IN THE DISTRICT COURT
AT OPOTIKI

I TE KŌTI-Ā-ROHE
KI ŌPŌTIKI

CRI-2022-047-000083
[2022] NZDC 12403

WORKSAFE NEW ZEALAND
Prosecutor

v

KELLISA FARMS LIMITED
Defendant

Hearing:	30 June 2022
Appearances:	T Williams-McIlroy for the Prosecutor J Lill for the Defendant
Judgment:	30 June 2022

NOTES OF JUDGE L M BIDOIS ON SENTENCING

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[1] Kellisa Farms Limited has pleaded guilty to a charge under the Health and Safety at Work Act 2015 of failure to comply with a duty which has resulted in a workplace death.

[2] The summary in brief is that the defendants are a sharemilking company contracted to work on a farm. Mr Scott Topp was a full-time worker for the company. A separate entity owns the farm on which the defendants carry out their sharemilking contract.

[3] There is a rotary dairy shed which has a backing gate which is used to herd cows. Both the defendant and a previous contract milker had stated to WorkSafe that

they had identified concerns with the lack of a guarding around the chain and sprockets at each end of the driveshaft of the backing gate and this was conveyed to the Trust.

[4] On 17 December 2020, Rozayah Hudson, a young boy, was brought to the farm by Mrs Hulena who is one of the directors of the defendant company. She dropped both Rozayah and two other children, two siblings, near the cowshed. They are the grandchildren of Mr Topp who was working in the milking shed that day.

[5] Mr Topp was near the end of the milking. Mr Topp was with one of the children who was on a stand where the control switch was for the backing gate. Two other children were near the backing gate waiting to catch a ride on the gate back from the cowshed to the far end of the yard. The child pressed the button which activated the backing gate and the two siblings hopped onto the backing gate and were riding on it. Unfortunately for Rozayah, part of his clothing got stuck on a coupling and this caused him to not be able to free himself. It pulled him between the driveshaft and the gate and as a result he was fatally crushed.

[6] A WorkSafe investigation established that there were a number of failings which could have prevented the death and that is accepted by the defendants through their plea of guilty.

[7] In relation to this matter, I have received comprehensive submissions from the prosecutor and from defence counsel relating to this matter and have heard from counsel today.

[8] The prosecution seeks a global award of emotional harm reparation in a sum no less than $170,000. The company's offending should be categorised as high culpability and an appropriate starting point for a fine is within the range of $700,000. The prosecution acknowledges that the company is entitled to discounts for reparation, remorse, willingness to participate in restorative justice, participation in restorative justice, co-operation with the investigation team and that would warrant a discount resulting in a final fine of $420,000. They seek costs of $4,789.

[9] In relation to this matter, they refer to the guideline decision of *Stumpmaster v WorkSafe NZ* which sets out the four step approach to sentencing.[1] That is to assess the amount of reparation to be paid to the victim, fix the amount of the fine by reference first to the guideline bands and then have regard to aggravating and mitigating factors, determine whether further orders are required and then make an overall assessment of proportionality and appropriateness of imposing the sanctions under the first three steps.

[10] In respect of step one, assessing quantum, reparation may be imposed in relation to a loss and emotional harm reparation is also available. There is no dispute that there is a victim and immediate family are defined in the Act. Their financial contributions can never fully compensate the loss and harm suffered when there has been serious injury or death.

[11] They provided a number of cases with a range of awards between 75 to $170,000. There is reference to Court of Appeal decision where the Court said the level of compensation of reparation is fixed in recognition of the harm caused. The culpability of the offender may, however, be relevant when portioning the extent to which multiple offenders should pay reparation.

[12] Victim impact statements have been filed for Storm Topp, Dean Hudson, Violet Hudson, Scott Topp and another victim impact statement was filed but has been since withdrawn.

[13] The prosecutor submits that in this case the award should recognise the devastating impact of the death of a six-year-old child on close family members. It is submitted that it is a case where the global sum should be in the upper end of the range of awards made in other cases and should be no less than $170,000.

