IN THE DISTRICT COURT
AT NORTH SHORE

I TE KŌTI-Ā-ROHE
KI ŌKAHUKURA

CRI-2018-044-001605
[2019] NZDC 9428

WORKSAFE NEW ZEALAND
Prosecutor

v

SENIOR CIVIL LIMITED (AKA) THIRTY ONE LIMITED
Defendant

Hearing: 20 May 2019

Appearances: C O'Brien for the Prosecutor
P White for the Defendant

Judgment: 20 May 2019

NOTES OF JUDGE P J SINCLAIR ON SENTENCING

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[1] On 5 May 2017, Phillip Gibson, a worker for Senior Civil Limited also known as Thirty One Limited, sustained serious injuries to both of his legs when he was cleaning a digger and was trapped between the digger blade and bucket. As a result, Thirty One Limited, which I will refer to from this point on as TOL, faces a charge under ss 48 and 36 Health and Safety at Work Act 2015 that it failed to ensure the health and safety of workers while the workers were carrying out civil construction work.

[2] In summary, TOL carried out civil residential construction work. Phillip Gibson was employed by TOL as a truck driver. He was truck driving and assisting a colleague, Troy Kinney, with earthworks on 5 May 2017. At about 2.00 pm, Mr Gibson and Mr Kinney were cleaning a five tonne Caterpillar digger owned by

TOL. Mr Kinney went to move the digger controls to lift the blade off the ground so they could better clean the blade. Mr Kinney stood on the digger tracks and reached into the cab. While attempting to move the blade control, he accidently bumped the bucket control lever, causing the bucket to move and trap Mr Gibson between the bucket and blade. In trying to free Mr Gibson, Mr Kinney bumped the controls a second time resulting in the bucket dragging Mr Gibson up into the air and dropping him to the ground. Mr Gibson suffered significant injuries to both of his legs.

[3] The Crown submit the following sentence would be appropriate in all the circumstances:

(1) A reparation order for emotional harm of $40,000 plus an order for consequential loss of $21,318.69;

(2) A starting point for a fine falling in the medium band of culpability in the vicinity of $700,000;

(3) A 15 percent discount for cooperation, remorse and the payment of reparation;

(4) A 25 percent discount for a guilty plea; and

(5) Costs of $1768.34.

[4] The defendant accepts an emotional harm reparation payment of $40,000 and costs of $1768.34 are appropriate. The defendant submits a consequential loss order of $9000 would be appropriate but submits it would be unnecessary for the Court to go through the sentencing process to determine the fine where it is clear that no fine could ever be paid given the company has been placed into liquidation. The defendant submits even on a theoretical basis the exercise of calculating a fine is futile. However, in the event a fine is assessed, the defendant submits a starting point in the range of $200,000 to $250,000 would be appropriate.

[5] In response to the Pike River Disaster, which resulted in 29 fatalities as well as a growing concern about the number of deaths and serious injuries in the New Zealand

workplace, a major reassessment of health and safety legislation was conducted. This resulted in the Health and Safety at Work Act, which I will refer to from now on as, "The Act," coming into force in April 2016. The Act substantially increased penalties for significant breaches of workplace health and safety obligations. It aimed to incentivise compliance with those obligations.

[6] The charge TOL is to be sentenced on carries a maximum penalty of $1.5 million. The equivalent charge under the previous legislation carried a maximum penalty of $250,000. The aim of the increase in fines is to increase deterrence and reduce New Zealand's poor workplace health and safety record.

[7] Sections 151 and 22 of the Act set out the criteria I must apply when determining sentences on this charge. I must have particular regard to:

(1) Sections 7 to 10 Sentencing Act 2002;

(2) The purpose of the Health and Safety at Work Act;

(3) The Risk of potential for illness, injury or death that could have occurred;

(4) Whether death, serious injury or serious illness occurred or could reasonably have been expected to have occurred;

(5) The safety record of a person;

(6) The degree of departure from prevailing standards in the sector of industry; and

(7) The financial capacity of the company and/or ability to pay the fine.

[8] In my view, accountability, deterrence and denunciation are paramount principles for this sentencing, the need to assess the gravity of TOL's culpability and be consistent with other like sentencing decisions is also important. As mentioned, regard must be made to the purpose of the Act which is provide for a balanced

framework to secure the health and safety of workers and other persons by protecting against harm and eliminating or minimising risk. Workers and other persons should be given the highest level of protection as is reasonably practical against harm to the health, safety and welfare from hazards and risks arising from their work.

