing scheduled for 2020, the company accepted that it was liable to pay reparation.

[10] At the sentencing in 2021, as a result of WorkSafe's failure to prove the disputed facts, the company attempted to withdraw from its concession that it was liable to pay reparation. In effect the company was now disputing paragraph 98, its original concession that the its failures resulted in the victim's death. If the defendant's failings did not result in the victim's death then I cannot award reparation.[1]

[11] After the sentencing hearing had concluded, I called for further submissions on this point, asking the question as to whether, despite the plea of guilty and the uncontested paragraph 98 of the summary of facts, I could now find that the defendant's failings did not contribute to the victim's death? The prosecution's view is that I am prevented by law and precedent to depart from an agreed summary of facts. The prosecution also suggest that if I am contemplating doing so they should be given an opportunity to "brief an appropriate expert to give evidence on causation." Given the delays to date, a significant part of which has been the prosecution's assertion of facts which they have later been unable to prove, I would not do that.

[12] In its initial plea of guilty and in its acceptance of paragraph 98 of the summary of facts, the company accepted that its failings led to Mr Bourke's death. Had this been part of the disputed facts hearing I might well have agreed with the company, that its failings did not contribute to Mr Bourke's death. The company is however now fixed with the acknowledgement it made in pleading guilty to that particular summary of facts.

The facts

[13] The company engages in forestry work, felling and extracting trees. In late 2017 it was contracted to harvest timber on a forestry block in Taranaki.

---

[1] That is because section 32 Sentencing Act only allows reparation to be paid "if an offender has, through or by means of an offence of which the offender is convicted, caused a person to suffer….. emotional harm."

[14] The company had originally been set up by three men, one of whom was the eventual victim in this matter, Paul Bourke. I shall refer to him as Mr Bourke. By the time of the accident Mr Bourke had stood down as a director and was, it appears, largely retired. The day-to-day operations of the company were managed by Mr Bourke's son Stephen. I shall refer to him as Stephen Bourke.

[15] The company owned a Komatsu D61 bulldozer (the bulldozer). It was well maintained.

[16] In early December 2017 Mr Bourke spent three days in hospital suffering from gastroenteritis. He was also at that time taking a prescribed anti-depressant. He was therefore subject to the standard advice to avoid operating heavy machinery until confident that his performance was not affected. No one in the company, including Mr Bourke's son Stephen Bourke, was aware that Mr Bourke was taking an anti-depressant. He had not disclosed it in a health assessment undertaken a year earlier. Stephen Bourke was aware that his father had been in hospital. It is accepted that Mr Bourke had recovered from his gastroenteritis.

[17] Shortly after Mr Bourke was released from hospital his son arranged for him to work on the forestry block on a casual basis. His work included driving the bulldozer. He was not required to fill out any paperwork regarding his health, even though it was known he had recently been discharged from hospital. He was not required to undertake any health assessment and no other enquiries were made as to his suitability to work.

[18] Mr Bourke has operated machinery for all of his working life. There was some issue as to how extensive that experience has been, with one view being that his experience was largely limited to tractors.[2] Another view is that he had operated bulldozers, although not specifically the Komatsu D61, for all of his working life.[3]

---

[2] This view is contained in the unsigned formal written statement of CJ Newble. He had worked for the company for a year. He does not appear to have worked with the deceased up until the few days before the fatal accident and his knowledge appears to be gained from conversations with others.

[3] This view is contained in an annexure in the sworn affidavit of G R O'Dea. A signed letter from a registered forest industry assessor, outlining Mr Bourke's extensive experience with bulldozers, excavators, log haulers and forwarders and with experience in extracting logs in "difficult and challenging terrain in the Wanganui and Taranaki regions for over a decade".

[19] On 11 December 2017 Stephen Bourke provided his father with an orientation of the bulldozer that lasted approximately four hours on flat to rolling grass land. This was the sort of terrain that Mr Bourke had been engaged to work on. Having completed his familiarisation with the bulldozer Mr Bourke and his son then began work in their respective machines at another location, which was also a flat to rolling paddock.