[14] The company made reparation payments amounting to $17,000 to the whānau. This figure should be deducted from any final award made. As with other defendants in this case, they have pleaded not guilty.

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[1] *Stumpmaster v WorkSafe NZ* [2018] NZHC 2020.

[15] The recommended course for the Court is to first determine the appropriate overall reparation figure. Secondly, determine the company's figure based on its culpability. Thirdly, make an order that the company paid share of the reparation in the usual 28 days and, fourthly, order that if for any reason the other defendants cannot pay or are acquitted that the company must pay the remaining reparation within 28 days of completion.

[16] The prosecutor submits that the company's culpability should be at least 40 per cent for the following reasons. The maintenance of the gate had been notified to the Trust by the company. The Trust owned the property for a long time and contract milkers come and go. Knowing that the gate posed a significant risk, children should not have been allowed to ride the gate. The responsibility for children at the workplace rested with the company who were the contract milkers.

[17] *Stumpmaster* also set out for guideline bands for the quantum of fines, low culpability ranging through to very high culpability. There are sentencing factors that have been identified in the *Department of Labour v Hanham and Philip Contractors Ltd* case which are set out which are relevant.[2] The prosecutor submits that the culpability of the company should fall within the high band of *Stumpmaster*, attracting a starting point in the realm of $700,000.

[18] The prosecutor highlights that the reasonable, practical steps by the company could have been taken which they failed to do, was to ensure that the backing gate was guarded, develop implemented, and monitored an effective health and safety management plan.

[19] Relevant risks in this case was entanglement in the exposed area of the unguarded backing gate which could cause death and death did in fact occur. The rotating shaft was on the backing gate and, of course, that posed a hazard in itself. Any person at the workplace would have been exposed to entanglement hazard which could cause death and in fact on this occasion did. There was potential for others to be harmed. Several children were exposed to this risk and the exposure was commonplace.

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[2] *Department of Labour v Hanham and Philip Contractors Ltd* (2018) 6 NZELR 79 (HC)..

[20] The company conduct departed significantly from industry standards and guidance. The serious risk arising from the unguarded machinery were well known and obvious. It is submitted that it would not have cost an excessive amount to ensure that the backing gate was adequately guarded.

[21] There is acceptance of no aggravating features to this offending. They acknowledge reparation payments have been made, co-operation, guilty plea and they have identified costs.

[22] In terms of the company, counsel acknowledge that this was a sad accident and it has affected everybody deeply. The company have tried to maintain contact with the family. They participated in restorative justice. They made some reparation. They are prepared to meet further reparation through their insurance cover but submit that they are not in a position to meet any financial penalty or costs. Those are not covered by insurance.

[23] It is highlighted that the company had liaised with the Trust to update the backing gate but steps were taken to do some work on the gates but not what was specifically responsible for this accident.

[24] In relation to emotional harm reparation, the submission is that the amount should be $70,000. It is recognised that there are multiple defendants, others who have pleaded not guilty. The company have pleaded guilty, accept responsibility and want the matter dealt with now and so they invite the Court to identify what the level of culpability is and the cover rather than making an order that is dependant on what happens to other offenders in the future.

[25] In terms of its financial position, it has provided an affidavit from its accountant that the prosecutor or informant accepts, means that they are not in a financial position to meet what would be an appropriate fine.

[26] In terms of payments made, $3,000 went to Scott Topp, $2,000 to Kelsey Herewini, $8,000 to Storm Topp and $4,000 paid to an aunt for supporting Rozayah's siblings. The submission is that the largest award should go to

Violet Hudson as she has the care of the children and it is to be recognised that Mr Dean Hudson did not receive any of the earlier payments. Of this $70,000, they have provided a breakdown as to their view as to who should receive what.