[9] Under the former Act, the leading case of the approach to sentencing health and safety prosecutions was *Department of Labour v Hanham & Philp Contractors Limited*.[1] Recently, in *Stumpmaster v Worksafe New Zealand,* a full High Court bench delivered a guideline judgment on sentencing offending under the Act.[2] The High Court largely retained the former approach to sentencing articulated in *Hanham* but with necessary modifications to recognise changes in the new Act.

[10] The former three step approach has therefore been expanded to a four step approach as follows:

(a) Assess the amount of reparation;

(b) Fix the amount of fine;

(c) Consider orders under ss 152 and 158 of the Act; and

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

[11] Fixing the fine is done with reference to four guideline bands:

(a) Low culpability from 0 to $250,000;

(b) Medium culpability; $250,000 to $600,000;

(c) High culpability; $600,000 to $1,000,000; and

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1 *Department of Labour v Hanham & Philp Contractors Ltd & Ors* (2008) 9 NZELC 93,095, (2008) 6 NZELR 79.

2 *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020, [2018] 3 NZLR 881.

(d) Very high culpability; $1,000,000 to $1,500,000.

[12] So the first matter; reparation. In *Stumpmaster*, the Court observed that the increase in penalties under the Act regime should not lower the size of reparation orders. In *Big Tuff Pallets Limited v Department of Labour*, the Court commented that fixing an award for emotional harm is an intuitive exercise; its quantification defies finite calculation.[3]

[13] My task and objective is to strike a figure which is just in all the circumstances in which this particular context compensates for actual harm arising from the offence in the form of anguish, distress and mental suffering.

[14] Mr Gibson is a 66 year old father of three and grandfather of four. He lives on a property with his wife, daughter and grandchildren. As a result of the incident, Mr Gibson suffered distal fractures of the right tibia and fibula requiring a metal rod to be inserted from his knee to his ankle. He broke his ankle on his left leg requiring a metal plate to be inserted, and fractured his tibia, posterior cruciate ligament and an anterior cruciate. He spent around 16 weeks in hospital and due to his leg bone not healing as expected, he required further surgery 14 months after the incident.

[15] So recovery from his injuries has been prolonged. He has flashbacks affecting his sleep and he constantly recalls the incident. He cannot engage in some of his enjoyable personal activities such as playing with his grandchildren. The accident and resulting recovery has adversely impacted on his mood. He is unable to help around the house with usual tasks such as mowing the lawns and he is unable to drive. He is unable to visit his mother on Great Barrier Island to assist with maintenance around her house.

[16] Prior to the accident, he was an active man who engaged in physical exercise and pursues. He states that if he had to describe the state of his health at 100% before the injury, he would now describe it at five percent.

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[3] *Big Tuff Pallets Limited v Department of Labour* (2009) 7 NZELR 322.

[17] I have reviewed comparable cases such as *The House Movers (Rotorua) Limited v Ministry of Business, Innovation and Employment*, *Worksafe New Zealand v Hunter Laminates Nelson Limited*, *Worksafe New Zealand v Hughes Partners Limited* and *HarvestPro New Zealand Limited v R* where reparation orders of between $35,000 and $45,000 were imposed involving similar injury.[4]

[18] In all of the circumstances, I consider a reparation order of $40,000 is appropriate.

[19] Worksafe, on behalf of Mr Gibson, is seeking a consequential loss award of $21,318.69. TOL is not opposed to paying consequential loss but challenges the manner in which the consequential loss is calculated and proposes a pragmatic resolution to formalise this matter today. Mr White states, "TOL paid $9000 towards Mr Gibson to modify his home in response to his injuries and has also offered to pay $2400 for counselling."

[20] Mr White refers to the decision of *Oceana Gold (New Zealand) Limited v Worksafe New Zealand* where the issue of consequential loss was discussed.[5] Two approaches were discussed by the Court; firstly, a statutory shortfall approach and secondly, an open ended approach. The Court adopted the statutory shortfall approach. Mr White urges me to adopt that approach as well. He suggests a figure of $9000 would be appropriate to address the consequential loss that Mr Gibson will suffer in light of his age and his work abilities.

[21] I consider, given all of the circumstances and in light of the background that TOL has paid $9000 towards Mr Gibson's house modifications and have offered to pay counselling costs, an order of $9000 for consequential loss is appropriate.

[22] I turn to assess the quantum of fine. By a memorandum to the Court dated 19 November 2018, counsel for TOL advised that TOL (In Liquidation) has changed

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4 *The House Movers (Rotorua) Limited v Ministry of Business, Innovation and Employment* [2014] NZHC 1208; *Worksafe New Zealand v Hunter Laminates Nelson Limited* DC Nelson CRI-2014-042-000957, 1 October 2014; *Worksafe New Zealand v Hughes Partners Limited* [2015] NZDC 20545; *HarvestPro New Zealand Limited v R* [2015] NZHC 364, (2015) 12 NZELR 611.