[20] There is evidence that Stephen Bourke is also a very experienced bulldozer operator and that he was an experienced and competent trainer of others in the use of such equipment. He had not however acquired the necessary formal qualifications such that he was, in the words of the charge, "qualified to make an objective assessment of (Mr Bourke's) experience, skills, competency and whether supervision is required."[4]

[21] Mr Bourke completed his work after three days as scheduled. The work that he completed was the development of an open, mostly flat area known as "the skid." There is no reason to suppose that Mr Bourke was not more than amply qualified to work that machine on that terrain. Although he had been due to finish-up once that work was completed it was agreed that he could stay on and help out the next day, being 15 December 2017.

[22] A track had been developed through the forestry block to allow machinery to move in and out as logs were cut and then extracted. It was known as the "ridge track" The ridge track had been opened up prior to 15 December. There was a particular part of the ridge track that was winding and steep. It had been given the name "the zig-zag". A worker, Mr Newble, who did a lot of work on the track, described how he considered the zig-zag dangerous, finding the ground in that area to be "greasy and way too soft". He had made his views known to the management.

[23] To help ensure his own safety when working in the area of the zig-zag Mr Newble had built up what he described as a "berm" on the outside edge of the zig-

[4] The evidence that Stephen Burke was, in reality, a competent operator and trainer is contained in a letter dated 28 July 2020 from a Stuart Morrisey, annexed to the affidavit of one of the company's directors.

zag part of the track. It is clear that a lot of work had been done around the zig-zag without mishap to date.

[24] At around lunchtime on 15 December 2017 it was realised that Mr Bourke was missing and out of radio contact. Stephen Bourke and another employee went looking for him. They noticed that there had been fresh earthworks at the "zig-zag.

[25] On searching further the two searchers saw the belly of the bulldozer down a steep incline having fallen off the track. Stephen Bourke ran down the incline and, tragically, found his father's body a few metres from the overturned bulldozer. Mr Bourke had been crushed during the bulldozer's tumble down the ravine.

[26] Mr Bourke should not have been in that area however. He was told not to operate on the zig-zag and was not expected to be there at all. There was evidence of fresh earthworks at the place where the bulldozer had fallen off the track and it is clear that he had been performing work in that area, contrary to his instructions. Mr Newble later noticed that the berms he had put in place to ensure his own safety had been removed.

[27] By its plea of guilty the company has acknowledged that Mr Bourke received insufficient training to operate that bulldozer and that the necessary pre-employment health assessment had not been made.

[28] WorkSafe accept that the failure to perform the necessary health standard did not play a part in the fatal accident. WorkSafe does assert however that the inadequate training Mr Bourke received before operating the bulldozer did result in his death. As already discussed, the company now deny that this is so and, as already discussed, I cannot now accept their denial.

[29] I do however note that although the company acknowledged that the formalities of appropriate training, instruction and/or supervision were lacking, Mr Bourke had a lifetime of experience with machinery, such as bulldozers not unlike the one that he was driving on the day of his death, that he had demonstrated familiarity and competency with that particular bulldozer, both before engaging in the three days'

work he performed and whilst carrying out that work. I also find that he should not have been working in the zig-zag area and that it was his deliberate choice to do that work that led to his death.

The penalties

[30] The total that the company will be required to pay as a result of pleading guilty to these charges will be made up of the fine for the two breaches, an award of emotional harm reparation and an award for consequential loss. In this case all of those categories that will result in financial payments carry their own complications. In the case of the level of the fine I must assess the degree of the company's culpability. In the case of emotional harm payments I must take account of the differing requirements of the victim's partner and five children, as well as any payments that have already been made. As regards consequential loss I am, in this case, required to assess Mr Bourke's income, an assessment that leads on directly to assessing the financial losses that his partner and dependants have experienced.

