IN THE DISTRICT COURT
AT MANUKAU

I TE KŌTI-Ā-ROHE
KI MANUKAU

CRI-2018-092-013433
[2020] NZDC 13314

WORKSAFE NEW ZEALAND
Prosecutor

v

STRING'S ATTACHED LIMITED
Defendant

Date of Hearing: 24 June 2020

Appearances: N Town for WorkSafe New Zealand
B Webster for the Defendant

Judgment: 23 July 2020

RESERVED DECISION OF JUDGE R McILRAITH
[On sentence]

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[1] String's Attached Limited is an industrial rope access company. It has pleaded guilty to a charge laid under ss 36(1)(a) and 48(1) Health and Safety at Work Act 2015. The charge carries a maximum fine not exceeding $1.5 million.

[2] The charge arose from an incident on 27 November 2017 when a previous employee of String's Attached, Mr Williamson, suffered an accident at work. The charge is that String's Attached, a person conducting a business or undertaking, failed to ensure, so far as reasonably practicable, the health and safety of Mr Williamson and that the failure exposed Mr Williamson to a risk of death or serious injury.

[3] String's Attached undertakes commercial property maintenance. It had been engaged to repair the roof of a commercial building at 95 Harris Road, East Tamaki. As part of the repair process, it had installed a ladder and hatch to allow for internal access to the roof. The hatch was installed vertically rather than horizontally over the ladder, leaving a clearance space of 513 millimetres between the rungs and the framing of the hatch. The *Acceptable Solutions and Verification Methods for New Zealand Building Code Clause D1 Access Routes* requires a clearance space of at least 750 millimetres between the rungs and any obstruction behind a climber.

[4] String's Attached acknowledges that the hatch was incorrectly installed vertically rather than horizontally and that as a result a beam ran through the diameter of the caged ladder. Mr Bisley-Wright, a director of the company, raised the installation method with the person who had installed it at the time but was told that it had been installed that way for waterproofing reasons.

[5] Mr Williamson worked at the premises on the day in question. Whilst String's Attached had identified falls from height as a risk, it had not identified this beam as a hazard. When he was coming up the ladder, he hit his head on the framing of the hatch and fell to the ground. Mr Williamson suffered neck and spinal injuries and is now a tetraplegic.

Approach to sentencing

[6] The guideline judgment for sentencing under s 48 of the Act is *Stumpmaster.*[1] In this decision the High Court confirmed a four step process:

(a) Assess the amount of reparation to be paid to the victim;

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

(c) Determine whether further orders under ss 152-158 of the Act are required; and

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

(d) Make an overall assessment of the proportionality and appropriateness of imposing the sanctions under the first three steps.

Assessing reparation

[7] Reparation is compensatory in nature and is designed to compensate an individual for loss, harm or damage resulting from the offending. Two components of reparation arise in this case. First, reparation for emotional harm and second, reparation for consequential loss.

Emotional harm

[8] Compensation for emotional harm is, of course, difficult to quantify financially. In *Big Tuff Pallets*[2] the court observed:

> Fixing an award for emotional harm is an intuitive exercise: its quantification defies finite calculations. 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. The nature of the injury is or may be relevant to the extent that it causes physical or mental suffering or incapacity, whether short term or long term.

[9] I have been provided with three victim impact statements from Mr Williamson, the last being dated 20 April 2020. Rather than attempting to summarise what is contained in those statements it is apt to simply quote from Mr Williamson:

> The injury has had life changing implications to myself and my family that words cannot describe. Every day I try my best to get on with life but this isn't something that will just get better. I will forever be emotionally and physically scarred from this incident.

[10] WorkSafe notes the following with respect to Mr Williamson's circumstances:

(a) He is a tetraplegic and will never be able to walk again, with the injury affecting 80 percent of his body and with no feeling below the nipple line. He also suffered a double bilateral subdural bleed of the brain.

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[2] *Big Tuff Pallets Ltd v Department of Labour* (5 February 2009)

(b) Following his discharge from the Auckland Rehabilitation Unit, he flew back to his home in the United Kingdom along with his partner and father, which cost approximately $19,000.

(c) He has suffered depression and has become very dependent on his partner and family.

(d) Two years on from the incident he attends regular physiotherapy and gym sessions but continues to suffer bad spasms in his legs and stomach.

(e) He cannot concentrate on reading books or watching television for more than an hour at a time without suffering migraines and dizzy spells.

(f) Attending to personal needs is difficult and has affected his ability to eat out and therefore socialise.

