IN THE DISTRICT COURT
AT HAMILTON

I TE KŌTI-Ā-ROHE
KI KIRIKIRIROA

CRI-2022-019-000830

WORKSAFE NEW ZEALAND
Prosecutor

v

CLARKIN GOAT COMPANY LIMITED
Defendant Company

Date: 31 January 2023

Appearances: K Opetaia for the Prosecutor
J Gurnick for the Defendant Company

NOTES OF JUDGE P W COOPER ON SENTENCING INDICATION

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[1] This is a sentence indication that has been sought by Clarkin Goat Company Limited that is charged with failing to ensure so far as is reasonably practicable the health and safety of a worker, Colin Austin, while he was at work, by exposing him to risk of death or injury arising from falling from a height.

[2] I acknowledge that Mr Austin is in court this morning and also I acknowledge the representatives of the company who are here as well.

[3] The alleged facts here are that on 1 March 2021, Mr Austin was employed by the defendant company. One of his tasks was to cover a large pile of wood shavings that were used for goat bedding. The shavings were stored in a large open concrete bunker, the top wall of which was 2.4 metres high. Mr Austin climbed to the top of the bunker to pull a large tarpaulin over the top of it. This would usually be a task carried out by two people but Mr Clarkin, the director of the company who would have ordinarily assisted, was not present on the day. Once up on the wall of the bunker, Mr Austin pulled on a rope attached to the tarpaulin. That did not shift the tarpaulin so further force was applied and the rope snapped. That caused Mr Austin to fall and he fell 2.4 metres landing on his head.

[4] He suffered very significant injuries; fractures to his neck with the C1, C6 and C7 vertebrae being broken and a spinal cord injury, fractures to his wrist and left patella, ligament damage to his right wrist and significant traumatic brain injury, and a laceration to his head requiring 30 stitches.

[5] The particulars in relation to the charge and the steps that were alleged were reasonably practicable for the company to have carried out:

(a) developing and implementing and maintaining an effective safe system of work for covering the wood shavings in the bunker including a risk assessment;

(b) eliminating the risk of fall by installing alternative cover system that did not require work at height; and

(c) ensuring that workers received effective information, training, instruction and supervision regarding this particular task, including the risk of fall from the bunker.

[6] The principles and purposes of sentencing and the criteria to be applied in cases such as this are well known; the Sentencing At 2002, s 151(2)(b) of the Health and

Safety at Work Act 2015 and the guideline judgment of *Stumpmaster v WorkSafe New Zealand*.[1]

[7] In that case, the Court identified four steps that need to be assessed. The first is assessing the amount of reparation to be paid to the victim. The second is fixing the amount of fine by reference first to the guidelines' bands referred to in the *Stumpmaster* case and then having regard to the aggravating and mitigating factors, then to determine whether further orders are necessary under ss 152 to 158 of the Act and then an overall assessment of proportionality and appropriateness, having regard to the sanctions that were required under those first three steps.

[8] The *Stumpmaster* case identifies four culpability bands; low culpability with a starting point of up to $250,000 fine; medium culpability with a starting point between $250,000 and $600,000; high culpability with a starting point of $600,000 to $1,000,000 and a very high culpability with a starting point of $1,000,000 plus. I should say for the benefit of those unfamiliar with the sentencing process, the Court is required to undertake, that the starting point is just that. It is a starting point and the Court is required to make adjustments to that starting point for mitigating factors.

[9] Among the material that has been provided to me is a formal written statement of Mr Austin dated 1 November 2022. That updates his present situation. What I do not have is a victim impact statement setting out just exactly what he had suffered from the point of the accident onwards. I have had some small amount of information today and I will talk about that in a moment.

[10] Mr Austin is now 47 years of age. His employment ended on 3 May 2021 because of his injuries. At the time of the accident, he was employed as a tractor operator. He has not been able to work since the accident and he is not sure when he will be able to work but he will not be able to work again in the farming industry.

[11] He suffered symptoms consistent with a serious head injury. His present situation is that he still suffers from constant headaches, has issues with fatigue, memory and concentration and struggles to complete even basic tasks. He is still

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

receiving outpatient care and rehabilitation, including physiotherapist, neurologist and when needed, psychiatrist attention. There are rods in place to support his neck which he will need for the rest of his life. He has limited movement in his neck and because of the injury to his knee, there is a risk of early arthritis. He has numbness down the left side of his body and limited strength in his hands and legs as a result of nerve damage. He has other nerve damage causing a burning sensation to his legs. He suffers from low blood pressure and bladder and bowel issues requiring medication. He is reliant on his partner for many things, including getting him around. He suffers feelings of isolation.

[12] I am told today that he was hospitalised for three months; one month in hospital and two months in a spinal ward. He relies for transport on his wife. He has a gastric tube inserted. He is not able to drink water. He takes medication and he relies on his wife to administer that. He was very fit prior to the accident and the accident has been a life changing incident.

[13] Those bare bones of the impact on the victim would not cover such things as loss of enjoyment of life, the impact on the family and relationships and it may be if necessary, the Court could receive further information by way of affidavit if that was required at a later date.

[14] I have also received an affidavit from Mr Lionel Smith who is a chartered accountant and he has attached the financial report of the company for the year ended 30 June 2022. In summary, the affidavit and report tells me that the company's liabilities exceeds its assets by over $1.5 million. There are retained losses on the balance sheet of a little over $2.6 million which have accumulated since the company began. The company is unable to pay its liabilities including any fine.

[15] The business activities of the company have ceased. That was on the sale of a farm at 248 Gillard Road, Ngāhinapōuri. That farm is not owned by the company. The only reason the company has not been wound up is because of accumulated tax losses which may be able to be utilised in the future and so the opinion of Mr Smith is that the company is not in a position to pay a fine or for that matter reparation.

