

**IN THE DISTRICT COURT
AT KAITAIA**

**I TE KŌTI-Ā-ROHE
KI KAITAIA**

**CRI-2020-029-000159
[2023] NZDC 8709**

WORKSAFE NEW ZEALAND
Prosecutor

v

SAND SAFARIS 2014 LIMITED
Defendant

Hearing: 5-8 December 2022 (closing submissions received 20/01/23 & 27/01/23)

Appearances: R Woods for the Prosecutor
R Mark for the Defendant

Judgment: 19 May 2023

RESERVE JUDGMENT OF JUDGE P R RZEPECKY

[1] In February 2019 the Oh family from Korea was enjoying a holiday in New Zealand. As many tourists do, they visited Te Tai Tokerau – The Far North. The family signed up for a bus tour which included a visit to Cape Reinga, and then the famous giant sand dunes near Te Pahi. The tour programme offered the opportunity to ride down the massive sand hills at the Te Pahi Stream on boogie boards. Mr Jin Chang Oh (Mr Oh) decided to take the opportunity to sand board down a dune. On his first run, Mr Oh tragically sand boarded through the run-out area at the bottom of the sand dune, into the path of another bus operated by Sand Safaris 2014 Limited (Sand Safaris). He collided with the side of the bus, and the rear wheel ran over him. He suffered unsurvivable head injuries.

[2] Following this accident, WorkSafe New Zealand (WorkSafe) charged Sand Safaris with a single charge under s 48(1) of the Health and Safety at Work Act 2015 (the Act). WorkSafe alleges that Sand Safaris, being a person conducting a business or undertaking (PCBU) failed in its duty to ensure, so far as reasonably practicable, that persons (other than its workers) were not exposed to the risk of serious injury or death from work undertaken in the course of Sand Safaris' business.¹

[3] WorkSafe must prove the following four key elements of the offence beyond reasonable doubt:

- (a) Sand Safaris was a PCBU (as defined by s 17 of the Act);
- (b) Sand Safaris had a primary duty in relation to persons affected by its work under s 36(2), including Mr Oh.
- (c) The defendant failed to comply with its duty – by failing to take reasonably practicable steps of:
 - (i) Developing and implementing an effective system to identify and control the hazards and risks arising from sand boarding at Te Paki Stream;
 - (ii) Identifying and utilising a safe area for sand boarding where there was no danger to sand boarders from motor vehicles; and
 - (iii) Implementing, in conjunction with other operators and stakeholders at the Te Paki Stream an effective traffic management system including signage
- (d) The defendant's failure to comply with its duty exposed Mr Oh to a risk of death and or serious injury.

¹ Health and Safety at Work Act 2015, s 36(2).

[4] The parties have reached agreement on some matters under s 9 of the Evidence Act 2006. They filed an admission dated 30 November 2022. Pursuant to the admissions, the first and second elements set out [3](a) & [3](b) above are not at issue.² The main issue in this prosecution is whether Sand Safaris complied with its duty – the third element.

[5] WorkSafe carries the onus of proof beyond reasonable doubt but submits that in relation to ss 48 and 49 of the Act it is not necessary to prove that the defendant:

- (a) Intended to take the action alleged to constitute the offence; or
- (b) Intended to not to take an action, where failure to take action is alleged to constitute the offence.³

[6] This means that the charge is in the nature of strict liability. This is consistent with other public welfare regulatory type offences.

[7] Furthermore, WorkSafe does not have to prove causation of harm to establish a breach by Sand Safaris under ss 36 and 48(1) of the Act. WorkSafe simply needs to show that the breach of duty by Sand Safaris has exposed a person or persons to risk of death or injury.⁴ Where there is evidence of causation, the test for whether the breach has caused the injury or death is whether it was a substantial and operative cause of the harm suffered.⁵

Background

[8] In 2019, Sand Safaris was a bus tour company owned and operated by Mr Petricevich and his family. He also owned and operated another company carrying out similar tours called Dune Rider 2017 Limited (Dune Rider). It appears that both companies offered tours of the Far North. Typically, these tours involved a bus trip to Cape Reinga with stops at attractions along the way, and then across country to the Te Paki Stream.

² Defendant's closing submissions 27 January 2023 at paragraphs [46] & [49].

³ See *Health and Safety at Work Act* 2015, s 54.

⁴ *Waimea Sawmillers Limited v WorkSafe New Zealand* [2016] NZHC 915 at [36].

⁵ See *WorkSafe v Centreport Limited* [2019] NZDC 3155.

[9] The tours would stop at the Te Paki Stream where there are giant sand dunes. One of the activities offered on the tour was sand boarding down the dunes. This involved Sand Safaris providing boogie boards and some basic instructions to the passengers by the bus driver, who would then supervise this activity.

[10] The bus tour would then drive along 90 Mile Beach exiting further south to return the passengers to where they were picked up. The direction of the tour was influenced by the high tide on 90 Mile Beach - depending on the timing of the tides the bus tour may well approach Te Paki Stream from 90 Mile Beach, or alternatively from Cape Reinga. On the tour giving rise to these charges, the bus had first of all been to Cape Reinga and had stopped at Te Paki Stream on its way back towards 90 Mile Beach.

[11] Driving a heavy-laden bus in this area had some particular challenges. The main problem was driving on soft sand around the sand hills and stream area. The drivers needed to be properly trained in how to approach this. They would need to regulate speed according to the conditions. Not only that but much of the area had soft sand where a bus could become stuck when it parked. One of the skills that the drivers needed was finding a suitable place to actually park the bus.

