IN THE DISTRICT COURT
AT QUEENSTOWN

I TE KŌTI-Ā-ROHE
KI TĀHUNA

CRI-2020-059-000535
[2023] NZDC 22679

WORKSAFE NEW ZEALAND
Prosecutor

v

NZ SKI LIMITED
Defendant

Hearing:	17-21 April 2023
Appearances:	K E Hogan and A J Simpson for the Prosecutor J R Rapley KC for the Defendant Company
Judgment:	10 October 2023

NOTES OF JUDGE G A REA ON SENTENCING

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[1] NZ Ski Limited appears for sentence today having been found guilty on a charge under the Health and Safety at Work Act 2015. On 21 September 2019 Ms Anita Graf-Russell was skiing on Coronet Peak. She died after colliding with a fence post at the base of Sugar's Run, one of the ski trails on the mountain.

[2] The company was charged under s 48 of the Health and Safety at Work Act with failing to comply with its duty to ensure its workplace was without risk to the health and safety of any person including Ms Graf-Russell and the failure exposed Ms Graf-Russell to the risk of death or serious injury.

[3] The defendant was found guilty of this charge on the basis it was reasonably practicable for it to have conducted an adequate risk assessment to identify the hazards and risks associated with the deer fence at the base of the ski trail.

[4] In the decision finding the defendant company guilty I traversed some factual findings and I intend to do that again briefly for the purposes of this decision. However, for a fuller understanding of the full basis of the decision it needs to be read together with these sentencing notes.

[5] The Sugar's Run ski trail is an advanced ski trail that ends very close to what is known as the Elephant Pit Reservoir. That was constructed in 2008 by the defendant company in order to hold water that would be used for snowmaking purposes during the ski season. It was quickly recognised that the reservoir itself was a manmade hazard. There was a possibility that skiers could go into it and would have considerable difficulty getting out of it and to prevent that from occurring clearly a risk assessment was undertaken and a fence was built around the reservoir. It is described as a deer fence. It started off as a single tier fence but in 2019 there was concern that a build-up of snow against the existing fence could create a type of ramp which could mean that skiers inadvertently went right over the top of the existing fence and into the reservoir.

[6] The fence was heightened by attaching further wooden posts and wire to the existing fence and bolting them on. Some parts of the bolts protruded from the wooden posts and represented a hazard in themselves.

[7] It is important to note that what is being called "Post number 10," which is the post that Ms Graf-Russell struck when she died, was also extended so there must have been an appreciation at that time that at that point of the ski trail skiers were at risk of going over the original fence and ramping into the reservoir and obviously if that could happen they could hit the fence if the snow was not in a ramp-like condition.

[8] The correct way to ski Sugar's Run, from all the evidence I heard, was to ski down it and make a right-hand turn at the bottom of it along a groomed area parallel with the deer fence. Some of the deer fence posts, at the base of the run, were padded

as a safety precaution but others further along from the right-hand turn were not padded in an apparent belief that they did not pose a hazard to the skiers. None of the wire between any of the posts had any padding that would prevent a skier from colliding with the wire or mitigating any damage if a skier did so.

[9] On the morning of 21 September 2019 Ms Graf-Russell was skiing with a group of friends. She was observed by others to come down Sugar's Run and at the end of the run she made a right-hand turn but instead of completing that turn she continued on her way and skied into one of the deer fence posts and collapsed. Medical assistance, including a doctor, arrived reasonably quickly; she was unconscious when they got there. After a period of time her breathing ceased and despite all efforts she died on the ski field at the location where she hit the fence.

[10] A post-mortem was undertaken by a pathologist who stated that the cause of death was blunt force trauma, cardiac tamponade, which is an obstruction to the flow of blood, and cardiac lacerations.

[11] In my decision I concluded that the only document from the defendant company to reference and assess the risk posed by the deer fence was a 2014 document entitled "Padding Hazard Register Grid A2." In that one of the ski patrollers, Mr Ashley Stewart, reported as follows:

> Elephant Pit Reservoir, 28 fence posts, metal deer fencing and strainers, very likely to be skied into at high speed. Several serious harm injuries have occurred already. Many near misses.

[12] It was accepted during an interview with senior members of the defendant's management that that document would have been available to the ski area manager and other managers would have been aware of it. As a result of course even with Mr Stewart knowing of it, the company was put on notice that there were serious safety concerns around the deer fence.

