IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

CRI-2019-091-002971
[2021] NZDC 3119

WORKSAFE NEW ZEALAND

v

CAR HAULAWAYS LIMITED

Hearing:	18 February 2021
Appearances:	B Finn for the Prosecutor (via telephone) P White for the Defendant
Judgment:	18 February 2021

NOTES OF JUDGE W K HASTINGS ON SENTENCING

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[1] Car Haulaways Limited appears for sentence having pleaded guilty to one charge of failing to comply with its duty as a person conducting a business or undertaking, a PCBU, to ensure so far as is reasonably practicable, the health and safety of people who work for it, including Graham Thomas Molyneux Browne, while loading a car transport trailer, and that failure exposing any individual to a risk of death or a serious injury arising from the work at height.

[2] The particulars state that it was reasonably practicable for Car Haulaways Limited to:

(a) Ensure car transport trailers had effective edge protection being a continuous guard rail at least 900 to 1100 millimetres high with infill.

(b) Ensure effective maintenance of the edge protection on trailers including having an effective preventative maintenance plan and regular testing by a competent person.

(c) Ensure the provision and maintenance of a safe system of work including the provision of information, training, instruction, supervision and monitoring of workers checking the condition of edge protection on trailers.

(d) Consult, co-operate with and coordinate activities with Waiohine Holdings Limited in relation to managing the risks involved in Mr Browne working at that height.

[3] With respect to the first particular, I ruled on 27 November 2020 that the presence or absence of a continuous guard rail at least 900 to 1100 millimetres high with infill would not significantly affect the sentence I am handing down this morning. That is because the agreed summary of facts states that Mr Browne was crouching and fell below the top wire when the middle wire gave way because it had not been properly maintained. A guard rail of at least 900 to 1100 millimetres high would not therefore have added anything to the cause of Mr Browne's death.

[4] Mr Finn has indicated that in light of that ruling, WorkSafe does not ask the Court to rely on the first particular in determining the sentence. I will therefore not rely on the first particular.

[5] I turn now to the agreed summary of facts. Mr White emphasised the company's view that this was an isolated failure to ensure its expectations were implemented by Mr Browne who was the sole owner/driver. He submitted that it was the failure to instil the necessary appreciation of why the safety bars were there and the importance of checking and replacing them which are the material failures by the company, failures the company accepts responsibility for.

[6] Where one lawyer takes issue with another lawyer's submission on a factual matter, I have used the fact as phrased in the agreed summary of facts. In summary, the facts are as follows. Mr Browne was a long-standing contractor who acted as a driver of car transporter trailers for the defendant. On 9 January 2019, while loading vehicles onto the top deck of a car transporter trailer at the defendant's yard in Wellington, Mr Browne fatally fell around three metres from the top deck onto the ground. Mr Browne's car transporter trailer had two wire ropes that acted as edge protection on the top deck. One of these wire ropes broke. This rope was severely corroded in several places resulting in a major loss of tensile strength such that minimal force was needed to break it. Testing of the other unbroken wire rope on the top deck indicated that it was also severely corroded although not to the same extent.

[7] Because of the configuration of the car transporter trailers, including that of Mr Browne, there was a very limited space for the defendant's drivers to strap cars onto the top deck. The wire ropes on Mr Browne's trailer had not been checked as required. Drivers, including Mr Browne, had a logbook they would fill out daily. Workers used this primarily to record their driving hours. It also prompted drivers to do pre-start checks including checking safety poles and cables. Some drivers did this wire rope check daily but others did it less often. If there were any issues, drivers were to fill in a truck maintenance record form.

[8] While drivers who were employees would submit their logbook to Mr Kevin Brown weekly for him to check the hours they were working, Mr Browne, the deceased, was not required to do this. Checking the wires generally involved a two step process:

(a) A visual check to identify corrosion or rust in the wire rope or the stanchion.

(b) A physical check where drivers would pull or kick the wire ropes. Some drivers did this while standing on the top deck, some lowered the top deck and were able to reach the wire from a standing position, others hung onto the wire rope over the side of the trailer.

[9] A lot of the trailers' wires have black rubber covers on them. This was to ensure the wires did not damage the vehicle doors when they were opened. This meant the drivers could not see the state of the wires underneath. Mr Levens, a driver trainer at the Grenada site, noted in relation to training workers on how to test wires that: "It's something we haven't really paid a lot of attention to I suppose because we've probably put too much onus on the drivers actually making sure their equipment is safe." He did not know how workers were meant to know how much pressure or weight the wire ropes should hold.

