ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF WITNESS/VICTIM/CONNECTED PERSON(S) PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html

IN THE DISTRICT COURT
AT PUKEKOHE

I TE KŌTI-Ā-ROHE
KI PUKEKOHE

CRI-2021-055-001079
[2022] NZDC 9562

WORKSAFE NEW ZEALAND
Prosecutor

v

MAINLAND POULTRY LIMITED
Defendant

Hearing:	23 May 2022
Appearances:	T Braden for the Prosecutor M Hammer for the Defendant
Judgment:	23 May 2022

ORAL JUDGMENT OF JUDGE S D OTENE

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[1] [redacted] was employed by Mainland Poultry Limited (MPL) as a [redacted] at its plant in Takanini, being one of 27 sites operated by MPL in the production of eggs and related goods. On 15 October 2020, whilst undertaking duties at work, [redacted] thumb was amputated.

[2] In consequence, MPL has pleaded guilty to one charge of contravening ss 36(1)(a) and 48(1) and (2)(c) of the Health and Safety at Work Act 2015 (HSWA)

which carries a maximum penalty of a fine of $1,500,000. The charge is described and particularised as follows:

> Being a person conducting a business or undertaking (PCBU) having a duty to ensure, so far as reasonably practicable, the health and safety of workers who worked for the PCBU, including [redacted], while the workers were at work in the business or undertaking, namely cleaning the auger between the Coenraadts and Pelbo machines, did fail to comply with that duty, and that failure exposed workers to a risk of serious injury.
>
> It was reasonably practicable for Mainland Poultry Limited to have ensured that the auger between the Coenraadts and Pelbo machines was guarded in accordance with AS/NZ 4024 or equivalent or higher standard.

Facts

[3] [redacted], when injured, was undertaking cleaning duties in the egg breaking and separating area of the operation. Part of the machinery in that area is an electric-powered auger housed in a stainless-steel trough. The rotating auger blades convey eggshells from two egg-breaking machines to a tank. There is a latch on the side of the auger to enable inspection of eggshell blockages within the trough. A hook secured the latch during operation of the auger. A bucket was placed beneath the latch because though closed, there was a small gap through which liquid passed. If closed, the latch was easily opened without tools. The latch was not interlocked.

[4] As part of the end of shift cleaning process, the auger is left running whilst flushed with water to expel eggshells out and into the bucket. Once flushed, the auger is stopped, manually scrubbed and the bucket beneath the latch is emptied and cleaned. The bucket is repositioned at the commencement of the next shift from the egg-breaking area. The auger was not supposed to be and was not normally operating when buckets were removed and replaced.

[5] At the time of the incident, the auger was running, and the latch was opened. [redacted] colleague noticed that the bucket was full, removed and emptied it and put it aside in the separating area where he and [redacted] were working, reckoning that any remaining shell could fall to the floor, given that daily production had finished. [redacted] had seen the bucket and concerned that eggshells would continue to be expelled, acted to replace it. It was not normal to do so from the separating area where she was located. In order to do so, [redacted] knelt, passed her left arm under a

structural bar and reached up with her left hand to hold up the obstructing opened latch so that the bucket could be placed beneath. Upon reaching for the bucket with her other hand whilst still holding the latch, [redacted] left thumb was caught between the latch and the rotating auger blade and it was severed from her hand.

[6] The cleaning procedure was documented in a Job Safety Analysis Worksheet (JSA). It identified the task as a "significant risk" but did not identify the risk of injury by means as occurred to [redacted]. Nor does the JSA address the task of removal or replacement of waste buckets underneath an opened latched when the plant is operating. [redacted] says the cleaning process was shown to her by the team leaders but that she had not seen nor been taken through the JSA.

[7] [redacted] was transported to hospital by the site manager and another company officer who remained with her until family arrived. She was hospitalised for nine days and continues to receive outpatient treatment. She has had two surgeries. The thumb could not be reattached, so an index finger was removed and repurposed as the thumb, necessitating skin grafting. [redacted] has difficulty bending her new thumb and it is numb. She undertakes physiotherapy. She elects at this stage not to undertake further surgical intervention to assist with movement though, as I am advised by counsel for the prosecution, [redacted] anticipates that she will nevertheless at some time have to receive further surgery. The absence of full function in her thumb impairs some tasks of daily living. For example, dressing, using utensils and care tasks for her children.

[8] MPL has engaged with [redacted] and offered support since the incident in the following ways:

(a) The site manager maintained contact with [redacted] during [redacted] hospitalisation and, at points, through her recovery.

(b) Invitation to company events has been extended to [redacted].

(c) The site manager met with [redacted] occupational therapist to establish a return-to-work plan via the Accident Compensation Corporation (ACC) and has discussed

alternate job roles with [redacted] should she wish to continue in MPL's employ. MPL has offered to fund counselling to assist [redacted] to that end.

