IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2021-004-007165
[2022] NZDC 13915

WORKSAFE NEW ZEALAND
Prosecutor

v

CLL SERVICE AND SOLUTIONS LIMITED
Defendant

Hearing:	6 December 2022
Appearances:	A Everett for the Prosecutor B Smith for the Defendant
Judgment:	6 December 2022

NOTES OF JUDGE K MAXWELL ON SENTENCING

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[1] The defendant CLL Services and Solutions Limited (CLL) has pleaded guilty to one charge of contravening s 36(1)(a), s 48(1) and s (2)(c) of the Health and Safety at Work Act 2015 (HSWA). The charge carries a maximum penalty of a fine not exceeding $1.5 million.

[2] CLL breached duties as a person conducting a business or undertaking (PCBU) under the HSWA. The exact nature of the duties breached will be discussed in the course of this sentencing, but in short CLL accept that it was reasonably practicable to have:

(a) Ensured an adequate lift plan was in place and complied with; and

(b) Ensured it had adequate systems in place to effectively identify, manage, assess, and control the risks and hazards associated with fatigue.

[3] The sentencing was heard before me on 7 November 2022. I had the advantage of reading submissions filed in advance of the hearing. There was also an opportunity for counsel to make further oral submissions when the matter was called. A further case was also filed following the hearing.

The Factual Basis for Sentencing

[4] I start with the facts surrounding this charge. The summary of facts is lengthy. I therefore refer for the most part to a summary of the facts as outlined in the prosecutor's submission on sentence.

[5] CLL is a limited liability company incorporated on 3 March 2016. CLL specialise in piling, ground stabilisation, rammed aggregate pier ground anchors, slip stabilisation, seismic strengthening, rope access, foundation, civil structures, drainage, and landscaping. CLL has around 180 workers.

[6] The victim "Mr B" was employed by CLL as a crane operator for over three years. He was an experienced crane operator, having operated cranes for over 20 years. He had also operated a Kato crane for over four years with no previous incidents. He held a certificate of competency and a New Zealand Qualification Authority qualification in crane operation. CLL considered Mr B was qualified and the 'go-to man' for tricky crane issues. He was the most senior and qualified mobile crane operator on site.

[7] On the day of the incident Mr B was operating the Kato crane with a dogman whose role included looking at the swing and carry of any lift from the crane. It appears common ground that workers responsible did not prepare a formal lift plan prior to a particular move. CLL accepts it did not have a system for checking the existence of a lift plan in advance and relied on Mr B and others to complete the lift plan as required. A lift plan was not required for every lift but was required if the

configuration of the crane needed to change, for example if the crane needed to lift a weight that was outside its existing configuration. In this case the 300-kilogram core barrel was outside the weight range for how the crane was configured.

[8] During the lift a warning alarm sounded, and warning lights flashed for approximately 29 seconds. Mr B continued to operate the crane and then the crane tipped. According to the summary Mr B stated that when he had the barrel just past the tower crane it got caught up on something. He was trying to deal with this when the alarm sounded on the machine and the warning light began to flash. The crane fell near workers and onto an oxygen tank and another tank.

[9] Mr B required help to get out of the cab. After discussing the incident with other workers he went to hospital but was not admitted. Mr B had a pre-existing, ongoing injury to his lower back, which was unrelated to this incident. However the injuries sustained from this incident have contributed to a relapse in his ongoing recovery of the pre-existing condition. Three months after the incident Mr B voluntarily resigned from CLL.

[10] CLL's insurance did not cover the damage to the crane as it had been operated by Mr B outside of the manufacturer's specifications. CLL was accordingly forced to write off the crane at a cost of $65,593.39.

[11] The summary goes into further detail as regards industry guidance and standards in this area.

Approach to the Sentencing

[12] The purposes of the HSWA relevantly include so far as sentencing is concerned:

(a) Protecting workers against harm to their health, safety and welfare by eliminating or minimising risks from work;

(b) Securing compliance through effective and appropriate enforcement measures; and

(c) Providing a framework for continuous improvement and progressively higher standards of work health and safety.

