SUPPRESSION ORDERS EXIST IN RELATION TO ASPECTS OF THIS JUDGMENT PURSUANT TO S 205 CRIMINAL PROCEDURE ACT 2011: SEE PARAGRAPH [47].
http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360354.html

IN THE DISTRICT COURT
AT NELSON

I TE KŌTI-Ā-ROHE
KI WHAKATŪ

CRI-2018-042-002104
[2019] NZDC 25406

WORKSAFE NEW ZEALAND LIMITED
Prosecutor

v

TREE & FOREST LIMITED
Defendant

Hearing:	4 September 2019
Appearances:	S E Leonard and B H McCarthy for the Prosecutor J B Lill for the Defendant
Judgment:	4 September 2019

NOTES OF JUDGE A A ZOHRAB ON SENTENCING

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[1] The defendant, Tree & Forest Limited, has pleaded guilty to an offence under the Health and Safety at Work Act 2015, ss 36(1)(a), 48(1) and 2(c). The offence that they have pleaded guilty to is that, being a PCBU, having a duty to ensure, so far as was reasonably practicable, the health and safety of workers who work for the PCBU including Hamish McMiken while at work in the business or undertaking working in the Motueka forest, did fail to comply with that duty, and that failure exposed workers to a risk of death or serious injury arising from tree felling.

[2] The particulars read as follows. Tree & Forest failed to take the following reasonably practicable actions in compliance with its duty to:

(a) Provide effective supervision for all workers by a competent person.

(b) Provide additional training, supervision and/or disciplinary action to workers who are known to be working in an unsafe manner.

(c) Have effective risk management procedures in place.

(d) Have appropriate equipment or systems to measure accurately safe working distances.

[3] This is an offence which has a maximum penalty of a fine not exceeding $1.5 million.

[4] For the purposes of sentencing, I have been provided with detailed written submissions from the informant, including an affidavit from Mr Waldron. I also have detailed written submissions filed on behalf of the defendant company. As well as those submissions, I also have an affidavit from Mr Benjamin Douglas and also an affidavit from Mr Patrick Hill, director and owner of the defendant company.

[5] The informant submits that a fine with a start point of $600,000 would be appropriate, that there should be appropriate discounts for previous good record, remorse, steps taken to address the issues and co-operation. There should also be a discount in terms of *Hessell v R* as well, the full 25 percent.[1] So that would still leave a significant fine in the region of $360,000.

[6] It has also suggested that notwithstanding that there is no victim impact statement, that a modest amount of emotional harm reparation was appropriate. The informant acknowledges the affidavit evidence provided by the defendant company as far as its financial circumstances are concerned, and it was suggested that the fine could be moderated, taking into account the financial circumstances, and that a fine in

[1] *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

the region of $80,000 to $90,000 might be appropriate, one which could be paid over a period of five years or the like, that being the normal benchmark by which payment of fines and reparation are usually considered by the Courts.

[7] On behalf of the defendant company, it was suggested that rather than a start point of a fine of around $600,000, that a start point of $300,000 would be appropriate, that there should be discounts for agreed matters such as taking responsibility, remorse, and all of those things, as well as the *Hessell* discount, leaving a fine in the vicinity of $100,000. However, given the contents of Mr Douglas' affidavit, it was submitted that no fine should be imposed, albeit that the reasoning should be given for the fine that would have been imposed otherwise, and that the company should simply be convicted and discharged. If a fine were to be ordered, then that would be the end of the company effectively, because the evidence from Mr Douglas is that it does not have the ability to be able to pay a fine either immediately, or over a period of time.