[31] My approach to all of this will be as set out in the High Court's guideline judgment of *Stumpmaster v WorkSafe New Zealand*.[5] I must assess the amount of reparation to be paid to the victim's family. Secondly, I must fix the amount of the fine by reference first to the guideline bands and then by having regard to the aggravating and mitigating factors. Finally, I should determine whether further orders are required.

[32] Finally, I must assess the ability of the company to pay. The provisions of the Sentencing Act on this issue are relevant. A fine should not be "disproportionality severe".[6] I may decide to not to impose a fine if the company cannot pay.[7] I must have regard to the company' financial capacity.[8] Quantum may need to be adjusted for financial capacity reasons.

---

[5] *Stumpmaster vWorkSafe New Zealand* [2018] NZHC 2020.
[6] Section 8(a) Sentencing Act 2002.
[7] Section 14(1) Sentencing Act 2002.
[8] Section 40(1) Sentencing Act 2002.

Reparation

[33] When it comes to reparation there are the two kinds of reparation I have already set out above. Reparation for emotional harm and reparation for consequential loss.

[34] Fixing an award for emotional harm is an intuitive exercise and each case must be judged on its particular circumstances. As has been said many times in other cases, there is not and can never be a tariff for the loss of life or the grief suffered. No amount of money will compensate Mr Bourke's partner and five children, his youngest of whom was still at primary school at the time of his death. Each of Mr Bourke's children have their own unique set of circumstances. As already mentioned, his youngest child is still very young. The loss of a father at any age is keenly felt. For a young child to lose their father is a particular tragedy and disadvantage. One of Mr Bourke's children was also his supervisor on the day of his death. It was he who discovered his father's body after he had gone missing. He has been blamed, unfairly in my view, by other members of the family for causing his father's death. This tragedy has divided the family.

[35] Each of Mr Bourke's children should however receive the same amount, notwithstanding their different circumstances. Calculating the figure is made more complicated by the need to factor in an insurance payment, paid to Mr Bourke's estate when he died. That calculation is made even more complicated because Mr Bourke's partner is not entitled to a share of his estate, as she was not included in his will and the present balance of the estate is also made up of money received by the sale of Mr Bourke's assets, principally his house. The estate has also paid off debts.

[36] The prosecution have provided a summary of cases where there have been emotional harm reparation orders and it would appear from those that awarding $30,000 to each of Mr Bourke's children and $80,000 to his surviving partner would be in line with those previous awards. That is what the prosecution ask me to do. The one significant difference in Mr Bourke's case is that he had five children, making six victims in total, which appears to be significantly more than was the case in the other prosecutions that have been referred to me. In general it appears that the total emotional harm awards have been between $85,000-$140,000 a sum that was, on the

face of it, to be shared between two or three people. If I follow the prosecution's calculations I would be making a total award of $230,000. This would put the amount of reparation awarded in this case significantly more than the cases to which I have been referred.

[37] However, in the High Court's decision in *Oceana Gold* the High Court made no further order for reparation after noting that the company had made direct payments of $200,000 and that the company's own employer provided insurance policy had provided a further $450,000 to the victim's surviving partner and family.[9] It was not suggested that these amounts were excessive, only that they did not require adding to.

[38] Furthermore, as has already been made clear, this is an intuitive exercise. It is not possible to put a price on Mr Bourke's life. Serious emotional harm has been suffered by his five children and surviving partner.[10] Should I proceed on the basis that I set a global figure with no regard as to how much that will equate to when divided by either a large or small number of victims? Or should I have no regard to the number of victims and compensate them each in line with the amounts of emotional harm reparation paid in like cases? In my view the latter approach must be taken. Setting a figure which might, because it is to be divided between a large number of victims, result in insultingly low payments would be objectionable.

[39] The defendant will pay a total of $230,000 in emotional harm reparation, with $80,000 going to Mr Bourke's surviving partner and $30,000 going to each of his children. In the case of Mr Bourke's youngest child the money should be placed in trust until she turns 18.