[12] The Te Paki Stream area is open to public traffic from both directions. It is effectively a road. Sand Safaris buses would proceed along the margins of the Te Paki Stream before parking to allow passengers to disembark and take part in the sand board riding. There was often more than one tour vehicle in the stream area at a time. Tour buses would often park in the flat area at the base of the dunes where there was hard sand. From time to time this was also where sand boarders would complete their run – referred to as the run-out area. This meant that, on occasion, the same area where buses and other vehicles were moving also had the potential for sand boarders to enter.

[13] On 4 February 2019 Mr Oh, who was on tour with his family from South Korea, was on a bus tour. He was accompanied by his wife, and his son and daughter in law. Mr Oh wanted to participate in the sand dune riding. He went to the top of the dune with other passengers. While the bus driver was organising another

passenger with their boogie board, Mr Oh proceeded to sand board down the dune. At the same time another bus operated by Sand Safaris was proceeding along the stream margin at the base of the dune. On reaching the bottom of the sand dune, Mr Oh could not stop in time and went through the through the run-out area at speed. Tragically, he collided with the right-hand side of the Sand Safaris bus and was run over by the rear wheel. Mr Oh suffered fatal head injuries.

What happened on 4 February 2019?

[14] There is not much disagreement between the parties as to what happened. The main factual issues are as follows:

- (a) What speed was the Sand Safaris bus, which Mr Oh collided with, doing at the time?
- (b) Was Sand Safaris the tour operator providing these services to Mr Oh and his family or was it Dune Rider?

What happened?

[15] The driver of the bus that Mr Oh was travelling in was Daniel Beazley. He confirmed that he was a contractor employed on the day by Dune Rider. At the time he had been conducting the bus tours for around 10 years and was considered to be an experienced driver.

[16] Mr Beazley described the tour on the day. He said that it started in Paihia at around 7.30 am. He then picked up more passengers in Kerikeri and Mangōnui, and they then went to Waipapakauri for morning tea. The tour then went to Cape Reinga with several stops. They then drove back from Cape Reinga, leaving the main road to branch out to the west to the Te Paki Stream.

[17] Mr Beazley talked about what the tour drivers commonly did when they arrived at the Te Paki Stream with a tour. He said that the driver was always looking for somewhere safe to park the bus. That is because there were lots of places you could not park either because of the size of the bus, or because there are areas of soft sand.

[18] Sand boarding on the dunes was an optional activity and usually not everyone on the bus tour would want to do it. Mr Beazley said that on 4 February 2019, before he let the passengers off the bus, he explained to them about sand boarding and asked who wanted to do it.

[19] Mr Beazley asked those passengers who were sandboarding to meet him at the back of the bus where the boogie boards were located. He ran through a brief description of how to do sand boarding. He explained that this was using a boogie board to slide down the sand dune, coming to a stop at the bottom. Mr Beazley said that he would show the tourists how to conduct the sand boarding, including how to stop using their feet. This was also the method to slow themselves down.

[20] Mr Beazley said that he told those people on the tour who were not sand boarding and who remained at the bottom of the dune to keep an eye out for vehicles. This was as follows:⁶

Q: Did you provide any instruction to the people who remained at the bottom of the dune?

A: Yes.

Q: What was that?

A: To keep an eye on other vehicles because while you're at the top of the dune sometimes you don't hear a vehicle or you don't see it before its too late and I used to say to passengers: "If you see a vehicle heading down this way, could you please stop it or detour it" and all the drivers did that.

Q: You have referred to the fact that there could be other vehicles in the area, what steps, if any, did you take in relation to those vehicles when you were at the top of the dune?

A: Well, like I said, I usually just told the passengers if a vehicle is coming along and it's heading towards our way, just divert it or stop it. Sometimes its hard to control because you've to – not only do you have to watch your passengers or look down the bottom to make sure no one is standing in the way, but its to try and watch both ways. I noticed in your starting speech how you said they came around the stream and it's up to the drivers to keep an eye on the traffic, but you can't. If you've got your back facing one way to look that way, you can't watch both sides of the stream, and you do get vehicles travelling both ways, so really it's up to the other drivers being down there and good passengers.

⁶ Notes of Evidence at 8, L 1-9, p. 9 L. 5-15..

[21] After he had shown the sand boarders what to do, he took them up to the top of the sand dunes. His intention was that the sand boarders would ride down one at a time.

[22] Mr Beazley set out in his evidence what happened to Mr Oh. Mr Beazley said that he was showing a young girl what to do and helping her to set up her board. He was kneeling down with her to place her board at the start of the run. He got her to lay down on the board. There were two other passengers standing behind her and another two a little further back. He heard Mr Oh drop his board down behind him. Mr Oh was lying on his board. Mr Beazley stopped him, put his hand up and said: ““You can’t go there, you have to come round this side” and I put my hand up”.⁷

[23] Mr Beazley told the Court that Mr Oh picked up his board, smiled to him and Mr Beazley then said to him: “You have to come around this side, you’re not allowed to go behind me.” The next thing Mr Beazley heard Mr Oh’s board hit the sand and he was off. By the time Mr Beazley saw him next, he was halfway down the dune.

[24] Mr Beazley stood up and saw that the other Sand Safaris bus was coming through. Mr Beazley tried to wave out, but the other bus driver was watching the other passengers who were standing all about near the stream. The bus driver was trying to avoid the passengers as he came along to where Mr Beazley’s bus was parked. Mr Beazley saw Mr Oh hit the side of the bus and “sort of” go underneath it.

[25] Mr Robson was driving the other bus. He did not attend the trial, but his witness statement was read to the Court. His evidence, therefore, was not challenged.