[8] As far as whether or not it was appropriate to order a payment of emotional harm reparation, Mr Lill, on behalf of the defendant company, noted that there was no victim impact statement, so there was no information. There has been no restorative justice process, through no fault of the defendant company, so on that basis it was suggested that no reparation award should be made, albeit that Mr Lill, on behalf of the defendant company, responsibly acknowledged the obvious that it was open to the Court to draw an inference, given that Mr McMiken was struck on the head a glancing blow from this tree which was felled, he suffered facial bruising, he lost consciousness for some 15 to 20 minutes, required a CT scan, and he was diagnosed with concussion and instructed to rest for two days. So, against that background, he responsibly acknowledged that, on those facts, a Judge could draw the inference that there had been a degree of suffering, and strike a nominal figure of emotional harm reparation.

[9] In terms of the facts, there is an agreed summary of facts. The defendant is a limited liability company. The sole director is Mr Hill. The defendant company is in the business of silviculture work in the upper South Island. Mr McMiken was the employee of the defendant, and is the victim in this matter. He had been in employment for about two and a half months. The defendant was contracted by Tasman Forest Management Limited in March 2017 to conduct thinning to waste work

in the Motueka Valley, and six workers were allocated to the project including Mr McMiken. There had been some concerns raised with the defendant about the quality of the work done by the workers in relation to some tree stumps being cut badly.

[10] From Mr Hill's perspective, Mr McMiken showed some promise as a trainee. Mr Hayden Wi was the foreman of the group and was partially supervising workers at the time of the incident. Mr Wi had expressed some concerns about Mr McMiken's work, in particular his getting his saw stuck, and about the quality of his cuts.

[11] On the day of the incident one of the daily tailgate meetings had been held. It did not formally identify the hazard of being hit by a felled tree, nor the height of trees in the work area. However, workers were told, and had been told, to stay 35 metres away from trees being felled, and this was an estimate of two tree lengths based on the 17.2 metre length per tree, though the average tree height in the area had not been measured, and the tree that eventually struck Mr McMiken was 20 metres tall. Workers did not have range finders or markers to assist them in measuring the appropriate distances from where trees were felled, and I will touch on that later because the company has responsibly taken steps since this incident to address that issue, and Mr Lill has pointed out in his submissions what it seems the practice was in the industry with those sorts of measuring devices.

[12] At the time of the incident the defendant had a document titled, "Site specific hazard or risk register." It also had planting risk register documents, but none of those recorded falling trees as a hazard. They also had a document, "Generic forestry hazards and suggested controls." What happened on 14 November 2018 was that work began on trees near the public road without incident. Roading controls were put in place initially but were removed as the workers moved further into the forest, but some work was still within two tree lengths of the road.

[13] After they had moved away from the road, the workers continued working in two teams with Mr McMiken and others working in an uphill area, with others working at the bottom of the block, with the two teams working towards each other. What happened was that as Mr Taylor was felling, Mr McMiken appeared from downhill

where the other team was working and was struck on the head by a 20 metre tree. He was knocked to the ground and fell unconscious, and he was taken to Nelson Hospital where he was diagnosed with a concussion, and was discharged after examination.

[14] In terms of the approach to sentencing, that is well established. There is the guideline judgment of *Stumpmaster v WorkSafe New Zealand*.[2] The Court confirmed the four step process:

(a) Assessing the amount of reparation to be paid to the victim.

(b) Fixing the amount of the fine by reference first to the guideline bands, and then having regard to aggravating and mitigating factors.

(c) Determining whether further orders under ss 152 to 158 HSWA are required.

(d) Then, finally, the Court is required to make an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.

[15] So the first stage is to deal with reparation, and reparation may be imposed in relation to loss or damage to property, emotional harm, and relevant consequential loss or damage. As the High Court has observed previously in *Big Tuff Pallets Ltd v Department of Labour*, imposing reparation:[3]

> ... for emotional harm is an intuitive exercise; its quantification defies finite calculation. The judicial objective is to strike a figure which is just in all the circumstances, and which in this context compensates for actual harm arising from the offence in the form of anguish, distress, and mental suffering.