[10] Graham Trask, another driver at the Grenada site, at the request of the defendant, tested the wires on his trailer following Mr Browne's incident by tugging on them and one of them broke.

[11] With respect to training and instruction, the defendant's expectation was that employees would generally undergo an annual assessment on their operation of the trailer by a driver trainer. However, this was not always done. Other than a site induction, the defendant did not organise any training for Mr Browne as he had been driving for over 32 years and as an owner/driver, the defendant did not consider that this was necessary. Mr Levens would monitor other staff in terms of how they were loading and unloading vehicles and address any issues, but not Mr Browne.

[12] Mr Browne would attend Toolbox Talks when he was at the Grenada site. The defendant had his health and safety manual with a section on subcontractor management which required all contractors to be monitored while on site to ensure that they continued to work safely. There were other forms to be filled out by contractors in this manual, namely a contractor agreement for contractors, a site induction for contractors and a contractor safety performance assessment. The safety assessment form had tick boxes for whether the contractor was working safety, hazards were being managed appropriately and relevant staff were aware of the safety issues.

[13] There was no contractor agreement or safety performance assessment for Mr Browne. There were no formalised arrangements regarding health and safety between the defendant and Waiohine.

[14] While there were standard operating procedures for the loading and unloading of vehicles on two, eight and 10 car trailers, there was no standard operating procedures specifically for a six car trailer like Mr Browne used. Mr White submitted that any standard operating procedure for a six car trailer would be the same as one for an eight or 10 car trailer. The failure was in not saying the eight and 10 car trailer operating procedure also applied to a six car trailer.

[15] I turn now to the sentencing criteria. Section 151(2) of the Health and Safety at Work Act 2015 requires me to have regard to the purpose of the Health and Safety at Work Act; the risk of and the potential for illness, injury or death that could have occurred; whether death, serious injury, or serious illness occurred or could reasonably have been expected to have occurred; the safety record of the person (including, without limitation, any warning, infringement notice or improvement notice issued to the person or enforceable undertaking agreed by the person) to the extent it shows whether any aggravating features are present; the degree of departure from prevailing standards in the person's sector or industry as an aggravating factor; and the offender's financial capacity or ability to pay any fines to the extent that it has the effect of increasing the amount of the fine.

[16] The Sentencing Act 2002 requires me to hold the offender accountable for the harm done by the offending, promote in the offender a sense of responsibility for that harm, provide for the interests of the victim of the offence, denounce the conduct in which the offender was involved and deter the offender and others from the same or similar offending.

[17] In *Stumpmaster v WorkSafe New Zealand* the High Court confirmed that there are four steps in the sentencing process.[1] The first step is to assess the amount of reparation to be paid to the victim. The second is to fix the amount of the fine by reference to the guideline bands and the aggravating and mitigating factors. The third is to determine whether further orders under ss 152 to 158 are required, and the fourth is to make an overall assessment of the proportionality and appropriateness of the result obtained under the first three steps.

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[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020 [9 August 2018]

[18] I turn now to the first step, which is reparation. Mr Browne's three children have suffered emotional harm as a result of his death. No amount of money can compensate a death, mitigate grief, or replace the loss of a future that might have been. I have read the victim impact statement written by Mr Browne's daughter Amanda Jane on behalf of herself and her brother Jamie. She writes and I quote excerpts from it: "The emotional harm would be being at the hospital at the end by myself with Dad. That whole process will never leave me, waiting for the organ team and seeing his body without any life in it. I could not leave until then as the eldest. I didn't leave him until the respirator was off and I was sure he was no longer there. I didn't want to let him down. Mum passed suddenly and now Dad. I am an orphan and my safety net is no longer there. The core person that I could rely on to be there is no longer there and that is a grief that will be with me forever."

[19] Amanda Jane goes on, she writes: "I know that Jamie is still affected emotionally by Dad's passing. From the age of 19, he lived alone with Dad on the farm. As Dad liked to be quite controlling, they had a very difficult relationship and they regularly fought. He hasn't been able to deal with his upbringing with Dad. He wanted to spend time with him working things out. His passing took that time away for him to deal with it and his strategy thus far has been to bury his feelings and not talk about it."

[20] Mr Browne's son Joshua has also written a victim impact statement. He writes about building a relationship with his father after his mother died: "It was hard. Sometimes we got angry at each other. He was a difficult, stubborn old man and sometimes he drove me crazy. I know I frustrated him too but we were part of one another's lives for the first time and we were getting somewhere. We were still getting to know each other, making up for all the years he hadn't been in my life. Now, I will never get to know what our relationship could have become had we had the time to build it. I will never be able to stop wondering, "What if?"