[13] Both counsel refer to the well-known authority of *Stumpmaster v WorkSafe New Zealand* where the court affirmed previous authority that sentencing in a health and safety context will generally require significant weight to be given to the purposes of denunciation, deterrence and accountability of harm done to the victim.[1]

[14] The sentencing criteria under s 151 of the HSWA are relevant to the current offending. The parties agree that the approach in *Stumpmaster* is relevant where the court outlined a four-step approach to a sentencing:

(a) Assess the amount of reparation;

(b) Fix the amount of the fine;

(c) Consider orders under s 152 to 158 of the HSWA; and

(d) Make an overall assessment of proportionality and appropriateness of penalty.

Reparation

[15] I start first with the issue of reparation. Section 7(1)(d) of the Sentencing Act 2002 states that one of the purposes of sentencing is to provide reparation for harm done by the offending. A sentence of reparation may be imposed under s 32 of the Sentencing Act. Under s 32(5) of the Act the court may not order reparation for consequential losses that are covered by the Accident Compensation Act 2001. The court may however award reparation for any shortfall not covered by the accident compensation scheme.

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

[16] In a victim impact statement dated 7 September 2022, Mr B sets out the effects of the offending. He refers in some detail to a pre-existing medical condition. He has had this condition since 2012, which started off with a prolapsed disc in his neck and has got progressively worse. He had an operation in 2013 but is still suffering ongoing nerve pain and muscle spasms. That he was taking codeine and gabapentin when he started working for CLL in 2018 and declared this to CLL (there has been no evidence to the contrary). Mr B also refers to jumping off a truck in 2018 when he was at work and sustaining lower back pain which aggravated his pre-existing condition. That he was prescribed more pain medication so he could continue to work.

[17] Mr B goes into some detail as to what occurred after this particular incident. His lower back pain got rapidly worse, that he was taking morphine daily to control the pain as well as the other medication mentioned. He states: "Since then I have had trouble walking, I get shooting pains down my legs and numbness around my knees and left foot." Mr B was on ACC up until December of 2021. He has since been on the jobseeker's benefit. That said, he also states that he is still medically unfit to work.

[18] WorkSafe submits that there are two kinds of reparation payable:

(a) Reparation for emotional harm arising in particular from injuries suffered by the victim; and

(b) Reparation for consequential loss in the form of an ACC top-up payment.

[19] WorkSafe acknowledge that they have been unable to identify a previous case where there was the aggravation of a pre-existing condition. They submit that in the present case in terms of emotional harm a reparation order of up to $30,000 is appropriate.

[20] CLL submits that the various authorities relied upon by WorkSafe all resulted in injuries to the worker. These include *WorkSafe New Zealand Limited v PBT Transport Limited*, *WorkSafe v Icon Homes New Zealand Limited*, *WorkSafe New*

Zealand v General Distributors Limited, *WorkSafe v Benchmark Homes* and finally *WorkSafe v Waikato Institute of Technology*.[2]

[21] On behalf of CLL, Ms Smith submits that there is no medical evidence addressing the matters raised in the victim impact statement. She refers to *WorkSafe New Zealand v Puke Coal Limited* as authority for the proposition that where the prosecution accept it cannot prove that a workplace accident caused a fatality or injury, reparation is not sought nor ordered.[3] That said, when pushed Ms Smith said any payment should not be more than in the region of $10,000 to $20,000.

[22] As to the consequential loss of reparation for an ACC shortfall Ms Smith submits that any calculation should only be up until the date that the victim agreed that his employment would end, this being 31 March 2021 rather than the date that ACC payments ended, namely 1 December 2021.