[16] As a general rule, the assessment of emotional harm is undertaken primarily with reference to victim impact statements, but we do not have any in this case. Mr McMiken declined to attend a restorative justice conference, and there has been no victim impact statement. Given that he was struck a glancing blow to his head, he

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[2] *Stumpmaster v WorkSafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881.
[3] *Big Tuff Pallets Ltd v Department of Labour* (2009) 7 NZELR 322 (HC).

suffered facial bruising, given that he lost consciousness for 15 to 20 minutes and a CT scan was conducted, and he was diagnosed with concussion, given those circumstances the prosecutor suggests that I award a nominal amount of reparation if I consider an award appropriate, and I was referred to a decision from another District Court Judge where an award was made in those circumstances, that is the *WorkSafe New Zealand v Gunac Hawke's Bay (1994) Ltd* case.[4] Mr Lill reminded me that I have no victim impact statement so I have no direct evidence as to any emotional harm suffered. Also, the other case was dealt with by way of agreement.

[17] So, in the circumstances, I still think it appropriate to award a nominal amount of emotional harm reparation. As a matter of logic, there would have been emotional harm suffered by Mr McMiken through having been struck a glancing blow to the right side of his head, suffering facial bruising and loss of consciousness for 15 to 20 minutes. He has then required hospital treatment with a CT scan, and he was diagnosed with concussion. But it will be very much a modest and nominal amount. In my view, $2000 is appropriate in the circumstances, given the nature of the blow that was struck to his head, the fact that he suffered facial bruising, the fact that he was rendered unconscious, and required a visit to the hospital and a CT scan, and a diagnosis of concussion, and rest from work for two days. That is very much a nominal sum but, in my view, it is appropriate in the circumstances.

[18] Then, in terms of the case law, the orthodox sentencing approach is set out in *R v Taueki*.[5] Firstly, I set a start point based on culpability, that is the defendant company's degree of fault or moral blameworthiness for the offending, and then I adjust that upwards or downwards for any aggravating or mitigating circumstances relating to the offence. We have got the four guideline bands for culpability. Both the informant and also the defendant accept that this falls within medium culpability of a start point of a fine of $250,000 to $600,000, however, the informant suggests that it is at the top end, $600,000 start point and, as I say, the defendant company in the range of $300,000.

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[4] *WorkSafe New Zealand v Gunac Hawke's Bay (1994) Ltd* DC Hastings CRN14020500867, 16 February 2015.

[5] *R v Taueki* [2005] 3 NZLR 372 (CA).

[19] As the Court noted, low culpability cases, this is in the decision at para [52] in *Stumpmaster*, low culpability 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.

[20] The Court noted, "We consider it likely that under the new bands a starting point of $500,000 to $600,000 will be common," so clearly this is not low culpability offending, but simply because the Courts have stated that under the new bands a start point of $500,000 to $600,000 will be common, it does not mean that we automatically start there. It requires an individual assessment in each case. It involves one of an evaluative nature.

[21] In terms of relevant considerations for assessing culpability, the Court referred to the well-known list of relevant factors from the guideline judgment under the earlier legislation, being that of *Department of Labour v Hanham & Philp Contractors Ltd*, and both lawyers have addressed those matters in their submissions, albeit that I am being asked to draw different conclusions.[6]

[22] As far as the informant's submissions on these matters are concerned, as far as identification of the operative acts or omissions at issue, and the practicable steps that it was reasonable for the company to have taken in terms of s 22, I have been reminded that the defendant company failed to take the following reasonably practicable actions:

(a) To provide effective supervision for all its workers.

(b) To provide additional training, supervision and disciplinary action to workers who are known to be working in an unsafe manner.

(c) Failed to have effective risk management procedures in place, and have appropriate equipment or systems to measure accurately safe working distances.

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

[23] Though, as I said earlier, Mr Lill has reminded me about practice in the industry, and Mr Hill in his affidavit addressed that issue as well in terms of not having seen such devices in other areas, as to the assessment of the nature and seriousness of the risk of harm occurring, as well as the realised risk, I have been reminded here that in this case the risk was significant. There were risks to workers other than Mr McMiken. There was also risk to the public where trees were being felled within two tree lengths of a public road with no roading controls in place, and that the potential for a more serious injury or fatality was real.