(d) MPL has paid a little over $5,000 in top-up of ACC payments received by [redacted].

The sentencing framework

[9] The HASWA purposes typically to the fore in sentencing matters such as this are protection of workers against harm from work hazards and risks, noting such protection should be given at the highest level[1] and securing compliance though appropriate enforcement measures.[2] Aligned with that are the Sentencing Act 2002 purposes speaking to offender accountability,[3] promoting the offender's sense of responsibility,[4] victim interests,[5] denunciation[6] and deterrence, specific and general[7] all of which, if met, can contribute to safe work places. The Sentencing Act principles most generally relevant are those that go to offence gravity and offender culpability,[8] seriousness of the type offence type,[9] victim impact[10] and restorative justice and other amends.[11]

[10] The sentencing exercise engages the following four step process as outlined in *Stumpmaster v Worksafe New Zealand*:[12]

(a) Assessment of the reparation amount.

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[1] HSWA, s 3(1)(a) and (2).
[2] Section 3(1)(e),
[3] Sentencing Act 2002, s 7(1)(a).
[4] Section 7(1)(b).
[5] Section 7(1)(c).
[6] Section 7(1)(e).
[7] Section 7(1)(f).
[8] Section 8(a).
[9] Section 8(b).
[10] Section 8(f).
[11] Section 8(j).
[12] *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020.

(b) Fixing the amount of the fine by reference first to the guideline bands[13] and then with regard to the aggravating and mitigating factors.

(c) Determining whether further orders under ss 152 – 158 of HASWA are required.

(d) Overall assessment of the proportionality and appropriateness of combined sanctions imposed upon exercise of the first three steps including consideration of the defendant's financial capacity to pay as it affects ability to pay or as it needs to be reflected by an increased fine.

[11] Relevant too are the following principles drawn from *Stumpmaster*:

(a) The HASWA expressly requires the application of the Sentencing Act 2002. Its applicability is not negated by the aggravating features emphasised in s 151 of the HASWA as needing particular consideration (in distinction to the predecessor of that provision that highlighted considerations both aggravating and mitigating).

(b) Because the Sentencing Act applies, and hence all its provisions that go to ability or inability to pay,[14] the mandatory regard required by the HASWA to a defendant's capacity to pay an increased fine does not preclude consideration of an inability to pay.

(c) The factors by which to assess culpability identified in *Department of Labour v Hanham and Philip Contractors Ltd*[15] encompass all of the features in the subsequently enacted s 151 to which the court must have regard. The *Hanham* factors remain relevant for sentencing purposes.

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[13] Being: low culpability – up to $250,000; medium culpability – $250,000 to $600,000; high culpability $600,000 to $1,000,000; very high culpability - $1,000,000 plus; at [53].

[14] Sentencing Act 2002, section 8(h) (requiring account to be taken of the circumstances of an offender that might mean an otherwise appropriate sentence would be disproportionately severe); s 14(1) (providing discretion not to impose a fine, otherwise appropriate, that an offender cannot pay); s 40(1) (directing regard to be had to the financial capacity of a defendant when imposing a fine); s 41 (empowering requirement for a defendant to provide a financial capacity declaration).

[15] *Department of Labour v Hanham and Philip Contractors Ltd* (2008) 6 NZELR 79 (HC).

Reparation

[12] The discretion to order reparation arises under s 32 of the Sentencing Act by virtue of [redacted] having suffered emotional harm and having suffered loss consequential to the physical harm. In determining the amount of reparation, account must be taken of any offer of amends made by the defendant.[16] Quantifying emotional harm reparation is an intuitive exercise with the objective being to impose an amount just in all the circumstances.[17]

Consequential loss

[13] [redacted] received ACC payments from October 2020 to July 2021. Accounting evidence establishes, and the prosecution and the defence agree, that the shortfall between the ACC payments and [redacted] pre-injury earnings is $5,170. Taking into account the payments of $5,050.20 made by MPL to [redacted], I am satisfied that the consequential loss that should be ordered in reparation is $119.80.

Emotional harm

[14] In evaluating the emotional harm suffered, I have regard to [redacted] statement which animates the ways in which the injury resonates in various aspects of her life. Her assertion that her life has been changed forever can be readily accepted, given the significant nature of the injury and the ongoing physical consequences. I observe that [redacted] had worked at MLP for 17 months and was a permanent employee. A fundamental aspect of her life as a worker has, therefore, been disrupted. Though there was opportunity for [redacted] to return to work, she is understandably uncomfortable to do so. So too her sons are reluctant for her to return to the job. [redacted] discomfort and her knowledge of the manner in which her family have been emotionally affected speaks to the psychological impact of the incident upon [redacted]

[16] Sentencing Act 2002, ss 32(6) and 10.
[17] *Big Tuff Pallets v Department of Labour* [2009] 7 NZELR 322 at [19].