Discussion

[23] In *Puke Coal Limited* the court observed: "It is agreed that the defendant company's offending and/or failure in the present case was not causative of the rockfall incident which led to Mr Kora's injuries". In this case that is not so. There is no such acknowledgement by WorkSafe and there also appears to be no serious challenge to causation. That said, the issue of emotional harm reparation is complicated.

[24] First, WorkSafe rely on a pre-existing condition in circumstances where there is no clear evidence as to how the pre-existing condition has been compounded. Medical evidence of some description would no doubt have quickly clarified the issue. WorkSafe relies on the victim impact statement.

[25] Second, it follows that it is difficult to then quantify an amount of emotional harm. Reparation is fixed in recognition of the harm caused. There would appear to be no authority on point both as regards the involvement of a pre-existing injury or

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[2] *WorkSafe New Zealand Limited v PBT Transport Limited* [2019] NZDC 2327, *WorkSafe v Icon Homes New Zealand Limited* [2019] NZDC 16134, *WorkSafe New Zealand v General Distributors Limited* [2015] NZDC 18672, *WorkSafe v Benchmark Homes* [2016] NZDC 7093, *WorkSafe v Waikato Institute of Technology* CRI-2014-019-005332.

[3] *WorkSafe New Zealand v Puke Coal Limited* [2020] NZDC 18038.

where medical evidence may be required. These issues do not arise in the ordinarily course of events given that the pre and post-injury state is generally obvious.

[26] Ordinarily the court can simply rely on a victim impact statement. However, there are authorities where the court has not required victim impact statements. These have some application in this case given the question around the necessity for medical evidence.

[27] In *WorkSafe v Essential Homes Limited* the court considered that reparation for emotional harm was available in the absence of a victim impact statement.[4] That said, the court observed: "However in such cases the description of what happened and any physical injuries that might have been sustained will often make it easy to infer not only that emotional harm has been suffered but as to what extent".

[28] Similarly in *WorkSafe v Tree and Forest Limited* the court determined that in the absence of a victim impact statement emotional harm could be inferred from the injuries that the victim sustained.[5] The victim had been hit by a felled tree, lost consciousness for 15 to 20 minutes, was diagnosed with concussion and was off work for two days. There the court inferred that a nominal amount of reparation was appropriate and awarded the victim $2,000.

[29] In *WorkSafe v The Pallet Company (Hawke's Bay Limited)* the court allowed emotional harm reparation in the absence of victim impact statement.[6] The victim had his thumb partially amputated by a bandsaw that was not properly guarded. The thumb was able to be re-attached in surgery however the victim was off work for six months as a result of the injury. The defendant had made a $2,000 contribution towards the victim's medical treatment. Against that background the court determined that emotional harm reparation in the sum of $10,000 was appropriate.

[30] Again here the victim had significant pre-existing injuries. The court is not in a position to clearly analyse the extent of impairment before and after the relevant injury to determine the extent of the additional impairment that was caused by the

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[4] *WorkSafe v Essential Homes Limited* [2020] NZDC 5873.
[5] *WorkSafe v Tree and Forest Limited* NZDC [2019] 25404.
[6] *WorkSafe v The Pallet Company (Hawke's Bay Limited)* [2019] NZDC 18776.

injury. All that can be said is that the condition was aggravated and that is clearly set out in the victim impact statement.

[31] This is not a case like *WorkSafe v PBT Transport Ltd* which is included in the WorkSafe submissions where the victim sustained spinal injuries and where the court considered it was easy to see how such injuries might impact on the life of the victim. In that case reparation in the sum of $20,000 was ordered.

[32] All that is apparent in the present case is that the victim remained on ACC for some time, and it appears that he is now on the jobseeker's benefit. A broad common sense approach is usually taken to decisions on whether to award reparation. It is an intuitive exercise; intangible harm is incapable of a tariff case. I do consider that there was some emotional harm after this incident, again that is evident from the victim impact statement. In my view the inferred emotional impacts are greater than in *Tree and Forest Ltd* and similar to *The Pallet Company (Hawke's Bay Limited)*.