[13] There followed from that no evidence of any documented risk assessments being undertaken as a result of Mr Stewart's report and none since 2014. The defendant, I found, had actual knowledge of the risk posed by the deer fence as a result of that document and also it transpired that management were aware that ski patrollers,

who were the elite group responsible for identifying safety hazards and issues, had found themselves on that fence. No proper assessment was done. In fact no documented assessment was done at all by those responsible for safety on the mountain that could properly formulate an appropriate way to mitigate what was obviously a danger and recognised as such certainly by a member of the ski patrol who reported it.

[14] It was a feature of the evidence at the trial that the defendant company took great pride in its safety regime and addressed issues that were drawn to its attention right through to board level. It is clear however that on this occasion, around this fencing, the system broke down. It is perhaps best illustrated by an acceptance by the CEO of the company during the course of an interview that once he became aware of the report from Mr Stewart he described it as "a WTF moment."

[15] As I found once the company had knowledge of the dangers presented by the deer fence overall it was not only reasonably practicable for it to conduct an adequate risk assessment to identify all of the hazards and risks, it was absolutely essential that it did so. Any such risk assessment would have to consider the fence overall and determine the extent of the risk at various parts of the fence and how that risk should be mitigated or managed.

[16] In sentencing for an offence under this Act it is necessary to look at the requirements of the Act and follow the guidance provided by it. The Act incorporates ss 7-10 of the Sentencing Act 2002. It says that the purpose of the health and safety legislation must be adhered to. You must take into account the risk of and the potential for injury, illness or death that has occurred and whether in fact that has occurred or it could reasonably have been expected to have occurred. You can look at the safety record of the company or individual involved, the degree of departure from prevailing standards and financial capacity which has not featured in this case.

[17] There is obviously an obligation for the protection of workers and other people who are on worksites, such as Coronet Peak, and it is necessary to look at promoting the terms of the Act and securing compliance with it and significant penalties are available should that not be done.

[18] It is necessary in a moment to go through the methodology that is necessary to arrive at the appropriate result in this case. However there has been an approach taken by Mr Rapley that I do not believe has ever arisen in another case and if it has it has not been drawn to my attention by either counsel who have been scrupulous in providing me with authorities on all sorts of different points that may come into issue.

[19] In this case the fault found with the defendant is failing to conduct an adequate risk assessment to identify the hazards and risks associated with the deer fence on the Sugar's Run ski trail. Another particular relating to the safety catch net fencing I found was not proved beyond reasonable doubt.

[20] The approach taken by Mr Rapley, both in relation to the charge and fine that will follow from it and in relation to the issue of reparation, is that the failure to conduct an adequate risk assessment cannot be causative of the death of Ms Graf-Russell and as a result the fact that she died cannot be taken into account as a feature of the case because the charge that the company has been found guilty of has no causative link with that death.

[21] Mr Rapley's argument is exactly the same in relation to the issue of reparation. The law requires that there be a linkage between the offence committed and the effect on the victim and in this case Mr Rapley says that there is no causative link between the two and therefore as a matter of law the Court cannot impose any emotional harm reparation.

[22] As I have said that is a novel argument. Taken to its logical conclusion I would suggest that if it is correct it would expose a gigantic hole in the legislation and the purpose for it. I do not wish to say anything more about that other than I reject Mr Rapley's submissions in relation to both points about the fine and also the emotional harm reparation.

[23] I consider that it is causative because the failure meant that the danger the fence represented to skiers was never properly addressed and as a result of it not being properly addressed the fence posed a continuing risk of death to the skiers and that ultimately is what led to the death of Ms Graf-Russell when she hit the fence.

[24] This was a case where the company were put on very strong notice, within their own systems, that there were significant issues arising with that fence and there is no documented evidence at all that that was ever properly addressed or any plan of mitigation ever formed. In fact as far as the CEO is concerned it came as a considerable surprise to him that that report had been made and there was an acceptance by him and Mr Miller that essentially the company had dropped the ball in not following it through in properly assessing the risk and doing something about it.

[25] While Mr Rapley claims what has occurred subsequent to the death is largely irrelevant, I consider that it took the death for a proper assessment to be made and for significant remedial action to be taken. That was all done after the event but within months of it occurring. That in itself shows that there is the linkage in my view. If appropriate assessment had been done and followed up with what would obviously have been some form of mitigation we may not be here today.

