

**IN THE DISTRICT COURT
AT NAPIER**

**I TE KŌTI-Ā-ROHE
KI AHURIRI**

**CRI-2021-041-002329
[2022] NZDC 17423**

WORKSAFE NEW ZEALAND
Prosecutor

v

IRONHIDE ROOFING LIMITED
Defendant

Hearing: 6 September 2022
Appearances: K Sagaga and K Opetaiia for the Prosecutor
B Harris for the Defendant
Judgment: 6 September 2022

NOTES OF JUDGE B M MACKINTOSH ON SENTENCING

[1] The defendant company, Ironhide Roofing Ltd, appears for sentence today having pleaded guilty to two charges, one of is a breach of the Health and Safety at Work Act 2015 and the other is a breach of the Health and Safety at Work (General Risk and Workplace Management) Regulations 2016.

[2] Essentially, the second relates to employing somebody under the age of 15, I believe, in construction work and of course at the relevant time the victim here was 14.

Factual Background

[3] So by way of background the defendant company, Ironhide Roofing Ltd was engaged to replace a section of roof at a woolstore located at 32 Pandora Pond. The roof consisted of new and old sections of skylights and a scaffolding tower was erected to access the roof. The skylights are plastic corrugated roofing sheets known as Clearlite and polycarbonate roof sheeting. The reroofing work essentially entailed removing the old corrugated iron and old skylights and laying Ausmesh and building paper and then new corrugated iron and new skylights.

[4] Now on 14 December at about 5.30 am the victim, ██████, started work. He was 14 years of age at the time, and he had essentially been employed by the company by way of sort of holiday employment. It was organised though, there was an employment contract, and there were understandings, and there was a contractual basis to that, but ██████ as I say, was only 14. He also was a friend of the family and he was also working with the director's son who I believe was a friend.

[5] Now I am told also that the family's here today, ██████████, the mother of ██████ and the directors of the company are all sort of part of a wider whānau group. So that in itself has put other stresses and strains, feelings of obligations and guilt across the wider family of everybody who is actually involved here today.

[6] Anyway, this is ██████ first day of working on this site. He was tasked to help another worker to spray lines on the old skylights to avoid walking on them. The boys were being supervised by Mr Paiwai and after morning tea at about 10 o'clock Mr Paiwai was carrying rolls of roofing paper up to the scaffolding tower and then up onto the roof. ██████ and the other young worker were each carrying rolls of roofing paper. At that time, they were not wearing safety gear such as helmets and harnesses, just high-vis tops and work shoes. Mr Paiwai and the boys put the paper down on the ridge line and while on their way back, and while crossing the old part of the roof, the other boy, Jay, stepped over the skylight. Now ██████ was behind and stepped onto a skylight and he fell through eight metres to the ground inside the woolstore.

[7] Now the director, Mr Thomson too, he was inside at the time and he heard a loud crack, [REDACTED] was lying on the ground on his stomach and there was blood. 111 was immediately called and the emergency services kicked into action. He was taken to hospital and he underwent surgery for these things.

[8] He was badly injured at the time, fracture and dislocation of the right elbow that required surgery. A fracture of the right and fourth and fifth metatarsals were dislocated and the first metatarsal required surgery. Fracture of the left elbow and wrist. Fracture of the right eyesocket, that did not require surgery, and there were some suggestion of liver laceration although that did not seem to actually amount to anything serious.

Victim Impact

[9] Now in terms of victim impact statements and restorative justice, I have read the victim impact statements from [REDACTED] [REDACTED] mum, and I have read [REDACTED] So as far as [REDACTED] is concerned, and these were actually dated in April of this year, I think that it was very stressful for [REDACTED] as the mother. She had her own sort of health issues that she was trying to get on top of and this situation on top of that was difficult for her.

[10] As far as financial costs, there was some personal costs involved in travel back and forwards down to Hastings and then I think in terms of emotional harm, [REDACTED] was really trying to do the best by her son in allowing him to have this job and to work. She certainly trusted the directors of the company and she liked the idea of him being involved in employment, as I think any parent would. She was not aware of the regulations for workers under 15 and maintains if she had been, she wouldn't have let him work there.

[11] Obviously when she heard about the accident she was devastated I would say and terribly worried about what was going to happen and I think she carries with her a certain amount of guilt herself for allowing him to do the job in the first place. However, I think that her decision was made with the best possible intentions and unfortunately it just played out in this way.

[12] As far as the recovery period was concerned, I think that was quite difficult, there was some adjustments that had to be made in the household to cope with all of that and I think she felt as far as [REDACTED] himself was concerned that obviously during the rehabilitation period he could not do the things that he had used to be doing like playing sport and running and sort of participating with his friends in the way that he could and had and I think she found that very difficult to cope with and as a mother of course she was worried about him, and who would not be as a mother.

[13] As far as [REDACTED] himself is concerned, I note that he was very conscious of the physical injuries that he received. That ultimately he went back to school for a while but then had to go home again for a while, and then go back to school, so it has been a very topsy-turvy sequence of events as far as he is concerned. This is all happened some time ago now so there has been sort of a long time between the incident and now this sentencing today.