[33] I am of the view that emotional harm in the sum of $10,000 is appropriate. I also make an order for $13,395 to represent the consequential loss. Any top-up should properly reflect the duration that the victim was on ACC. To draw the line at the date that Mr B finished work at CLL is not justified. He was still under ACC as a result of injuries aggravated during his time with CLL.

Fine

[34] The standard sentencing methodology applies to determining a fine. First, a starting point should be arrived at by reference to the culpability of the offending. And second, adjustment should be made for the relevant aggravating and mitigating factors personal to the defendant including the plea of guilty.

[35] WorkSafe submits that the factors as set out in *Department of Labour v Hanham and Philp Contractors Ltd* and referred to in *Stumpmaster* are relevant when assessing CLL's culpability.[7] I agree with that approach. Both WorkSafe and Ms Smith focused on these factors as far as they applied factually.

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[7] *Department of Labour v Hanham and Philp Contractors Ltd* (2009) 9 NZELC 93, 095, (2008) 6 NZELR 79 (HC).

[36] WorkSafe submitted in written submissions that CLL's culpability sits in the medium band range as set out by the High Court in *Stumpmaster v WorkSafe New Zealand*. They placed this at approximately $450,000 to $500,000. At the earlier hearing a slightly reduced range of $400,000 to $450,000 was identified. As to discounts and mitigating factors WorkSafe fairly accepts that discounts are available in the range of 45 per cent. Finally, WorkSafe seeks a contribution towards legal costs of $2,350.89 together with costs for experts in the sum of $1,365 and $21,000 respectively.

[37] For CLL, Ms Smith submits that CLL's culpability sits within the lower band. She identifies a starting point of $200,000. Alternatively she submits that the culpability of CLL sits at the lower end of the medium culpability range. She accepts 45 per cent by way of mitigation. No issue is taken with the legal costs, issue is however taken with the cost of experts engaged to provide fatigue advice.

[38] I will work through each of those operative acts or omissions at issue and the practicable steps it was reasonable for CLL to have taken in terms of s 22 of the HSWA. However, by way of initial observation, there is no dispute in this case that there was an injury, albeit the aggravation of an existing injury. Therefore in my view the matter falls squarely for consideration under the medium band.

[39] In *Stumpmaster* at para [52] the court observed as follows:

> There is a case to increase the low culpability band by a lesser amount than the other bands. The pattern of decisions suggests such cases will typically involve a minor slip-up from a business otherwise carrying out its duties in the correct manner. It is unlikely actual harm will have occurred or if it has it will be comparatively minor.

Steps CLL Could Have Taken and the Availability or Ease of Taking Those Steps

[40] The reasonably practical steps not taken by CLL are set out in the particulars of the charge. CLL accepts that it failed to have a system in place to ensure that Mr B was completing adequate lift plans. CLL also accept the same as regards a fatigue plan. That said, there is no evidence that Mr B was suffering from fatigue. Ms Smith pointed out that his hours did not exceed NZTA requirements.

Nature and Seriousness of Harm and the Realised Risk

[41] There is an inherent risk to safety whenever heavy machinery is being used within a confined space and in a manner outside factory specifications as was happening when this incident occurred. The crane was operating where others were present, it was working outside its recognised parameters. The risk of serious harm or death from a crane operating in such circumstances was obvious.

Degree of Departure from Prevailing Industry Standards

[42] Again the crane was working outside its recognised parameters and the warning system, namely an alarm and flashing lights, were seemingly ignored. This all could have been avoided if an adequate lift plan was in place. That said, Mr B who was responsible for the crane was highly experienced. CLL systems at the time relied heavily on self-reporting as regards fatigue. CLL appear to accept in an affidavit that Mr B did not feel comfortable coming forward in respect of issues as regards pain and sleep. That said, there was compliance with the NZTA requirements and again there is no evidence that Mr B was fatigued. Neither the summary of facts nor the victim impact statement suggests the same. The summary of facts is limited to an opinion from an expert in circumstances where there appears to be no factual basis for that opinion.