[15] Further, [redacted] is relatively young, being aged [redacted]. Her eight children aged from 8 years to 22 years live with her and she is the sole carer for those still dependent upon her. She will likely have many years to bear the consequences of the injury. Her life is now subject to uncertainties about her physical function and employment prospects and, as noted, she cannot perform some care tasks for herself and her children as she did and for some matters, she requires assistance. [redacted] contribution to an important educational and cultural festival for her children is curtailed because she can no longer make children's costumes as has been her responsibility.

[16] I recount matters in that way because it gives an indication as to the broadness of the ongoing consequences for [redacted]. They in combination persuade me that the emotional harm of the incident has been significant.

[17] I have described the MPL's response to the offence. It was properly supportive. It was a proactive and timely response and as such, I am satisfied that the offer of assistance and support is genuine.

[18] The prosecution contends that $35,000 emotional harm reparation is appropriate. The defence contends that $17,500 is appropriate.

[19] The prosecution and defence have referred to a number of cases in which reparation orders have been made to victims who have suffered finger and thumb injuries. In some, the physical injury has been more serious than that suffered by [redacted] In others, less serious.[18] The cases assist to indicate a broad range within which reparation orders are appropriate for the emotional harm of offending that results in injuries of those types, but it does not follow that because the physical injury is comparable, so too is the emotional harm. There is also a need for care when looking to other cases for comparison not to focus upon the reparation amount ordered without regard to other factors other than the extent of the injury that may have informed that amount. For instance, in *WorkSafe New Zealand v Kimberley Tool & Design (NZ) Ltd*,

[18] The reparation orders in the cases referred to by the prosecution and the defence ranged from $15,000 to $35,000.

reparation of $17,500 was ordered but taking into account payments already made by the defendant to the victim.[19]

[20] I return to my evaluation that the emotional harm to [redacted] of the incident has been significant balanced with MPL's response, which I have assessed to be proper. My assessment is that reparation to [redacted] in the sum of $30,000 for emotional harm is appropriate. The total reparation encompassing both consequential loss and emotional harm will, therefore, be $30,119.80.

Fine

[21] The prosecution and defence both contend that the offending falls within the medium culpability band identified in *Stumpmaster* with a corresponding range for fines from $250,000 to $600,000. There is a divergence about the appropriate starting point of the fine; the prosecution is contending an amount of $400,000 to $500,000 is appropriate, and the defence contending $350,000 to $400,000.

[22] Bearing in mind the *Hanham* factors and the s 151 matters to which regard must be had, I consider the following relevant to the level of MPL's culpability:

(a) The omissions that resulted in the incident are as particularised in the charge and accepted by MPL: in essence, absence of an effective risk assessment to identify the latch system on the auger as a hazard and failure to manage that risk by ensuring that the latch was interlocked and fitting a guard to the latch. That said, I accept that MPL regarded its health and safety obligations properly, given the broader features it had in place. For example, governance by a health and safety committee and lines of report to that committee, daily health and safety site walkarounds by the manager, daily staff production meetings in which health and safety matters could be raised, dedicated time each week for performance of tasks by a health and safety representative and induction and training processes for new staff. Those measures have since been enhanced.

[19] *Worksafe New Zealand v Kimberley Tool & Design (NZ) Ltd* [2019] NZDC 16489.

(b) The risk posed was of serious physical injury to any person working near the inspection latch of the auger and, most seriously, of amputation to digits, which risk was realised. I place little weight on MPL's submission that the risk of injury was low if procedures in place at the time had been followed. MPL's actions in having previously made safety modifications to the machine and fitting an interlock on another latch and fitting guards and sensors demonstrate the serious risk to persons working proximate to an exposed auger blade irrespective of work practices they are directed to follow.

(c) The departure from prevailing industry standards was relatively discrete, that being a failure to fix a guard and interlock, rather than of multiple or comprehensive shortfalls. It was, nevertheless, a material departure.

(d) The hazard was known and obvious to workers, yet it was not obviously apparent upon execution of the health and safety processes that were in place. For example, the placement of the bucket obscured the latch from the daily health and safety site walkarounds by the manager. What that demonstrates is that health and safety processes fail when they are not sufficiently connected to practical operations. I observe that many of MPL's actions since go towards eliminating that disconnect. For example, discussions have been had intentionally with workers about hazards present, but unreported; health and safety is now a formal agenda item for daily production meetings rather than a matter to be addressed on an ad hoc basis. These enhancements are commendable, although do highlight the inadequacy of the former processes.