[14] I think for him probably the hardest thing was not being able to do what he used to be able to do, and having to learn to live with that, and try and get yourself back to the level of fitness and ability that you had before the accident and time has marched on even further now than it was when you did this in April and I am hopeful that things are improving all the time, but for you it has become quite a concentrated effort that you have to make now and life is different. It did change, this incident did change your life.

[15] I was pleased to see that everybody did have the opportunity to go to a restorative justice conference. These kinds of situations, particularly where people do know each other and have relationships with each other, I think they can be very helpful and beneficial to ultimately the healing process that needs to take place and to what needs to be achieved in the outcome.

[16] But I think that for everybody, including the directors, it has been a very traumatic period of time and I think everyone just wants to now be able to make the best of the situation and I do note that there is ongoing involvement insofar as [REDACTED] is concerned and that everyone is trying to do their bit, [REDACTED] I think to make sure that for you the long-term outlook is as good as it can be.

[17] So you have, despite all of this, still got the same team of people around you who want to help you and do right by you and make sure that things are going to pan out okay as far as you are concerned.

[18] Everybody feels a certain level of guilt I note because of what happened. I know that you do, yourself, your mum does, and of course the Thomson's do too, so it is very difficult all around. Ultimately everybody wants the best outcome and that is good to see that you are all on the same page with that and that there is ongoing support and nobody's walked away from the situation. So that is good and that is positive.

[19] So I think, and I do agree with what Mr Harris says about the restorative justice, and I do think that clearly there is a lot of goodwill on both sides for the way forward so that is a positive thing.

Sentencing Principles

[20] As far as sentencing is concerned, what I need to do is bear in mind the relevant legislation in relation to the charges that have been laid and in terms of this particular kind of sentencing s 151 of the Health and Safety and Employment Act sets out the specific sentencing criteria to be applied when someone is convicted under s 48 of the Act which is what we are dealing with here.

[21] There is a number of factors I need to take into account including various provisions in the Sentencing Act, and look for the purposes of the sentencing today I do not intend to recite out all the relevant legislation, because largely by and large there is some consensus as to the outcome.

[22] But what I do need to bear in mind of course is the purpose of the relevant legislation, the risk and the potential for illness, injury or death that could have occurred in terms of what happened. Whether death, serious injury or serious illness occurred or could reasonably have been expected to have occurred, the safety record of the person, the degree of departure from the prevailing standards in the relevant

sector or industry as an aggravating feature and the ability to pay a fine or financial capacity.

[23] I also need to bear in mind the purpose of the Act which is set out in s 3 and includes among other things protecting workers or other persons against harm to their health, safety and welfare by eliminating or minimising risks arising from work or from prescribed high-risk plant or high-risk situations.

[24] But ultimately the way that we have to approach sentencing is clearly set out in the decision of *Stumpmaster v Worksafe New Zealand*.¹ It is recognised as the guideline judgment for sentencing under the legislation and it provides a four-step approach.

[25] So the first thing to do is to assess the amount of reparation, then to fix the amount of the fine by reference to the guideline bands, and then having regard to the aggravating and mitigating features, and then determine whether any further orders are necessary under the Health and Safety Act, and then finally make an overall assessment of the proportionality and the appropriateness of the combined sanctions imposed by the preceding three steps and that of course involves, and it is relevant in this case, a consideration of the defendant company's ability to pay.

Reparation

[26] As far as reparation is concerned, the prosecution have referred to a number of cases and suggest that an amount is somewhere between \$35,000 and \$40,000 would be appropriate for reparation. I note that the defendant company has made some financial contribution already by way of some accommodation that was provided by a payment of a week's wages and by way of providing some sundry items and from the information I have got that would amount to \$2,010.

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

[27] Bearing in mind cases such as *Worksafe New Zealand v Forest View High School Board of Trustees*, *Worksafe New Zealand v Waikato Institute of Technology*, *Worksafe New Zealand v Fullstop Scaffolding Ltd and QJB Roofing*², it seems to me that given the physical effect on the victim at the time, given the fact that some recovery has been made, the emotional and physical impact on him and his family, particularly his mother, his youth and the fact that there are still some ongoing effects to deal with an appropriate amount of reparation would be \$40,000.00, which is slightly more than the defence have suggested, but in my assessment that is an appropriate amount to be paid in this case.

Fine

[28] As far as the assessment of the fine is concerned, and what that requires is an assessment of the nature and seriousness of the risk of the harm occurring. So the risk of falling from an eight metre height was significant with obvious potential for serious injury or death. It appears that the problem being that the old roof was not delineated from the new roof. There was no obvious barrier in that regard which is why in fact one of the reasons why this incident happened. █████ did not know that he was not able to go there.