[43] I am satisfied that the departure from prevailing industry standards in the context of this case was moderate.

The Obviousness of a Hazard

[44] The hazard arising from failing to have and comply with a lift plan is obvious.

Availability, Cost and Effectiveness of the Means Necessary to Avoid the Hazard

[45] An affidavit has been filed by Sean Henry. Mr Henry is the general manager of CLL. To the credit of CLL, they have taken significant steps to implement a number of new processes. Such steps have included a change to previous hard copy systems, these are now cloud-based. CLL has also now a dedicated administration staff member verifying the daily and timely submission of site information. CLL has also now

developed and rolled out a new fatigue management plan and has developed a fatigue scorecard.

[46] In the affidavit Mr Henry acknowledges that during the incident investigation it was clear that their system at the time did not provide enough information to assess fatigue creeping in during the week. In other words, CLL could only verify hours worked at the end of the week but there were no red flags about a hard day at work during the week that could affect performance of an employee the following day.

[47] The incident also highlighted for CLL management that they could be out of touch with some of their site personnel. They therefore have implemented an anonymous survey carried out by a third party to verify engagement, culture and staff satisfaction with overall company performance and undertakings. This is now undertaken three times a year.

[48] CLL has also increased its level of competency and staff skill by increasing the training footprint to include all operators and ground staff within the CLL operation team. They have created a new role to carry out the co-ordination and delivery of training, competency testing, licensing, and professional development within the company. Mr Henry states that since the incident the company has invested more than $500,000 improving systems, training staff and surveying company culture.

Comparison with Other Cases

[49] I have been referred to several sentencing decisions. WorkSafe relies on *WorkSafe v Michael Vining Contracting Limited*, *WorkSafe New Zealand v Glaziers Choice*, *WorkSafe v CNC Profile Cutting Limited* and *Maritime New Zealand v C3 Limited*.[8] WorkSafe submits that a starting point higher than the authority of *C3 Limited* but lower than the other three cases may be justified.

[50] On behalf of CLL Ms Smith distinguishes the authorities referred to by WorkSafe. She submits that when compared to *Michael Vining Contracting Limited*

[8] *WorkSafe v Michael Vining Contracting Limited* [2018] NZDC 6971, *WorkSafe New Zealand v Glaziers Choice* [2021] NZDC 13492, *WorkSafe v CNC Profile Cutting Limited* [2021] NZDC 9794 and *Maritime New Zealand v C3 Limited* [2022] NZDC 2106.

there is no evidence that Mr B worked outside NZTA guidelines. As regards *Glaziers Choice*, Mr B was appropriately trained. Finally as regards *C3 Limited* there were failures in the foreman's training and he also contributed to the incident.

[51] I agree with Ms Smith that distinctions can inevitably be drawn between this case and those referenced by WorkSafe. In this case the failure must focus on inadequate checks and measures. This is not a case where Mr B was inexperienced, untrained, or worked contrary to work hours. It is not a case where there was otherwise something wrong with the machinery. The failings might be described as omissions.

[52] That said, invariably in situations such as this there is always room for human error. Assumptions that an experienced operator will not make a mistake and can operate without checks and measures can have serious consequences. This appears to be acknowledged. That said, warning signs appear to have been ignored by Mr B and as I have mentioned earlier there is no direct connection to fatigue.

[53] One of the cases referred to by WorkSafe is *WorkSafe v Icon Homes Limited*.[9] There the court identified starting points of $450,000 for Just Brilliant Limited (JBL) and $300,000 for Icon. The facts involved a timber frame which was lifted in circumstances where there should have been a crane, there was a failure to carry out a proper risk assessment. Apprentice carpenters were also involved.

[54] I draw some assistance from this decision and see the offending in the current case as sitting somewhere between those two figures. I also draw assistance from the decision referred to by WorkSafe namely *C3 Limited*. In that case there was no injury, but none of the staff had been properly trained. A starting point of $375,000 was identified.