[26] In his evidence, Mr Robson said that he had been driving buses on the tour route for 28 years. On 4 February 2019, he was driving for Sand Safaris.

[27] Mr Robson started working at around 8 am. He started pickups in Kaitaia around 8.30 am and by 8.45 was at the Kauri Kingdom in Awanui. Similarly to Mr Beazley, he was driving up the road to Cape Reinga and then back via the beach due to the tides. He made stops in Houhora, Parengarenga and Cape Reinga before

⁷ Notes of Evidence at 9.

stopping for lunch at Tapurapura. After that he drove the tour bus to Te Paki Stream, arriving there between 1.15 or 1.20 pm.

[28] He saw that Mr Beazley was on the dunes with the passengers. He noted that Mr Beazley's bus was already parked facing 90 Mile Beach. When he first saw the bus, he was about 100 metres away and didn't see anyone coming down the dunes.

[29] Mr Robson said that after that he did not look up at the dunes as he was coming to park. There were people milling around, so his attention was on them. He said that he was only going two to four kilometres an hour as he was about to stop. The common speed in that area is about 10 kilometres an hour. Mr Robson tooted the horn so that the people standing on the track in front would get out of the way.

[30] Mr Robson did not see Mr Oh sliding down. It appears from his evidence that he did not even realise that he had run over Mr Oh. Several passengers on the bus also gave evidence which broadly corroborates what Mr Robson told the Court the only issue being his speed at the time.

How fast was Mr Robson travelling

[31] There was dispute over how fast Mr Robson was travelling when the bus ran over Mr Oh. At the end of the day this was something of a red herring as it does not seem to have been a factor which WorkSafe has relied upon to establish the elements of the offending.

[32] The primary evidence of speed was given in a statement from Mr Robson. He said that he thought at the time of the accident that he was crawling to a stop at the bottom of the dunes and was only travelling at two to four kilometres an hour. He notes that there were passengers also standing about where he was going to park so he was going very slow for them.

[33] In any event, he confirmed that the common speed of busses in that area was about 10 kilometres per hour. Consistent with this Mr Lane, a passenger on the bus, estimated that the bus had been travelling between 10 and 20 kilometres per hour. In

addition, Mr Oh's daughter in law, Ms Bai said in evidence that she thought the speed was quite fast, that description does not really take this issue any further.

[34] Sand Safaris relied on a GPS system called E Road Monitoring. This device was fitted to its buses. Mr Petricevich gave evidence in support of this. However, he was not an expert. Sand Safaris did not call an expert to analyse the E Road information. It appears from the cross-examination of Mr Petricevich that it is possible that the bus in the same minute was travelling either four kilometres per hour or 19 kilometres per hour. In any event, I find that without expert analysis, the E Road evidence is not reliable, and I do not place any weight upon it.

[35] That leaves me with the evidence of Mr Robson called by WorkSafe. I accept his evidence, that he was travelling at two to four kilometres per hour at the time of the accident.

Who operated the tour which Mr Oh was on?

[36] WorkSafe has brought these proceedings against Sand Safaris (2014) Limited. However, Sand Safaris now says that it was a related company, Dune Rider (2017) Limited which was the tour operator.

[37] WorkSafe began its investigation immediately following the accident. Sand Safaris instructed Mr Mark to represent them at an early stage. There was quite extensive correspondence between WorkSafe and Mr Mark on Sand Safaris' behalf. This included a detailed response from Mr Mark by letter dated 7 March 2019. This letter dealt with a number of issues.

[38] At paragraph [12] of the letter, Mr Mark confirms "Mr Oh was a Sand Safaris customer when the incident occurred." WorkSafe says that it relied on that statement when conducting its investigation. In particular, it advanced its investigation on the basis that Sand Safaris was the company operating both buses involved in the incident.

[39] The WorkSafe investigators carried out an extensive interview with Mr Petricevich – the owner and director of Sand Safaris. At the interview he agreed to speak on behalf of Sand Safaris. The investigators put all of their questions and

requests for information to him on the basis that Sand Safaris was operating both vehicles at the time of the incident. Mr Petricevich never volunteered that it was any other company which he also owned. He confirmed in cross-examination that he told the investigator for WorkSafe that he was the owner and director of Sand Safaris and authorised to speak on its behalf. Mr Petricevich was questioned extensively in that capacity. At no stage did he tell the investigators that Mr Oh was on a tour conducted by Dune Rider, another of Mr Petricevich's companies.

[40] Ultimately, WorkSafe laid the charge against Sand Safaris. In the course of the pre-trial procedures, the parties signed a case management conference memorandum dated 22 September 2020 on the standard form. In that case management memorandum, Sand Safaris advised that at trial, it would not dispute the fact that Mr Oh was one of its customers.⁸

[41] However, Mr Mark subsequently wrote to WorkSafe's counsel in a letter dated 26 October 2022, in which Sand Safaris, for the first time, disavowed that Mr Oh was ever its customer. Instead, Mr Mark asserted that Mr Oh was a customer of a company called Commuter Tours Limited (Commuter Tours). Mr Mark made it clear in the letter that Sand Safaris would dispute that Mr Oh was its customer.

[42] WorkSafe submits that as a result of the expiry of the limitation period for laying charges, it could not effectively investigate Commuter Tours involvement any further. Effectively WorkSafe had lost the opportunity to pursue Commuter Tours.

[43] Eventually at trial, Mr Petricevich gave evidence that it was Dune Rider which the Oh family booked the tour with.

[44] WorkSafe points to the following available evidence to support Sand Safaris' first position:

- (a) The bus driven by Mr Beazley that Mr Oh was on was owned by Sand Safaris;

⁸ Case management conference memorandum dated 22 September 2020 at 4.