[16] The Court has received extensive submissions from both the prosecution and the defence and I thank counsel for their assistance. WorkSafe's position is that first of all, in assessing the amount of reparation, emotional harm in the order of $50,000 is appropriate. The prosecution refers to the cases of *WorkSafe v Forest View High School*, *WorkSafe New Zealand v CMP Canterbury Ltd* and *WorkSafe New Zealand v Phil Stirling Building Ltd and Duncan Engineering Limited*.[2]

[17] In assessing the amount of the fine, the prosecution refers to the guideline decision of *Moses v R*[3] as to the methodology and then working through the various factors, submits that this case falls within the higher end of the medium band in the *Stumpmaster* case with a starting point, it is submitted, between $500,000 and $600,000. The prosecution accepts that mitigation is available to the defendant; 25 per cent for its guilty plea if that were forthcoming and the possibility of other mitigation.

[18] Mr Gurnick, for the defendant company, submits that the reparation that should be imposed would be in the order of $30,000 to $35,000 and he relies on a number of cases. I will just refer to those ones that relate to the 2015 Act and not the earlier ones; *WorkSafe New Zealand v Rangiora Carpets Ltd*, *WorkSafe New Zealand v Lindsay Whyte Painters and Decorators Ltd*, *WorkSafe New Zealand v Style Construction Ltd*, *WorkSafe New Zealand v Gold Hawk Co-operation Ltd* and *WorkSafe New Zealand v PBT Transport Ltd*.[4]

[19] Mr Gurnick submits that the fine in this case is at the lower end of the medium band of culpability in the *Stumpmaster* case and submits that the starting point would be in the order of $300,000 with mitigation for co-operation in the investigation, previous good record, reparation, if payable, and guilty plea, total discounts of 50 per cent.

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2 *WorkSafe New Zealand v Forest View High School* [2019] NZDC 21558; *WorkSafe New Zealand v CMP Canterbury Ltd* [2016] NZDC 11865; and *WorkSafe New Zealand v Phil Stirling Building Ltd and Duncan Engineering Limited* [2019] NZDC 10608.

3 *Moses v R* [2020] NZCA 296.

4 *WorkSafe New Zealand v Rangiora Carpets Ltd* [2017] NZDC 22587; *WorkSafe New Zealand v Lindsay Whyte Painters and Decorators Ltd* [2017] NZDC 28091; *WorkSafe New Zealand v Style Construction Ltd* [2018] NZDC 26752; *WorkSafe New Zealand v Gold Hawk Co-operation Ltd* [2019] NZDC 17745; and *WorkSafe New Zealand v PBT Transport Ltd* [2019] NZDC 2327.

[20] So now turning to the analysis that the Court is required to undertake. Insofar as reparation is concerned, that is an intuitive exercise. The harm suffered by Mr Austin is life changing. I have no hesitation in fixing the amount of reparation at $50,000 which is higher than that advocated for by Mr Gurnick but goes only a short way to recognise the very, very significant harm that Mr Austin has suffered. I have to have regard not only to that harm but consistency with other cases and, having said that, the $30,000 to $35,000 referred to by the defence does not in my view adequately meet the degree of harm that has been caused in this case.

[21] I turn now to assessing the fine that is appropriate and to a certain extent this is a notional exercise because it is really accepted that the company is not in a position to pay a fine. But discussing the various factors involved in this exercise, the first step is to assess the harm, the risk of harm and the realised risk of harm and that is obvious in this case and it has already been discussed.

[22] The next is the degree of departure from the standards prevailing in the industry and MBIE have a best practice guideline for working at height and there has been a significant departure from that best practice. In this case in particular, there has simply been no assessment of the risks involved and no consideration as to how those risks might be managed. A simple thing that could have been done to avoid the risk would be to have installed a cover over the bunker, for example, a roofing solution which did not require workers to work at height at all.

[23] The next thing to consider is the obviousness of the hazard and the obviousness of the hazard is clear, the risks of falling from a height of 2.4 metres. The availability, cost and effectiveness of the means necessary to avoid the risk is another factor and, as I just mentioned, there was a relatively straightforward method of avoiding the risk which could have been implemented with relatively modest cost. The state of knowledge of the risk in falling from a height on a wall is an obvious risk which the company would have appreciated or should have appreciated.

[24] The cases that have been referred to by the defence do not involve the same degree of harm suffered by Mr Austin in this case. The case that to me seems to be most analogous is the *Forest View High School* case and in fact in some ways this case

is more serious but nevertheless, I would take the view that the starting point should be similar to that in the *Forest View High School* case which is $500,000.

[25] The defendant company is entitled to mitigation and there is the guilty plea 25 per cent, its previous good record. Lack of previous convictions would generally result in a reduction of five per cent. If reparation was to be paid, 10 per cent reduction. Mr Gurnick has submitted that there should be a reduction for co-operation with authorities. I have not received any particular detail about that but assuming it exists, I would make a reduction of five per cent for that.

[26] Whether there is further mitigation available by way of remorse or other mitigation is not possible for me to assess at this stage. The total reductions for the mitigation that I have identified would be 45 per cent and then there would have to be a very substantial reduction for impecuniosity, but that is a reduction that comes in at the last stage of this analysis which is to look at the overall proportionality of the sanctions that would be imposed, namely a fine of the order I have just discussed and the reparation of $50,000.

[27] So if the defendant's position was that it could pay no more than $100,000, which if it can pay anything at all, seems to be the maximum it could pay, then I would indicate that the sentence would be a reparation figure of $50,000 and a fine of $50,000.

[28] I would not reduce the reparation because of impecuniosity. The burden of that would fall on the fine. The defendant company would not be in a position to pay other costs sought by the prosecution.

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Judge PW Cooper
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 09/02/2023