5 *Oceana Gold (New Zealand) Limited v Worksafe New Zealand* [2019] NZHC 365.

its name and gone into liquidation. It is accepted that TOL has no ability to pay a fine. There are three approaches that I could take, given TOL's financial incapacity; first, make an assessment of what an appropriate fine would have been following the approach taken in *Stumpmaster* and impose no fine, secondly, make an assessment of what an appropriate fine should be following the approach taken in *Stumpmaster* and impose a fine, or thirdly, make no assessment of what an appropriate fine would have been.

[23] The prosecutor urges me to make an assessment of what an appropriate starting point for a fine should be and also impose a fine regardless of TOL being in liquidation given it had already commenced proceedings prior to TOL being in liquidation. [Worksafe submits] this approach would address the general and specific purposes of sentencing.

[24] In *Worksafe New Zealand v Department of Corrections*, at the time the Department was being prosecuted, it could not be fined. However, the Court made an assessment of what an appropriate fine would have been.[6] In *Worksafe New Zealand v Corboy Earthmovers Limited*, again the Court made an assessment following the approach in *Stumpmaster* but did not actually impose a fine.[7]

[25] I consider it is appropriate for the Court to assess a fine so that the offending is marked. I intend assessing the fine but do not intend imposing a fine. I concur with the prosecutor that this was a high focus risk involving people and plant and a general deterrence is required.

[26] So I turn to assess TOL's culpability with reference to the relevant factors previously identified in *Hanham* and then place the offending within one of the four bands I have mentioned. In *Stumpmaster*, the Court observed that those factors remained relevant under the Act and whilst, "Some of the proposed language may be better, we prefer to leave it to the sentencing Courts to express the concepts as they wish."

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[6] *Worksafe New Zealand v Department of Corrections* [2016] NZDC 24865, [2017] DCR 368.
[7] *Worksafe New Zealand v Corboy Earthmovers Limited* [2016] NZDC 22290, [2017] DCR 118.

[27] So [I turn to] the *Hanham* factors and the relevant factors specified in s 151 of the Act. What were the operative acts or omissions and what was reasonably practicable? Bearing in mind the definition of, "Reasonably practicable," in s 22 of the Act, I consider it was reasonably practicable for the defendant to have ensured that an effective procedure was developed, implemented and monitored for cleaning the digger.

[28] In my view, TOL ought to have been aware of the extent of risk from the exposure to crushing hazards by moving machinery is very serious, and could have resulted in a fatality. The realised harm to Mr Gibson was very serious as indicated by his injuries and resulting impact on his life. This was the gravest factor in my view under the *Hanham* factors.

[29] The risks associated with moving machinery are well known in the construction industry as are the steps to manage those risks; material and information is published on the Worksafe website and is publicly available. Working in close proximity to moving machinery is obvious. The risk of harm should have been easily anticipated and managed by TOL.

[30] Regulation 17 Health and Safety in Employment Regulations 1995 provides that machinery should not be cleaned or repaired until every part has been secured against movement and that a procedure should be established for the carrying out of cleaning and maintenance in a safe manner. TOL's conduct departed from those guidelines and standards. Worksafe's published *Good Practice Guidelines* for excavation safety and CAT operation and maintenance manual for the digger provides safety measures which should be adopted by operators when utilising diggers. References are made to the potential dangers and hazards when operating mobile plant and specific control measures to address those risks. TOL did not have an effective procedure for workers working in and around mobile plant and when cleaning the digger.

[31] The defendant accepts that Mr Kinney took a shortcut. He did not ensure that Mr Gibson was aware that he was about to operate the digger and failed to ensure that Mr Gibson was in a safe position before operating the digger. Mr Kinney stated he

was aware having a clear zone of operation is a fundamental rule and that he should have been seated inside the cab when he operated the machinery. He stated he called out to Mr Gibson but Mr Gibson did not hear. Both Mr Kinney and Mr Gibson commented that they developed a system over the years of communication when they were working with each other and this was an isolated incident. The defendant submits it is difficult to conceive how a formal procedure should have been implemented and monitored given TOL was a very small construction company.