- (b) The bus was sign written with both names Sand Safaris and Dune Rider Unique Tours;
- (c) Sand Safaris was the holder of the transport service license that was required to conduct the tour.
- (d) Dune Rider did not hold such a license. WorkSafe says that Sand Safaris' assertion now that Dune Rider could conduct its tour under the transport services license is wrong as such as it would be illegal under s 30J of the Land Transport Act 1998.
- (e) Furthermore, even if Mr Beazley was employed by Dune Rider, WorkSafe says that he could only drive under the transport license held by Sand Safaris.
- (f) Other evidence referred to by WorkSafe includes a passenger list on Sand Safaris' letterhead which referred to the Oh family.
- (g) Finally Sand Safaris produced, with leave, a Training in Supply report prepared for Sand Safaris in 2016. This audit report sets out that Mr Beazley drove for both Sand Safaris and Dune Rider, and that the two companies treated their operations, including their health and safety systems as broadly interchangeable.

[45] Mr Petricevich set out the arrangements between the various companies he operated focussing in particular on Sand Safaris and Dune Rider. It appears that he had a formal arrangement where although the bus was owned and licensed by Sand Safaris, he leased it to Dune Rider. There was no corroborating documentary evidence of this.

[46] Mr Petricevich's evidence that the correct company was Dune Rider was of course completely inconsistent with the separate previous positions put forward by Mr Mark on his behalf.

[47] Mr Petricevich was cross-examined at some length. Surprisingly, he denied that he had told his lawyer Mr Mark that Mr Oh was a Sand Safaris customer, despite this appearing in Mr Mark's initial letter to WorkSafe. When challenged on whether Mr Mark would have shown him the letter before he sent it, Mr Petricevich couldn't remember. He effectively disavowed Mr Mark's letter saying that he (Mr Petricevich) did not write it.

[48] Similarly, in respect of the case management conference minute memorandum Mr Petricevich under cross-examination told the Court that he couldn't remember if he had discussed the memorandum with Mr Mark before it was filed. Furthermore, he denied that he had ever told Mr Mark that Sand Safaris was the operator, or that Mr Oh was a Sand Safaris customer. He said that he would have told Mr Mark that Mr Oh was a Dune Rider customer.

[49] However, when presented with the 26 October 2022 letter in relation to Commuter Tours he once again denied that he told Mr Mark that that was the correct company. He denied that he had ever seen the letter and said that Mr Mark was wrong.

[50] Mr Petricevich was referred to the transport service license that Sand Safaris held. He accepted that such a license was not transferrable, and that each operator needed to have its own transport service license. However, he stated that it was his understanding that the transport service license related to the vehicle and therefore Dune Rider could operate through a lease of the Sand Safaris bus.

[51] I accept the Sand Safaris' argument that it was a separate entity from Dune Rider. However, Sand Safaris itself was prepared to accept that it was the operator of the tour that Mr Oh was on. This was an admission against its own interest given when represented by legal counsel. The timing of Sand Safaris' retraction of this admission is troubling, as it prevented WorkSafe from further investigating any other potential Petricevich entities.

[52] I also consider it significant that the first alternative to Sand Safaris provided by Mr Petricevich provided through Mr Mark was Commuter Services rather than Dune Rider. His response to cross-examination that he simply could not remember

and did not have any role in instructing Mr Mark was simply not credible. I refer to the facts as set out above relied upon by WorkSafe. On that basis, I am sure that Sand Safaris was the tour operator responsible for the services to Mr Oh and his family, and I find accordingly.

[53] In any event, Sand Safaris can still be in breach of its duty under the Act, even if it was not operating the tour that Mr Oh was on.

Legal Principles: The Health and Safety at Work Act

[54] The Act sets out the duties of a PCBU in sub-part two. Section 36 sets out those duties as follows:

36 Primary duty of care

- (1) A PCBU must ensure, so far as is reasonably practicable, the health and safety of—
 - (a) workers who work for the PCBU, while the workers are at work in the business or undertaking; and
 - (b) workers whose activities in carrying out work are influenced or directed by the PCBU, while the workers are carrying out the work.
- (2) A PCBU must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.
- (3) Without limiting subsection (1) or (2), a PCBU must ensure, so far as is reasonably practicable,—
 - (a) the provision and maintenance of a work environment that is without risks to health and safety; and
 - (b) the provision and maintenance of safe plant and structures; and
 - (c) the provision and maintenance of safe systems of work; and
 - (d) the safe use, handling, and storage of plant, substances, and structures; and
 - (e) the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities; and
 - (f) the provision of any information, training, instruction, or supervision that is necessary to protect all persons from risks

to their health and safety arising from work carried out as part of the conduct of the business or undertaking; and

- (g) that the health of workers and the conditions at the workplace are monitored for the purpose of preventing injury or illness of workers arising from the conduct of the business or undertaking.
- (4) Subsection (5) applies if—
- (a) a worker occupies accommodation that is owned by, or under the management or control of, a PCBU; and
 - (b) the occupancy is necessary for the purposes of the worker's employment or engagement by the PCBU because other accommodation is not reasonably available.
- (5) The PCBU must, so far as is reasonably practicable, maintain the accommodation so that the worker is not exposed to risks to his or her health and safety arising from the accommodation.
- (6) A PCBU who is a self-employed person must ensure, so far as is reasonably practicable, his or her own health and safety while at work.