[24] Mr Lill acknowledges those submissions, acknowledges the charge that has been pleaded guilty, and acknowledges the practicable steps alleged there. He reminds me, though, of the nature of the felling that they were undertaking in this case, because this is a situation where they were not felling mature trees. This was a thinning to waste operation involving felling immature trees which are much smaller in size than mature trees. So whilst they acknowledge that more serious injury could have occurred, that the risk is, in his submission, not comparable to tree felling or breakout operations where there is a real and substantial risk of death.

[25] As to whether death, serious injury or serious illness occurred, or could reasonably have been expected to have occurred, once again this is probably a different aspect to the same point that I have just been dealing with. Whilst the injury was relatively modest in nature on this occasion, it could have been much greater, and from the informant's perspective could have resulted in a fatality. As I have noted just previously, Mr Lill asked me to reflect upon the fact that this was a thinning to waste operation, as opposed to felling of mature trees, and he urges me to weigh that into my overall assessment of the start point.

[26] In terms of the degree of departure from prevailing standards in the industry, it is submitted on behalf of the informant that the defendant's conduct departed from well-known industry standards and guidelines for forestry. I have been referred to the *Approved Code of Practice for Safety and Health in Forest Operations*, and the statements there. I have also been referred to *Treefelling Best Practice Guide*, and the guidelines also identify the seven key causes of harm in tree felling. I have also been reminded about s 36(3) Health and Safety at Work Act providing:

(36)(3) ... a PCBU must ensure, so far as is reasonably practicable,—

...

(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

[27] Mr Lill has developed his argument further, in that reminding me that thinning to waste operations involve felling immature trees which are much smaller in size than mature trees, and his submission here is that the nature of the felling that was being undertaken in this place, the guidelines are not as specific and clear as to the approach necessarily to be taken, and whilst he accepts the argument that, by analogy, you can use the *Approved Code of Practice for Safety and Health in Forest Operations* in the case of thinning to waste operations, he urges caution because, in his submission, there is still a degree of confusion in the industry.

[28] As to the obviousness of hazard, I have been reminded by the informant that the risk of serious injury when working in a high risk industry such as forestry is extremely obvious, with the felling of trees recognised as a high risk operation, and the hazards being immediately obvious. Once again, the defence argument is that I need to bear in mind that we are talking here about thinning to waste operations involving felling immature trees which are much smaller in size than mature trees.

[29] As to the availability, cost and effectiveness of the means necessary to avoid the hazard, the prosecution acknowledges some cost is associated to comply with training requirements to ensure competency. However, they submit that the costs would have been insignificant and certainly not disproportionate to the risk or the harm to workers. Mr Lill has advised me about the nature of the industry, the difficulty in getting trained people, and getting people who would be suitable as supervisors, and that is something that the defendant company has since engaged in subsequent to this incident at some cost to the company by ensuring that it has properly trained people and properly trained supervisors.

[30] So the informant then goes on to refer me to a number of cases which they suggest assist in my reaching a start point of $600,000. I have been referred to the

decisions of *Stumpmaster v WorkSafe New Zealand, WorkSafe New Zealand v Marris Couper Logging Ltd,* also *WorkSafe New Zealand v Cropp Logging Ltd.*[7]

[31] Mr Lill, on behalf of the defendant company, has urged caution about those comparable cases, submitting that they are not comparable. He has not been able to identify any previous health and safety decisions arising in a thinning to waste context. His submission is that the cases referred to by the prosecutor arise in different circumstances, and are largely irrelevant to the exercise that this Court should go through. For example, the cases involve tree felling or breaking out which involves larger trees which pose a greater risk, and there is much more prescriptive guidance material available.