[26] As I have said there is a lot that could be added to this issue of causation, I do not intend to add any more today because as I have indicated at the start this is a sentencing following the death of Ms Graf-Russell, it is not a legal dissertation and that will have to occur elsewhere if it is pursued.

[27] The first thing that the Court is required to do is to assess reparation. That is an easy calculation in this case because it is agreed by the parties and the Court concludes that the figure of $130,000 is an appropriate level of emotional harm reparation.

[28] I have had the very sad task of reading the victim impact statements from the deceased's sister and her daughters. It is an understatement to say that this death has brought significant tragedy to the family and individual tragedies to each member of it. The deceased was more than a significant person in each of their lives and undoubtedly in the lives of other people and a sentencing exercise such as this can never change that or can never change what happened. The law simply allows for emotional harm reparation in this situation.

[29] There are guidelines as to how much should be imposed in circumstances such as this and I am satisfied that the agreed figure of $130,000 is appropriate. Accordingly, there will be an order for emotional harm reparation in the sum of $130,000.

[30] This is a case where I have been invited by the prosecution not to stipulate how much goes to each of the particular victims but for the fund to go to the family presumably for them to assess and they are in a far better position to do that than I am.

[31] The next thing that needs to be considered is to assess the quantum of the fine. The leading case is the well-known case of *Stumpmaster* and it sets culpability into four separate categories[1]. There is low culpability, medium culpability, high culpability and very high culpability. In this case the prosecution says that this falls into the top end of the medium culpability range and they rely on a number of other authorities and similar cases to arrive at that conclusion.

[32] Ms Hogan, on behalf of the informant, submits that the appropriate starting point for a fine is between $550,000-$600,000 based on her view of the level of culpability here.

[33] Mr Rapley, for his part, based principally on his causation argument, considers that this is a low culpability case and sets the amount of the fine much lower than that assessed by the prosecution.

[34] The *Stumpmaster* case sets out the various criteria that need to be considered. They have been supplied to me and commented on in the submissions of each of the counsel and while it may be usual for a Judge on sentence to go through and to isolate each of those and to say where the defendant fits in terms of each of those criteria, I consider in this case that what the defendant has been convicted of is readily apparent. In this case I concluded that a risk assessment should have been undertaken as soon as the company knew of the report that Mr Stewart had put in, that it failed to do so and that has led us to where we are today.

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[1] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881.

[35] I consider that based on the authorities, and again I do not intend to cite them but they have all been set out in the submissions given to me that the appropriate starting point is a fine of $550,000.

[36] There are what is known as mitigating factors as far as the company is concerned. I considered that it is entitled to a deduction of 10 per cent from that for its co-operation during the course of the enquiry and for the steps that it took to mitigate the failure to properly consider the safety of that deer fence immediately after the events. Obviously there is not a deduction simply because the company then carried out what I found to be its legal requirements anyway but it is accepted that they have gone the extra mile in this case to not only alleviate the situation at the bottom of Sugar's Run but also in other parts of their business on that mountain and on another.

[37] I also consider that there should be a deduction of 10 per cent to reflect the compensation or reparation payment. Mr Rapley considered that there should be one-for-one reduction. However the cases speak very strongly against that. It simply dilutes the fine that is needed to bring home to a defendant the seriousness of the situation and the need to ensure that they comply with their health and safety requirements into the future. On the other hand, the prosecutor considered something less than 10 per cent would be appropriate. However, I consider that overall that is a fair position to take.

[38] That then gives a total deduction of 20 per cent from the starting fine of $550,000. The end fine therefore will be one of $440,000.

[39] There is also a claim for costs. That is common in cases such as this particularly those that have gone to a full scale defended hearing as this one did. There is a submission from the prosecution that half the amount of the actual costs should be awarded and that is sum of something over $28,000 and in the case of the defence Mr Rapley submits that it should be half as much again bearing in mind that the informant was only partially successful in the prosecution.

[40] In the end because of the way these charges are structured and can be structured, the result remains the same. The defendant has been convicted of failing

to ensure as far as reasonably practicable that the workplace was without risks to the health and safety of Ms Graf-Russell and did not expose her to the risk of death or serious injury. I consider that the amount of costs payable should be in the sum of $28,000.

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Judge G A Rea
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: …19/10/2023