[55] This duty, although expressed in broad terms, is of fundamental application and importance. It has been described as the apex of the code.⁹

[56] It is not possible for a PCBU to contract out of its duty under the Act or to transfer this duty to another party.¹⁰

[57] Under s 33 of the Act, more than one person may have the same duties. This means that where one PCBU has a duty in respect of work it carries out in a workplace, this does not prevent another PCBU from holding a corresponding duty.

[58] The offence provisions are set out in s 48 of the Act. WorkSafe alleges that Sand Safaris has breached its duty under s 36 and says that there were reasonably practicable steps available to Sand Safaris which it failed to take. As a result, there was an unacceptable risk to the health and safety of its customers. Furthermore, that the breach caused or substantially contributed to the death of Mr Oh.

⁹ See *Lynn Fox Logistics (NZ) Limited v Worksafe New Zealand* [2018] NZHC 2909 at [52] per Davison J.

¹⁰ See *Health and Safety at Work Act 2015*, s 31.

[59] Whether or not a step which could be taken by a PCBU is reasonably practicable may include an assessment of the likely risk on one hand and the cost of averting that risk on the other. To some extent this is a balancing act. However, where the risk is reasonably low but the likely outcome catastrophic the level of effort required to avoid the risk may be proportionately increased.¹¹ Under s 22(c), the knowledge of the PCBU as to the hazard or risk or ways of eliminating it is relevant. The test is what the person (PCBU) actually knows or ought reasonably to know. In this regard, an assessment of the available knowledge is objective – not the defendant’s subjective knowledge.¹²

Issues

[60] The issue in this prosecution relate to the third element: whether Sand Safaris complied with its duty of care. The following issues arise:

- (a) Was there a hazard which arose in the course of Sand Safaris’ tour business which presented a risk to the health and safety of persons including Mr Oh?
- (b) Were there reasonably practicable steps available that could either eliminate or minimise the risk?
- (c) Did Sand Safaris fail to take such steps?

[61] WorkSafe said in opening that its case was straightforward as follows:

- (a) Sand Safaris operated tours to Te Paki Stream.
- (b) The location used by Sand Safaris and other operators, as Sand Safaris was aware, created the real risk that sand boarders would cross areas used by vehicles, including other vehicles operated by Sand Safaris.

¹¹ See *WorkSafe New Zealand v Department of Corrections* [2017] NZDC 819; and *Edwards v National Coal Board* [1949] 1 KB 704 at [712].

¹² *Department of Labour v Solid Timber Building Systems New Zealand Limited* HC Rotorua AP 464a/44/2003 7 November 2003 at [35].

- (c) This created an obvious risk of serious injury or death, if a sand boarder was struck by a vehicle.
- (d) The obviousness of the risk was further illustrated by an incident approximately three years earlier when a young boy had been struck by a vehicle in these circumstances. Sand Safaris was aware of this incident prior to 4 February 2019.
- (e) Sand Safaris had not developed an effective system to control the hazards and risk arising from sand boarding at Te Paki Stream.
- (f) Sand Safaris did not implement an effective traffic management system at the Te Paki Stream. Knowing that multiple tours could be operating in the area at any one time, Sand Safaris should have engaged with other stakeholders to ensure that neither its sand boarding activities nor its vehicle movements in the area created a risk to sand boarders' health and safety.
- (g) Sand Safaris' systems did not include any traffic management in the area including any signage or barriers to physically separate sand boarders from traffic. Nor did Sand Safaris ensure that traffic was managed by someone at the base of the dune.
- (h) Sand Safaris' reliance on the driver at the top of the dune was inadequate and inappropriate given the degree of risk and the likelihood of serious harm/death arising from the hazards.

[62] Sand Safaris disputes this. It says that the sand boarding activity had been carried out by Sand Safaris and its related family companies without serious incident for 30 years. As a result, the risk of serious injury or death was extremely unlikely. The accident only occurred because there was a series of separate and unlikely coincidences:

- (a) Mr Oh did not follow the driver's instructions despite being told once to stop and wait his turn;
- (b) He was unable to control his speed down the sand dune. Other participants had no difficulty controlling their speed;
- (c) There would be a bus driving slowly into the parking area at exactly that very moment.
- (d) The procedure adopted by Sand Safaris was meant to avoid this very occurrence.

Hazard: The Likelihood and risk of one of Sand Safaris' customers being run over when they were sand boarding

[63] As a tour operator offering sand boarding activities, Sand Safaris' operations included a hazard related to the risk inherent in the sand boarding activities and in operating heavy passenger vehicles (buses) in the Te Paki Stream area.

[64] Hazard is defined under s 16 of the Act as follows:

Hazard includes a person's behaviour where that behaviour has the potential to cause death, injury or illness to a person (whether or not that behaviour results from physical or mental fatigue, drugs, alcohol, traumatic shock or another temporary condition that affects the persons behaviour).

[65] The effective assessment and identification of the risks establishing the hazard is necessary to determine the scope of Sand Safaris' duty, and whether it complied with its duty under s 36 of the Act.

[66] Sand Safaris says, in its closing submissions, that the Petricevich family (owner of Sand Safaris) had been involved in sand boarding at the Te Paki Stream for 30 years without incident. Sand Safaris noted that there had been one incident in 2016 involving another company. However, it believed there were health and safety policies and procedures in place to minimise the risk. It believed that WorkSafe had approved the steps taken in 2016 to minimise the risk following that accident.

[67] The real issue though is the nature and extent of the risk which establishes the hazard. The incident in December 2016 cannot be minimised. In that incident, a young boy was sand boarding in similar circumstances while riding a boogie board down the sand dune when he collided with a ute and was seriously injured.