[11] String's Attached accepted that a significant reparation order for emotional harm was appropriate. I was referred by WorkSafe and String's Attached to a number of comparative cases. Two cases are particularly relevant in my view. First, in *Supermac Group Resources Limited*[3] an employee was left paraplegic as a result of a workplace accident and was awarded emotional harm reparations of $110,000. Second, in *McKee*[4] a stable hand fell from a horse becoming a tetraplegic and was awarded an emotional harm reparation award of $110,000.

[12] There is no disagreement between WorkSafe and String's Attached that the appropriate emotional harm reparation award in this case is also $110,000. I agree.

[13] I note for completeness at this point that Mr Webster confirmed that the $19,000 incurred by Mr Williamson referred to at 10 (c) is to be reimbursed by String's Attached.

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[3] *WorkSafe New Zealand v Supermac Group Resources Limited* [2019] NZDC 15023.
[4] *WorkSafe New Zealand v McKee*[2019] NZDC 16341.

Consequential loss

[14] In addition to emotional harm reparation, pursuant to s 32(1)(c) Sentencing Act 2002, a victim is entitled to reparation for consequential loss.

[15] The High Court has considered the correct approach to reparation for lost earnings. In *Oceana Gold*[5] the District Court had obtained an actuarial assessment based on projected earning capacity of the victim for the remainder of his working life and ordered $350,000 for lost earnings to be paid to a family. On appeal, the High Court held:[6]

> The legislation provides a useful context against which the calculation of quantum for such reparation payments can be based and can still be consistent with the purpose of the social contract underpinning the accident compensation scheme by providing compensation which is fair rather than full.

[16] The High Court held that the correct approach to fixing the quantum of reparation is the "statutory shortfall" approach, that being the shortfall between the pecuniary benefit that the victim would have received (calculated by reference to net income in the period prior to the incapacitating incident) and the victim's entitlement to compensation payments under the Accident Compensation Act for the period to which they are entitled to such payments.

[17] The High Court rejected the "open ended" approach to calculating lost earnings. That approach had proceeded on the basis of an estimate of the victim's actual future earning potential, including the probabilities of increased earning potential across time. That necessitated actuarial reports in many avenues for argument. The Court held that this process was inappropriate in the summary context of sentencing. In rejecting that open ended approach, the Court held that the assessment of lost earnings for reparation purposes was to be approached "on a basis consistent with the principles of the accident compensation legislation and the social contract".

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[5] *Oceana Gold (NZ) Limited v WorkSafe New Zealand* [2019] NZHC 365.
[6] At [41].

[18] In this case, WorkSafe submitted that it was clear that Mr Williamson had not been able to return to work and that he would not be in a position to work again. For its part, String's Attached acknowledged that Mr Williamson faced an uphill battle as a result of his injury but submitted that it was not clear he would never work again. It submitted that there was no current evidence before the court to that effect. It observed that he has full use of his arms and that there is no medical evidence for the court to say that his ability to concentrate would not improve over time. It submitted that it would therefore be possible, considering Mr Williamson's age, that he would in future be able to retrain or upskill in his previous occupation as a health and safety officer (by way of example).

[19] Accordingly, it submitted that he may well in due course, be able to work around his rehabilitation and physical difficulties. To that effect it had obtained an affidavit of Mr Peter Davies, director of Davies Financial and Actuarial Limited. While it appreciated the statement of principle from the High Court in *Oceana*, it nevertheless observed that Mr Davies had commented specifically on Mr Osborne's calculations undertaken for WorkSafe, with respect to Mr Williamson's projected loss. It was Mr Davies' view that:

(a) Mr Osborne should have allowed for the possibility of Mr Williamson returning to work and applied a reasonable contingency of between 10 and 20 percent to allow for that possibility;

(b) That assuming standard New Zealand male mortality rates, the value of future earnings should be adjusted by five percent;

(c) There are some uncertainties surrounding the assumptions in the valuation and there is therefore an advantage in receiving a lump sum. A small contingency of five percent should be allowed for that; and

(d) It is his view that it would be appropriate to apply an overall 25 percent deduction to take account of those factors.

[20] In his affidavit Mr Osborne had stated that the shortfall between what Mr Williamson is receiving from ACC and the minimum adult wage for the period between 5 December 2017 to 21 September 2052 (the date on which Mr Williamson will turn 65) is $294,514.50. WorkSafe noted that while Mr Williamson may be receiving support through the National Health Service in the United Kingdom, that was not the equivalent of the ACC system and Mr Williamson would not be receiving compensation for lost income from the NHS. That was accepted by Mr Webster and I note has been confirmed in subsequent inquiries by Worksafe.