[32] Notwithstanding that, in my view, a formal procedure should have been developed and implemented. That is the purpose of the Worksafe legislation which applies to all companies and PCBUs irrespective of their size. A formalised procedure covering factors such as communication and ensuring workers were clear from plant before operating should have been in place. TOL did not provide any formal training on working in and around mobile plant for workers working in a close proximity to diggers and exposed to the risk on a regular basis. Workers should have been provided with training by a competent person and TOL should have monitored workers to ensure they were fully briefed and followed that procedure. This could have mitigated against the risk of an incident occurring.

[33] It was not for the workers, in my view, to develop their own strategy and procedures. It was also reasonably practicable for TOL to ensure that the digger was operated safely. There was no process or procedure for working in and around mobile plant or for workers cleaning the mobile plant and this included cleaning of the digger. The operators should have established a clear zone of operation to ensure operators operated the digger's controls from a seated position inside the cab.

[34] TOL submits the digger did have a lock out leaver that prevented its operation. However, Mr Kinney released the leaver and reached across, inadvertently moving the bucket which led to Mr Gibson's injuries. While the defendant submits that this was an isolated lapse in judgement by Mr Kinney, it occurred against a background where insufficient measures had been put in place to ensure an incident like this did not occur.

[35] So to conclude, there was a combination of factors which led to this incident and highlighted TOL's failings. First, there was no system or procedure in place for

workers working around the plant, secondly, there was no monitoring and, thirdly, there was no formal training. TOL's failure to implement control measures, in my view, represents a significant departure from well-known industry standards. The measures required of TOL were not onerous or cost prohibitive.

[36] I have reviewed the decisions of *Worksafe New Zealand v Cardinal Logistics*, *Worksafe New Zealand v Toll Networks (NZ) Limited* and *Worksafe New Zealand v Altranz (2008) Limited*.[8] Of course, no decision falls on all fours with the fact scenario here, however, these decisions have some similarities particularly the extent of injuries suffered by the victim and the similar type of machinery used. Starting points range from $700,000 to $900,000.

[37] I agree with the prosecutor that this present case is slightly more serious than *Cardinal Logistics* given TOL had not taken any steps to ensure workers were not harmed when working around moving machinery. However, it is less serious than *Toll Networks* given the risks the workers were exposed to. Although the injuries suffered in *Altranz* were more serious than the injuries suffered by this victim, the risks were not dissimilar. However, I also appreciate the situation in these cases involved larger organisations and companies and greater number of workers were exposed to the risks.

[38] Taking all of these factors into account and [bearing in mind] the purposes and principles of sentencing and the authorities I have mentioned, I consider a fine in the medium band of the *Stumpmaster* bands at around $600,000 is appropriate.

[39] I turn to the mitigating factors. In *Stumpmaster*, the Court cautioned against the use of standard bulk discounts for remorse, cooperation, remedial action, reparation and prior good record because, "They distort the sentencing process and bring about sentencing outcomes that are lower than they should be." The Court in *Stumpmaster* called for a proper analysis before applying such credits and commented that a further discount of up to 30 percent is only to be expected in cases that exhibit

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8 *Worksafe New Zealand v Cardinal Logistics* [2018] NZDC 19686; *Worksafe New Zealand v Toll Networks (NZ) Limited* [2018] NZDC 11132; *Worksafe New Zealand v Altranz (2008) Limited* [2018] NZDC 26548.

all the mitigation factors to a moderate degree or one or more of them to a higher degree.

[40] I consider TOL is entitled to the following discounts; five percent for cooperation with the investigation, five percent for remorse given that TOL attended a restorative justice conference and five percent for reparation, as I have ordered $40,000 in reparation. There is no evidence that TOL has undertaken any remedial steps. I infer that is because it has been placed in liquidation. TOL entered a guilty plea at a reasonably early opportunity. Taking into account the *Hessel v R* factors, I consider a discount of 25 percent is warranted.[9]

[41] On these calculations, I reach a fine of $382,500.

[42] It is now necessary for me to take into account TOL's financial capacity. I have already discussed the issue of TOL's liquidation. Given its financial situation, I accept it cannot pay a fine and as indicated earlier, I do not intend imposing a fine as the assessing of the fine addresses the general denunciation factors.

[43] Orders under s 152 to 158 of the Act are sought. Worksafe is seeking an order for costs of $1768.34. That is granted.

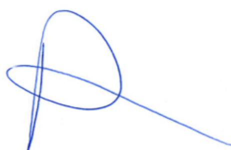
[44] So accordingly, and in summary:

(1) An emotional harm reparation order of $40,000 is imposed;

(2) A consequential loss award of $9000 is imposed;

(3) Costs of $1768.34 is imposed; and

(4) A fine is assessed at $382,500, however, it is not imposed.



Pippa Sinclair
District Court Judge

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