[68] From that point onward, the hazard of sand boarders coming into collision with vehicles whether they be tour vehicles or members of the public must have been obvious. Mr Petricevich was made aware of what had happened almost immediately after the 2016 accident. He was contacted by a Mr Charles Parker who was the CEO of Fullers, another bus company operating similar tours with sand boarding. It was one of Fullers' passengers who had had the accident.

[69] Mr Petricevich said in evidence that his understanding of the 2016 accident was that a sand boarder collided with a fisheries officer's vehicle coming through the stream. Mr Parker was interested to discuss future management and training with Mr Petricevich.

[70] Sand Safaris was also highly experienced in operating in the area. It must have been aware that the Te Paki Stream was used by a variety of vehicles including commercial tour buses and public vehicles.

[71] From time to time, sand boarders continued beyond the base of the dune running into the stream itself. This had the potential to place passengers in the path of traffic raising the risk of a collision and serious injury or death. This was clear from an internal report of Sand Safaris.¹³ That document recognised the fact that the stream is a road and therefore the necessity to watch for traffic. In particular, the document stated:

Driving anywhere near sand boarders we must drive with extreme caution. Where possible stay out of the path of sand boarders and ensure that you give way to them as they may not have sorted out their brakes.

[72] This was clear acknowledgement by Sand Safaris that there was a potential risk of sand boarder and vehicle coming into collision.

¹³ Exhibit 2 tab [13] at page 4 – para 8.

[73] This risk was exacerbated, because in most cases sand boarders would approach the roadway from side on down the dune, as in this particular case involving Mr Oh. That meant that the drivers, while looking forward, would not be able to see the sand boarder approaching on the side. Importantly, the outcome of any likely collision between an unprotected sand boarder and a vehicle was serious injury or death. Common sense alone dictated that this was a risk under the prevailing circumstances which were well known by Sand Safaris.

[74] I am sure that the sand boarding activities as undertaken by Sand Safaris presented a significant risk of injury or death to sand board riders who collided with buses and other vehicles negotiating the Te Paki Stream, so that Sand Safaris had a duty to manage and mitigate this risk.

Were there reasonably practicable steps available that could have either eliminated or minimised the risks of collision.

[75] Having decided that Sand Safaris was aware of the hazard and risks presented by their tour/sand boarding operation, there was a duty on Sand Safaris to take reasonable steps to ensure that the sand boarding activities did not expose passengers to a serious risk of injury or death, by collision with vehicles on the Te Paki Stream. In its charge sheet, WorkSafe provided particulars of the reasonably practicable steps that Sand Safaris could have taken to control the collision hazard:

- (a) Developing and implementing an effective system to identify and control the hazards and risks arising from sand boarding at Te Paki Stream;
- (b) Identifying and utilising a safe area;
- (c) Sand boarding where there was no danger to sand boarders from motor vehicles; and
- (d) Implementing in conjunction with other operators and stakeholders at Te Paki Stream, an effective traffic management system, including signage.

[76] WorkSafe made extensive submissions on how the question of reasonable practicability is to be assessed. Section 22 provides the following definition of reasonably practicable:

22 Meaning of reasonably practicable

In this Act, unless the context otherwise requires, **reasonably practicable**, in relation to a duty of a PCBU set out in subpart 2 of Part 2, means that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters, including—

- (a) the likelihood of the hazard or the risk concerned occurring; and
- (b) the degree of harm that might result from the hazard or risk; and
- (c) what the person concerned knows, or ought reasonably to know, about—
 - (i) the hazard or risk; and
 - (ii) ways of eliminating or minimising the risk; and
- (d) the availability and suitability of ways to eliminate or minimise the risk; and
- (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

[77] What is reasonably practicable is not to be assessed with the benefit of hindsight.¹⁴ Furthermore, a PCBU in Sand Safaris' position must have what was reasonably practicable assessed at the relevant time. They cannot be held to a standard requiring them to take steps which could not have reasonably been achieved or contemplated at that relevant time. This is an objective test – requiring an analysis of what the PCBU (Sand Safaris) ought reasonably to have known at the time. To some extent, subjective knowledge will still be relevant. Therefore, any evidence that Sand Safaris had identified a relevant hazard and taken steps by which the hazard could be mitigated, will be included in the assessment of what it was reasonable for Sand Safaris to have done. In other words, the standard must be applied to a reasonable PCBU having the same or similar knowledge as Sand Safaris.

¹⁴ *Waimea Sawmillers Limited v WorkSafe New Zealand* [2016] NZHC 915 at [36].

[78] Section 30 of the Act sets out the requirements on PCBUs to manage risks as follows:

30 Management of risks

- (1) A duty imposed on a person by or under this Act requires the person—
 - (a) to eliminate risks to health and safety, so far as is reasonably practicable; and
 - (b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.
- (2) A person must comply with subsection (1) to the extent to which the person has, or would reasonably be expected to have, the ability to influence and control the matter to which the risks relate.

[79] The primary requirement of the PCBU under s 30 is the elimination of a particular risk. However, if that is not reasonably practicable, the PCBU may still discharge its duty by minimising the risk to the extent reasonably practicable. Whether the ability to eliminate or reduce the risk is possible may also depend on the extent to which the PCBU would reasonably expect to have the ability to influence and control matters. Where there is significant control in the PCBU, they must take corresponding steps available to them to eliminate or minimise the risk.

[80] Under s 33 of the Act, more than one person may have the same duty imposed by the Act at the same time. Under s 33(3)(b), the duty on the PCBU is to act according to their ability to influence or control the matter. Importantly with this case, WorkSafe submits that the PCBU need not have sole or total control (see s 33(3)(b)) as different degrees of control and influences are contemplated by the section.