[21] WorkSafe strongly opposed any discount being applied to reparation for consequential loss for Mr Williamson. It noted that the decisions of this court referred to by Mr Webster (for example *Wai Shing* and *Ask Metro*) had both been decided prior to *Oceana*. In the more recent decision of *Supermac*[7] this court had concluded that this type of discount was not appropriate.

[22] WorkSafe noted the following factors in support of no discount being applied:

(a) The benefits of the ACC scheme apply to both parties. The time, cost and stress created by civil litigation to recover losses (in the absence of an ACC scheme) would impact on both parties. Further, by reason of the ACC scheme, the defendant cannot be pursued for the amount covered by the ACC scheme and for the medical costs and related expenses that are also covered by the scheme. A further reduction is therefore not warranted.

(b) The benefits that the victim obtains through the certainty of ACC are offset by the fact that any compensation for lost earnings under ACC is limited to 80 percent of the amount that they were earning at the time they were injured. Under the social contract, individuals notionally surrender their ability to pursue the full amount of their losses from the party who caused the loss in return for the certainty of the ACC scheme.

[7] At [47].

(c) The calculation of consequential losses adopting the statutory shortfall approach adopts a conservative methodology that is likely in most (if not all) cases to result in an amount below that which would reflect the victim's actual consequential loss as it does not take into account future earnings potential. Accordingly, the defendant is advantaged by the approach to calculating reparation, which is inherently conservative.

[23] I accept WorkSafe's submissions in this case. In my view, it is not appropriate to apply any deduction to the amount of consequential loss reparation in light of *Oceana.* While I understand entirely the points made by Mr Davies, these are taken in to account in the *Oceana* analysis. In particular, the statutory shortfall approach without deduction is, in my view, likely to have been a very conservative methodology in this case as it does not take in to account at all Mr Williamson's future earnings potential had the accident not occurred. The amount awarded to Mr Williamson is, accordingly, $294,514.50.

Assessing fine

[24] I must next set a fine by reference first to the guideline bands in *Stumpmaster* and then having regard to aggravating and mitigating facts. The culpability bands identified in *Stumpmaster* are:

(a) Low culpability – Up to $250,000

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

(c) High culpability – $600,000 to $1 million

(d) Very high cupability - $1 million plus

[25] In *Hanham*[8] the High Court identified a list of sentencing factors which continue to be relevant. They are:

[8] *Department of Labour v Hanham and Philp Contractors Ltd* (2008) NZELR 79.

(a) The identification of the operative acts or omissions at issue;

(b) The assessment of the nature and seriousness of the risk of harm occurring;

(c) The degree of departure from industry standards;

(d) The obviousness of the hazard;

(e) The availability, cost and effectiveness of the means necessary to avoid the hazard;

(f) The current state of knowledge of the risks and of the nature and severity of the harm that could result; and

(g) The current state of knowledge of the means available to avoid the hazard or mitigate the risk of its occurrence.

[26] String's Attached has acknowledged through its guilty plea that there were a number of reasonably practicable steps that it should have taken to protect Mr Williamson. In particular, it has accepted that it failed to comply with its duties by failing to take the following steps:

(a) Adequately consult, co-operate and co-ordinate activites with other entities as to the identification, assessment and management of risks posed by the installation of the ladder and hatch;

(b) Enquire whether building consent had been obtained for the installation of the ladder and hatch before commencing work;

(c) Ensure that the ladder and hatch were installed by a competent worker or that the ladder and hatch were not used until inspected by a qualified engineer and deemed code compliant;

(d) Ensure that the ladder and hatch complied with the New Zealand Building Code D1 requirements including a minimum 750 millimetre clearance from the rungs to any obstruction behind the climber; and

(e) Having installed the hatch vertically, identify, assess and manage the hazards associated with the obstructed accessway.

[27] String's Attached quite properly brought to the Court's attention that it had trained its employees on the safe use of ladders and in particular, how to climb a ladder. A fall from height, given the primary work undertaken by String's Attached, had been identified as a hazard recognising an understanding and appreciation of the importance of hazard identification and Mr Williamson had, during his employment, installed ladders and hatches and was therefore familiar with correct installation methods. String's Attached also noted that it had worked closely with Carter Holt Harvey who occupied the premises concerned on health and safety matters and complied with its health and safety requirements before commencing on site.

[28] String's Attached accepted that the nature and seriousness of the risk of harm was significant and that the hazard was obvious. As noted it accepted its departure from industry standards and it accepted that cost involved with taking the practicable steps identified would not have been disproportionate to the risk of serious injury or death involved.

[29] Both WorkSafe and String's Attached submitted that its culpability fitted in the medium culpability band identified in *Stumpmaster*. A start point of $450,00 was therefore submitted.