[32] So whilst acknowledging the argument from the informant that you can use, by way of analogy, those cases in felling to waste cases, he submits that *Stumpmaster* can be distinguished, as can *Marris Couper* and also *Cropp Logging.* So his submission effectively is that Tree & Forest's culpability is in the medium band, primarily due to the fact that there was a risk of serious injury or even death, however, its placement within the band should reflect:

(a) The lack of guidance for silviculture operations.

(b) That there was a possibility, rather than a real risk of death.

(c) The harm suffered was minor.

(d) That the workers were trained, and deemed competent, and the company's failings are not demonstrative of a complete disregard for health and safety, and the means to remedy the issue were not readily available.

So then we have got this start point anywhere from $250,000 to $350,000.

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[7] *WorkSafe New Zealand v Marris Couper Logging Ltd* [2018] NZDC 16139; *WorkSafe New Zealand v Cropp Logging Ltd* [2018] NZDC 20232.

[33] It is always difficult trying to fix a start point and then look to other cases, because no two cases are the same.

[34] In my view, a start point of $450,000 is justifiable on the facts of this case. I see, given the nature of the felling operation being conducted on this occasion, albeit that by analogy some of the comparable cases referred to by the informant provide some guidance, I would have thought, though, that it is much higher than the start point advocated by defence counsel, because the general guidance for forestry can be used by way of analogy for silvicultural operations. A lot of it is basic common sense, and it can be extrapolated out.

[35] Even for trees in this situation, there was a real risk of death, given the size of the tree on this particular occasion. I accept that for felling to waste in another situation you can be dealing with very modestly sized trees, but given the size of the tree, and the other trees in this particular area that were being felled, there was a real risk of death still, albeit that it was not realised on this particular occasion, but when I weigh in the factors that I have to as far as the factors from the *Department of Labour v Hanham & Philp Contractors Ltd* case, and then look at the other cases that I have been referred to for guidance, I would have thought that a start point of a fine of $450,000 is justifiable, less than the $600,000 suggested by the informant, but still considerably more than there $250,000 to $350,000 start point suggested by the defendant.

[36] In terms of other factors to be taken into account at this stage there are no aggravating features that warrant an uplift. There has been co-operation with the investigation, and it is described as full co-operation. The defendant company has previous good character, not having previously appeared before the Courts on health and safety offending, and also there was a willingness to undertake the restorative justice process, so those factors need to be taken into account. There is clear evidence that the defendant has amended its tailgate meeting form to require more information, it has purchased personal locator beacons and a range finder. The defendant has hired a more experienced supervisor, reduced the number of trainees, staff have completed further qualifications. So there are a number of significant steps that have been taken.

[37] So I know we sometimes get into arguments about what the appropriate discount is at that stage, but I am content, given the positive steps that have been taken by the defendant company, more particularly as far as getting these locator beacons and the range finder, and the like, and the upskilling of the training, that a 20 percent discount could be justified, so that would then take me to a start point of $360,000 by way of a fine.

[38] They would be entitled to the full 25 percent discount in terms of credit for *Hessell*. That would then take me to an end point of $270,000 from the $360,000.

[39]

[40] He also submits that it is relevant that there is currently a shortage of workers in the industry. Permitting a small business that has taken this process seriously and made changes as a result being able to continue trading would be a fair and just outcome from this process as opposed to my imposing a fine which would end in the business being liquidated. He has referred me to two recent decisions of the District Court which have considered the financial positions of companies at sentencing. These are *WorkSafe New Zealand v D Heaps and 4 Hippos Farm Limited* where there was no financial imposed on the company due to its financial position,

and also *WorkSafe New Zealand v Supermac Group Resources Limited* where the full fine was imposed as it was unable to pay any lesser amount.[8]

[41] As I have previously touched upon, what was suggested by the informant is that I could get to the nominal fine, but I could still impose a fine which would bite, albeit at a much reduced basis, and they are suggesting somewhere in the range of $80,000 to $90,000. Mr Lill, however, urged that I not do that given the steps that have been taken, given the precarious nature of the business, and suggested that a fine would be not appropriate.