(e) The presenting hazard was simply addressed by installing an interlock control over the latch. Over and above that, MPL has implemented a wider response, as I have described, which also encompassed risk assessment by an independent agent with key staff, and training and safety auditing.

Starting point

[23] The prosecution and defence have referred to several cases for assistance in determining MPL's level of culpability. I observe that sentencing is necessarily an evaluative exercise because rarely, if ever, will a case be on all fours with any other. Hence whatever sentence is arrived at, there will always be similar cases at which higher or lower starting points have been set.

[24] However, because I am satisfied that MPL was cognisant of its health and safety obligations and had processes in place intended to meet those obligations generally and specifically to operation of the auger, albeit they were not acute enough to avoid the failings described, those cases in which the hazards were wide-ranging or had been made obvious and either discounted or inadequately addressed by the employer, or in which no risk assessment had been undertaken, are less helpful as direct comparators.[20]

[25] I am better assisted by *WorkSafe New Zealand v Otago Polytechnic* in which the starting point was assessed at a fine of $400,000.[21] Like this matter, there were health and safety processes in place, yet failure to identify the hazard created by an unguarded blade. In assessing culpability the distinction was made with cases in which there had been an absence of risk assessment or health and safety training and hence a higher culpability in those cases reflected in starting points of fines of $450,000. That distinction is similarly valid here. Whilst there was a lesser injury to the victim in *Otago Polytechnic* than here, I do not consider much turns on that. The victim in *Otago Polytechnic* could easily have been as severely injured.

[26] I determine that a starting point of a fine of $400,000 is appropriate.

Adjustments

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[20] I place within this category *Stumpmaster v Worksafe New Zealand* above n 12 (starting point $500,000), *Worksafe New Zealand v Funtech Plastics* Limited [2018] NZDC 18150 (starting point $500,000), *Worksafe New Zealand v Skyline Buildings Limited* [2020] NZDC 10681 (starting point $400,000), *Worksafe New Zealand v NZCCC Limited* [2019] NZDC 1662 ($350,000).

[21] *WorkSafe New Zealand v Otago Polytechnic* [2020] NZDC 11114.

[27] There are no aggravating factors warranting an uplift and none is sought by the prosecution.

[28] The prosecution and defence both submit that mitigating factors may be recognised by applying a discount of 50 per cent to the starting point. The prosecution particularises that as follows:

(a)	Co-operation with the investigation:	five per cent.
(b)	Remorse:	five per cent.
(c)	Reparation:	five per cent.
(d)	Remedial steps:	five per cent.
(e)	Prior good character:	five per cent.
(f)	Early guilty plea:	25 per cent.

[29] I have addressed matters that go to mitigation in respect of remedial steps undertaken by MPL and support offered and provided for [redacted]. I am satisfied that those actions in combination are reflective of sincere remorse. As to other matters of mitigation, I take into account that MPL has co-operated with the investigation, has no prior convictions and a relatively limited compliance history with WorkSafe New Zealand proportionate to the scale of its operation, and I take account of the early guilty plea. The discounts as particularised are made out and are appropriate.

[30] The result is that a 50 per cent allowance, equivalent to $200,000, is made for mitigating factors such that the provisional end point of the fine is $200,000.

Regulator costs

[31] The Court is empowered to award the regulator just and reasonable costs toward the prosecution. A contribution to internal legal costs of $2,791.40,

representing a half share of those costs, is reasonable, so too the costs incurred in commissioning the report from a machinery guarding expert, being $4,393.

[32] Total costs awarded to WorkSafe New Zealand will, therefore, be $7,184.40.

Financial capacity/ancillary orders

[33] For completeness, there are no issues as to MPL's financial capacity that need to be reflected in adjustment of the fine, nor do the circumstances call for the imposition of any other ancillary orders.

Sentence

[34] In summary, MPL is convicted and sentenced by imposition of the following orders:

(a) A fine of $200,000.

(b) Reparation to [redacted] of $30,119.80 (comprising $119.80 for consequential loss and $30,000 for emotional harm).

(c) Costs to WorkSafe of $7,184.40.

Suppression

[35] I order suppression of [redacted] name and the victim impact statement and the name of three other employees referred to in the summary of facts, they being [redacted].

[36] As described, the emotional effect on [redacted] has been significant. The other employees have been part of a very difficult circumstance for which they do not bear responsibility in terms of this exercise. I am, therefore, satisfied that publication of the names and details of all would cause undue hardship. There is no public interest in their names being published and suppression is granted.

[37] I invite counsel for WorkSafe New Zealand and for MPL to submit an agreed amended summary of facts taking into account the suppression orders.

[38] Finally, counsel are thanked for their helpful submissions.

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Judge SD Otene
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 29/05/2022