[30] I was referred to a number of comparable cases. I accept the submission that the upper-middle band is the appropriate start point for culpability given the factors identified and that a starting point of $450,000 is appropriate.

[31] There are no aggravating features requiring an uplift from that starting point. There are, however, mitigating factors and discounts are appropriate.

[32] First, String's Attached has co-operated fully with WorkSafe's investigation.

[33] Second, it has a prior good safety record. It has been in business since 2013 and until this accident prided itself on an exemplary health and safety record. It is an active member of the Industrial Rope Access Association of New Zealand and an active Site Safe member.

[34] Third, it has always acknowledged that reparations are appropriate and had obtained insurance to cover any appropriate reparation awards.

[35] Fourth, String's Attached has taken remedial steps since this incident. It does not seek a discount for those remedial works that it acknowledges were addressing deficits that should not have existed in the first place. However, since the accident it has engaged Height Pro Limited, a recognised leader in the industry, to undertake a six monthly review of its own practices, has committed to upskilling its employees well beyond industry standards and has paid for them to attend a number of appropriate courses.

[36] I accept that discrete discounts of five percent for each of these four factors is appropriate. A 20 percent discount is therefore applicable. String's Attached is, in addition, entitled to a 25 percent discount for its prompt guilty plea. Discounts therefore total 45 per cent, being $202,500. Deduction of that discount brings the final level of fine to $247,000.

Ancillary orders

[37] WorkSafe has sought an award of costs of $18,000. String's Attached has submitted that this is an excessive amount. Certainly it exceeds the amount which is normally awarded when other cases are considered. Accordingly, while I accept WorkSafe's submission that the amount sought represented a small portion of actual costs, the amount that will be awarded is $4000 by way of contribution.

Overall assessment of proportionality

[38] This final step requires the Court to make:

> An overall assessment of the proportionality and appropriateness of the combined packed of sanctions imposed by the preceding three steps. This includes consideration of the defendant's ability to pay, and also whether an increase is needed to reflect the financial capacity of the defendant.

[39] String's Attached has submitted that its financial capacity to pay a fine is such that no fine should be imposed. WorkSafe has taken a different view. In its view, after reviewing the information provided by String's Attached, the company could pay a fine by taking a number of steps. Notably, it submits that those steps could include reducing the amount that shareholders take from the company, further reducing costs and seeking to raise funds to pay a fine through a loan.

[40] In *YSB*[9] the High Court considered the following principles to be important in assessing a company's financial capacity to pay:

(a) It is important to determine a provisional fine or starting point before adjustment to reflect a defendant's financial capacity.

(b) Fines may be in instalments but should not be ordered for any length of time and that 12 months is normally an appropriately lengthy maximum period.

(c) A fine ought not to place a company at risk.

(d) A fine should be large enough to bring home the message to directors and shareholders of corporates.

(e) One must avoid a risk of overlap that in a small company directors are likely to be the shareholders and therefore the main losers if a severe sanction is imposed on a company. The Court must be alert to make sure it is not in effect imposing a double punishment.

[41] String's Attached is a small company with variable profit and loss throughout each year. It has two shareholders. I have been provided by the company's accountant

[9] *YSB Group Limited v WorkSafe New Zealand* [2019] NZHC 2570.

with forecasted budget, profit and lost, forecast and balance sheets to March 2021. I note that this information was provided prior to the Covid-19 pandemic. I have been advised by Mr Webster that the company has continued to operate and while it anticipates its business being affected somewhat, it has not, as yet, suffered any decline in its financial position. It does, however, look forward with a great degree of caution, as would be understandable.

[42] It provided evidence from its accountant, Mr Alderson. His opinion based on his analysis of the projections and financial information is that String's Attached is not financially in a position to pay a fine whether by instalments or otherwise.

[43] As I have noted previously, WorkSafe's Mr Osborne has commented on that ability to pay a fine. String's Attached did not accept his observations.

[44] I accept Mr Webster's submission that there is a very real risk that should a fine be imposed, String's Attached will go out of business. I do not consider that appropriate in this case. This is not a case where there has been repeat offending or egregious breaches by the defendant. I do not consider that a fine should be imposed that creates the real risk that String's Attached would go out of business. Accordingly, mindful of the factors noted in *YSB*, no fine will be payable.

[45] In conclusion, the following orders are made:

(a) A payment for emotional harm reparation of $110,000.

(b) A payment of consequential loss reparation of $294,514.50.

(c) Reimbursement of costs incurred by Mr Williamson of $19,000.

(d) A contribution to WorkSafe's costs of $4000.

Judge McIlraith
District Court Judge

Date of authentication: 23/07/2020

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