[29] As far as the injuries that occurred, and whilst he has largely recovered physically, there are still ongoing effects of the incident that are relevant for him. He is not able to participate in the same way that he did at the time of the incident in terms of his sporting events and that is a difficult thing for a teenage boy to have to cope with. Hopefully in time he will get back to base, to where he was and that will also require a lot of hard work and effort by him, and also by others around him.

[30] As far as the degree of departure from the standards in the industry, it is my view that there was a significant degree of departure. Given that there was no physical or visual barrier on the roof to delineate the old roof from the new. Also added to the mix in this case of course is the breach of regulation to employ a 14-year-old in such

² *Worksafe New Zealand v Forest View High School Board of Trustees* [2019] NZDC 21558; *Worksafe New Zealand v Waikato Institute of Technology* CRI 2014-019-005332; *Worksafe New Zealand v Fullstop Scaffolding Ltd and QJB Roofing* [2020] NZDC 3629

a role, in such high-risk work and the risk of perhaps such a young person ending up being hurt in my view would be greater than perhaps an adult who may have more essentially nous or wits about them in terms of what they were doing.

[31] As far as the hazard is concerned, it was obvious and the remedy of it, it would not have been any significant cost or difficult to provide some sort of signage or some sort of indication not to go there. So there was a breach in terms of the best practice guidelines to avoid falls through upper levels by failing to isolate and minimise that risk.

[32] So it would seem to me there was a relatively medium/high if I can put it that way risk. The sentencing bands are well known fines and essentially high-risk starts at a fine of \$600,000. Medium is \$250,000 to \$600,000. When one assesses this particular case, probably the most similar case in my view would be *Work Safe New Zealand and Armitage Williams Construction & Ors.*³

[33] But given the age of the victim and the fact that he fell from an eight metre height and while there may have been some other processes in place, there was no specific site plan. It would seem to me that this would have to sit right towards the high end of band 2 if not on the cusp.

[34] So it probably suffices today to say that the starting point in my view for the fine would be somewhere in and around \$500,000 to \$600,000. Of course, there would be mitigation for that and there is no real dispute about any of that. There would be full credit for guilty plea, there would be, in my view, there would be at least another 10 per cent available for remorse and restorative justice. Reparation is able to be paid and that also warrants a credit as well. So there would be a minimum of 40 per cent deduction from that for those matters. That would get us back somewhere in and around a fine of about \$300,000.

³ *Work Safe New Zealand v Armitage Williams Construction Ltd, MacMillan Plumbing and Gas Ltd and Smartflow Plumbing and Gas Limited* [2021] NZDC 16630.

Financial Capacity

[35] However, of course, there is today the issue of financial capacity and ability to pay and there is an issue in terms of that, and I have received financial information from Barnes Mossman, who are the accountants for the defendant company, indicating that essentially the companies in a negative equity situation and has really limited if no means to pay.

[36] I have also received a report from Worksafe's independent accountant, Mr Jay Shaw, who is employed by Grant Thornton Accountants. He also has essentially indicated that the company basically has material expenses comprising 70 per cent of the overheads that the after-tax margin for the years that he looked at was in and around four per cent, that's relatively low. That he considered it unlikely that Ironhide has financial capacity to pay a significant fine by instalment unless it can increase future business profitability, or it can reduce costs in other areas including shareholder remuneration, and although ultimately it is a matter of judgement, he would expect that payment of a fine more than \$5,000 per annum would be challenging for the company.

[37] So he essentially takes the view that despite owning assets which appear to be surplus to operations, the company's nil equity position means it does not appear to be able to realise those assets and use them to pay a lump sum fine. Its position may improve in the future if the business could increase profitability. So anything more than \$5,000 per annum would be challenging for the company and I do not think that is really argued against by Worksafe except to say that they could pay off a fine over a period of time.

[38] Now in terms of that, Mr Harris has made the point that we live in a post COVID world and five years is a long time and it could, essentially I think what he is saying, unnecessarily hamstringing the company so a time payment would not be appropriate. It seems to me that it is always difficult to crystal ball gaze, but we are living in an environment now where the construction industry actually is very busy. I do not see that a period of five years is too long to pay something off and an award of a \$5,000 fine per annum is a fairly modest amount to be paid, given the circumstances

of the offending. So I take the view that in terms of a fine, and I would think that any longer than five years would be an additional hardship, so I intend to impose a fine of \$25,000 to be paid off over five years.

[39] Now in terms of other payments to be made. There are solicitor's costs of \$6,441.11 to be paid towards costs of the prosecution. I do take Mr Harris' point here that there does not seem to be much substantiation of that so I am not entirely sure how that has been arrived at and what component of it is their independent accounting amount, but probably in the round there would be a cost to that and it does not seem to be an excessive amount to me, so I am prepared to order that to be paid as part of the costs of the prosecution.

[40] So that just gets us back to the issue of the reparation and how that is to ordered. The reparation payment is to be made of \$40,000 to the victim [REDACTED], [REDACTED] mother on behalf of him also. So I will split the fine, \$20,000 on s 48 prosecution, Mr Harris, and \$5,000 on the other one.

Judge B M Mackintosh
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: ...15/09/2022