[27] In terms of fixing the amount of the fine, it is accepted that they failed to carry out their responsibilities. They recognised that the Trust had the responsibility for the supply of materials and maintenance of fixtures and chattels. There had been some work done by Hayes Engineering but they were ad hock and did not identify the lack of a guarding rail. The company accepts that it should have taken a more proactive approach to get that sorted out. It deeply regrets allowing children to stand on and ride on the backing gate

[28] The aggravating features that I see is that there are two aspects of the offending. It is the operation of a backing gate with an unguarded rail and then letting children play on the machinery. There are the effects that the offending has had on the victim.

[29] Today Mrs Hudson has read out her victim impact statement and the lead investigator has read out other victim impact statements. Obviously the harm that has been caused is felt deeply by not only the parents but the wider whānau, including the grandparents and others and it is something that is pretty hard to imagine unless you have experienced how they are feeling. So that has to be recognised.

[30] Mitigating factors are plea of guilty, remorse, attendance at restorative justice, a letter of apology has been provided and was read out by counsel. A part of that says in a nutshell:

> It has been a crippling in many ways. In short, the pain and suffering will never end. Rozayah was and still holds a special place in our hearts. That night was the worst day that we'd ever experienced.

[31] That shows the sentiment and obviously genuine remorse. There was co-operation with the investigators and there were some steps taken subsequently to address issues.

[32] I have to assess the overall seriousness of the offending. A young life was lost through a tragic action. The ramifications are deep and widespread. The victim impact

statements and the restorative justice report all highlight the pain and the suffering experienced by all who knew Rozayah. When a young life is lost, the community feels the loss and that was reflected in the number of people that paid their respects at the house and at the funeral, the tangi.

[33] Regretfully, the finger can be pointed so we can apportion blame both directly and indirectly. There are always different dynamics going on and there is always self-reflection. What I need to say is that no one ever contemplated that the actions of the children that day would result in the loss of the life of Rozayah. The kids thought they were having fun, doing something that they had done many times before.

[34] At a higher level, there is a responsibility placed on the workplace operators and owners. A milking shed is a high-risk working environment at any time. Operators like the defendant who are contract sharemilkers have a responsibility to themselves, fellow workers and visitors, particularly children.

[35] Children are by nature adventurous and want to do things like riding on tractors motorbikes and quadbikes and riding on the backing gate. The defendant had a responsibility to ensure that the kids did not play on the backing gate even if it was fun for them. Safety issues had to be drawn to the Trust's attention. By its nature, it was potentially dangerous.

[36] Having the children's grandfather present, who would have been seen as the primary person responsible for their care and wellbeing, did not excuse the defendant's responsibility. In fact, previous visits by the kids should have triggered a conversation between the defendants and the grandfather and a safety guideline policy put in place so it was not like that the defendants, Mr and Mrs Hulena, were being killjoys by telling the kids to get off the rail. That policy could have been done. They could have avoided embarrassing the grandfather by telling him to tell the kids to get off the gate by having that policy in place and children being told prior to their visit that they were not allowed to do that. This would have prevented what obviously happened.

[37] The starting point in a sentencing exercise is to determine the reparation. In this case, emotional harm reparation. In this case it is the death of a young child. You

cannot get a greater loss or harm caused through a workplace accident than the loss of a life, particularly a young one. Every life matters but a child has to be seen as greater in my view than an adult. A child has effectively so much more time to live and enjoy life.

[38] The informant seeks a global assessment with apportionment to those responsible. At the present time the defendant has pleaded guilty but the other three parties have pleaded not guilty and their Judge-Alone Trial is some time off.

[39] Options raised include fixing a total amount, ordering a portion to be paid immediately, there be a period of abeyance to await determination of other offenders. If convicted, a subsequent apportionment would be made. If not then any balance would be then ordered to be paid within 28 days. That is one option.

[40] Another option is to sentence the defendant to the whole amount with a re-hearing being granted at a later date to make any adjustment if other defendants are convicted.

[41] The third option is apportion the defendant's liability and impose that now.