[81] WorkSafe submits that an analysis of whether the steps relied upon by WorkSafe were reasonably practicable must be seen in the following context:

- (a) The likelihood of the hazard occurring was unpredictable. It points to the incident in 2016 and says that overall the likelihood of the hazard occurring could be described as a real possibility.

- (b) The degree of harm likely to result is at the highest level – as evidenced by Mr Oh’s death. If a person lying prone on the board was struck or run over by a vehicle they are likely to be seriously injured or killed.
- (c) As set out above, Sand Safaris was well aware of the risks causing the hazard.
- (d) Sand Safaris was aware of the means of minimising the risk – the possibility of stationing a driver at the base of the dune with another at the top to manage the run-out area and traffic around it.

[82] It appears that Sand Safaris’ main submission in response to this is that there was a 30-year history of the activity with only one significant incident – not involving them. Sand Safaris submitted that there was highly unlikely that a collision would result in a bus running someone over. In particular, Sand Safaris says that the accident to Mr Oh occurred as a number of coincidences including the timing of the second bus’s arrival, and Mr Oh not directly following the instructions of Sand Safaris’ driver.

Developing and implementing an effective system to identify and control the hazards and risk arising from sand boarding at Te Paki Stream

[83] Sand Safaris continued to rely on having a single driver at the top of the dune to operate the sand boarding activities and to manage the risk of traffic in the stream area where the board riders might run out. In his evidence Mr Petricevich acknowledged that this was the primary control that the company used to control the hazard.¹⁵

[84] However, this response does not appear to have represented an effective system to control the hazards and risks. Although Sand Safaris had earlier identified the appropriate practice to address the risk was to have one driver at the top and another at the bottom managing traffic, it did not incorporate this practice into its procedures, or record them within its health and safety policy.

¹⁵ Notes of Evidence at 134, lines 6-16 (Petricevich xxe).

[85] WorkSafe points to the 2016 Training in Supply (TIS) Audit Report for Sand Safaris which pointed out that Sand Safaris had a lack of policies and procedures for tracking identified hazards/risks and accidents, analysing trends and recording all appropriate actions that are taken.¹⁶ This report was not produced until after the trial when Sand Safaris applied to adduce it, which was not opposed by Worksafe.

[86] WorkSafe says that this report is based on the same audit as an earlier report. WorkSafe contends that Sand Safaris did not carry out a workplace safety audit following the notification of the 2016 incident. No further audits were carried out until after Mr Oh's death. WorkSafe highlights that the audit concluded that Sand Safaris had "several medium risk safety issues" including an absence of policies and procedures for tracking identified hazards/risks and accidents analysing trends and recording appropriate actions that are taken.

[87] However, here we are dealing with an identifiable hazard which required a system to manage it. That system had been identified by Mr Petricevich as having a driver at the top of the dune and another at the bottom managing traffic. That policy though was never instituted or adhered to.

Use a different location for sand boarding away from the Te Paki Stream.

[88] WorkSafe contends that there were multiple areas within the Te Paki reserve where sand boarding could be carried out so that sand boarders do not have to enter the Te Paki Stream and cross an area where the general public is permitted to drive as if it were a road. Mr Petricevich was cross-examined on this. He denied that other locations would be appropriate. He gave the following reasons for not shifting the sand boarding:

- (a) The presence of waahi tapu within areas of the dunes;
- (b) Aggressive and abusive behaviour of other DOC concessionaires running competing businesses; and

¹⁶ Exhibit A to the affidavit of Garth Bruce Petricevich sworn on 20 December 2022 at 4 and 7.

- (c) Operational reasons including the need to keep the tours to a particular timetable to negotiate the high tide at 90 Mile Beach.

[89] WorkSafe contends that none of these reasons could justify a decision not to shift the sand boarding away from the threat posed by the Te Paki Stream Road. WorkSafe submits that while there were some waahi tapu areas, would not have prevented the other areas from being used. Furthermore, any interpersonal issues with other PCBUs could have been worked through, with the help of the concession granter which was the Department of Conservation.

[90] Finally, WorkSafe contends that the timing of the tour could not justify Sand Safaris exposing its passengers to a risk which might otherwise be eliminated or mitigated.

[91] I accept WorkSafe's submissions on these issues. To a large extent, the area in which the sand boarding would take place was in the control of Sand Safaris. It appears from the evidence of the drivers, Mr Beazley and Mr Robson, that there was significant time pressure on them by the need to work within the limitation posed by the high tide on 90 Mile Beach.

[92] There is a strong inference that they selected the sand dune closest to where the bus was parked in order to quickly facilitate the dune riding activities. Sand Safaris was prepared to do this for pragmatic reasons even if it meant that the sand boarders would run out across the road. Using a different location would have been a total answer to the risk and surely would not have been economically unviable. By comparison to the risk of serious injury or death this would have been relatively easy to deal with.

Implementing, in conjunction with other operators and stakeholders at the Te Paki Stream, an effective traffic management system including signage

[93] In relation to this particular, WorkSafe contends that following the 2016 incident, Sand Safaris identified that there needed to be improved management of the traffic in the stream area to meet the hazard, and embarked on some discussions with Fullers. In those discussions, Fullers and Sand Safaris identified that stationing one

driver at the base of the dunes and another to attend passengers on the top was an appropriate control to manage the hazard.¹⁷ WorkSafe says that cordons and signage to warn drivers that the activity was taking place could also have been used.