[21] Both the prosecutor and defence counsel agree that $30,000 is warranted for each victim who has suffered emotional harm. This takes into account Mr Browne's funeral expenses of $15,000 that were paid by the defendant. Mr White, however, submits that there should be no emotional harm reparation for Jamie Browne because

he was estranged from his father at the time of his death and therefore suffered little or no emotional harm. The submission is that Mr Browne was not in a close relationship with Jamie at the time of the offence as required by the definition of "victim" in the Victims' Rights Act 2002.

[22] I do not accept this submission. I consider there is sufficient information in Amanda Jane's victim impact statement about the effect on Jamie of his father's death. The deceased and Jamie were father and son. It is apparent from the victim impact statement that each of the deceased's children had at times a difficult relationship with him. There is nothing to indicate that Jamie's relationship with his father was irretrievable. Grief manifests itself in different ways. Emotional harm payments recognise the pain of grief but more importantly they recognise pain from the loss of potential, of what might have been.

[23] I will therefore make three reparation orders in the amount of $30,000 for each of Amanda Jane, Joshua and Jamie Browne, in total $90,000. I also order reparation in the order of $560 for consequential loss to Amanda Jane Browne. This is based on her rough estimate of expenses incurred while visiting her father in hospital in Wellington and in organising matters when he was injured.

[24] I turn now to stage two which is calculation of the fine. The maximum fine for this offence is $1.5 million. Applying the *Stumpmaster* methodology, the culpability bands are as follows: low culpability, a starting point of up to $250,000; medium culpability, a starting point of $250,000 to $600,000; high culpability, a starting point of $600,000 to $1 million; very high culpability, a starting point of $1 million plus. Both the prosecutor and the defendant agree that this offending is in the medium culpability band. The prosecutor submits a starting point between $450,000 and $500,000 is appropriate. The defence submits a starting point between $400,000 and $420,000 is appropriate.

[25] Identification of the appropriate starting point requires an assessment of the factors in *Stumpmaster* and s 151. I will consider each factor in turn.

[26] First, the practical steps that were reasonable for the defendant to have taken are agreed. They were steps to:

(a) Ensure effective maintenance of the edge protection on trailers including having an effective maintenance plan and regular testing by a competent person.

(i) Regular inspections of the wire ropes on all trailers used by workers should have been undertaken by a competent person.

(ii) A preventative maintenance plan should have been in place which ensured the periodic replacement of wire ropes to ensure they remained fit for purpose.

(b) Ensure the provision of maintenance of a safe system of work, including the provision of information, training, instruction, supervision and monitoring of workers checking the condition of edge protection on trailers.

(i) Workers, including Mr Browne, should have been provided with sufficient information, training and instruction about checking the condition of the wire ropes.

(ii) Workers, including Mr Browne, should have been monitored to ensure they were undertaking these checks.

(c) Consult, co-operate and coordinate activities with Waiohine Holdings Limited in relation to managing the risks involved in Mr Browne working at height.

[27] Mr White has submitted that Mr Browne knew the requirement to replace the wires because he replaced the top wire on the trailer. The defendant accepts though it

failed to ensure that its only owner/driver was taking the same safety steps that other CHL workers were taking. I agree with Mr Finn that these safety steps are fundamental to the defendant's core business and that a failure to ensure that workers, including Mr Browne, knew to take these safety steps which include the proper maintenance of edge protection is significant.

[28] Second, there was a risk of Mr Browne and any other car transporter trailer driver falling from the top deck of a trailer, three metres in this case, if a wire fails is serious and has the potential to cause death as happened in this case.

[29] Third, there was a departure from prevailing industry standards. Mr White submitted that it was not a substantial departure because the *Best Practice Guidelines Working at Height in New Zealand* are guidance that needs to be modified to be applied to car transport trailers, as does the NZS / AS standard. Notwithstanding the need to modify the guidance or the fact that the Australian standard has not been explicitly adopted in New Zealand, they are examples of best practice that were readily accessible but due to the defendant's lack of coordination with Mr Browne, these were not brought home to him.

[30] Fourth, the hazard was obvious. There was a risk to drivers working on the top deck.

[31] Fifth, it was not cost prohibitive for the defendant to ensure that workers including Mr Browne were made aware, through training and monitoring systems, of the importance of safety measures that included the need to check the edge protection on trailers.

[32] I have been referred to three cases that involve falls from a height. A starting point of $500,000 was adopted in *WorkSafe New Zealand v Forest View High School Board of Trustees* which involved two people, of nine people present, falling 3.9 metres from scaffolding erected for a school play.[2] The Court considered there were serious failures to carry out a risk assessment, to provide training on how to use a moving scaffold and a failure to consider using alternative means to work at height.