[42] I adopt the third option. That is to determine the defendant's culpability. As a result, if convicted other defendants would need to be dealt with on merit.

[43] In this case, the defendant had the operational control of the milking shed. Although it had brought to the Trust's attention that there were safety issues, one could not just stop working because the nature of milking is that the cows have to be milked twice a day everyday and so you could not just pack up and not milk the cows.

[44] The defence submit that an award of $70,000 is appropriate. I need to take into account that this is a child. It was a preventable death. It was the defendant who had responsibility for operating the milking shed, including the backing gate. There was no policy. Although there had been a referral to the Trust about safety issues, there was no follow up. There was, of course, the fact that Mrs Hulena had brought the kids

to the milking shed specifically and that is something that had happened on previous occasions.

[45] I fix an amount at $110,000. This has had the devastating effect on everybody and this child was only six years old.

[46] The next matter is apportionment between family members. I have to take into account that $17,000 has been paid so the actual amount to be apportioned is $93,000. Both the informant and defendant make comment as to apportionment. My own personal view is that grandparents and parents should not financially benefit from the loss of a life of a child but I recognise that there are costs involved and both the informant and defendant accept that there needs to be an apportionment.

[47] The matter is complex. There are family dynamics that were going on at the time. Payments have been made. One would have hoped that that would have been used for funeral related costs but I do not know.

[48] The children were living with Mr Scott Topp at the time of Rozayah's death. The parents were separated and neither had the care of the children. The Hudson grandparents now have the care of the two siblings of Rozayah and so those are all factors. There is an expectation in the future that one or other of the parents when they get their life sorted out may take care of the children.

[49] I apportion as follows:

(a) The persons to receive funds are Scott Topp, Storm Topp, Dean Hudson and Violet Hudson and they will be awarded $15,000 each, less what they have already received. That, therefore, means:

(i) Scott Topp has already received $3,000 so the award is $12,000.

(ii) Dean Hudson as the father has received nothing so he gets an award of $15,000.

(iii) Storm Topp has received $8,000 so her award is $7,000.

(iv) Violet Hudson has not received any payment and she gets $15,000 as the grandmother.

(b) There will be $10,000 also to Violet Hudson as she has the care and maintenance of the siblings at the present time.

(c) $34,000 will be given to the siblings. That is $17,000 each.

[50] As to the fine, the informant seeks $700,000 which is an overall assessment. The defence does not quantify the amount of the fine in its submissions. The risk in this situation has to be seen as totally different from sawmills and freezing works where there are knives and saws that can do harm which are patently obvious. Here the danger was a little bit more discrete but it was there and was known.

[51] In this case there was a fatality but these children had done this many, many times before without incident and we kind of just turn a blind eye to these sorts of things. There is knowledge of the risk. There was no follow up once there was a referral to the Trust. There was no health and safety policy in place for children who came to the workplace on a number of occasions. Mrs Hulena had dropped the children off at the milking shed and the company let them play on the backing gate. So I place that culpability in the low end of the medium range and fix a starting point of $250,000.

[52] It is accepted that there are no aggravating factors. Mitigating factors are strong. There was a guilty plea, amends, remorse, co-operation and steps taken which come in my view to 45 per cent which is a discount of $112,500, taking the final fine down to $138,000.

[53] There is an affidavit from the defendant on file and one from WorkSafe indicating that finances are limited. A fine is still appropriate in my view despite the fact that the company are financially strapped. The defendants want the matter over and they did so on the basis of a plea of guilty and acceptance of responsibility. There is an obligation on them to pay some money towards a fine even if it is a token amount

to reflect the fact it was their responsibility to ensure that the children who visit the site should have been safe.

[54] The fine will be $38,000.

[55] In terms of cost, again they claim that they have no financial ability to pay but there is a future ahead of them so I order $2,394.50 which is a 50 per cent contribution towards the costs.

[56] There is a suppression of financial details.

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Judge L Bidois
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 05/07/2022