[55] I also draw some assistance from *WorkSafe v Ron Frew Family Partnership Limited*.[10] There a starting point of $350,000 was adopted where a worker's foot and leg were pulled into the unguarded rollers of a potato harvester resulting in multiple fractures requiring ongoing medical intervention and seven operations. The court

[9] *WorkSafe v Icon Homes Limited & Just Brilliant Limited* [2019] NZDC 16134.
[10] *WorkSafe v Ron Frew Family Partnership Limited* [2018] NZDC 20330.

considered that operating procedures were not adequate: "They were not formal processes and needed to be". That said, the court observed: "This is not a case where the employer failed to appreciate risk or had been cavalier about the risk of harm to employees". The court also considered how the accident occurred:

> Here it seems the tractor driver acted contrary to instructions by not disengaging the power drain when the noise was brought to his attention. Also contrary to instructions the other employee pointed his foot towards the rollers. Whether this caused his baggy clothing to become caught up or not we do not know.

[56] The present offending falls within the lower to middle range of the medium band and that a starting point of $370,000 may be justified.

Aggravating and Mitigating Factors

Guilty Plea

[57] The plea was entered at an early stage. Expert advice was sought by WorkSafe in respect of the potential prosecution. I agree with both counsel that a discount of 25 per cent is available for plea.

Co-operation

[58] CLL have co-operated with the investigation, that is clearly set out in the summary of facts. I also agree that a 5 per cent discount is available.

Remedial Action

[59] The steps taken have been outlined in the affidavit of Sean Henry. In my view the steps taken were significant and I also agree that 5 per cent discount is available.

Reparation

[60] Whilst the quantum of reparation was disputed by CLL that was for understandable reasons. There was also a willingness to cover consequential loss. I agree that 5 per cent discount is available for this factor.

Previous Good Character

[61] As per the summary of facts CLL has no previous health and safety convictions. Further, Mr Henry points out that CLL has been operating without an incident of this nature for more than 25 years. He also identifies other involvement by CLL in the industry and the community. I accept the submissions of both counsel that a further 5 per cent is available.

Other

[62] A separate discount for remorse is not warranted in light of the co-operation and the remedial steps taken. Authorities have observed that corporate remorse is difficult to assess and again the above factors have already engaged this particular factor. This is not a case for example where there were payments made to Mr B immediately after the incident.

Final Sentence

[63] Taking into account a reduction of 45 per cent that leaves a fine of $166,500.

Costs

[64] In considering a contribution to costs I have to factor in the overall picture in terms of the penalty. I agree that there should be a contribution towards legal costs, this will be in the sum of $2,350.89.

[65] I turn to the issue of expert advice. Plant and building safety assisted with the technical investigation and travelled to the site after WorkSafe had been contacted by CLL. In the circumstances having regard to the nature of the incident I agree that this cost should be met by CLL. That will be in the sum of $1,365.

[66] As regards the fatigue advice from Massey University again there is no evidence that fatigue was causative of the incident. Neither the summary nor the victim impact statement is to that effect. That said, CLL has pleaded guilty and has accepted that it was reasonably practicable to ensure that it had adequate systems in place to effectively identify, manage, assess, and control the risks and hazards

associated with fatigue. I anticipate that the report provided by Massey University is likely to have guided some of the remedial steps which have been taken since the incident. In the circumstances a contribution towards the invoice in the sum of $7,000 is ordered.

[67] The total monetary cost to CLL is around $200,000. I do not consider that an unjust outcome or an inappropriate outcome having regard to the circumstances of this case.

[68] Section 151 of the Health and Safety at Work Act requires me to take into account the financial position of the party and whether they will be able to pay the fine imposed. There is no evidence that CLL would not be able to pay the fine and the costs ordered.

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Judge KH Maxwell
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 22/08/2023