[94] Mr Petricevich gave conflicting evidence. He confirmed that it would be possible for Sand Safaris' buses to travel in tandem to make sure there were two drivers on hand when sand boarding was to take place. However, on re-examination he suggested that this was operationally unachievable. Mr Petricevich also argued that the timing of having two buses at Te Paki Stream may be difficult. WorkSafe contends though that as they were dependent on the tide, timing for the tide in Te Paki Stream could have been coordinated to achieve that outcome.

[95] Otherwise, a dedicated worker could have been sent to the area to conduct the traffic management role.

[96] Sand Safaris may have achieved some of these steps by consulting coordinating and cooperating with other PCBUs operating at the stream. WorkSafe says the fact that these measures were reasonably practicable is amply demonstrated by the fact that they were implemented within a week after the accident. Following the accident, there is now a cost sharing arrangement in place, and Ngati Kuri ambassadors provide traffic management.

[97] WorkSafe says that there was nothing to suggest that the cost of any of these steps would have been prohibitive or grossly disproportionate.

[98] Taking these points made by WorkSafe into consideration, I am satisfied that these steps were reasonably practicable. In other words, Sand Safaris could have significantly reduced the risk by having a person stationed to manage traffic and the use of cordons and signs. That is now fully implemented. Accordingly, I am sure that an effective traffic management system could have been implemented by Sand Safaris. It could have coordinated this with other PCBU's. Sand Safaris failed to take these practicable steps.

¹⁷ Notes of Evidence 130, line 24 to 131, line 4 Petricevich.

Did Sand Safaris' failure create a risk of death or serious injury

[99] This is the third element of the breach allegation. I have carefully considered the evidence presented by WorkSafe. That included the evidence of both bus drivers.

[100] I am sure from the evidence of Mr Robson and Mr Beazley summarised above, that appropriate traffic management at the Te Paki Stream, or the relocation of the sand boarding activities would have all but eliminated the risk to passengers carrying on sand boarding. In particular it is that risk which caused Mr Oh to be killed.

[101] Accordingly, I am sure that Sand Safaris' failure created a risk of death or serious injury. This was a substantial and operative cause of Mr Oh's death.¹⁸ I am not satisfied by the evidence of Mr Petricevich that the company took sufficient steps to mitigate the risk.

The conduct of Mr Oh

[102] To some extent Sand Safaris has sought to lay some of the blame for what happened on Mr Oh. That is, they say, because Mr Oh may have failed to follow Mr Beazley's instructions on top of the dune. However, this conclusion is not clearly supported by Mr Beazley's evidence. The starting point is the fact that Mr Oh did not speak English. The evidence of Mr Beazley was as follows:¹⁹

What actually unfolded was I was showing a young girl setting her up on her board. I was kneeling down. I placed her board, got her to lay down, and I do recall two other passengers standing virtually behind her and another two a little bit further back, and just as I was explaining to her what to do and making sure she was set up, I heard the board drop down behind me, so I turned around the guy was just laying on his board. I stopped him put my hand up and I said "you can't go there you have to come around this side" and I put my hand up. He picked his board up smiled at me, and I said to him "you have to come down this side, you're not allowed behind me;" and he smiled again and I turned back to tend to the girl, and just as I turned back to tend to her to let her to her go, I heard the board hit the sand again, but as I turned around he was gone. By the time I turned back to the left he was half way down the dune.

¹⁸ See *WorkSafe v Centreport Limited* [2019] NZDC 3155.

¹⁹ Notes of Evidence at 9, L.19-31.

[103] There was nothing in that evidence that suggests that Mr Beazley had unequivocally told Mr Oh that he could not go. Furthermore, it appears that Mr Beazley was just about to let the “girl” that he was instructing go. Clearly, there is a reasonable inference from this evidence that he was not alerted to the fact that Mr Robson’s bus was entering the area and must undoubtedly pose a risk to sand boarders operating with Mr Beazley. I am satisfied that Mr Oh was not to blame at all for what happened to him.

[104] Furthermore, where a PCBU has failed to otherwise put in place proper work and safety safeguards, even where there is non-compliance by a worker or other person, that will not excuse the PCBUs non-compliance.²⁰

Conclusion

[105] Mr Petricevich was the owner and director of Sand Safaris. On his evidence Mr Petricevich and his family, through their various companies, had been operating tours driving through the Te Paki Stream and offering sand board riding for around 30 years without a serious accident. However, by 2019 when Mr Oh and his family were on their tour, the sand board riding activity presented a readily identifiable hazard. There had already been an incident in 2016 when a teenage boy boarding with another company, Fullers, had been seriously injured after being run over by a utility vehicle. Where the dune chosen for the activity enabled the board rider to run out across the Te Paki Stream road, there was a serious risk that the board rider would be injured or killed by a bus or other vehicle negotiating the Te Paki Stream.

[106] Following this Mr Petricevich acknowledged that there needed to be some management over traffic. The preferred approach was to have a driver at the top of the dunes managing the board riders and another driver or person at the bottom managing traffic. However, this rarely if ever happened. It certainly did not happen on the day that Mr Oh was killed.

[107] At the end of the day there was a clearly identifiable hazard which Sand Safaris had a duty to eliminate or significantly minimise using reasonably practicable steps.

²⁰ *Oceana Gold Limited v WorkSafe New Zealand* [2019] NZHC 365 per Venning J.

Those steps included using another dune not adjacent to the roadway, and/or a proper traffic management system using another driver or employee. Failure to take these steps significantly contributed to the cause of Mr Oh's death. On that basis I find that all elements of the charge are proven beyond reasonable doubt. Accordingly Sand Safaris guilty of the charge, and it will be convicted accordingly.

Judge P Rzepecky

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 19/05/2023