Consequential loss reparation

[40] In this case the calculations are complicated by issues around how consequential loss is calculated and the extent to which monies already received as a

[9] *Oceana Gold (New Zealand) Ltd v WorkSafe New Zealand* [2019] NZHC 365.

[10] I also have particular regard to Mr Bourke's siblings, their partners and their children, as well as Mr Bourke's close friends in and outside of the company, all of whom are affected. Precedent however dictates that it is only the most direct victim's who should be compensated.

result of Mr Bourke's death, by way of an insurance payment, should be taken into account.

[41] Reparation is payable to any person who has suffered financial loss as a result of Mr Bourke's death. However, the Sentencing Act prohibits making an order for reparation for consequential loss for which ACC has or is being paid.[11] Reparation is to be calculated by what is known as the "statutory shortfall approach", as opposed to an actuarial analysis. In other words I must calculate what those entitled to compensation are receiving, calculate what they would be receiving were Mr Bourke still alive and then award the difference. The total amount of compensation payable is capped. It must not exceed the earner's entitlement.[12]

[42] WorkSafe provided evidence of consequential loss via a chartered accountant. The base figure the accountant worked from was the income that Mr Bourke received in the week before his death. The company objected to using this figure as it appears the wages Mr Bourke received in the week before his death were the first wages he had received that year. The company's position is that this figure was a "one-off", Mr Bourke being essentially retired.

[43] WorkSafe's reply to this is, effectively, that to apply any other analysis would be to engage in an actuarial analysis. WorkSafe submit that what Mr Bourke earned in the week before his death is what the ACC are basing their payments on and that, therefore, the demonstrated shortfall is $165,060. I accept this figure. I reject the company's argument that those entitled to receive payment for consequential loss, Mr Bourke's partner at the time of his death and his two children who were under 18 at the time of his death, will be over-compensated by such an award.

[44] There are clear policy reasons for adopting this figure, as WorkSafe set out in its submissions. It is not for the court to second-guess Mr Bourke's intentions as regards employment from 15 December 2017 onwards.

---

[11] Section 32(5) Sentencing Act 2002.
[12] The entitlement being the lesser of 80 per cent of their pre-death gross taxable income or the cap.

The level of the fine – the company's culpability

[45] As regards the charge under section 48, although I am very clear that nothing Stephen Bourke personally did or did not do lead to his father's death, I overall assess that I am obliged to find that the company's failings lie within the midrange of the medium culpability bands set out in *Stumpmaster*. I assess the appropriate fine as being one of $425,000.

[46] As regards the charge under section 49, there are no guideline judgements. I regard the company's culpability as being less than the comparable case referred to me and assess the fine as being appropriately set at $75,000.

[47] There are no aggravating factors, the company has a good health and safety record. The company should receive the full 25% discount for its guilty plea.

[48] However the company has provided clear evidence, and the prosecution accept this to be the case, that it has no ability to pay a fine. Even a modest fine paid over a period of years could cause problems such that the company would cease trading and its employees made redundant. The Sentencing Act and the precedent provided by other cases means that I should not order any fine to be paid.

Costs

[49] The company seeks an award of costs to be made against the prosecution due to the preparation they had to undergo for the disputed facts hearing that WorkSafe later abandoned.

[50] The issue of costs is governed by s 152 HSWA. There is some merit to the company's position. WorkSafe had ample time to prepare their case, they were aware that the Court had dedicated several days to hearing the disputed facts, neither the Court nor the defendant company were advised of WorkSafe's inability to prove their disputed facts until the eve of the hearing. The prosecution has wasted a lot of valuable time and money. An award of costs is certainly merited.

[51] However it also now appears to be standard practice to award costs against a defendant arising out of the costs of the prosecution. Under the circumstances, costs will lie where they fall.

Summary of Orders and conclusion

[52] The defendant will pay emotional harm reparation of $230,000.

[53] The defendant will pay reparation of $165,060 for consequential loss.

[54] No fine is ordered due to the company's inability to pay.

[55] Costs to lie where they fall

_____
Judge AS Greig
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 03/09/2021