[42] When sentencing in a case such as this, s 151(2) of the Act sets out the specific sentencing criteria to apply. I have to have regard to the Sentencing Act 2002, in particular ss 7 to 10 of the Act, also the purpose of the Health and Safety at Work Act, and other factors that are set out, whether death, serious injury or serious illness occurred, or could reasonably have been expected to have occurred, the degree of departure from prevailing standards, and of course the offender's financial capacity or ability to pay a fine to the extent that it has the effect of increasing the amount of the fine.

[43] Section 7 Sentencing Act sets out the purposes of sentencing, and in cases under this Act the following purposes are important:

(a) Holding an offender accountable for the harm done by the offending.

(b) Promoting in the offender a sense of responsibility for that harm.

(c) Providing for the interests of the victim, including reparation.

(d) Denunciation of the conduct in which the offender was involved.

(e) Deterrence, both specific and general.

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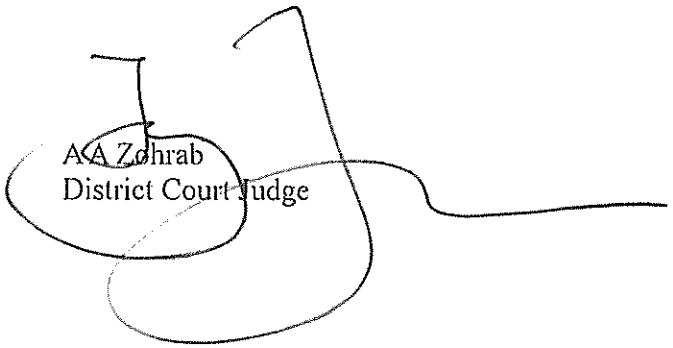
[8] *WorkSafe New Zealand v D Heaps and 4 Hippos Farm Limited* [2019] NZDC 15462; *WorkSafe New Zealand v Supermac Group Resources Limited* [2019] NZDC 15023.

[44] I have also got to have regard to the particular purposes of the Health and Safety at Work Act which are set out in s 3, which include protecting workers and other persons against harm to their health, safety and welfare by eliminating or minimising risks arising from work, or from prescribed high risk plant, promoting the provision of advice, information, education and training to work, health and safety, securing compliance with this Act through effective and appropriate compliance and enforcement measures, and ensuring appropriate scrutiny and review of actions taken by persons performing functions or exercising powers under this Act. As a "general rule", the cases talk about fines being required to bite because this offence carries with it a maximum penalty of a fine of $1.5 million, it has increased over recent years, and as has been observed in the *Stumpmaster* case, for cases other than low culpability they consider that it is likely that, under the new bands, a start point of $500,000 to $600,000 will be common. So even on the defendant's own submissions, advocating for a start point of $250,000 to $350,000, this still has to be seen as moderately serious offending.

[45] So taking into account the aims and objectives of sentencing in cases such as this case, which basically have to be to ensure that people are held to account, that there is deterrence both specific and general, and that the conduct is denounced, in my view there needs to be a fine imposed, in my view, the aims and objectives of sentencing in a case such as this could not be met simply by a conviction and discharge. Having said that, I have got the affidavit evidence from Mr Douglas, and I have got the affidavit evidence from Mr Waldron. In my view, a fine of $25,000 is appropriate. It is a fine which, in my view, could be appropriately met over a period of five years. It is much less than was advocated by the informant on a reduced basis but, as I say, in my view a simple conviction and discharge would not meet the aims and objectives of sentencing in this case.

[46] So the end result will be a fine of $25,000. There is the emotional harm reparation figure as well, to be paid within 21 days, and there are also the costs sought of $865.77.

[47] The financial information supplied can be suppressed.



A A Zohrab
District Court Judge