[2] *WorkSafe New Zealand v Forest View High School Board of Trustees* [2019] NZDC 21558

The use of the scaffold was not the school's core business however, so the starting point was reduced to the medium band.

[33] A starting point of $450,000 was adopted in *WorkSafe New Zealand v Agility Building Solutions Limited*, another case involving a fall from scaffolding of some two metres.[3] The Court noted that the company was aware of the risks, took a number of corrective measures before the incident, and that the victim, a contractor, had been too relaxed in his approach to health and safety. A supervisor was beside the victim immediately before the incident, which was not the case with Mr Browne.

[34] A starting point of $450,000 was adopted in *WorkSafe v Strings Attached Limited* which involved the victim falling through an incorrectly installed hatch that allowed for internal roof access. Both *Strings Attached* and *Agility* involved defendant companies that were closely involved in the circumstances leading to the incidents. In *Agility*, a supervisor was beside the victim immediately before the incident. It could be inferred that a supervisor would have knowledge of the risk. In *Strings Attached*, the company had a significant amount of control around how the hatch was actually installed.

[35] Mr White submitted that the "slightly more distant" relationship in this case means culpability is slightly less than it was in *Strings Attached* and *Agility.* I do not think the slightly more distanced relationship in this case is significant. Mr Browne's working relationship with the defendant began approximately 30 years ago. Mr Browne was engaged by the defendant as an owner/driver rather than an employee, which was not unusual for the defendant 30 years ago. The length and depth of the relationship between Mr Browne and the defendant, to my mind, compensates for Mr White's characterisation of the relationship as "slightly more distant."

[36] Taking these cases into account and the factors I have identified, I consider a starting point in the medium culpability band of $450,000 to be appropriate.

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[3] *WorkSafe New Zealand v Agility Building Solutions Limited* [2018] NZDC 24165

[37] I turn now to aggravating and mitigating factors and apply the methodology in *Moses v R.*[4]

[38] First, the defendant has a previous conviction in 1999 for a health and safety matter in which a worker fell from an unguarded top deck of a vehicle transporter and was concussed. Mr White submitted that the incident seems to be of a different character because it involved no wires, whereas the present case involves inadequate maintenance of wires that were fitted. He submits that current management have no knowledge of the matter. The prosecutor has not been able to locate the sentencing notes. I do not consider that I have sufficient information about that case to treat it as a relevant aggravating factor, particularly given its age.

[39] The defendant does not have an unblemished safety record. There have been incidents not involving prosecutions in which workers have been injured by falling from heights on trailers. These were relatively minor injuries compared to what happened in this case. These include the incident in which Mr Clingan shattered his foot 13 to 14 years ago, and the incidents recorded in the incident register on 25 January 2017, 31 May 2017, 26 November 2017 and 2 November 2018, all of which are referred to in Mr Tibbs' affidavit. These incidents all concern falls from decks resulting in injuries and, while not resulting in prosecutions, are of sufficient frequency to warrant a small uplift of two per cent, which is the equivalent of $9,000.

[40] I agree with both defence and prosecution that discounts of five per cent for co-operation with the investigation, five per cent for the remorse that is set out in Mr Tibbs' affidavit and the defendant's willingness to attend restorative justice, and five per cent for the remedial steps taken, are appropriate.

[41] The remedial steps taken include covering the exposed large holes in the centre of the top decks, replacing the two wire fall protection system with a four wire system on all relevant trailer units, and asking the European supplier to provide better documentation on their trucks.

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[4] *Moses v R* [2020] NZCA 296 [15 July 2020]

[42] I also agree with both defence and prosecution that a 25 per cent discount is appropriate for the early guilty plea. That in total is a 40 per cent discount from the starting point of $450,000 which is the equivalent of $180,000 which when subtracted from $459,000 results in a fine of $279,000.

[43] Turning to the third step, I will award $2,050 towards the cost of the prosecution to WorkSafe. There is no issue with respect to ability to pay. With respect to the fourth step, I will make no further adjustment under the proportionality assessment. The overall sentence is a proportionate response to the offending.

[44] So in summary, the sentence is as follows:

(a) Reparation for Joshua Browne in the amount of $30,000. Reparation for Jamie Browne in the amount of $30,000. Reparation for Amanda Jane Browne in the amount of $30,560.

(b) A fine of $279,000.

(c) Costs of $2,050 which, if my maths is correct, comes to a total of $371,610.

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Judge WK Hastings
District Court Judge

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